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ALLIED TUBE & CONDUIT CORP. v. INDIAN HEAD, INC.: AN EMERGING CONCEPTUAL FRAMEWORK FOR CLAIMS OF NOERR IMMUNITY

Since its decision in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.1 the Supreme Court has made it clear that no violation of the Sherman Act2 can be predicated solely on efforts "to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint [of trade] or a monopoly."3 The source and scope of this area of antitrust "immunity," however, has never been clear. In the decade after Noerr the Supreme Court decided two more cases bearing directly on antitrust liability for petitioning the government.4 Neither case clarified the source and

* The author gratefully acknowledges the assistance of Dr. Gregory B. Adams, Associate Professor of Law at the University of South Carolina, for his comments and suggestions in the preparation of this note.
4. The term "immunity" may be a misnomer. At various times the Supreme Court has suggested that the Noerr doctrine is based on a construction of the Sherman Act. See id. at 132 n.6. On other occasions it has suggested that Noerr is rooted in the first amendment's guarantees of association and petition. See California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972). If Noerr is based on a construction of the Sherman Act, then the doctrine is not one of antitrust "immunity" because the activity it protects cannot properly be labeled a restraint of trade. If, however, the doctrine is required by the first amendment, then "immunity" might be an appropriate label, since the Constitution would prevent the Sherman Act from reaching some purportedly prohibited activity. Whatever the source of the Noerr doctrine, the term "immunity" is used throughout this Note merely for simplicity.
5. See California Motor Transp., 404 U.S. 508; United Mine Workers v. Pennington, 381 U.S. 657 (1965). The Court has mentioned the Noerr doctrine in other antitrust cases, but the Noerr issue either was not decided, see Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 53 n.11 (1985), or was not the central
scope of Noerr's protections. In fact, the subsequent cases arguably clouded an already uncertain legal doctrine. To compound the problem, the Court began a prolonged silence with regard to claims of Noerr immunity. This reticence left the lower federal courts to roam at large in a field of antitrust immunity. The results were perhaps predictable: the lower courts varied in application of the doctrine and its exceptions and even crafted additional exceptions.\


6. The principal exception to the Noerr doctrine is the so-called sham exception. First suggested by dicta in the Noerr opinion itself, 365 U.S. at 144, the sham exception blossomed in California Motor Transport. In that case the Court held that a complaint alleging that a competitor had instituted "a pattern of baseless, repetitive claims" before state and federal regulatory agencies for the purpose of preventing a rival trucking company from obtaining or transferring operating rights stated an antitrust claim under the sham exception. Id. at 512-13. Nevertheless, the scope of the sham exception has fostered significant debate among the courts and commentators. For a more thorough discussion, see infra notes 53-58 and accompanying text and notes 210-30 and accompanying text.

Other exceptions have also been fashioned based on dictum in Supreme Court opinions. For example, some courts have suggested that Noerr may not protect petitioning activity when the government agency is a co-conspirator in the antitrust violation. See, e.g., California Motor Transp., 404 U.S. at 513 ("Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression."); Pennington, 381 U.S. at 671 (Secretary of Labor "not claimed to be a co-conspirator" in antitrust conspiracy allegedly formed by mine operators and union); Sessions v. Tank Liners, Inc. v. Joor Mfg., 827 F.2d 458, 466 (9th Cir. 1987) (dictum stating that Noerr immunity does not "extend to private parties who have entered into a 'conspiracy' with governmental actors"); vacated, 108 S. Ct. 2862 (1988) (remanded for further consideration in light of Allied Tube Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988)); Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1252 n.17 (9th Cir. 1982) (conspiracy with licensing authority to eliminate competition not protected by Noerr) (citing Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962)), cert. denied, 459 U.S. 1227 (1983); Duke & Co. v. Foerster, 521 F.2d 1277, 1282 (3d Cir. 1975) (Noerr does not apply to "official participation with private individuals in a scheme to restrain trade"); Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964) (Noerr might not apply if public official participates in antitrust conspiracy). But see Boone v. Redevelopment Agency, 841 F.2d 886, 897 (9th Cir.) (repudiating Harman and citing Pennington for the proposition that no co-conspirator exception to Noerr doctrine exists), cert. denied, 109 S. Ct. 489 (1988); Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975) (co-conspirator exception would abrogate Noerr doctrine).

The lower courts have also suggested a commercial activity exception to the Noerr doctrine. This exception precludes Noerr immunity when the government acts solely in a commercial capacity, generally as a purchaser of goods or services. See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.), cert. denied, 400 U.S. 850 (1970); cf. FTC v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768 (1990) (condemning restraint imposed on governmental purchases of legal services). But see In
The Court’s 1988 decision in Allied Tube & Conduit Corp. v. Indian Head, Inc.,\(^7\) the first to consider Noerr in sixteen years, has begun the process of clarification. Although its contours are not clear, Allied Tube outlines a basic framework for analyzing claims of Noerr immunity. Under Allied Tube, antitrust immunity for acts of petitioning the government may be either absolute or qualified. Absolute immunity extends to acts of petitioning that result in restraints of trade imposed by governmental action.\(^8\) Qualified immunity extends to acts of petitioning that result in restraints of trade imposed by private parties if those restraints are incidental to valid and genuine efforts to influence governmental action.\(^9\) Qualified immunity varies with the “context and nature” of the petitioning activity.\(^10\) This Note examines the conceptual framework for claims of Noerr immunity emerging from Allied Tube, with a view toward solving some of the uncertainties remaining after that decision.\(^11\) To understand the Allied Tube case itself, however, a basic knowledge of the Noerr doctrine as it had developed in the Supreme Court’s prior opinions is necessary.

I. DEVELOPMENT OF THE NOERR DOCTRINE

A. Noerr and Pennington

The Noerr doctrine grew out of a “‘no-holds-barred fight’”\(^12\) between groups of railroads and trucking companies who competed in hauling heavy freight. The railroads had undertaken a publicity campaign, directed at the public at large, allegedly “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.”\(^13\) Through various

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\(^7\) See Airport Car Rental Antitrust Litig., 693 F.2d 84, 88 (9th Cir. 1982) (rejecting commercial activity exception), cert. denied, 462 U.S. 1133 (1983). The existence and application of these exceptions to the Noerr doctrine are beyond the scope of this Note.
\(^8\) 486 U.S. 492 (1988).
\(^9\) Id. at 498.
\(^10\) Id.
\(^11\) Id.
\(^12\) This Note focuses on what might be called the typical Noerr claim. In such cases the antitrust plaintiff alleges that certain of the defendant’s activities in seeking governmental action have caused him competitive injury. The defendant raises Noerr as a defense. The plaintiff then asserts that the conduct is either not protected by Noerr or amounts to a form of sham petitioning.
speeches and written materials, the railroads attempted to sway public opinion by charging that heavy trucks posed certain traffic hazards and did a disproportionate share of damage to the nation's highways. The railroads, however, did not disclose their involvement in the campaign. Instead, they used the "third-party technique," an advertising ploy which made the views expressed appear to be those of independent persons and groups even though they were actually prepared by the railroads. These efforts were apparently successful, obtaining stricter enforcement of traffic laws against truckers and a gubernatorial veto of a Pennsylvania bill that would have permitted trucks to carry heavier loads in that state. The truckers filed an antitrust action and obtained a judgment in the district court. A divided Third Circuit panel affirmed.

The Supreme Court reversed the court of appeals. The Court began with the premise that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." The rule extended, it said, to petitioning "with respect to a law that would produce a restraint or monopoly" and encompassed the railroads' publicity campaign.

The decision rested on three points. First, the publicity campaign bore "little if any resemblance to the combinations normally violative of the Sherman Act," combinations characterized by agreements among competitors to fix prices, divide markets, or boycott recalcitrant suppliers or customers. Second, if efforts to influence government fell within the proscriptions of the Sherman Act, "the power of government to take actions through its legislature and executive that operate to restrain trade" would be impaired. Since representative democracy depends upon the ability of persons to communicate with their elected officials, the Court refused to "impute to the Sherman Act a purpose to regulate, not business activity, but political

14. Id. at 130-31.
15. Id. at 129-30.
16. Id. at 130.
20. Id. at 135.
21. Id. at 136.
22. Id.
23. Id.
24. Id.
25. Id. at 137.
activity." Finally, construing the Sherman Act to prohibit the publicity campaign "would raise important constitutional questions." Specifically, the Court feared that affirming the lower courts might impair the railroads' first amendment right to petition the government. While noting these constitutional issues, Noerr held only that the publicity campaign did not constitute a restraint of trade within the meaning of the Sherman Act. The Court did not decide that the first amendment prohibited application of the Sherman Act in some cases.

The Court rejected the truckers' argument that use of the third-party technique brought the publicity campaign within the reach of the antitrust laws. It concluded that "[i]nsofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and . . . a publicity campaign to influence government action clearly falls into the category of political activity." Nevertheless, in dictum the Court explained that not all forms of petitioning are immune from antitrust liability: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." Noerr was not such a case, however, because the truckers did not dispute that the publicity campaign was genuinely intended to influence government action. Any damage the truckers suffered was merely an "incidental effect of the railroads' campaign to influence governmental action."

Four years later, in United Mine Workers v. Pennington, the Court revealed how broad Noerr's protection could be. In Pennington the United Mine Workers and a group of large coal mining operators jointly asked the Secretary of Labor to set a minimum wage under the Walsh-Healey Act for employees of coal contractors selling to the Tennessee Valley Authority (TVA). The Secretary agreed, setting a rate that made it difficult for small, nonunion coal mines to sell to the TVA in the contract market. The union and the larger mines also

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26. Id.
27. Id. at 138.
28. Id. at 137-38.
29. Id. at 137.
30. Id. at 132 n.6.
31. Id. at 140-41.
32. Id. at 144.
33. Id. at 143.
34. 381 U.S. 657 (1965).
36. Pennington, 381 U.S. at 660.
urged the TVA to curtail its purchases of coal in the spot markets, which were largely unaffected by the Walsh-Healey Act, and allegedly engaged in a collusive price-cutting campaign in the TVA spot market designed to put the small mines out of business.\textsuperscript{37} The small mines filed an antitrust claim and won $270,000 in treble damages in the district court.\textsuperscript{38}

The Supreme Court reversed.\textsuperscript{39} The small mine companies had argued that \textit{Noerr} did not control the case because the union and larger companies had asked for the establishment of minimum wage rates with an anticompetitive purpose. The Court, however, summarily rejected that position, stating that under \textit{Noerr} "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."\textsuperscript{40}

One commentator has accurately noted that \textit{Pennington} represents a considerable extension of \textit{Noerr}.\textsuperscript{41} Immunity for the union's efforts to persuade the Secretary of Labor to set a minimum wage rate is plainly consistent with \textit{Noerr}. But the Court largely ignored allegations of predatory conduct by the union and larger mines in the spot market. Even though the TVA is a governmental entity, its coal purchases would seem to be precisely the type of commercial activity that falls within the parameters of the Sherman Act. Nevertheless, given the Court's apparent lack of concern about the nature of the TVA's purchasing decisions, \textit{Pennington} can be read as holding that petitioning of governmental actors who are making purely commercial decisions falls outside the reach of the Sherman Act.\textsuperscript{42}

B. California Motor Transport and the Sham Exception

The final case in the original \textit{Noerr} trilogy, \textit{California Motor Transport Co. v. Trucking Unlimited},\textsuperscript{43} has befuddled courts faced with claims of \textit{Noerr} immunity perhaps more than any other case. The Court's unusually casual language and broad dicta can be interpreted to support any particular result a tribunal might wish to reach when faced with a \textit{Noerr} claim.

In \textit{California Motor Transport}, Trucking Unlimited filed an antitrust action against a group of its competitors, alleging that they had

\textsuperscript{37} Id. at 660-61.
\textsuperscript{38} Id. at 661.
\textsuperscript{39} Id. at 657.
\textsuperscript{40} Id. at 670.
\textsuperscript{41} Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Chi. L. Rev. 80, 85 (1977).
\textsuperscript{42} Id. at 85-86; cf. supra note 6 (discussing "commercial activity" exception).
\textsuperscript{43} 404 U.S. 508 (1972).
used administrative and judicial proceedings in a concerted effort to thwart its efforts to obtain operating rights. The defendants claimed immunity under Noerr, and the district court dismissed the suit. The Ninth Circuit, however, reversed the district court, holding that Noerr did not protect petitioning of administrative and judicial bodies. The Supreme Court affirmed the Ninth Circuit, but rejected its reasoning. After reviewing the holdings in Noerr and Pennington, the Court concluded that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of the business and economic interests vis-à-vis their competitors.

Perhaps no single statement has caused more difficulty in discerning the source and scope of protection under the Noerr doctrine. Some courts and commentators have read this statement as making Noerr a creature of constitutional mandate rather than statutory construction, despite the Noerr Court's refusal to address the first amendment issue. Ascertaining the source of Noerr's protection is vital to defining the parameters of the doctrine. For example, if Noerr is required by the first amendment, then it also must apply to state antitrust laws. If, however, the Noerr doctrine merely represents a construction of the Sherman Act, some petitioning activity not protected by the first amendment might nevertheless be immune from antitrust liability.

44. Id. at 509.
49. See supra note 30 and accompanying text. Although this is a plausible position, California Motor Transp. does not expressly purport to replace Noerr's statutory construction with a constitutional analysis. Likewise, its reliance on the first amendment in part is not inconsistent with the approach taken by the Court in Noerr.
51. See Kintner & Bauer, Antitrust Exemptions for Private Requests for Govern-
Although the source of Noerr immunity still remains unresolved,\(^{52}\) this troublesome issue did not impede the California Motor Transport majority. Having decided that Noerr immunity extended to the petitioning of administrative agencies and the judiciary, the Court immediately narrowed the scope of that protection by breathing life into the so-called "sham exception."\(^{53}\) The Noerr Court had suggested that petitioning intended to injure a competitor directly, rather than to influence governmental action, would not merit antitrust immunity.\(^{54}\) California Motor Transport gave that dictum binding effect. The defendants had allegedly instituted judicial and administrative proceedings "'with or without probable cause, and regardless of the merits of the cases.'"\(^{55}\) The allegations, the Court said, stated a claim under the sham exception, for such "a pattern of baseless, repetitive claims" would amount to an abuse of the administrative and judicial processes.\(^{56}\)

These conclusions should have been sufficient to dispose of the case. Unfortunately, the Court also muddled the sham exception by listing a number of other unethical petitioning tactics, such as perjury and misrepresentation, and suggesting that they too might fall within the sham exception, depending upon the governmental body from whom the petitioner sought action.\(^{57}\) In short, the Court suggested that if a petitioner seeks legislative action, then Noerr immunity is broad. But if a petitioner seeks judicial or administrative action, then unethical petitioning, even though genuinely intended to influence governmental action, may fall within the sham exception. This interpretation expanded the sham exception delineated by the Noerr Court and led the lower courts to take an expansive view of the sham exception in an effort to curb what they considered to be petitioning abuses.\(^{58}\)

After California Motor Transport, the Court did not directly address another Noerr claim for sixteen years. During that time the lower courts struggled with the appropriate framework for analyzing Noerr claims. The uncertain source and scope of the doctrine led to particu-

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52. See infra notes 174-91 and accompanying text (discussing the Noerr doctrine and the first amendment and suggesting that Noerr rests on a construction of the Sherman Act).


54. See supra text accompanying notes 32-33.


56. Id. at 513.

57. Id. at 512-13.

58. See infra notes 210-30 and accompanying text (discussing cases defining the scope of the sham exception).
larly divergent results in its application. Thus, by the time Allied Tube & Conduit Corp. v. Indian Head, Inc. 59 reached the courts, clarification of the Noerr doctrine's myriad of uncertainties was overdue.

II. THE ALLIED TUBE CASE

The Allied Tube decision arose from a dispute between makers of steel electrical conduit and makers of polyvinyl chloride (PVC) electrical conduit. As the Court described it, conduit is "the hollow tubing used as a raceway to carry electrical wires through the walls and floors of buildings." 60 Generally, the type of conduit used in buildings is not left to the discretion of a builder or electrician, but is prescribed by state or local law. Because most legislators lack the technical expertise to draft a workable set of regulations, legislative bodies rarely write the applicable statutes. Instead, most state and local governments enact model codes published by private standard-setting organizations. The drafting of one of those model codes, the National Electric Code (NEC), was the basis of the controversy in Allied Tube.

The NEC is published and revised every three years by the National Fire Protection Association (NFPA), a private, voluntary association of industry, labor, insurers, medicine, and academia. 61 The NFPA operates through a process known as "consensus standard making." 62 NEC revisions are initiated by the association's members, who submit proposals to a reviewing panel of experts. If the review panel approves a measure, it is then submitted for final approval of those members in attendance at the NFPA's annual meeting. 63

Before 1980 the NEC permitted the use of steel conduit, and, in fact, most of the conduit sold in the United States was steel. 64 In September 1978, however, Indian Head, Inc. proposed that the NFPA include PVC conduit as an approved material in its 1981 revised code. An expert panel reviewed the proposal thoroughly and also considered a report by Underwriters Laboratories on the matter. It approved PVC for inclusion in the NEC in December 1979. The NFPA then scheduled a vote of the full membership on the proposal for the annual meeting in May 1980. 65

Indian Head's chances of successfully marketing PVC conduit depended heavily on the product's inclusion in the NEC. Although In-
dian Head claimed that PVC conduit was more pliable, cheaper to install, and less susceptible to short circuiting than its steel counterpart. Certain scientific evidence suggested it posed safety risks. Specifically, there was some fear that during fires in high-rise buildings PVC conduit might burn and emit toxic fumes. On a more practical level, "a substantial number of state and local governments routinely adopt the [NEC] into law with little or no change." Thus, exclusion of PVC conduit from the NEC meant that it could not be used in a number of areas. Even in those jurisdictions that did not adopt the NEC or that amended it to allow for the use of PVC conduit, approval was vital to Indian Head's marketing plans. Private certification services, such as Underwriters Laboratories, normally will not list and label an electrical product that does not meet NEC standards. Insurers will not insure buildings that do not conform to NEC provisions, and many electricians and contractors simply refuse to use materials not approved by the NEC. Therefore, absent inclusion in the code, Indian Head could expect resistance to its efforts to market PVC as a viable alternative to steel conduit, whatever the product's alleged advantages.

Armed with this knowledge and alarmed at the competitive threat posed by Indian Head's proposal, a group of steel conduit manufacturers, led by Allied Tube and Conduit Corporation, undertook a joint effort to exclude PVC conduit from the 1981 NEC. Since PVC could not be included in the code without approval by a majority of NFPA members in attendance at the 1980 annual meeting, the steel interests recruited 230 persons to join the NFPA and to attend the meeting for the purpose of voting against Indian Head's proposal. Allied Tube alone enlisted 155 new members, including some of its executives, employees, sales agents and their employees, and the wife of a national sales director. The steel interests paid over $100,000 to enroll these new NFPA members and to see that they attended the annual meeting.

At the meeting Allied Tube and the other steel manufacturers instructed these new members where to sit and how to vote. None of

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66. Id. at 495. Even those state and local governments that amended the NEC made only minor revisions. Among the states that had adopted the NEC by June 1982, 26 had adopted it without any changes. Allied Tube & Conduit Corp. v. Indian Head, Inc., 817 F.2d 938, 939 n.1 (2d Cir. 1987), aff'd, 486 U.S. 492 (1988). Nineteen states had adopted it with amendments, but those jurisdictions changed on average only 12 of the NEC's 114 articles. Id. Among cities, 232 adopted the NEC as written and 256 adopted it with amendments, but changed on average only 11 of the code's articles. Id. at 939-40.

67. Allied Tube, 486 U.S. at 495-96.

68. Id. at 496-97.

69. Id. at 497.

70. Id.
these persons had the technical knowledge or data to follow the discussion on the merits of Indian Head's proposal. None spoke against the proposal or otherwise participated actively in the proceedings. Nevertheless, when the matter came to a vote, the new members voted as a bloc against the PVC proposal. Allied Tube monitored the group by stationing group leaders throughout the meeting hall. These group leaders used walkie-talkies and hand signals to explain to the new members when and how to vote on various questions brought to the floor. With the solid opposition of the newly enrolled members, the NFPA rejected Indian Head's proposal by a 394-390 margin.\footnote{71. Id.}

Indian Head appealed to the NFPA board of directors, arguing that the steel interests had "stacked" the vote on the PVC proposal by enlisting new members whose sole role was to vote against it. The board denied the appeal on the ground that no NFPA rules had been violated.\footnote{72. Id. It did, however, agree that the steel interests had circumvented the association's rules. To prevent such a recurrence, the board adopted new regulations requiring persons to be NFPA members for a minimum of 180 days before they acquired voting privileges at an annual meeting.\footnote{73. Id.}}

After its unsuccessful appeal to the NFPA board, Indian Head sued Allied Tube under section 1 of the Sherman Act.\footnote{74. Brief of Respondent at 7, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (No. 87-157).} Its complaint alleged that Allied Tube conspired with other steel conduit makers to exclude PVC conduit from the NEC and thus from the market as a whole.\footnote{75. Id. at 497-98.} At a bifurcated trial the jury found that while Allied Tube had a genuine concern about the safety of PVC conduit and that its actions at the NFPA meeting in 1980 were motivated, at least in part, by that concern, it nevertheless subverted the NFPA's standard-setting process.\footnote{76. Id. at 497-98.} The jury also found that Allied Tube's actions had an adverse impact on competition and therefore unreasonably restrained trade.\footnote{77. Id. at 498.} It therefore awarded Indian Head $3.8 million in actual damages for lost profits resulting from the exclusion of PVC conduit from the NEC.\footnote{78. Id.} According to the Supreme Court, the jury awarded no damages for lost profits flowing from the adoption of the 1981 code by any governmental body; Indian Head sought compensation only for the "stigma" that exclusion from the NEC imprinted on PVC conduit and

\footnote{71. Id.}
\footnote{72. Id.}
\footnote{73. Brief of Respondent at 7, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (No. 87-157).}
\footnote{74. 15 U.S.C. § 1 (1988).}
\footnote{75. Allied Tube, 486 U.S. at 497.}
\footnote{76. Id. at 497-98.}
\footnote{77. Id. at 498.}
\footnote{78. Id.}
for Allied Tube's subsequent efforts to market that stigma.79

79. Id. at 498 n.2. A full understanding of the case requires a discussion on damages. Throughout the proceedings Allied Tube contended that Indian Head sought compensation for injury inflicted by passage of the NEC by state and local legislatures. Of course, the Sherman Act generally does not allow recovery of damages when state statutes and local ordinances prohibit use of such products because such legislative conduct falls within the state action doctrine of Parker v. Brown, 317 U.S. 341 (1943). Even if Parker is not applicable, passage of the NEC by legislative bodies may be an intervening cause of the claimant's damages and thus bar recovery. Cf. P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 201 (Supp. 1988) (in Noerr-Pennington context, government's decision to act reflects independent choice and constitutes intervening cause between defendant's action and plaintiff's damages); Hurwitz, Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr, 74 Geo. L.J. 65, 123 (1985) (“In the absence of egregious conduct, a governmental decision favorable to the petitioners will negate the proximate causation of any competitive injury.”). Indian Head, however, denied Allied Tube's contention and claimed that it sought damages only for the “stigma” that exclusion from the NEC had caused PVC conduit in the marketplace. During argument on Allied Tube's motion for judgment notwithstanding the verdict (JNOV), the trial judge indicated that he did not recall the “stigma” theory being advanced at trial. Joint Appendix at 66, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (No. 87-167). Nevertheless, the record reflects that when the case was submitted to the jury, the trial judge set forth Indian Head's “stigma” theory in detail:

[T]he plaintiff's argument is what happened in May 1980 has created a certain stigma on the product which has carried through and that the defendants have attempted to market that stigma in the years which have ensued so that the extent of the damages which it now suffered [sic] are as a direct resulted [sic] of what happened in 1980, and that is the plaintiff's claim. The plaintiff claims his damages do result from what happened in May 1980 and not from any conduct of the defendants that they were engaged in other than the marketing of that defeat in 1980 in the years that follow. That's the plaintiff's claim.

. . .

The plaintiff does not seek damages resulting from any of the defendant's conduct other than its conduct at the May 1980 meeting and its marketing of that defeat in the marketplace.

To the extent that the defendant has sought to bring to the public's attention safety questions, to the extent the defendant has sought to legislate — to lobby before legislative bodies or political bodies with respect to the safety question, the plaintiff does not claim any damages from that conduct, and such conduct may not be a proper predicate for you to assess any damages because that type of conduct would be protected and is not a violation of the antitrust laws. The defendants are entitled to take whatever measures they want to take to inform the public or the public bodies involved of their concerns about the safety issues and the plaintiffs do not seek any damages as a result of that conduct.

So the ultimate test for you to decide is . . . do the damages . . . which [the plaintiff] claim[s] [it] suffered result from what happened in 1980 and the defendant's efforts since 1980 to rely upon that or utilize that factor in the marketplace. Those damages are properly recoverable . . . .

Id. at 30-31.

Despite this charge, the trial judge, in granting Allied Tube's motion for JNOV, rejected Indian Head's argument that the case had been submitted to the jury on the
Allied Tube moved to set aside the verdict on the ground that Noerr protected its conduct. Because the NEC is widely adopted by a number of state and local legislatures, Allied Tube argued that its opposition to Indian Head's proposal at the NFPA meeting constituted a form of petitioning for governmental action. The trial court agreed and granted Allied Tube's motion for judgment notwithstanding the verdict, but the Second Circuit reversed.80

III. ALLIED TUBE IN THE SUPREME COURT: A CONCEPTUAL FRAMEWORK FOR NOERR

The Supreme Court affirmed the Second Circuit's judgment, agreeing that Noerr was inapplicable to the facts of Allied Tube. It did not, however, accept the Second Circuit's reasoning that Noerr did not reach the petitioning of private groups. Instead, the Court established a two-step analysis for claims of Noerr immunity depending upon "the source, context, and nature of the anticompetitive restraint at issue."81 If the restraint "is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.82 If, however, the restraint flows from private action, a party may still enjoy Noerr immunity if the restraint is merely "incidental to a valid effort to influence governmental action."83 Thus, in analyzing claims of Noerr immunity, the first question is whether the restraint results from governmental or private action.

80. See Allied Tube, 817 F.2d 938 (2d Cir. 1987).

81. Allied Tube, 486 U.S. at 499. The Court also granted certiorari to determine whether Allied Tube's conduct, if not immune under Noerr, constituted an unreasonable restraint of trade. It ultimately vacated the grant of certiorari on that issue as improvident. Id. at 499 n.3. Given its disposition of that issue, the Court could and did assume that Allied Tube's conduct was unreasonable in the absence of Noerr immunity.


83. Id. (quoting Noerr, 365 U.S. at 143)(emphasis added).
A. The Governmental Action/Private Action Dichotomy: The Intersection of Noerr and the State Action Doctrine of Parker v. Brown

Much of the dispute in Allied Tube centered around proper characterization of the NFPA. Although Allied Tube contended that the NFPA constituted a quasi-legislative body solely because legislatures routinely adopt the NEC, the majority summarily dismissed the argument.\(^{84}\) Although it gave no real analysis of the problem, the Court focused on three factors that it found to be hallmarks of private action: (1) the NFPA is unaccountable to the public; (2) the NFPA lacks official authority; and (3) the NFPA is composed in part of persons and organizations who have financial interests in restraining trade.\(^{85}\) While admitting that the "line between restraints resulting from governmental action and those resulting from private action may not always be obvious," the Court had "no difficulty concluding that the restraint [at issue in Allied Tube] . . . resulted from private action."\(^{86}\)

This result is indisputably correct. From a conceptual standpoint, however, the Court's analysis is lacking. Certainly none of the factors enumerated by the Court are objectionable as indicia of private action. Nonetheless, they do not distinguish the activity at issue in Allied Tube from the allegedly anticompetitive conduct immunized in Noerr and Pennington; the same characteristics describe the railroad combination in Noerr and the coal mining combination in Pennington. Additionally, the Court's failure to fashion any guidelines for distinguishing between governmental and private restraints is surprising, especially when the distinction plays such a central role in analyzing claims of Noerr immunity under the Allied Tube approach. Assuming that immunity from antitrust liability in such cases is truly absolute, a workable standard differentiating governmental restraints from private conduct would allow the lower courts to dispose of many antitrust claims before trial. Perhaps the Court did not need to establish a test to resolve the dichotomy between governmental and private action to dispose of the case; Allied Tube stipulated that the NFPA is a private, not a public, body.\(^{87}\) Indian Head's damage theory also allowed the Court to sidestep the issue.\(^{88}\) Nevertheless, this skeletal analysis is puzzling because the Court has familiar tools with which to make the

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\(^{84}\) Id. at 501-02.  
\(^{85}\) Id. at 502.  
\(^{86}\) Id.  
\(^{87}\) See Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 943 n.4 (2d Cir. 1987).  
\(^{88}\) See supra note 79.
determination.

Distinctions between governmental action and private action are not new to antitrust jurisprudence. Although rooted in the Court's decision in Olsen v. Smith, the distinction blossomed in Parker v. Brown. Parker addressed a challenge to a raisin marketing program under the California Agricultural Prorate Act that was designed to reduce competition among growers and maintain their prices. A disgruntled grower sued the state administrator of the program, claiming that the regulatory scheme violated section 1 of the Sherman Act. The Court assumed, without deciding, that the program would constitute an unreasonable restraint of trade if organized and effected solely by an agreement among private parties. Nevertheless, it refused to enjoin the prorate program because it concluded that "nothing in the language of the Sherman Act . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." The Sherman Act, the Court held, prohibits "individual and not state action." From this seemingly simple holding, the Court struggled to find some workable boundaries for antitrust's unique federalism problem, the state action doctrine. Although Parker addressed claims for injunctive relief only, its logic applies equally to treble damages actions against restraints resulting from state economic regulations. That same logic also dictates that private action taken pursuant to state regulatory programs be immune from antitrust scrutiny. Otherwise, Parker becomes "an empty formalism, standing for little more than the proposition that [the plaintiff, by filing a claim solely against state officials,] sued the wrong parties." Nevertheless, on at least two subsequent occasions the Court suggested that state action immunity did not apply unless the antitrust plaintiff had named the state or state officials as defendants in the suit. On other occasions the Court as-

89. 195 U.S. 332 (1904) (upholding Texas statute limiting pilotage of vessels at port of Galveston to licensed state pilots).
90. 317 U.S. 341 (1943).
91. Id. at 348-49.
92. Id. at 310-12.
93. Id. at 350.
94. Id. at 350-51.
95. Id. at 352.
97. See Bates v. State Bar, 433 U.S. 350, 361 (1977); Cantor, 428 U.S. at 591-92 (plurality opinion) ("Since the case now before us does not call into question the legality of any act of the State of Michigan or any of its officials or agents, it is not controlled by the Parker decision.").
sented that *Parker* applied only when a state regulatory program compelled private parties to act in a manner that restrained trade. 98 At other times the Court stated that *Parker* immunity applied only if it were “necessary” to make a state regulatory program work. 99 None of these tests, however, has withstood recent developments.

After grappling with the scope of *Parker* immunity for private parties, the Court finally settled upon a two-prong test for evaluating such claims. In *California Retail Liquor Dealers Association v. Midcal Alu-

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98. See *Bates*, 433 U.S. at 359-60; *Cantor*, 428 U.S. at 592-93 (plurality opinion); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975). *Goldfarb* had perhaps the most explicit statement concerning the compulsion requirement: “It is not enough that... anticompetitive conduct is ‘prompted’ by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.” *Id.* The Court has since discarded the compulsion requirement. See *Southern Motor Carriers*, 471 U.S. at 61-62.

Interestingly, the *Southern Motor Carriers* Court did not purport to overrule *Goldfarb*. It did, however, engage in what might be termed revisionist history. In *Goldfarb* the Court held that a minimum fee schedule promulgated by a county bar association and enforced in some measure by the disciplinary rules of the state bar did not enjoy immunity from antitrust scrutiny. *Goldfarb*, 421 U.S. at 791-92. The decision rested in part on the state’s failure to require lawyers to adhere to the fee schedule. The *Southern Motor Carriers* Court, however, recast the *Goldfarb* holding. *Goldfarb*, it stated, “is not properly read as making compulsion a *sine qua non* to state action immunity... The focal point of the *Goldfarb* opinion was the source of the anticompetitive policy, rather than whether the challenged conduct was compelled.” *Southern Motor Carriers*, 471 U.S. at 60. It is difficult to reconcile this language with the *Goldfarb* Court’s assertion that “[t]he threshold inquiry in determining... [claims of immunity under *Parker v. Brown*] is whether the activity is required by the State acting as sovereign.” *Goldfarb*, 421 U.S. at 790.

99. *Bates*, 433 U.S. at 361; *Cantor*, 428 U.S. at 597-98 (plurality opinion). This test was taken from another line of cases in which the Court has attempted to define when a federal regulatory scheme results in an implied repeal of the antitrust laws. It reflects the disfavored status of statutory repeal by implication. Under this approach a federal regulatory program implicitly repeals the antitrust laws only when “necessary to make the... [regulatory act] work.” *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963). Even then the scope of the implied repeal is limited “to the minimum extent necessary.” *Id.* This rule has been applied in numerous “implied repeal” cases. See, e.g., *National Gerimedical Hosp. & Gerontology Center v. Blue Cross*, 452 U.S. 378 (1981); *United States v. National Ass’n of Sec. Dealers*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963). The *Southern Motor Carriers* Court also rejected application of the “necessity” test to claims of immunity under *Parker v. Brown*. *See Southern Motor Carriers*, 471 U.S. at 57 n.21. Application of this test to state regulatory programs has been criticized as a vehicle for judicial interference with state economic regulation reminiscent of the substantive due process doctrine of *Lochner* v. *New York*, 198 U.S. 45 (1905), and its progeny. See *Cantor*, 428 U.S. at 627-31 (Stewart, J., dissenting); see also 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 214, at 88 (1978) (application of “necessity” test prompts the “kind of interference with state sovereignty... that... *Parker* was intended to prevent”).
minum, Inc., the Court held that state action immunity shields private parties from liability for following anticompetitive state regulations if: (1) the restraint is a "clearly articulated and affirmatively expressed" goal of state policy; and (2) the state itself "actively supervise[s]" the private conduct. Since adopting this approach, the Court has adhered to it strictly, except in limited circumstances when plaintiffs have brought antitrust claims against state actors or municipalities. Because the Midcal test is designed to distinguish

100. 445 U.S. 97 (1980).
101. Id. at 105 (quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978)).
102. Id. (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)(plurality opinion)).
103. See Hoover v. Ronwin, 466 U.S. 558 (1984). Hoover held that a committee of bar examiners appointed by the Arizona Supreme Court was immune from antitrust liability under Parker. The committee had administered and graded a bar examination taken by respondent Ronwin. Ronwin failed and the committee recommended that the Arizona Supreme Court deny him admission to the bar. Ronwin then filed an antitrust suit. The Court, noting that the Arizona Constitution granted the state supreme court plenary authority to determine admissions to the bar, concluded that the committee's acts were acts of the state supreme court itself in the exercise of its sovereign powers. It therefore declared the conduct immune without analyzing it under the Midcal test. "When the conduct is that of the sovereign itself, ... the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision.'" Id. at 569.
104. See, e.g., Fisher v. City of Berkeley, 475 U.S. 260 (1986); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982). Municipalities are not beyond the reach of the Sherman Act by virtue of their status as political subdivisions of the state. Town of Hallie, 471 U.S. at 38; City of Boulder, 455 U.S. at 52. If, however, a municipality acts pursuant to a clearly articulated and affirmatively expressed state policy — that is, it meets the first prong of the Midcal test — the action isimmune from antitrust attack without further supervision from the state. Town of Hallie, 471 U.S. at 46-47.


Fisher apparently raised another barrier to actions under the Sherman Act to enjoin enforcement of municipal ordinances. According to the Fisher Court, the question of Parker immunity need not be addressed in these suits unless the Sherman Act preempts the ordinance. Fisher, 475 U.S. at 265. Preemption, in turn, occurs only when the ordinance conflicts irreconcilably with the antitrust laws. Such conflict exists, for example, when the ordinance requires conduct that constitutes a per se violation of the Sherman Act. Id. at 264-66; Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982). The plaintiff in Fisher challenged a rent control ordinance passed by popular referendum in Berkeley, California. The Court refused to strike the ordinance because it could not find an agreement between the city and landlords to fix rental prices. Fisher, 475 U.S. at 266-70.
between restraints imposed by government and those imposed by private parties, it is adaptable to the distinction between governmental and private restraints at issue in claims of *Noerr* immunity. Furthermore, because the *Noerr* doctrine has often been described as a natural analogue to *Parker v. Brown*, the *Midcal* test logically fits the Court's framework established in *Allied Tube*. In fact, any other approach might create an irrational dislocation in antitrust law. The definition of state action ought not to change depending upon whether a party is asking for or responding to governmental conduct.

Using the *Midcal* test to distinguish between governmental and private action would not narrow the scope of *Noerr* immunity. *Noerr* cannot be strictly limited to those cases in which a party petitions for what would be state action under *Midcal*. The *Allied Tube* Court made clear that even if a restraint is imposed by private parties, *Noerr* immunity might still apply if the restraint is "incidental" to a valid attempt to influence the government. Application of the *Midcal* test would merely answer a threshold question: whether a petitioning party's conduct is entitled to absolute immunity because it results in no private action that restrains trade.

Applying the *Midcal* test to the facts in *Allied Tube* would not have changed the result. First, no discernible state policy supports promulgation of the NEC. In petitioning the NFPA to exclude PVC conduit from the 1981 code, *Allied Tube* sought immediate action from private parties, not from government. While that alone would not defeat *Allied Tube*'s claim of *Noerr* immunity, it counsels against treat-

Absent such an agreement, no violation of section 1 could be established, let alone a per se violation, and thus, the Sherman Act did not preempt the ordinance. *Id.*

Despite the Court's suggestion that preemption analysis differs from state action immunity under *Parker*, several commentators have convincingly shown that the two issues are identical. See P. AREEDA & H. HOVENKAMP, supra note 79, ¶ 202.2; Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 YALE L.J. 486, 502-08 (1987).

105. See Baker, Exchange of Information for Presentation to Government Agencies: The Interplay of the Container and *Noerr* Doctrines, 44 ANTITRUST L.J. 354, 356-57 (1975) (*Noerr* represents flipside of *Parker* v. *Brown*); Hurwitz, supra note 79, at 76 (*Noerr* not an extension of *Parker* but a complement to it). This view seems unassailable. *Parker* and its progeny control those cases in which private parties comply with a governmentally adopted regulatory program. *Noerr* and its progeny control when private parties urge the government to adopt a program that restrains trade.

106. See *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 583-85 (N.D. Cal. 1981) (rejecting argument that *Noerr* immunity is coextensive with state action immunity under *Parker*), aff'd, 833 F.2d 84 (9th Cir. 1982), cert. denied, 486 U.S. 1113 (1983); see also P. AREEDA & H. HOVENKAMP, supra note 79, ¶ 203.2a, at 28 (commenting favorably on *In re Airport Car Rental Antitrust Litig.*).

ing any resulting restraint as governmental conduct. Admittedly, twenty-six states adopted the product of the NFPA's deliberations without changes, and another nineteen adopted it with only minor amendments. Yet that fact does not prove that the NEC was drafted pursuant to any clearly articulated and affirmatively expressed state policy. Arguably, governmental enactment of the NEC reflects a ratification of the code-drafting process. This reasoning, however, ignores that in prior state action cases, the Court has demanded some clear articulation and affirmative expression of state policy to displace competition before a private party undertakes some potentially anticompetitive activity. The only authority devolving on the NFPA and its members was a de facto approval resulting from a pattern of NEC adoption by various legislative bodies over a number of years. That alone is insufficient to meet the first prong of the Midcal test.

But even if Allied Tube's conduct had fallen within the first prong of the Midcal test, it failed to meet the second prong, which requires that the private activity be actively supervised by the state. The purpose of the active supervision requirement is clear. While Parker allows states to displace competition in some markets with a regulatory scheme, it does not allow the states to subvert the fundamental national policy favoring competition by licensing private parties to violate the Sherman Act. Therefore, when a state regulates a market or industry in a manner that would otherwise violate the Sherman Act, it undertakes a corresponding duty to oversee the implementation and operation of the regulatory scheme. Traditionally, states have chosen

108. See supra note 66.
109. See Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)(no antitrust immunity when state agency passively accepts public utility tariff); see also Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64 ("[I]n Cantor the anticompetitive acts of a public utility were held unprotected because the Michigan Legislature had indicated no intention to displace competition in the relevant market.").
110. Allied Tube, 486 U.S. at 501.
111. The Allied Tube Court apparently understood this to be true. See id. ("We agree with the Court of Appeals that the [NFPA] cannot be treated as a 'quasi-legislative' body simply because legislatures routinely adopt the Code the [NFPA] publishes.").
112. Failure to satisfy one prong of the Midcal test precludes a finding of immunity under Parker's state action doctrine. See Patrick v. Burget, 486 U.S. 94, 100 (1988) (only if act of private party meets both prongs of Midcal test is it fairly attributable to the state; failure to satisfy one prong precludes finding of state action immunity).
113. Parker v. Brown, 317 U.S. 341, 351 (1943) ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . .'').
114. Because a private party cannot claim immunity from the antitrust laws for compliance with a state regulatory scheme if the state does not actively supervise the program, the antitrust laws effectively preempt an unsupervised, anticompetitive regulatory program. See P. AREEDA & H. HOVENKAMP, supra note 79, ¶ 209.2; Garland, supra
to supervise their regulatory programs by administrative oversight\textsuperscript{115} or through other state actors with administrative authority.\textsuperscript{116} The active supervision requirement, however, leaves the states free to impose any particular structure they deem appropriate as long as it does more than cast "‘a gauzy cloak of state involvement’ over what is essentially private anticompetitive conduct.”\textsuperscript{117} Absent that supervision, “there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”\textsuperscript{118}

Several cases have considered exactly what constitutes active supervision under the \textit{Midcal} test.\textsuperscript{119} Although the Court has never settled on a single verbal formulation of the requirement, the mere presence of some state monitoring is insufficient.\textsuperscript{120} At a minimum, the state must “exert[] . . . significant control over” the terms of the restraint.\textsuperscript{121} Yet in its most recent pronouncement on the issue, the Court apparently has established a more rigorous approach. The active supervision prong of the \textit{Midcal} test “mandates that the State exercise ultimate control over the challenged anticompetitive conduct.”\textsuperscript{122} Allied Tube’s petitioning of the NFPA—in fact, the entire NFPA code-drafting process—falls outside any standard of active supervision previously articulated by the Court.\textsuperscript{123}

The NFPA establishes its own rules for membership, for confer-
ring voting rights, and for drafting procedures for the NEC. None of these rules or procedures is reviewed by any state agency. Of course, some forty-five states adopt the product of this process either verbatim or with few changes.124 Such legislative action may constitute supervision in some sense, but because of the negligible review most legislatures give the substance of the NEC, this supervision amounts to no more than the state rubber-stamping decisions made by a private body. Such summary approval of the NFPA's recommendations, without any "'pointed reexamination'" of the antecedent conduct generating those recommendations, has never been sufficient to satisfy the second prong of the Midcal test.125

Public policy also supports the Court's refusal to treat the restraint in Allied Tube as a governmental restraint. As a practical matter, no state is likely to undertake the review of the code-drafting process sufficient to confer Parker immunity on the NFPA and its membership. Because of the number of states that adopt the NEC, any review procedure would be prone to what has been described in other antitrust contexts as the "free rider" problem.128 The first state to un-

125. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980). Midcal itself gives an indication of the type of supervision sufficient to satisfy the requirements of Parker. In Midcal a state statute required all wine producers and wholesalers to file a fair trade contract or price schedule with the California Department of Alcoholic Beverage Control. No state-licensed wine merchant was allowed to sell to a retailer at any price other than that posted in its price schedule or fair trade contract. As the Court noted, this scheme constituted a legislatively mandated form of resale price maintenance, id. at 103, a practice long forbidden by the Sherman Act. See Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). Parker did not save the restraint, despite the clearly articulated and affirmatively expressed state policy favoring resale price maintenance because

[t]he State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.

Midcal, 445 U.S. at 105-06; see also Patrick, 486 U.S. at 100-06 (supervision of hospital's physician peer review procedures by state health division, state board of medical examiners, and state courts insufficient to confer immunity under Parker); 324 Liquor Corp., 479 U.S. at 344-45 (1989) (state supervision of mandated resale price maintenance for liquor sales insufficient to confer Parker immunity); cf. Cantor v. Detroit Edison Co., 428 U.S. 579, 594-95 (1976) (Michigan Public Service Commission's routine approval of utility's anticompetitive conduct not sufficient to confer immunity under Parker).

undertake a review procedure would bear all of the administrative costs of that process. Every other state considering adoption of the NEC could then avoid the costs of a review procedure by merely relying—that is, "free riding"—on the first state's findings. Thus, the first reviewing state would enjoy only a portion of the benefits of its review while bearing all the costs. This "free rider" potential acts as a disincentive for any state to initiate a review of the code-drafting process.\footnote{127}

Arguably, this analysis is equally applicable to uniform state laws, such as the Uniform Commercial Code, and yet has not deterred individual state review of these statutes. Proposals governing general commercial transactions, however, involve only policy choices within an area familiar to most legislators. While the importance of these matters is not to be minimized, they differ substantially from a set of safety standards based on scientific data. The question in considering electrical codes is not, for example, whether the state wishes to impose some minimal level of safety upon builders, but what requirements best serve the safety standards the state wishes to promote. These matters generally require technical expertise beyond the knowledge of the average legislator. In fact, the terms of the National Electric Code are so detailed and grounded in expert assessment of scientific data that, absent the code's publication by the NFPA, states would largely be compelled to adopt traditional regulatory schemes staffed by industry experts to achieve the same results.\footnote{128} Recognition of the value of the NFPA's code-drafting process counsels against harsh antitrust treatment.\footnote{129} The potential for abuse of that process, however, as manifested by \textit{Allied Tube}, cautions against treating such restraints as governmental imposed absent strict compliance with the \textit{Midcal} test.\footnote{130}

\footnote{127}. In another context the Court has allowed one jurisdiction to rely on the findings and experiences of other jurisdictions in enacting legislation. \textit{See} City of Renton \textit{v}. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986) (city need not conduct new studies or produce evidence of harmful effects of adult theatres before enacting zoning ordinance dispersing them; city may rely on experiences of other jurisdictions as long as that evidence is reasonably believed to be relevant to the problem addressed).

\footnote{128}. \textit{See} Allied Tube \& Conduit Corp. \textit{v}. Indian Head, Inc., 486 U.S. 492, 502 (1988) (noting that state and local governments lack the resources and technical expertise to second guess the NEC's drafters). For example, the states might have to create regulatory bodies similar to those governing public utility rates or intrastate trucking rates to regulate the design and installation of electrical wiring systems, which is the function of the National Electric Code.

\footnote{129}. \textit{See id}. at 501 (potential benefits provided by standard-setting associations have led most lower courts to apply rule of reason rather than per se analysis to restraints imposed by such groups).

\footnote{130}. This is not to suggest that actual adoption of the NEC by a state legislature

\url{https://scholarcommons.sc.edu/sclr/vol41/iss3/6}
B. "Incidental" Restraints, "Valid" Petitioning, and the Political Activity/Commercial Activity Dichotomy

Antitrust immunity for petitioning activity does not depend on governmental conduct. The Allied Tube majority noted that "Noerr immunity might . . . apply . . . if . . . the exclusion of polyvinyl chloride conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action."131 This conclusion is unobjectionable; indeed, it seems compelled by the Noerr decision itself. The railroads' publicity campaign in Noerr was directed at the public at large with the hope that a swing in public sentiment might induce a favorable governmental response.132 Thus, while the petitioning activity in Noerr sought governmental action as its ultimate goal, it was not directed at any state or local governmental agency.

Allied Tube argued that its petitioning fell squarely within this branch of the Noerr doctrine. Throughout the case it maintained that Indian Head's injury, if any, resulted largely from "the predictable adoption of the Code into law by a large number of state and local governments."133 It also argued that the NEC's wide acceptance by governmental bodies made lobbying the NFPA the most efficient means of influencing legislation regulating electrical conduit.134 Both the Second Circuit and the Supreme Court rejected Allied Tube's damage theory, but the Supreme Court admitted that Allied Tube's second point "ha[d] some force."135

The Second Circuit had refused to regard Allied Tube's conduct as petitioning of the government within the meaning of Noerr.136 It based that decision on the following three factors: (1) Allied Tube's conduct amounted to business conduct rather than a request for legislative action;137 (2) the Noerr doctrine, as an implied exemption from the antitrust laws, must be narrowly construed;138 and (3) Allied Tube's con-

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133. Allied Tube, 486 U.S. at 502.
134. Id.
135. Id.
137. Id.
duct was not "'political activity'" within a "'political arena.'"\textsuperscript{139} Much of this reasoning found its way into the Supreme Court's opinion, although the Court rejected the Second Circuit's conclusion that petitioning of private parties could not be protected by \textit{Noerr}.\textsuperscript{140}

The Court accepted Allied Tube's contention that its conduct was a form of petitioning genuinely intended to influence governmental action and that its central anticompetitive effect was incidental to the petitioning efforts.\textsuperscript{141} But the Court refused to accept Allied Tube's "absolutist position that the \textit{Noerr} doctrine immunizes every concerted effort that is genuinely intended to influence governmental action."\textsuperscript{142} This decision apparently leaves intact the Second Circuit's distinction between antecedent conduct generating recommendations and submission of those recommendations to a governmental body. This conclusion undoubtedly represents the correct approach, since any other result would undermine much of the Sherman Act's force. As the Court noted, such reasoning would, for example, immunize price fixing agreements among competitors in a regulated industry as long as the competitors submitted the agreement to a ratemaking agency that actually sets prices.\textsuperscript{143}

Having rejected the argument that \textit{Noerr} protects all petitioning genuinely intended to influence governmental action, the Court had to

\textsuperscript{139} Allied Tube, 817 F.2d at 946.
\textsuperscript{140} See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 510 (1988).
\textsuperscript{141} See id. at 502-03.
\textsuperscript{142} Id. at 503.
\textsuperscript{143} Id. (dictum). Allied Tube does not alter the holding in Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985). In that case the Court held that state policies permitting collective ratemaking in the trucking industry immunized the conduct from antitrust scrutiny under the state action doctrine of \textit{Parker} v. \textit{Brown}, 317 U.S. 341 (1943). The distinction between \textit{Southern Motor Carriers} and the hypothetical suggested by the Allied Tube Court is the state authorization and supervision of the anticompetitive conduct present in the former case. In the latter, unsupervised anticompetitive conduct was used to influence governmental action.

The Court also noted that Allied Tube's absolutist position might require immunization of other forms of anticompetitive conduct:

Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action. Immunity might even be claimed for anticompetitive mergers on the theory that they give the merging corporations added political clout.

\textit{Allied Tube}, 486 U.S. at 503-04.
decide whether Allied Tube's conduct amounted to a valid effort to influence the government. According to the majority, that determination "depends . . . on the context and nature of the activity." The appropriate context in Allied Tube was the private standard-setting association. Although the standard-setting process at the NFPA depended on the voting of the membership, the Court refused to equate those procedures with legislative decisionmaking. The Court's decision that the NFPA is not a quasi-legislative body seems to compel this conclusion. Furthermore, the distinction between petitioning legislatures and petitioning other agencies is not new. The Court first drew the distinction in California Motor Transport Co. v. Trucking Unlimited, rejecting the notion that conduct protected in the legislative arena by Noerr was necessarily protected when directed toward other governmental units.

[U]nethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws . . . . Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. . . .

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. . . . Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

It is difficult to understand why unethical tactics should be tolerated when the petitioning activity is aimed directly at a private organization if they are not tolerated, at least in some instances, when petitioning activity is directed at government. Yet this is precisely what Noerr permits. The allegedly unethical practice in Noerr—use of the third-party technique—was a form of petitioning aimed not at a governmental body but at the general public. Therefore, the use of deceptive or un-

144. Allied Tube, 486 U.S. at 504.
145. Id.
146. 404 U.S. 508 (1972).
147. Id. at 512-13. Several commentators have argued that the distinction between protection given to conduct in an adjudicatory context and that given to conduct in a legislative context is unsupported. See, e.g., Fischel, supra note 41, at 98-100. Professor Fischel's argument is based upon his belief that Noerr and its progeny rest on the first amendment. He correctly notes that some unethical conduct is subject to regulation and prohibition even in the legislative arena. Id. at 99. For example, perjury before a legislative committee is subject to prohibition. See 18 U.S.C. § 1621 (1988).
ethical tactics alone cannot distinguish Allied Tube’s conduct before the NFPA from the railroads’ activities in Noerr.

Nor can any distinction rest solely on the difference between harm resulting directly from petitioning activity and harm resulting from governmental action taken in response to the petitioning. 148 This distinction is largely addressed at the initial inquiry considering the source of the restraint. 149 Moreover, it was rejected by the Noerr Court itself as a sufficient basis for separating protected petitioning from unprotected petitioning. In Noerr the trucking companies argued that apart from any governmental action, the railroads’ petitioning had caused them competitive injury. 150 Specifically, they claimed that the railroads’ publicity campaign had damaged their relationships with some customers. 151 The Noerr Court, however, dismissed such direct injury as an “inevitable” and “incidental” consequence of the petitioning conduct. 152 While Allied Tube makes clear that there are limits to this doctrine, the Court’s solution works within this branch of Noerr rather than wholly abandoning it. Those limits are defined not by the source of the injury but by the “validity” of the petitioner’s activities. 153

Allied Tube is distinguishable from Noerr because “the context and nature of [Allied Tube’s] activity mai[d]e it the type of commercial activity that has traditionally had its validity determined by the anti-trust laws themselves.” 154 This focus on the “context and nature” of the anticompetitive activity requires the lower courts to draw fine distinctions between different but admittedly genuine attempts to influence governmental action. Although the majority recognized this point, 155 it nevertheless offered several factors to distinguish the com-

148. But see Calkins, supra note 50, at 341-44 (arguing that distinction between direct and indirect harm distinguishes Allied Tube from other cases in Noerr line).

149. While generally advocating the distinction between direct and indirect harm, Professor Calkins admits that “inquiry into whether a restraint is ‘incidental’ to ‘valid’ petitioning arises only when harm has been caused directly by petitioning.” See id. at 343. This merely restates the distinction between governmental restraints and private restraints that supposedly separate absolute immunity under Noerr from qualified immunity.


151. Id.

152. Id.

153. This is not to suggest that direct injury plays no role in analyzing claims of Noerr immunity. The point is that the antitrust plaintiff must show something more than direct injury. Direct injury may be a necessary element for overcoming the Noerr defense, as some courts have said, see Premier Elec. Constr. Co. v. National Elec. Contractors Ass’n, 814 F.2d 358, 376 (7th Cir. 1987), but it alone is not sufficient.


155. See id. at 507 n.10. The Court said:
mercial activity in _Allied Tube_ from the political activity in _Noerr._

First, the Court noted that _Allied Tube_'s petitioning of the NFPA "did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process."\(^{156}\) Private standard-setting associations have long been subjected to antitrust scrutiny.\(^{157}\) In fact, the Court suggested that petitioning within private standard-setting organizations may be held to more rigorous antitrust standards than petitioning aimed at governmental bodies or the public at large.\(^{158}\) Such organizations are classic antitrust conspiracies; their members often compete against one another or stand in a dealer-supplier relationship. They are tolerated under the antitrust laws "only on the understanding that [they] will [conduct their business] in a nonpartisan manner offering procompetitive benefits . . . ."\(^{159}\) This framework, the Court concluded, distinguished the case from _Noerr_. _Noerr_ had turned in part on two points: (1) the extreme caution with which Congress has traditionally regulated petitioning; and (2) the "essential dissimilarity" between the 'railroads' petitioning activity and activity normally held violative of the Sherman Act.\(^{160}\) Neither concern applied in _Allied Tube._

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It is admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact, and this is itself a case close to the line. For that reason we caution that our decision today depends on the context and nature of the activity.

_Id._

156. _Id._ at 506.


158. _Allied Tube_, 486 U.S. at 507 ("[T]he standards of conduct in . . . [the private standard-setting context] are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication."). The Court's language is cryptic at best and can be characterized as dictum. Nevertheless, the clear import is that some petitioning directed at a private standard-setting organization may not be protected under _Noerr_, even though that same petitioning would be protected if conducted in a political arena or directed to an adjudicatory body.

159. _Id._ at 506-07.

160. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 141 (1961). The "essential dissimilarity" reasoning has been attacked as contrary to precedent. Fischel, _supra_ note 41, at 83; _see_ American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946) (Sherman Act condemns result of anticompetitive conduct, not form of combination or means used). Fischel also argues that the Court's caution in imputing
The activities within private standard-setting groups are precisely the type of business conduct that traditionally falls within the Sherman Act. Furthermore, the Court has never held that conduct otherwise proscribed by the Sherman Act is immune from sanction simply because it has a speech component. 161

Second, Allied Tube's conduct went beyond mere petitioning. The Court distinguished the railroads' petitioning in 

\textit{Noerr} as "mere solicitation" 162 to persuade an \textit{independent} decisionmaker. Allied Tube, however, "orchestrated the actual exercise of the Association's decisionmaking authority in setting a standard." 163 Given the Court's em-

to Congress intent to regulate petitioning activity is unpersuasive unless that petitioning is protected by the first amendment. See Fischel, supra note 41, at 77. Fischel, however, misses the point of the \textit{American Tobacco} holding. The issue in \textit{American Tobacco} was whether the evidence warranted a jury finding that an agreement existed among cigarette manufacturers to monopolize the market. \textit{American Tobacco}, 328 U.S. at 309-10. There was no dispute, however, that the resulting monopolization was illegal. By contrast, \textit{Noerr} involved no attempt by the railroads to boycott the truckers. The question in \textit{Noerr} was not, as it was in \textit{American Tobacco}, whether an agreement existed among the alleged antitrust conspirators. The railroads admitted the agreement. \textit{Noerr}, 365 U.S. at 131. The sole question was whether the conduct resulting from that agreement constituted an unreasonable restraint of trade within the meaning of the Sherman Act. Id. at 131-33. Accordingly, the Court properly refrained from reaching the first amendment question. See Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (discussing when Court will not pass upon constitutional questions and noting that Court will not even pass upon a properly presented constitutional question if the case can be disposed of on other grounds).

Fischel also points out that when Congress passed the Sherman Act, it intended to exercise all of its constitutional authority to regulate trade restraints. Fischel, supra note 41, at 77. While this statement is technically correct, it cannot be understood in an historical vacuum. When the Sherman Act became law in 1890, the prevailing conception of congressional authority under the commerce clause, U.S. Const. art. I, § 8, cl. 3, was much narrower than it is today. Compare United States v. E.C. Knight Co., 156 U.S. 1 (1895) (manufacturing held not to be commerce) with Wickard v. Filburn, 317 U.S. 111 (1942) (commerce clause gives Congress authority to regulate purely intrastate activity that may have substantial impact on interstate commerce). Since the "jurisdictional" reach of the Sherman Act is necessarily circumscribed by constitutional limitations on the power of Congress to regulate interstate commerce, congressional intent to exercise its full constitutional authority in 1890 cannot be equated with an intent to exercise the full constitutional authority that the post-New Deal conception of the commerce clause might allow. Although the Supreme Court has subsequently allowed the reach of the Sherman Act to expand along with the judicial conception of the commerce power, see Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976), the Court has never made that expansion coextensive with the reach of the commerce clause. In fact, this is one of the primary teachings of the Court's preemption and state action cases. See, e.g., Fisher v. City of Berkeley, 475 U.S. 260 (1986) (Sherman Act does not preempt all inconsistent state regulation); Rice v. Norman Williams Co., 458 U.S. 654 (1982) (same).

163. \textit{Allied Tube}, 486 U.S. at 507.
phasis on this point, it is perhaps the crucial factor in the case. The Court's interpretation, however, is only partially correct. Allied Tube and other steel manufacturers controlled the votes of 230 new members of the NFPA; these new members were enrolled solely to oppose the inclusion of PVC conduit in the NEC and were instructed how to vote on that proposal by Allied Tube's agents.164 Nevertheless, the steel interests defeated the PVC plank by a scant four votes, 394-390.165 Although the steel interests would not have prevailed absent their enrollment and control of the new members, it is clear that they alone could not have prevailed without some support from a substantial, and apparently independent, minority of the NFPA membership. Even without the votes of Allied Tube's recruited members, nearly thirty percent of the remaining membership voted against Indian Head's proposal to include PVC in the NEC. The record does not indicate that these votes were motivated by any anticompetitive purpose or were otherwise tainted.

The Allied Tube majority glossed over these facts with little apparent concern for their effect on the NFPA's actual decision-making process. The clear implication is that an "economically interested party"166 may exercise decision-making authority in a private standard-setting organization even when that party does not have enough votes to sway the outcome by itself.167 Without offering any clear comment on when and to what extent the Sherman Act limits an economically interested party's participation in a standard-setting association,168 the Court said that such parties remain "free to take advantage

164. Id. at 497.
165. Id.
166. With little elaboration, the Court described Allied Tube as an "economically interested party." Id. at 504. This term is as malleable as the term "decisionmaking." Perhaps like obscenity, it cannot be defined but the Court "know[s] it when [it] see[s] it." See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). It may mean nothing more than "competitor" or a party with some clear economic incentive to restrain trade in the affected market. Yet the Court gave no explanation as to why it would limit the definition to such parties.
167. Perhaps this result can be rationalized by the doctrine of proximate causation. Normally one need not be the sole cause of injury to be liable. PROSSER AND KEETON ON THE LAW OF TORTS §§ 46-52 (5th ed. 1984). The conduct of the steel interests combined with the lawful conduct of other NFPA members proximately caused Indian Head's injury.
168. The Court also granted certiorari to decide whether Allied Tube's conduct, if not protected by Noerr, constituted an unreasonable restraint of trade. The Court vacated the writ of certiorari on that question as improvident. Allied Tube, 486 U.S. at 499 n.3. The Court noted, however, that at one point Allied Tube's literal compliance with the NFPA's rules did not relieve it of antitrust liability. It then added, "An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide . . . safeguards [against anticompetitive activity]. The issue of immu
of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body." Allied Tube thus leaves open the possibility that petitioning of private standard-setting associations will be protected by Noerr only if the petitioning party does not otherwise participate in the standard-setting process.170

More likely, however, the benefits of the code-drafting process in bodies such as the NFPA will lead the Court to adopt a more indulgent rule. The steel interests' conduct at the NFPA appears to be predominately an exercise of business judgment. Although Allied Tube did have some concern about the safety of PVC conduit, its primary motivation appears to have been, or at least the jury so found, to protect its market position by excluding potential competitors from the market. This is certainly a defensible conclusion based on the facts of the case. If the steel interests had truly been motivated by the potential safety risks posed by PVC conduit, one would expect that at least some of the new members they enrolled would have had the technical data to follow and participate in the debate at the NFPA meeting. Instead, it appears that Allied Tube merely recruited a number of people simply to attend the meeting and vote as instructed by the steel interests. That these new members also had a financial stake in the outcome of the vote also points to the conclusion that business interests rather than the public interest lay behind Allied Tube's petitioning activities.

Perhaps the exercise of business judgment coupled with the intended direct injury to competitors provides a sufficient basis for distinguishing protected petitioning from unprotected decisionmaking.171

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169. Id. at 509 (footnote omitted). The Court immediately retreated from this statement, however, saying that it was not "set[ting] forth the rules of antitrust liability governing the private standard-setting process . . . " Id. at 509-10.

170. Id. at 510 (emphasis added) (footnote omitted).

171. Of course, Pennington makes clear that even petitioning motivated by anticompetitive purposes is protected by Noerr. See United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965). One can perhaps assume that most business judgments are
Of course, such inquiries into subjective motivation often present difficult problems of proof. Juries may resolve conflicting evidence against the petitioner even when the petitioner is motivated primarily by legitimate public concerns. If Noerr immunity is to offer real protection for presentation of scientific evidence in the drafting of model codes, associations must be given the latitude to fashion voting procedures conducive to efficient and reliable code-drafting. Otherwise, Noerr immunity in this area will be nothing more than a surrogate for a set of "rules of antitrust liability governing the private standard-setting process."172 The risk of inquiring into the subjective motivation of the petitioner is that it may deter presentation of precisely the type of reliable scientific evidence that makes the drafting of model codes useful in the first instance.173 Unfortunately, Allied Tube leaves the limits of

made with an eye toward preserving or increasing a firm's market share. But in Allied Tube there is more. There is business judgment, unfiltered by government review, and a direct competitive injury flowing from that business judgment. The lower courts have often used a similar approach in analyzing Noerr claims. See, e.g., Litton Sys. v. American Tel. & Tel. Co., 700 F.2d 785, 807 (2d Cir. 1983) (decision to impose anticompetitive tariff conceived in AT&T boardroom and did not result from regulation), cert. denied, 464 U.S. 1073 (1984). The Supreme Court's latest discussion of Noerr also suggests that an exercise of business judgment that causes direct injury is not immune under Noerr. See FTC v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768 (1990) (restraint which is means of obtaining legislation rather than consequence of legislation not immune under Noerr). The Court has also used a similar analysis when determining whether a federal regulatory program repeals the antitrust laws by implication. See, e.g., National Geri Medical Hosp. & Gerontology Center v. Blue Cross, 452 U.S. 378, 390 (1981) (implied repeal especially disfavored when antitrust implications of a business decision not considered by a governmental entity). Since the Noerr doctrine's practical operation differs little from an implied repeal, one would expect that direct injuries flowing from a business judgment would be viewed under the normal antitrust lens.

172. Allied Tube, 486 U.S. at 509. The Court stated that "[t]he issue of immunity in this case . . . collapses into the issue of antitrust liability." Id. This language is unfortunate for two reasons. First, in one sense, it states a truism in all antitrust cases in which a claim for Noerr immunity is denied. The lack of Noerr immunity does not mean that a party has committed an antitrust violation but only that the validity of its conduct must be judged under traditional antitrust standards. One case vividly illustrates the point. In George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970), the court held that Noerr does not protect attempts to influence the government to make certain purchases. This case gave rise to the so-called commercial exception to the Noerr doctrine. See Fischel, supra note 41, at 115-18; Hurwitz, supra note 79, at 82-87. Four years later, the First Circuit held that even if the defendant's conduct was unprotected by Noerr, it did not constitute an antitrust violation. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975). Second, even if the language is meant only to apply to standard-setting organizations, it clearly conflicts with the Court's assertion that Noerr immunity might apply to those situations in which a party does nothing more than vigorously argue accurate scientific evidence in front of a code-drafting body.

173. The problem with excessive deterrence in the antitrust context is that it does
permissible petitioning in the private standard-setting context unclear.

C. Noerr and the First Amendment

As a final step in its analysis, the Allied Tube majority distinguished the case before it from the holding in NAACP v. Claiborne Hardware Co.\textsuperscript{174} Claiborne Hardware did not involve the federal antitrust laws, but arose instead from a state tort action. In the mid-1960s the NAACP organized a boycott of white merchants in Claiborne County, Mississippi. The boycott was designed to make both government and business comply with its demands for racial equality. In many respects, the boycott was a typical form of protest during the civil rights movement. The white merchants of the county filed suit claiming that the NAACP’s actions in enforcing the boycott constituted tortious activity under state law.\textsuperscript{175} Many of these enforcement efforts amounted to nothing more than social ostracism of those blacks who failed to comply with boycott, coupled with vague, unspecified threats. Some of the measures, however, involved violence.\textsuperscript{176} After years of protracted litigation, the Mississippi Supreme Court affirmed an award of damages to the merchants.\textsuperscript{177} The United States Supreme Court reversed, holding that the first amendment protected the nonviolent elements of the boycott and its enforcement.\textsuperscript{178}

Although the Claiborne Hardware decision cited Noerr, it rested squarely on first amendment grounds.\textsuperscript{179} The Allied Tube Court, however, did not expressly distinguish the case on that point. Instead, it noted that

the boycott [in Claiborne Hardware] was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market.\textsuperscript{180}

not “redound to the public’s benefit.” United States v. United States Gypsum Co., 438 U.S. 422, 442 n.17 (1978). It deters conduct that is not only legal but also socially desirable. “The antitrust laws differ in this regard from, for example laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose.” Id.

175. Id. at 889-90.
176. Id. at 904-05.
177. Id. at 894.
178. Id. at 928-29.
179. Id. at 913-14.
The Court also pointed out that Allied Tube "was at least partially motivated by the desire to lessen competition, and . . . stood to reap substantial economic benefits from making it difficult for [Indian Head] to compete."\(^{181}\) This distinction seems irrelevant in light of prior decisions. The Noerr Court had rejected an argument that the railroads' desire to injure their trucking competition subjected the activity to antitrust scrutiny.\(^{182}\) The Pennington Court was even more explicit, holding that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."\(^{183}\) Justice White's dissenting opinion in Allied Tube also made reference to this inconsistency.\(^{184}\)

The majority's distinction of Claiborne Hardware goes to the core question posed by the Noerr doctrine: whether the doctrine rests on a construction of the Sherman Act or is mandated by the petitioning clause of the first amendment. The key to unraveling the apparent inconsistency and reconciling the distinctions among Allied Tube, Claiborne Hardware, Noerr, and Pennington lies buried in an Allied Tube footnote: "Although the absence of such anticompetitive motives and incentives is relevant to determining whether [Allied Tube's] restraint of trade is protected under Claiborne Hardware, we do not suggest that the absence of anticompetitive purpose is necessary for Noerr immunity."\(^{185}\) This statement suggests a clear dividing line between the scope of protection afforded petitioning activity under the Noerr doctrine and the scope of protection afforded that same activity by the first amendment. Petitioning with an anticompetitive purpose is apparently, in some instances, not protected by the first amendment. Nevertheless, both Noerr and Pennington make clear that the same petitioning is not condemned by the Sherman Act for that reason alone. If Allied Tube stands for this proposition, then it implies that the Noerr doctrine is rooted in construction of the Sherman Act and does not rest solely on the first amendment.\(^{186}\) The use of the "essential dissimilar-

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181. Id. at 509.
184. See Allied Tube, 486 U.S. 512-13 (White, J., dissenting).
185. Id. at 509 n.11.
186. Professor Calkins notes that by referring to Noerr as conferring "immunity" from antitrust scrutiny, the Allied Tube Court was perhaps implying that the doctrine's undeniable constitutional roots are preeminent. Calkins, supra note 50, at 345-46. This is not Calkins' preferred interpretation, see id. at 346 n.96, nor does it consider the distinction the Court drew between Claiborne Hardware and Noerr. Professor Calkins, however, is surely correct in noting that defining the Noerr doctrine as a creature of statutory construction, rather than as a determination that the Sherman Act is unconstitutional as applied in some cases, would not automatically require rejection of
"litigation" rationale advanced by the Noerr Court to distinguish between political and commercial activity also supports this conclusion.\textsuperscript{187}

Still further support can be found in the Court's latest discussion of Noerr. In\textit{ FTC v. Superior Court Trial Lawyers Association}\textsuperscript{188} the Court held that a concerted refusal by a group of private criminal attorneys to accept appointments under the District of Columbia's Criminal Justice Act (CJA)\textsuperscript{189} was not protected by Noerr. The lawyers had refused to take the cases of indigent defendants in the hope of—depending upon how one views the boycott—persuading or coercing the D.C. City Council to raise the hourly fees of attorneys who accept CJA appointments. Although the parties had briefed the Noerr issue extensively, the Court dismissed the claim in three short paragraphs.\textsuperscript{190} Nevertheless, it noted that Noerr "[i]nterpret[ed] the Sherman Act in light of the First Amendment's Petition Clause."\textsuperscript{191} The Court's discussion of Noerr was, at most, a passing reference in its more general inquiry into the lawfulness of the lawyers' boycott. But since the lawyers also raised a separate first amendment claim, which the Court treated in detail in another section of its opinion, \textit{Superior Court Trial Lawyers Association} can be read as returning the Noerr doctrine to its roots: a statutory construction with an eye on constitutional concerns.

Of course, if this is what the Court means, it has not said so. Thus, although the \textit{Allied Tube} Court has begun the process of defining a conceptual framework for analyzing claims of Noerr immunity, the framework is incomplete. The crucial question of the doctrine's foundation has not been clearly answered. Even though \textit{Allied Tube} and \textit{Superior Court Trial Lawyers Association} suggest a resolution, such extrapolation is a poor substitute for a fully developed opinion on the matter.\textsuperscript{192}

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those decisions holding that the first amendment compelled antitrust immunity for certain petitioning conduct. \textit{See id.}
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\textsuperscript{187} \textit{Allied Tube}, 486 U.S. at 507.

\textsuperscript{188} 110 S. Ct. 768 (1990).

\textsuperscript{189} D.C. CODE ANN. §§ 11-2601 to -2609 (1981).

\textsuperscript{190} \textit{Superior Court Trial Lawyers Ass'n}, 110 S. Ct. at 776. The Court's decision on this point was unanimous although three Justices dissented from the Court's ruling on the liability issue.

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{See Calkins, supra} note 50, at 346 (noting that question of whether Noerr doctrine derives from statutory construction or constitutional mandate "should not be decided by implication").
D. The Dissenting Opinion

Justices White and O'Connor dissented in Allied Tube. They took exception to the majority's application of the Noerr doctrine, but offered no real alternative other than a different view of the sham exception.193 The dissent argued that the case "present[ed] an even stronger argument for immunity than did Noerr itself."194 It read Noerr as turning solely on whether the petitioner genuinely sought to obtain the enactment or enforcement of laws. Since the majority conceded that Allied Tube's petitioning was genuinely designed to influence the content of state and local fire codes, that concession, in the dissent's view, disposed of the case.195 The principal strength of Allied Tube's argument, the dissent said, was that the NFPA actually drafted proposed legislation and presented it nationwide.196 It contrasted these legislative efforts with the railroads' "diluted attempt to move public opinion" through the broad publicity campaign in Noerr.197

The dissent also objected to the majority's reliance on the "context and nature" of the petitioning activity to determine the scope of immunity under Noerr.198 This disagreement, however, amounts to little more than a semantic war. There is no dispute that the breadth of Noerr immunity varies with the arena in which the petitioning is conducted. In fact, Justice White chastised the majority for not developing its reasoning fully. "No workable boundaries to the Noerr doctrine are established," he wrote, "by declaring, and then repeating at every turn, that everything depends on 'the context and nature of the activity' if we are unable to offer any further guidance about what this vague reference is supposed to mean ... ."199 Such malleable standards, he concluded, will leave the lower federal courts without any direction about how to apply the Noerr doctrine.

Finally, the dissent objected to the decision on policy grounds, arguing that it will hamper the standard-setting process in a number of code-drafting bodies.200 Justice White noted that some 400 private organizations prepare and publish various codes and product standards

193. See Allied Tube, 486 U.S. at 511-16 (White, J., dissenting); see also infra notes 210-30 and accompanying text (examining various applications and definitions of the sham exception).
194. Allied Tube, 486 U.S. at 512.
195. Id.
196. Id.
197. Id.
198. Id. at 513.
199. Id.
200. Id. at 513-14.
nationwide. The majority's decision, he concluded, will chill participation in drafting meetings and deprive both the local governments and the public of the benefits of industry self-regulation of health and safety standards.

The dissent's policy objections are unpersuasive. Blanket immunity for participation in the code-drafting process would effectively preclude antitrust scrutiny of a segment of a standard-setting association's activities. Specifically, that conduct which is, at least in part, genuinely designed to influence governmental action would be immune without regard to its nongovernmental consequences. The logical implication of this reasoning is that Noerr not only immunizes the submission of model codes to state and local legislative bodies, but also immunizes the antecedent conduct that crafts the model codes. Although this is a conceivable position, it fails to take account of the Court's prior decisions which suggest a contrary result.

The dissent's concerns about the effect of Allied Tube on the standard-setting process can largely be obviated by fashioning appropriate rules of antitrust liability for standard-setting organizations. Although the majority refused to consider or establish any such rules, it noted that the "issue of immunity in this case . . . collapses into the issue of antitrust liability." While the import of this statement is not clear, it apparently means that members of a private standard-setting organization do not have antitrust immunity merely by complying with the letter of the organization's rules. The dissent takes no issue with this point. It would, nevertheless, confer immunity on the petitioning conduct genuinely intended to influence government in order to avoid antitrust litigation in the first instance. Again, this concern could be

201. Id. at 514.
202. Id. at 516.
203. See Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (holding that State of Georgia may obtain injunctive relief against railroad conspiracy to fix rates to be submitted to the Interstate Commerce Commission); cf. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982) (noting that private standard-setting organizations are rife with opportunities for anticompetitive activity). To his credit, Justice White is consistent; he dissented in both Hydrolevel and Allied Tube. The dissent in Hydrolevel, however, was not based on the conclusion that the conduct at issue did not amount to a violation of the antitrust laws. Instead, the dissent focused on the Court's holding that a standard-setting association could be liable under the Sherman Act for the conduct of its agents acting within the scope of their apparent authority. Id. at 579 (Powell, J., dissenting). Interestingly, Chief Justice Rehnquist, who dissented in Hydrolevel, joined the majority in Allied Tube. Justice O'Connor, on the other hand, dissented in Allied Tube although she had been in the majority in Hydrolevel.
204. Allied Tube, 486 U.S. at 509.
205. See id. For a criticism of this language, see supra note 172.
206. See Allied Tube, 486 U.S. at 514 (White, J., dissenting). Justice White wrote: It must inevitably be the case that codes such as [the National Electric Code]
alleviated by fashioning appropriate rules of antitrust liability that adequately reflect the potential procompetitive benefits such organizations may provide.

Extending Noerr immunity might indeed provide a basis for more speedy resolution of those suits that are filed, perhaps at the summary judgment stage. But this argument loses much of its force in light of recent developments. The Court's willingness to allow summary judgment more readily in antitrust suits207 offers a similar vehicle for quick disposition of those claims under traditional liability standards. Moreover, as noted below,208 the dissent's solution for curbing petitioning abuses in standard-setting organizations (i.e., expansion of the sham exception) belies its argument that potential antitrust litigation will chill industry participation in the code-drafting process.

In short, aside from its views on the sham exception, the dissent had little disagreement with the analytical framework for Noerr claims erected by the Allied Tube majority. Although the dissent quibbled with application of those rules to the facts at issue, the substantive theory supporting its position differed little from the majority's.209

E. The Sham Exception

The central disagreement between the majority and the dissent in Allied Tube arose over the breadth of Noerr's so-called "sham exception." As originally conceived by the Noerr Court, the sham exception embraced petitioning "ostensibly directed toward influencing governmental action . . . [that is] nothing more than an attempt to interfere directly with the business relationships of a competitor."210 Although this language seemingly limits the sham exception to anticompetitive activity carried out under the ruse of petitioning, after California Motor Transport the lower courts developed a practice of finding certain

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207. See Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986). Again, to his credit, Justice White is consistent; he wrote the dissenting opinion in Matsushita. See id. at 598 (White, J., dissenting). Justice O'Connor, however, was with the majority in that case.

208. See infra notes 227-29 and accompanying text.


genuine but unethical petitioning conduct, such as misrepresentation, within Noerr's sham exception.\textsuperscript{211}

Perhaps the broadest reading of the sham exception came in Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.;\textsuperscript{212} a Ninth Circuit decision rendered shortly after the Second Circuit's opinion in Allied Tube. Sessions merits some attention because its facts closely parallel those of Allied Tube. Joor Manufacturing, a maker of underground storage tanks for hazardous fluids, successfully petitioned the Western Fire Chiefs Association (WFCA) to amend its model fire code to exclude a tank repair process developed by Sessions. The WFCA code, much like the NEC, is quite influential; many county and municipal governments in the western United States routinely adopt it as law.\textsuperscript{213} Furthermore, like the NFPA, the WFCA is a nongovernmental body. Its voting membership, however, is limited exclusively to public officials who enforce fire safety regulations. Unlike the NFPA, it has no voting members who have a clear economic interest in the contents of the model code.\textsuperscript{214}

The dispute was over an exclusionary tactic concerning a repair process for leaking underground storage tanks. When a tank leaked, Sessions repaired it by puncturing the tank while still in the ground and coating the inner surface with an epoxy lining. Joor contended that this process could not detect corrosion which might have caused the leaking. It argued that aboveground inspection was necessary to determine whether the leaking tanks could continue to withstand ground pressure. Because exhuming a tank is expensive, most businesses will buy new tanks if the underground repair process is not available.\textsuperscript{215}

In 1978 Joor's president became a member of a subcommittee assigned to revise the WFCA's code provisions governing the use and storage of inflammable fluids. In subcommittee meetings he argued vig-
orously that underground tank lining should be completely prohibited. The subcommittee eventually adopted that proposal unanimously, and the WFCA governing body wrote the subcommittee’s recommendation into its code in 1982.216

Sessions then filed claims under sections 1 and 2 of the Sherman Act. Joor Manufacturing raised *Noerr* as a defense, and the district court granted it summary judgment. The Ninth Circuit affirmed nearly every aspect of the lower court’s order.217 It disagreed with the Second Circuit’s conclusion that *Noerr* immunity could not protect petitioning within a standard-setting association.218 Instead, it held *Noerr* applicable to Joor’s petitioning and immediately turned to the sham exception. It also refused to confine its definition of sham petitioning to those instances in which a party does not genuinely seek to influence governmental action. According to the *Sessions* court, the sham exception extends to those cases “in which the defendant genuinely seeks to achieve his governmental result, but does so through improper means.”219 The court reasoned that such improper petitioning could be a sham because the petitioner made “a pretense of seeking an independent, impartial decision.”220

Whatever the merits of this broad interpretation of the sham exception, the Supreme Court rejected it in *Allied Tube*. Without elaboration, the majority noted that the Ninth Circuit’s approach “distorts [the] meaning [of the word ‘sham’] and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action.”221 The dissent endorsed the *Sessions* approach, but offered no reasoning to support its position other than a conclusory assertion that the sham exception is “enough to guard against flagrant [petitioning] abuse[s]” in standard-setting associations.222

The dissent’s failure to develop its reasoning fully is inexplicable. The *Sessions* court had admitted its agreement with the Second Circuit’s result in *Allied Tube*. Instead of holding the conduct outside *No-

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216. *Id.* at 461.
217. The Ninth Circuit held that Sessions’ allegation that Joor had made misrepresentations concerning the tank lining process to some local fire officials stated a claim under *Noerr*’s sham exception. *Id.* at 468. Accordingly, it reversed the district court on this point and remanded the case for trial on this claim alone. *Id.* at 469. Since this was a relatively minor aspect of the complaint, the reversal was at best a Pyrrhic victory for Sessions.
218. *Id.* at 465.
219. *Id.* at 465 n.5 (emphasis in original).
220. *Id.* (citing Hurwitz, *supra* note 79, at 109).
222. *Id.* at 516 (White, J., dissenting).
err's protection, however, it would have reached that result by declaring it an unprotected sham.223 Justice White's dissent made no mention of this fact. It labelled Allied Tube's conduct an "occasional abuse"224 of the standard-setting process, but denied that such abuse "render[ed] the entire process less useful and reliable."225 This statement perhaps harkens back to the California Motor Transport decision in which the Court held that a pattern of baseless and repetitive claims constituted sham petitioning.226 The dissent's failure to fully de-

223. Sessions, 827 F.2d at 466 (noting that Allied Tube's conduct "constitutes exactly the kind of abuse of process that the 'sham' exception to Noerr-Pennington serves to weed out"); see also Allied Tube, 486 U.S. at 507 n.10 (commenting on Ninth Circuit's opinion in Sessions).

224. Allied Tube, 486 U.S. at 516 (White, J., dissenting).

225. Id.

226. See California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972). The Court has never indicated whether the sham exception is triggered by a single petitioning abuse. Perhaps the closest it has come to addressing the issue is Vendo Co. v. Lektro-Vend Corp., 453 U.S. 623 (1977). In Vendo a divided Court held that section 16 of the Clayton Act, 15 U.S.C. § 26 (1988), does not constitute an express exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), and thus does not permit a federal court to enjoin a state court proceeding that the antitrust plaintiff alleges constitutes sham petitioning. The Vendo plurality, Justices Rehnquist, Stewart, and Powell, stated that California Motor Transport "may be cited for the proposition that repetitive, sham litigation in state courts may constitute an antitrust violation and that an injunction may lie to enjoin future state-court litigation." Vendo, 433 U.S. at 635 n.6. Later the plurality observed that the federal antitrust plaintiff could set up his antitrust claim as a defense to the state court litigation or bring a treble damages action for injury "resulting from the vexatious prosecution of that state court litigation." Id. at 636 n.6. Although this language suggests that the plurality would permit a damage action against a single sham suit, see Hurwitz, supra note 79, at 100 n.155, the issue is not clear. Justice Blackmun and Chief Justice Burger concurred in the Vendo result. They would have allowed injunctions against pending state suits that were "part of a 'pattern of baseless, repetitive claims' that are being used as an anticompetitive device." Vendo, 433 U.S. at 644 (Blackmun, J., concurring). In dissent, Justices Stevens, Brennan, White, and Marshall argued that California Motor Transport prohibited even a single instance of sham petitioning and thus justified injunction of a pending state proceeding. Id. at 651-62 (Stevens, J., dissenting). The fact that Justice White joined the Vendo dissent makes it unlikely that he would require a pattern of petitioning abuses to trigger the sham exception.

Since Vendo, several cases have held that a single petitioning abuse constitutes a sham. See, e.g., Omni Resource Dev. Corp. v. Conoco, Inc., 739 F.2d 1412 (9th Cir. 1984); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), cert. denied, 469 U.S. 1227 (1983); Colorado Petroleum Marketers Ass'n v. Southland Corp., 476 F. Supp. 373 (D. Colo. 1979). But see Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484 (8th Cir. 1985); Hospital Bldg. Co. v. Trustees of Rex Hosp., 691 F.2d 678 (4th Cir. 1982) (pattern of baseless claims required to trigger sham exception), cert. denied, 464 U.S. 904 (1983); Mountain Grove Cemetery Ass'n v. Norwalk Vault Co., 428 F. Supp. 951 (D. Conn. 1977) (multiple petitioning abuses required to trigger sham exception). Several commentators also believe that a single petitioning abuse is sufficient
velop its reasoning, however, makes this speculation at best.

The majority's limitation of the sham exception alters the basic framework of the Noerr doctrine as it has developed in the lower federal courts. Under the Sessions court's broad construction, claims of Noerr immunity largely depended on the applicability of the sham exception. One commentator has labeled this the "exception-to-the-exemption analysis. \footnote{227} Under it the courts presume that the petitioning conduct falls within the protection of Noerr and then apply an expansive sham exception to determine if the Noerr shield should be withdrawn. \footnote{228} This practice is precisely what the Allied Tube dissent advocated. Yet this position is fundamentally at odds with the concern that antitrust litigation hinders the standard-setting process. If petitioning conduct is protected unless the sham exception applies, no antitrust plaintiff would be discouraged from filing suit when a competitive adversary uses marginal petitioning tactics. The plaintiff would simply phrase the claim so that it falls within the sham exception. Thus, the dissent's objection to the majority's focus on the "context and nature" of the petitioning conduct as determinative of the applicability of Noerr must be rejected. Its alternative approach would render the sham exception "no more than a label courts could apply to activity they deem unworthy of antitrust immunity . . . ."\footnote{229} \footnote{Allied Tube effectively buries this approach without a drastic change in result. \footnote{230} Instead of treating sham petitioning as an exception which withdraws the protection of Noerr, it is more properly viewed as an "invalid" effort to influence the government. Noerr immunity, therefore, is not withdrawn because it does not even reach the conduct in the first instance. In some contexts, sham petitioning may be the only form of "invalid" petitioning. The inquiry into sham conduct, however, does not turn on the tactics used by the petitioner but on whether its conduct is genuinely intended to influence governmental action.}

IV. Conclusion

Even if its contours are not clear, a framework for analyzing claims of Noerr immunity has emerged from Allied Tube. This is a welcome
development after the Supreme Court's prolonged silence in this area. Much unfinished work remains, however. If Noerr immunity is truly absolute when the petitioner seeks and obtains a governmentally imposed restraint, then the Court should develop some guidelines for distinguishing governmental conduct from private conduct. The current state action doctrine is well suited for this task. It provides a relatively simple structure for ascertaining the sources of anticompetitive restraints and offers a workable standard in the Noerr context. In fact, such a clear rule may help the lower courts dispose of many cases on Noerr grounds without protracted litigation.

The Court also needs to clarify when private conduct that restrains trade will be deemed incidental to a valid petitioning effort and therefore immune under Noerr. In the lexicon of Allied Tube, the Court must establish some rules for determining when petitioning conduct is truly political activity rather than commercial activity being conducted partially in the political arena. This will inevitably involve some inquiry into the subjective motivations of the petitioner. The task for the Court is to fashion rules that do not deter potentially beneficial conduct while nevertheless making the full panoply of antitrust sanctions available against the business actor who uses the political arena for anticompetitive purposes that cause direct marketplace injury, regardless of the result of the governmental action requested. This will not be an easy chore.

Finally, the Allied Tube Court missed an opportunity to answer perhaps the chief question lingering with the Noerr cases: the source of Noerr immunity. Until the Court definitively decides whether Noerr is a constitutional doctrine or, as Allied Tube and Superior Court Trial Lawyers Association suggest, a construction of the Sherman Act informed by first amendment concerns, the details of the framework established by Allied Tube will remain vague.

Yet even with its flaws Allied Tube is an important step in the development of a rational Noerr doctrine. It is the first pronouncement from the Supreme Court concerning the framework for analyzing claims of antitrust immunity for petitioning activity. It also provides the lower courts with a starting point for addressing the numerous issues presented by Noerr claims. Having finally broken its silence in this area, one can only hope that the Court will not wait another sixteen years before adding another significant piece to the Noerr puzzle.

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