

2-8-2013

Deference or Destruction? Reining in the *Noerr-Pennington* and State Action Doctrines

Karen Roche

Recommended Citation

Karen Roche, *Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines*, 45 Loy. L.A. L. Rev. 1295 (2012).
Available at: <http://digitalcommons.lmu.edu/llr/vol45/iss4/6>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

DEFERENCE OR DESTRUCTION? REINING IN THE *NOERR-PENNINGTON* AND STATE ACTION DOCTRINES

*Karen Roche**

This Article focuses on two limits to federal antitrust law—the Noerr-Pennington and state action doctrines. These doctrines aim to balance the right to petition and the independent sovereignty of the states with the goals of antitrust law. Therefore, these doctrines protect petitioning and state action from liability, even where such action is anticompetitive in nature or motive and thwarts the goals of the antitrust laws. While it seems clear that these two exceptions to federal antitrust law are rooted in the First Amendment and federalism, the Supreme Court has not clearly delineated the sources or extent of the doctrines. Because of this, the doctrines are far broader than is necessary to give deference to these principles. This Article examines the harm that these overly broad exceptions cause consumers and proposes that the Court narrow the doctrines by tailoring them to what is required by the First Amendment and federalism.

* J.D. Candidate, May 2013, Loyola Law School Los Angeles; B.A., May 2010, University of San Diego. I would like to express my gratitude to Whitney Chelgren for her guidance, support, and keen eye for editing. I would also like to thank Professor Lazaroff for his insight and the editors and staff of the *Loyola of Los Angeles Law Review* for their tireless efforts. Most importantly, I would like to thank my family and friends, especially my father, for the countless hours he spent helping and inspiring me, and Jonathan Sandler and James Payer, for being my law-school support system.

TABLE OF CONTENTS

I. INTRODUCTION	1298
II. BACKGROUND	1302
A. The <i>Noerr-Pennington</i> Doctrine.....	1303
1. Genesis of the <i>Noerr</i> Doctrine	1303
2. The Court Used the Canon of Constitutional Avoidance in Creating the <i>Noerr</i> Doctrine.....	1304
3. Limitations of <i>Noerr</i> Immunity: The Sham Exception	1305
4. Limiting the Limitation: Narrowing the Sham Exception	1307
5. Other Limitations of <i>Noerr</i> : Exceptions for Fraud ..	1308
B. The State Action Doctrine	1309
1. Evolution of the State Action Doctrine.....	1310
2. Expansions of State Action Immunity	1316
III. CRITIQUE	1318
A. The Court Misinterpreted the Sherman Act by Using the Canon of Constitutional Avoidance	1318
B. The <i>Noerr</i> Court's Failure to Recognize a Conflict Between Antitrust Law and the First Amendment in Has Resulted in an Excessively Broad Immunity	1319
1. Is the Sham Exception Itself a Sham?.....	1321
a. The PRE test raises the bar too high and fails to protect the consumer.....	1321
b. The subjective intent requirement swallows the sham exception	1324
c. Sham immunizes antitrust defendants that can afford to pay for protection.....	1325
2. The Lack of a Misrepresentation Exception Undermines the Democratic Process	1327
C. The <i>Parker</i> Court's Failure to Recognize the Conflict Between Antitrust Laws and Federalism Principles Has Left State Action Essentially Unregulated	1328
1. <i>Midcal</i> Foreseeability.....	1329
2. Active Supervision.....	1330

Summer 2012]	<i>DEFERENCE OR DESTRUCTION?</i>	1297
	a. Unclear standard requires courts to make subjective determination about what is sufficient	1330
	b. Misguided faith in municipalities	1331
	c. Exemption of regulatory agencies from active supervision broadens state action beyond its intended purpose	1333
	3. Market Participant Exception	1335
IV.	RECOMMENDATIONS	1336
	A. Narrowing <i>Noerr</i> and Bringing It Within the Parameters of the First Amendment	1337
	1. The Court Should Clearly Define “Petition”	1337
	2. The Court Should Adopt First Amendment Limitations	1338
	a. The Court should create an exception for fraud and intentional misrepresentations	1339
	b. Intentional misrepresentations should not be immunized in any context	1340
	3. Broadening Sham to Protect the Consumer	1341
	B. Narrowing the State Action Doctrine and Aligning It with the Principles of Federalism	1343
	1. Narrowing the Doctrine by Strengthening the Clear Articulation Standard	1343
	2. Narrowing the State Action Doctrine by Strengthening the Active Supervision Requirement	1345
	3. Implementing Market Participant and Conspiracy Exceptions	1347
V.	CONCLUSION	1349

I. INTRODUCTION

In 1890, in reaction to the public outrage at nineteenth century economic giants, Congress enacted the Sherman Antitrust Act (the “Sherman Act” or the “Act”) in an effort to curb the unethical political and economic forces behind monopolies.¹ The Act prohibits any trust or conspiracy in restraint of trade or commerce and makes it a felony to monopolize or attempt to monopolize any part of interstate trade or commerce.² The purpose of the Act was, and still is, to promote competition for the benefit of the consumer.³ Because competitive prices and quality resources protect the consumer, antitrust laws restrict conduct that harms efficiency by raising prices above—or driving quality or output below—the competitive level.⁴

Since 1890, the enforcement of antitrust laws and the laws themselves have changed with the economic, political, and social climate.⁵ While protecting the consumer remains the goal of the antitrust laws, the structures used to achieve this end have varied.⁶ These laws have been viewed both narrowly and expansively to match the climate of the era.⁷ But, however one views substantive

1. Robert P. Faulkner, *The Foundations of Noerr-Pennington and the Burden of Proving Sham Petitioning: The Historical-Constitutional Argument in Favor of a “Clear and Convincing” Standard*, 28 U.S.F. L. REV. 681, 696 (1994).

2. 15 U.S.C. §§ 1, 2 (2006).

3. See, e.g., *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (The Sherman Act “directs itself . . . against conduct which unfairly tends to destroy competition . . . out of concern for the public interest.”); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) (noting that the “central purpose” of the antitrust laws is to preserve competition in order to benefit consumers); *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 308 (3d Cir. 2007) (“The primary goal of antitrust law is to maximize consumer welfare by promoting competition among firms.”); *Assoc. of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 79 F. Supp. 2d 1219, 1223 (W.D. Wash. 1999), *aff’d*, 241 F.3d 696 (9th Cir. 2001) (“Antitrust laws are only intended to preserve competition for the benefit of consumers.”).

4. *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001).

5. See 1 JULIAN O. VON KALINOWSKI ET AL., *ANTITRUST LAWS AND TRADE REGULATION* § 1.01, at 1-1 to 1-2 (2d ed. 2011).

6. *Id.*

7. *Id.*; see also Diana De Leon, *The Judicial Contraction of Section 2 Doctrine*, 45 LOY. L.A. L. REV. 1105 (2012) (arguing that two recent Supreme Court cases have narrowed the scope of liability for Section 2 monopoly violations involving unilateral firm conduct, to the detriment of competition and consumers); Allen G. Haroutounian, *Shedding Light on the Federal Courts’ Treatment of Horizontal Restraints Under Section 1 of the Sherman Antitrust Act*, 45 LOY. L.A. L. REV. 1173 (2012) (discussing how the court has moved from the per se approach to the rule of reason approach when analyzing horizontal restraints); Nicole McGuire, *An Antitrust Narcotic: How the Rule of Reason Is Lulling Vertical Enforcement to Sleep*, 45 LOY. L.A. L. REV. 1225 (2012) (focusing on how the rule of reason has overtaken the per se standard as the only analysis

antitrust law, there are certain areas in which antitrust law does not apply.⁸ Both the judiciary and the legislature have recognized these areas, which create exceptions to the general consumer-protection policy of antitrust law.⁹ These exceptions aim to give deference to competing policies that conflict with antitrust laws.¹⁰ This Article focuses on two such limits—the *Noerr-Pennington*¹¹ and state action doctrines. Respectively, these doctrines shield citizen petitioning and state action from the reach of antitrust law.¹² The U.S. Constitution and the structure of the federal government protect the independent sovereignty of the states¹³ and the right of all citizens to petition the government.¹⁴ The *Noerr-Pennington* and state action doctrines aim to balance these core principles with the goals of antitrust law.¹⁵ Therefore, under these doctrines, petitioning and state action will not give rise to liability, even where such action is anticompetitive in nature or motive¹⁶ and thwarts the goals of antitrust law.¹⁷

in vertical restraint cases and arguing that the rule of reason operates as a default rule of per se legality); Marleina Paz, *Almost But Not Quite Perfect: The Past, Present, and Potential Future of Horizontal Merger Enforcement*, 45 LOY. L.A. L. REV. 1045 (2012) (arguing that the Obama Administration has appropriately been more aggressive in challenging horizontal mergers than the Bush administration).

8. 3 VON KALINOWSKI, *supra* note 5, § 47.01, at 47-1.

9. *Id.* at 47-7 to 47-9.

10. *Id.*

11. The doctrine takes its name from the two cases that created it: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). This Article will use the terms *Noerr-Pennington* and *Noerr* to refer to the doctrine.

12. *Noerr*, 365 U.S. at 138; *Parker v. Brown*, 317 U.S. 341, 351 (1943).

13. The Constitution reflects the balance between state and federal sovereignty. The Supremacy clause makes the laws of the United States the supreme law of the land, U.S. CONST. art. VI, cl. 2, while the Tenth Amendment dictates that powers not delegated to the federal government are reserved to the states. U.S. CONST. amend. X.

14. U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”).

15. As a constitutional guarantee, the right to petition deserves deference from all other laws and policies. Although “[a]s a charter of freedom, the Sherman Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions[.]” the Sherman Act is “perhaps unfortunately” not a constitutional provision. Faulkner, *supra* note 1, at 689 & n.62 (citing *Appalachian Coals v. United States*, 288 U.S. 344, 359–60 (1933)).

16. *Black’s Law Dictionary* defines anticompetitive conduct as “[a]n act that harms or seeks to harm the market or the process of competition among businesses, and that has no legitimate business purpose.” BLACK’S LAW DICTIONARY 109 (9th ed. 2009); *see also* *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 308 (3d Cir. 2007) (defining anticompetitive conduct “generally . . . as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits. Conduct that impairs the opportunities of rivals and either does

While it seems clear that these two exceptions to federal antitrust law are rooted in the First Amendment and federalism, the Supreme Court has failed to clearly delineate the precise sources or extent of the doctrines.¹⁸ This failure has left the lower courts without a clear standard to apply in cases where these protected rights conflict with antitrust law.¹⁹ When the Supreme Court carved out these exceptions to antitrust liability, it relied on the Sherman Act as the source of the immunities.²⁰ The Court held that it was excluding from antitrust liability activities that it found to be beyond the intended scope of antitrust laws. In doing so, the Court read the Sherman Act in a way that altogether avoided the conflict between antitrust law on one hand and the First Amendment and federalism on the other.²¹ For example, in *Noerr*, the Court held that a petition to the government was not the type of agreement in restraint of trade that the Sherman Act was meant to prevent.²² The Court explained that the Sherman Act is meant to regulate business activity, not political activity.²³ Similarly, in *Parker*, the case that created the state action doctrine,²⁴ the Court held that there was nothing in the language of the Sherman Act that was intended to prohibit a state from exercising its own regulatory authority.²⁵ Although the Court ultimately found that the Sherman Act simply did not apply in these contexts, the decisions themselves and later opinions indicate that the *Noerr* and *Parker* holdings were influenced by the Court's concern

not further competition on the merits, or does so in an unnecessarily restrictive way may be deemed anticompetitive").

17. *Noerr*, 365 U.S. at 136; *Parker*, 317 U.S. at 351.

18. See *infra* Parts II.A.1, II.B.1.

19. See *infra* Part III.

20. *Noerr*, 365 U.S. at 136–37; *Parker*, 317 U.S. at 350–51.

21. *Noerr*, 365 U.S. at 137; *Parker*, 317 U.S. at 351.

22. *Noerr*, 365 U.S. at 136–37.

23. *Id.* at 137 (explaining that imposing liability on those petitioning the government “would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act”).

24. *Parker*, 317 U.S. at 341. While *Parker* is generally recognized as the case that created the state action doctrine in its current form, some scholars have argued that this is a misconception, and that the doctrine can be traced to decisions prior to *Parker*, such as *Olsen v. Smith*, 195 U.S. 332 (1904). Milton Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 8 (1976).

25. *Parker*, 317 U.S. at 350–51.

for First Amendment rights and the principles of federalism.²⁶ The antitrust immunities, therefore, were born from a desire to avoid a conflict between antitrust laws and the First Amendment and principles of federalism.

However, the goals of antitrust law are not only different from but are also often inconsistent with the goals of the First Amendment and federalism.²⁷ While reading the Sherman Act to avoid this conflict has appeal in its simplicity, it fails to recognize, grapple with, and adequately resolve how to balance the important statutory objective of protecting consumers with the need to preserve First Amendment rights and the principles of federalism. Antitrust laws exist to preserve economic freedom and the right to compete, and while they may sometimes be in conflict with the First Amendment and the principles of federalism, the freedoms they protect are no less important than those protected by the Constitution and the United States' system of government.²⁸ This Article will argue that, by concluding that Congress never intended for antitrust law to regulate in these areas, the Court gave undue deference to the First Amendment and federalism. In doing so, the Court immunized conduct that should be regulated because without regulation there is nothing to stop anticompetitive conduct that is harmful to the consumer. In order to allow antitrust laws to properly curb this anticompetitive behavior, as well as to produce clear guidance in this area for the lower courts, the Court must reassess these doctrines and more effectively balance the goals of antitrust law with First

26. *Noerr*, 365 U.S. at 138 (“The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”); *Parker*, 317 U.S. at 351.

27. See David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL’Y 293, 295–96 (1994) (“One of the ways a firm can compete is by asking the government to confer a benefit on the firm or to impose a burden on its competitors. Firms compete in this political ‘market’ for economic benefits they cannot otherwise get in economic markets. . . . Companies that turn to the political markets to gain a competitive advantage almost always do so in order to achieve an anticompetitive result. If they could achieve the same result legally in the market—through innovation or more efficient management, for example—the company would do so and save the costs of transacting with the government.”).

28. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) (“Antitrust laws . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.”).

Amendment and federalism concerns. Instead of construing antitrust law to avoid the conflict, the Court should articulate a policy that enables the lower courts to effectively and fairly balance these competing goals. The Supreme Court must narrow the application of these exceptions in a manner that will not only continue to protect First Amendment rights and federalism but will also allow antitrust law to serve its purpose—protecting the consumer.

Part II of this Article will discuss the development of the *Noerr-Pennington* and state action doctrines. It will look at the Supreme Court cases that have shaped the two doctrines and will discuss the contours of the doctrines as they exist today. Part III will demonstrate how the Supreme Court has construed the Sherman Act as separate from and inconsistent with the goals of *Noerr* and *Parker*. It will then argue that this construction both has created unnecessarily broad immunities—which leaves unregulated areas of activity that need antitrust supervision—and has left lower courts without a clear framework to follow. Part IV proposes that the Court, instead of construing the doctrines to avoid a constitutional problem, must actually perform an analysis that will enable antitrust law to coexist with the First Amendment and federalism principles without sacrificing protections for the consumer. By engaging in this analysis, the Court can define the boundaries of the immunities and create clearer guidelines for the lower courts to follow. This Article proposes that the Court can scale back the immunities without infringing on First Amendment rights or encroaching on state sovereignty.

II. BACKGROUND

The Supreme Court created the *Noerr-Pennington* and state action doctrines in three landmark cases.²⁹ Since the Court created the two doctrines, it has modified them by expanding and limiting their application over time.³⁰ However, since the creation of the doctrines, these exceptions to antitrust law have proven to be not

29. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Noerr*, 365 U.S. at 127; *Parker*, 317 U.S. at 341.

30. *See infra* Part II.A–B.

only confusing but also harmful to the very goals antitrust law is supposed to promote.³¹

A. *The Noerr-Pennington Doctrine*

Under the *Noerr-Pennington* doctrine, efforts to lobby the government for legislation, executive action, or judicial decisions are immune from antitrust liability, even where the purpose of the action is to restrain trade or is otherwise anticompetitive.³² In order to qualify for immunity under this doctrine, the petition to the government must be a genuine attempt to obtain governmental action.³³ A petition that is not actually intended to result in such action is considered a “sham” and is not entitled to *Noerr* immunity.³⁴ A company, therefore, can lobby the state to enact laws that would adversely affect their market competitors without facing antitrust liability.³⁵ This is the case even if the purpose of the campaign is to put competitors out of business, provided that the company is genuinely attempting to influence government action.³⁶

1. Genesis of the *Noerr* Doctrine

The Supreme Court created the *Noerr* doctrine in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*³⁷ In *Noerr*, truckers alleged that a group of railroad companies violated Sections 1 and 2 of the Sherman Act by engaging in a publicity campaign.³⁸ The campaign sought to harm the competing trucking industry by creating dislike for truckers among the public and fostering support for measures, such as securing a veto of a law that would have allowed trucks to carry heavier loads.³⁹ A unanimous Supreme Court held that the Sherman Act does not prohibit attempts to influence the legislature to pass a particular law, even if the law

31. See *infra* Part III.

32. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Pennington*, 381 U.S. at 657; *Noerr*, 365 U.S. at 127.

33. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991).

34. *Id.*

35. See *Noerr*, 365 U.S. at 139–40.

36. *Id.*

37. 365 U.S. 127 (1961).

38. *Id.* at 129–30.

39. *Id.*

would result in a monopoly.⁴⁰ The Court rested its decision on a finding that the Sherman Act was not intended to regulate political activity, and therefore the railroads' petitioning did not fall within the scope of the Act.⁴¹ Thus, the Court held that "the Sherman Act [did] not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws."⁴²

The Court also recognized that the case presented First Amendment questions.⁴³ For example, it noted the significance of the right to petition and declined to "impute" to Congress an "intent to invade" the "freedoms protected by the Bill of Rights."⁴⁴ Moreover, the Court stated that a statute that created liability for efforts to petition the government "would raise important constitutional questions."⁴⁵ However, because it ultimately found that the Act was not meant to regulate in the political arena, the Court did not conduct any constitutional analysis.⁴⁶ By failing to draw a line between the goals of antitrust law and the constitutionally protected right to petition, the Court failed to identify—let alone resolve—the conflict between the First Amendment and antitrust law. As a result, the Court created an excessively broad immunity that left lower courts without clear guidelines to apply in similar cases.

2. The Court Used the Canon of Constitutional Avoidance in Creating the *Noerr* Doctrine

The Supreme Court has traditionally interpreted statutes so as to avoid a conflict with the Constitution.⁴⁷ This canon of statutory

40. *Id.* at 136.

41. *Id.* at 137 ("To hold that the . . . people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.").

42. *Id.* at 138.

43. *See id.*

44. *Id.*

45. *Id.* at 137–38.

46. *Id.*

47. Adam Eckstein, *The Petition Clause and Alternative Dispute Resolution: Constitutional and Consistency Arguments for Providing Noerr-Pennington Immunity to ADR*, 75 U. CIN. L. REV. 1683, 1689 (2007) ("[T]he Supreme Court has interpreted statutes narrowly so as to avoid abridging the right of petition.").

interpretation is known as constitutional avoidance.⁴⁸ However, the Court has qualified this requirement by saying that courts are required to construe the statute in a way that avoids a conflict *only* if “an alternative interpretation of the statute is fairly possible.”⁴⁹ Scholars and lower courts have considered *Noerr* to be an application of this canon⁵⁰ because the Court avoided a conflict between the Sherman Act and the Constitution by saying that the Sherman Act was simply not meant to regulate petitions to the government.⁵¹ The Court called an agreement to jointly petition the government for legislation fundamentally dissimilar from the agreements that typically violate the Sherman Act.⁵² The Court could not “lightly impute to Congress an intent to invade [the] freedoms” protected by the First Amendment⁵³ and said that such an interpretation would have no basis in the legislative history of the Sherman Act.⁵⁴ However, in doing so, the Court failed to articulate exactly what type of restrictions on anticompetitive behavior would invade those freedoms.

3. Limitations of *Noerr* Immunity: The Sham Exception

Although the Court subsequently expanded *Noerr* immunity to apply in the context of petitions to the executive branch,⁵⁵ the judicial branch, and administrative agencies,⁵⁶ the Court has also

48. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 n.5 (9th Cir. 2006) (“[T]he rule of statutory construction known as the canon of constitutional avoidance . . . requires a statute to be construed so as to avoid serious doubts as to the constitutionality of an alternate construction.”).

49. *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (internal quotations and citation omitted); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principal that this court will *first ascertain whether a construction of the statute is fairly possible* by which the question may be avoided.” (emphasis added)).

50. *Sosa*, 437 F.3d at 931 n.5 (“*Noerr-Pennington* is a specific application of . . . the canon of constitutional avoidance.”).

51. *Noerr*, 365 U.S. at 141 (“The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena.”).

52. *Id.* at 136.

53. *Id.* at 138.

54. *Id.* at 137.

55. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670–71 (1965).

56. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972) (“[I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state

placed some important limitations on the doctrine.⁵⁷ Perhaps the most notable limitation is the sham exception, which applies in situations where the petition is “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”⁵⁸ Where the petition is actually an attempt to interfere with a competitor’s business, liability under the Sherman Act is appropriate.⁵⁹ The Court applied the sham exception for the first time in *California Motor Transport*.⁶⁰ There, a group of highway carriers brought an action against another group of highway carriers, alleging that they violated the Sherman Act by initiating several judicial and administrative proceedings to eliminate the competition of other trucking groups.⁶¹ The plaintiffs alleged, and the Court agreed, that the purpose of the proceedings was to eliminate competition and put the other truckers out of business.⁶² The Court held that one baseless claim would likely not fall under the sham exception, but a pattern of repetitive claims would be considered an abuse of the administrative and judicial processes and, as such, would fall squarely within the exception.⁶³ Interestingly, the Court justified its decision to deny *Noerr* immunity by pointing to the fact that “First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.”⁶⁴ Although the Court did not change the essential understanding of *Noerr*—that the Sherman Act simply is not meant to regulate in the political arena—the Court recognized that it was looking to First Amendment principles to guide how the doctrine, and specifically, the sham exception, should be applied.

and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.”).

57. See, e.g., *id.* at 511 (applying the sham exception for the first time); *id.* at 513 (discussing a misrepresentation exception).

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

59. *Id.*

60. *Cal. Motor Transp.*, 404 U.S. at 511.

61. *Id.* at 509.

62. See *id.* at 515.

63. *Id.* at 513.

64. *Id.* at 514.

4. Limiting the Limitation: Narrowing the Sham Exception

After *California Motor Transport*, there was much confusion about the scope of the sham exception, and lower courts generally applied it broadly.⁶⁵ In 1988, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.* (“*Allied Tube*”),⁶⁶ the Court sought to define the sham exception and limit its application.⁶⁷ Although it declined to apply *Noerr* immunity, the Court held that a genuine effort to affect governmental action cannot constitute a sham, even if the methods used to effect the change are improper.⁶⁸ The Court then narrowed the exception even further in *City of Columbia v. Omni Outdoor Advertising, Inc.* (“*Omni*”),⁶⁹ where it held that the “‘sham’ exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.”⁷⁰ In *Omni*, the city council passed legislation sought by Columbia Outdoor Advertising, which required the council’s approval for all newly constructed billboards.⁷¹ Because Columbia sought to disrupt its competitors’ business through the product of its lobbying efforts (the zoning ordinances) rather than through the lobbying itself, the sham exception did not apply, and Columbia was entitled immunity under *Noerr*.⁷² This holding effectively limited the sham exception to the point that it will almost never apply.⁷³ In most situations, it is unlikely that the party lobbying for anticompetitive action will want to harm its competitor

65. See Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965, 978 (2003) (noting that after “the Noerr/Pennington/California Motor Transport trilogy . . . [m]any courts distorted ‘sham’ to make it apply to all forms of improper or unethical petitioning conduct deemed not worthy of antitrust immunity”).

66. 486 U.S. 492 (1988).

67. Lao, *supra* note 65, at 979–81.

68. *Allied Tube*, 486 U.S. at 507 n.10 (rejecting the dissent’s approach to the sham exception, which would exclude from *Noerr* immunity a defendant’s genuine attempts to affect the government if done through improper means); see also Lao, *supra* note 65, at 981 (“In emphasizing that genuine efforts to influence government do not constitute sham, no matter how improper the methods used, the Supreme Court radically changed the sham exception.” (emphasis and footnote omitted)).

69. 499 U.S. 365 (1991).

70. *Id.* at 380.

71. *Id.* at 367–69.

72. *Id.* at 381.

73. *Id.*

only through the process of lobbying and not through the legislation as well.⁷⁴

Two years after *Omni*, the Court narrowed the sham exception yet again in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (“*PRE*”)⁷⁵ by creating a two-part test that increases the plaintiff’s burden in proving that a petition is a sham and therefore not immunized by *Noerr*.⁷⁶ To satisfy the first part of the test, the lawsuit must be objectively baseless.⁷⁷ If it is objectively baseless, a court then looks at the litigant’s subjective motivation for bringing the lawsuit.⁷⁸ This second prong is where the court considers whether the petitioner seeks to interfere with competition through the petitioning process, rather than through the outcome, as outlined in *Omni*.⁷⁹

5. Other Limitations of *Noerr*: Exceptions for Fraud

Another potential limitation on *Noerr* immunity is a fraud or misrepresentation exception.⁸⁰ Although the Court in both *California Motor Transport* and *Allied Tube* indicated in dicta that “fraud and misrepresentations made in an adjudicatory context exceeded *Noerr*’s reach [but] were immune in a legislative setting,” the Court reopened the issue in *PRE* without giving an answer as to whether an exception exists.⁸¹ Additionally, although the Court substantially narrowed the sham exception in *Allied Tube*, it also limited the scope of the *Noerr* doctrine generally by declining to extend immunity to

74. Lao, *supra* note 65, at 983 (“In view of *Omni Outdoor Advertising*, sham would rarely, if ever, apply to any legislative lobbying because it is unlikely that one merely hopes to injure a competitor through the process of petitioning for favorable legislation rather than through the enactment itself.”).

75. 508 U.S. 49 (1993).

76. *Id.* at 60.

77. *Id.*

78. *Id.*

79. *Id.* at 60–61.

80. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499–500 (1988); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512–13 (1972).

81. Lao, *supra* note 65, at 987–88; *Prof'l Real Estate Investors*, 508 U.S. at 61 n.6 (“We need not decide here whether, and if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant’s fraud or other misrepresentations.”); *Allied Tube*, 486 U.S. at 499–500; *Cal. Motor Transp.*, 404 U.S. at 512–13.

all genuine efforts to influence government action.⁸² The Court held that whether *Noerr* immunity applies in a particular case depends on the nature, context, and impact of the activity.⁸³

Although certain limitations on *Noerr* immunity exist, the Court has continued to broaden the reach of the doctrine, as seen with the narrowing of the sham exception.⁸⁴ While it is unclear whether a fraud or misrepresentation exception exists, the Court has conclusively stated that there is no conspiracy exception to *Noerr* immunity.⁸⁵ The Court has also held that the incidental effects of petitioning will be protected by *Noerr* immunity.⁸⁶ Thus, in *Allied Tube*, although petitioning a private standard-setting organization was *not* itself covered by *Noerr*, the Court held that immunity might still apply if petitioning the organization was incidental to a valid effort to influence the government.⁸⁷

B. The State Action Doctrine

The state action doctrine mandates that federal antitrust laws do not apply to states acting in their sovereign capacity.⁸⁸ Anticompetitive action qualifies for immunity under this doctrine if it is authorized by a clearly articulated state regulatory policy and subjected to active state supervision when the actor is a private party.⁸⁹ For example, a state legislature can implement a regulatory

82. *Allied Tube*, 486 U.S. at 503.

83. *Id.* at 504.

84. See *supra* Part II.A.3; see also *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991) (rejecting a conspiracy exception to *Noerr*); *Allied Tube*, 486 U.S. at 502 (expanding *Noerr* protection to the incidental effects of petitioning as well as the petitioning itself).

85. *Omni*, 499 U.S. at 383 (“[A] ‘conspiracy’ exception to *Noerr* must be rejected.”).

86. *Allied Tube*, 486 U.S. at 502–03.

87. *Id.* The Court in *Allied Tube* declined to apply *Noerr* immunity because the injury alleged in the case, a “restraint . . . imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition,” had resulted from private, rather than government action. *Id.* at 502. However, after declining to extend *Noerr* immunity, the Court then went on to discuss the *Noerr* doctrine, deciding whether *Noerr* might still apply because the petitioning of the association, whose actions the Court said were not quasi-legislative, might have been *incidental* to a valid petitioning of the government. *Id.*

88. *Parker v. Brown*, 317 U.S. 341, 351–52 (1943). While *Parker* is generally recognized as the case that created the State Action doctrine in its current form, there are some scholars that trace the doctrine to decisions prior to *Parker*. See *supra* note 24.

89. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

policy that allows cities to choose which utility company to use. The city may then grant a monopoly to a certain utility company pursuant to that regulatory policy, even if the city's purpose is anticompetitive and otherwise violates antitrust laws.⁹⁰

1. Evolution of the State Action Doctrine

The Court created the state action doctrine in *Parker v. Brown*.⁹¹ That case involved a California regulatory program that dictated how raisin growers could market their crops.⁹² The purpose of the program was to restrict competition among raisin growers and to control the price of the raisins distributed to packers.⁹³ A producer and packer of raisins brought suit, claiming that the legislation was anticompetitive and therefore violated the Sherman Act.⁹⁴ A unanimous Court held that states acting in their sovereign capacity are not subject to antitrust liability, even if the state action was anticompetitive.⁹⁵ In so holding, the Court emphasized that there was nothing in either the language or history of the Act that would suggest that this was the intent of the statute.⁹⁶ The Court highlighted the fact that the immunity is rooted in the principles of federalism, saying that “[i]n a dual system of government in which, under the Constitution, the states are sovereign . . . an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”⁹⁷ However, just as the Court in *Noerr* skirted the conflict between antitrust law and the First Amendment’s right to petition by holding that the Sherman Act simply did not apply to petitioning activity, the Court in *Parker* construed the Sherman Act in a way that avoided any conflict with the principles of federalism. The Court said that Congress did not intend to bring state action within the realm of antitrust liability⁹⁸ and found “nothing in the

90. See *Parker*, 317 U.S. at 352.

91. 317 U.S. 341 (1943).

92. *Id.* at 344–47.

93. *Id.* at 346.

94. *Id.* at 344.

95. *Id.* at 351–52.

96. *Id.* at 350–51.

97. *Id.* at 351.

98. *Id.* at 350–51.

language of the Sherman Act or in its history which suggest[ed] that its purpose was to restrain a state.”⁹⁹

However, the underlying problem that the Court sought to resolve in creating the state action doctrine was a preemption problem raised by the federalist system of government.¹⁰⁰ The Supremacy Clause¹⁰¹ allows a court to invalidate a state law when Congress expressly preempts state law, when there is a direct conflict between state and federal law, or when Congress has left no room in its regulatory scheme for states to regulate.¹⁰² Thus, it seems that federal antitrust laws should preempt any state regulation in the area.¹⁰³ The Court did point to a federalism problem, stating that “[i]n a dual system of government in which, under the Constitution, the states are sovereign . . . an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”¹⁰⁴ However, rather than engaging in a discussion of when there would be a conflict between a state’s sovereignty and the federal antitrust laws, the Court simply reiterated that the legislative history of the Sherman Act showed that the Act was not meant to regulate in this area at all.¹⁰⁵

Since *Parker*, the Court has refined the state action doctrine.¹⁰⁶ In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum* (“*Midcal*”),¹⁰⁷ the Court created a two-part test for state action

99. *Id.* at 350.

100. James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1568 (2010).

101. The Supremacy Clause states as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

102. Cooper & Kovacic, *supra* note 100, at 1568.

103. *Id.* at 1569–70 (“[T]he antitrust laws express a national policy in favor of competition and . . . Congress acted to the fullest extent of its commerce powers when enacting the antitrust laws.”) (citing *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) and *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945)).

104. *Parker*, 317 U.S. at 351.

105. *Id.*

106. See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 106 (1980).

107. 445 U.S. 97 (1980).

immunity.¹⁰⁸ First, the challenged action must be taken pursuant to a clearly articulated and affirmatively expressed state policy.¹⁰⁹ Second, the state must actively supervise this conduct.¹¹⁰ However, the Court has not clearly defined how this test should be applied. Lower courts are split as to what level of supervision is sufficient to satisfy *Midcal*'s requirement.¹¹¹

The Supreme Court narrowed the active supervision requirement in *FTC v. Ticor Title Insurance Co.*¹¹² There, rating bureaus organized by the defendant insurance companies were authorized by four states to set joint rates for title searches.¹¹³ Once the bureau set the rates, the rates became effective unless the state rejected them within a certain period.¹¹⁴ The Court held that such a system of review was not sufficient to satisfy the active supervision requirement.¹¹⁵ The Court required more than “[s]ome basic level of activity directed towards seeing that the private actors carry out the state’s policy and not simply their own.”¹¹⁶ It required a showing that “the State has played a substantial role in determining the specifics of the economic policy.”¹¹⁷ Under the facts of this particular case, it required that the state had determined the specifics of the rate-setting scheme.¹¹⁸ However, apart from this fact-specific determination, nowhere in the opinion did the Court provide guidance about how much supervision would be sufficient to meet its requirement that the state play a substantial role.¹¹⁹

Additionally, the Court has not clarified what constitutes a “clearly articulated” state policy under the first prong of the test.¹²⁰

108. *Id.* at 105.

109. *Id.*

110. *Id.*

111. See Peter Hettich, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 DEPAUL BUS. & COM. L.J. 105, 130–33 (2006).

112. 504 U.S. 621 (1992).

113. *Id.* at 629.

114. *Id.* (calling this approval system a “negative option” system).

115. *Id.* at 637.

116. *Id.*

117. *Id.* at 635.

118. *Id.* at 638.

119. Justice O’Connor recognized the majority decision’s flaw in her dissent. *Id.* at 647 (O’Connor, J., dissenting). Although arguing for a more flexible requirement, she noted that “the majority does not offer any guidance as to what level of supervision will suffice.” *Id.*

120. The Court has applied several different standards, including that the authorization be “affirmatively expressed,” *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97,

The language used by the Court in *Midcal* seemed to reflect the Court's desire to give deference to states in implementing their own regulations.¹²¹ However, the Court stepped back from this requirement in both *Town of Hallie v. City of Eau Claire* (“*Hallie*”)¹²² and *Southern Motor Carriers* when it held that anticompetitive conduct need only be “foreseeable” from a state’s grant of power in order for it to be considered authorized under a clearly articulated policy.¹²³ Lower courts have been unsure whether foreseeability is enough.¹²⁴ The Tenth Circuit recently noted this confusion, pointing to some Supreme Court cases that required an *affirmatively expressed* grant of authority to suppress competition and others that required “something *less* of cities seeking to invoke *Parker’s* protections”—namely, those that suggest that foreseeability is sufficient.¹²⁵ The court then concluded that, “though it’s hard to see a way to reconcile all of the Court’s competing statements in this area, we can say with certainty this much—a municipality surely lacks antitrust ‘immunity’ unless it can bear the burden of showing that its challenged conduct was *at least* a foreseeable (if not explicit) result of state legislation.”¹²⁶

Because of this ill-defined standard, the lower courts have different ways of determining whether there is a clearly articulated state policy, which has resulted in both broad and narrow applications of the foreseeability standard.¹²⁷ For example, the Seventh Circuit recently applied this standard very broadly, holding that “it is generally understood that the authority to contract

105 (1980), that anticompetitive conduct “logically would result,” from the state’s authorization, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985), and that anticompetitive conduct is a foreseeable result of the state’s policy. *Id.*

121. Hettich, *supra* note 111, at 111 (explaining that *Midcal* immunized actions “emanating from a sovereign state, i.e. actions, which can be attributed directly to the state” and thereby granted “immunity [to] private actors . . . when obeying anticompetitive regulation enacted by a sovereign entity”).

122. 471 U.S. 34 (1985).

123. *Id.* at 42; *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 65 (1982).

124. *Kay Elec. Coop. v. City of Newkirk, Okla.*, 647 F.3d 1039, 1042–43 (10th Cir. 2011).

125. *Id.*

126. *Id.* at 1043.

127. *Compare* *Active Disposal, Inc. v. City of Darien*, 635 F.3d 883 (7th Cir. 2011) (applying the test broadly), *with* *Shames v. Cal. Travel & Tourism Comm’n*, 626 F.3d 1079 (9th Cir. 2010) (applying the test narrowly); *see also* Hettich, *supra* note 111, at 122–26 (discussing several cases where the foreseeability standard was applied both narrowly and broadly).

contemplates the power to create exclusive contracts.”¹²⁸ Thus, a monopoly and other anticompetitive conduct was the foreseeable result of a statute that allowed a city to enter into contracts for waste disposal.¹²⁹ On the other hand, the Ninth Circuit has held that “a foreseeable result cannot *create* state authorization itself. . . . Rather, ‘foreseeability’ is to be used in deciding the *reach* of antitrust immunity that stems from an already authorized [anticompetitive conduct]”.¹³⁰ Recently, in an attempt to make sense of these conflicting views, the Tenth Circuit identified “at least a few bright lines . . . in this muddled arena.”¹³¹ First, there must be more than the traditional grant of authority in a municipal charter.¹³² Second, that a state authorized *some* anticompetitive conduct does not mean all other anticompetitive conduct is foreseeable.¹³³ Third, to determine whether a state authorized anticompetitive conduct, the court must look at “the most specific direction issued by the state legislature on the subject.”¹³⁴ However, even applying the Tenth Circuit’s bright-line rules, it is far from clear what makes anticompetitive conduct foreseeable.¹³⁵

The Court has also held that while a municipality is not itself sovereign and therefore not per se exempted from antitrust law, the state can use a city to implement its own clearly articulated

128. *Active Disposal, Inc.*, 635 F.3d at 889.

129. *Id.*; see also *Massengale v. City of Jefferson, Mo.*, No. 10-CV-4232-NKL, 2011 WL 3320508 slip op. at *8 (W.D. Mo. Aug. 2, 2011) (holding that although the state did not “expressly grant municipalities the power to grant exclusive solid waste disposal contracts,” the clearly articulated policy requirement was met because displacing competition was “a necessary and reasonable consequence of engaging in the authorized activity,” regulating solid waste disposal); *Metro W. Ambulance v. Clark Cnty., Wash.*, No. C10-5809RJB, 2011 WL 7153926, at *13 (W.D. Wash. Dec. 22, 2011) (granting state action immunity to a county where the county granted an exclusive contract to an ambulance service, because this contract was the foreseeable result of a state law that authorized any county to establish a system of ambulance service and award contracts for ambulance service).

130. *Shames*, 626 F.3d at 1084.

131. *Kay Elec. Coop. v. City of Newkirk, Okla.*, 647 F.3d 1043 (10th Cir. 2011).

132. *Id.*

133. *Id.* at 1043–44.

134. *Id.* at 1044.

135. *Id.* at 1043 (“[W]hat does and doesn’t qualify as foreseeable is hardly ‘self-evident’ or self-defining, itself perhaps another reason to eschew the [foreseeability] test.”). The Court then found that it was “clear” that the defendant in the case did not enjoy immunity because the state had not authorized the anticompetitive behavior. *Id.* at 1044. It is interesting that the court would use this language after discussing the confusion that exists within the test and then reverse the district court’s dismissal of the case in favor of the defendant.

policies.¹³⁶ Similarly, regulatory agencies are not per se immune from antitrust laws, but a state can also use a regulatory agency to implement its own policy.¹³⁷ However, it is unclear whether these regulatory agencies should be treated more like private actors or municipalities.¹³⁸ In *Hallie*, after holding that active supervision is not required for municipalities, the Court said in a footnote, “In cases in which the actor is a state agency, it is likely that active supervision would also not be required, although we do not here decide that issue.”¹³⁹ Thus, lower courts have been left without any guidance on whether they should require active supervision for state regulatory boards and other similar state entities. In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,¹⁴⁰ the North Carolina Board of Dental Examiners (“the Board”) brought an action against the FTC, seeking a declaration that active supervision is not required for immunity to apply to regulatory agencies under the state action doctrine.¹⁴¹ In the underlying proceeding, the Board claimed that it was immune from antitrust liability under the state action doctrine, but the FTC denied the Board’s motion, saying that the Board did not qualify for exemption because its conduct was not actively supervised by the state.¹⁴² The court noted that “the law is unsettled as to whether or not [the Board] is subject to the antitrust laws under the *Parker* state action doctrine,” citing both *Hallie* and *F.T.C. v. Monahan*,¹⁴³ a 1987 First Circuit decision that held that active supervision may be required for state regulatory boards.¹⁴⁴ Thus, while the parameters of the doctrine have been defined, how and when the doctrine applies is not entirely clear.

136. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978).

137. *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 68 (1982).

138. Hettich, *supra* note 111, at 117–18.

139. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46–47 & n.10 (1985).

140. 768 F. Supp. 2d 818 (E.D.N.C. 2011).

141. *Id.* at 822.

142. *Id.* at 820–21.

143. 832 F.2d 688 (1st Cir. 1987).

144. *F.T.C.*, 768 F. Supp. 2d at 824.

2. Expansions of State Action Immunity

As with *Noerr*, the Court has both expanded and limited state action immunity.¹⁴⁵ Generally, the Court has limited the doctrine by requiring that state action is authorized and actively supervised by the state.¹⁴⁶ Additionally, the Court has held that a home-rule provision, by which a state gives a city blanket authority to create its own regulations and policies, is not sufficient for antitrust immunity because it does not satisfy the “clearly articulated . . . policy” prong of the *Midcal* test.¹⁴⁷

However, there have been several significant expansions of the doctrine. As with *Noerr*, the Court has refused to recognize a conspiracy exception to state action immunity.¹⁴⁸ Before *Omni*, several courts had refused to grant state action immunity where local government officials had conspired with private parties to act anticompetitively.¹⁴⁹ Those courts relied on the language of *Parker*, which suggested that the Court would not have granted immunity if a state or municipality had combined with others to restrain trade.¹⁵⁰ However, the *Omni* Court rejected this interpretation of *Parker*, holding that *Parker* “simply clar[ified] that [state action] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.”¹⁵¹ Thus, in *Omni*, the fact that the city council had not only agreed with but had also been paid by its local constituents to enact a regulation in their favor did not preclude state action immunity.¹⁵² The Court refused to create such an exception on the assumption that it is

145. See, e.g., *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991); *Cnty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (holding that a home rule provision is not sufficient for immunity).

146. Only state action that meets these standards will be immunized under *Parker*. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

147. *City of Boulder*, 455 U.S. at 54–55.

148. *Omni*, 499 U.S. at 374.

149. See, e.g., *Duke & Co. v. Foerster*, 521 F.2d 1277 (3rd Cir. 1975), *abrogated* by 499 U.S. 365; *Windham v. Am. Brands, Inc.*, 68 F.R.D. 641, 646 (D.S.C. 1975); see also E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism's Triumph over Competition, the Last Fifty Years*, 3 WASH. U. J.L. & POL'Y 473, 480–81 (2000) (discussing the former conspiracy exception and citing to *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 73 (8th Cir. 1982) and *Witworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated* 435 U.S. 992 (1978)).

150. *Sullivan*, *supra* note 149, at 481.

151. *Omni*, 499 U.S. at 374–75.

152. *Id.* at 378.

“desirable for legislators and their constituents to agree to pursue a [certain] policy.”¹⁵³ Creating an exception to state action immunity would subject legislators to antitrust liability in such a situation, which was a consequence the Court wished to avoid.¹⁵⁴

Many other expansions of the doctrine apply to immunize the actions taken by municipalities. In *Hallie*, the Court held that active supervision is not required for municipalities.¹⁵⁵ The Court reasoned that municipalities are unlikely to act in the interest of private parties, and that the requirement of a clearly articulated state policy alleviates any danger that they will act for “purely parochial public interests at the expense of more overriding state goals.”¹⁵⁶ The Court also held that the state need not compel the municipality to enact the policy in order for the immunity to apply.¹⁵⁷ Rather, it is sufficient that the state authorize the municipality to engage in anticompetitive behavior.¹⁵⁸ Further, the *Hallie* Court introduced a foreseeability standard, immunizing the municipality’s activity so long as anticompetitive conduct could logically result from the authority granted to the municipality by the state.¹⁵⁹ In *Southern Motor Carriers*, the Court expanded its holding in *Hallie* and held that compulsion is not required for private actors either.¹⁶⁰ The Court stayed consistent with the foreseeability standard it established in *Hallie*, saying that there need not be detailed, specific authorization for private anticompetitive action as long as it is clear that the state intends to displace competition in a specific area.¹⁶¹

153. *Id.* at 375 (“[I]t is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them.”); McGowan & Lemley, *supra* note 27, at 350.

154. McGowan & Lemley, *supra* note 27, at 350; *see also Duke & Co.*, 521 F.2d at 1282 (holding a claim could be stated against antitrust defendants, despite their governmental status because “it is clear that when there is an allegation of governmental participation in [a combination of public and private entities] to the benefit or detriment of private parties . . . a claim has been stated under the antitrust laws”).

155. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46–47 (1985).

156. *Id.* at 47.

157. *Id.* at 45–46.

158. *Id.* at 45.

159. *Id.* at 42.

160. *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 60 (1985).

161. *Id.* at 65–66.

III. CRITIQUE

Because the Court has failed to recognize a conflict between the goals of the antitrust laws on the one hand and the First Amendment and federalism on the other, the Court has not used a principled method of creating the boundaries of the *Noerr* or state action immunities. The sham exception to the *Noerr* doctrine is far too narrow and is ineffective as a limit. The lack of a misrepresentation exception creates additional problems within the doctrine because it undermines the democratic process. Additionally, the foreseeability standard within the state action doctrine requires almost nothing in terms of a clear state policy before it immunizes the anticompetitive conduct of a municipality or a private actor. Municipalities are left to act in their own best interests since they are exempted from the active supervision requirement. As a result, both the *Noerr* and state action doctrines are far too broad, and consequently, consumers are harmed because they do not receive the protection of antitrust laws.

A. The Court Misinterpreted the Sherman Act by Using the Canon of Constitutional Avoidance

The *Noerr* Court's interpretation of the Sherman Act, by which the conflict between the First Amendment and antitrust laws was avoided, is inaccurate in light of the Act's legislative history. The Court held that there was no basis in the legislative history of the Sherman Act to regulate political activity rather than business activity.¹⁶² However, "part of the 'public outcry' generally seen as leading to the passage of the Sherman Act involved the widely held view that the nineteenth-century economic giants . . . secured and maintained their monopolies through unethical economic and *political* practices."¹⁶³ In one of the speeches Senator Sherman made in defense of his bill, he included the political influence of the trusts as a reason to take legislative action.¹⁶⁴ Further, the common law, which was expressly incorporated into the Sherman Act, condemned monopolies obtained by deceptive or coercive petitioning of the

162. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

163. Faulkner, *supra* note 1, at 696 (emphasis added) (emphasis omitted).

164. *Id.* at 697.

legislature.¹⁶⁵ Thus, it seems clear that the Sherman Act's drafters did intend the Act to apply in the political arena.¹⁶⁶ Further, protection of free speech and the development of First Amendment jurisprudence did not gather momentum until the 1930s.¹⁶⁷ At the time Congress enacted the Sherman Act, the Supreme Court had not even applied the First Amendment right to petition.¹⁶⁸ However, by the time *Noerr* was decided in 1961, First Amendment jurisprudence had been developed and strengthened, so it was recognized that the government was prohibited from interfering with the political activities of its citizens.¹⁶⁹ Thus, at that time, "[t]he political process, by which information is conveyed and desires expressed, [was] considered too important to be restricted by concerns for . . . economic liberty."¹⁷⁰ Therefore, while the *Noerr* Court held that there was no basis in the history of the Sherman Act for applying antitrust laws to political activity, it seems more likely that the Court was simply reacting to the prevailing norms of its time. The Court's intention likely was to give utmost deference to citizens in petitioning and speech activity. However, instead of creating an exception to the Sherman Act out of deference to the First Amendment, the Court incorrectly stated that the Sherman Act was not meant to regulate this area.

*B. The Noerr Court's Failure to Recognize a Conflict
Between Antitrust Law and the First Amendment in
Has Resulted in an Excessively Broad Immunity*

Although it was a simple solution for the Court to construe the Sherman Act to avoid any conflict with the First Amendment, the goals of antitrust law and the goals of the First Amendment do

165. *Id.* at 702.

166. *Id.* at 697–99 (discussing a speech by Senator Sherman, 21 CONG. REC. 2562 (1890), in support of Sherman's bill, and arguing that he would exempt a farmers' lobby not because "his bill only applied to 'economic' or 'trade' activity or that all attempts to 'affect public opinion' [were] excluded from the bill's broad language," but because Sherman viewed the lobby as having a beneficial purpose).

167. *See id.* at 707.

168. *Id.* at 704.

169. *See id.* at 708.

170. *Id.*

frequently conflict.¹⁷¹ The First Amendment protects the citizens' request for governmental action,¹⁷² but when those requests or the result of the requests create anticompetitive effects, they naturally conflict with antitrust laws.¹⁷³ Although, under the Supremacy Clause, the Constitution must prevail when a conflict arises, the Supreme Court made *Noerr* immunity unnecessarily complicated by not recognizing that a conflict exists when it created the doctrine.¹⁷⁴ Instead of creating an exception to antitrust law, where immunity is carved out in deference to the First Amendment, the Court said that antitrust law did not apply at all.¹⁷⁵ Although it seems that the result would be the same, by taking the First Amendment issue out of the equation altogether, the Court failed to create any boundaries to the doctrine.¹⁷⁶ If there is no conflict and the Sherman Act simply does not apply, it is much harder for the courts to know when to apply *Noerr* than it would be if they could use the First Amendment as a guideline. The Supreme Court's failure has resulted in the development of an unclear doctrine, which is too broad and which the lower courts are still applying inconsistently fifty years after it was created.¹⁷⁷

171. McGowan & Lemley, *supra* note 27, at 297 (“[A] statutory preference for competition may conflict with a constitutional mandate for self-government and freedom of speech.”).

172. U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”).

173. Lao, *supra* note 65, at 966 (“[W]hen efforts to persuade the government produce anticompetitive effects, they necessarily also impinge upon antitrust law, creating tension between that law and the First Amendment and related values.”); McGowan & Lemley, *supra* note 27, at 296 (“[P]etitioning, in and of itself, can have dramatically anticompetitive effects, even if the petitioning is unsuccessful.”).

174. The Supremacy Clause provides that the Constitution is the supreme law of the land. U.S. CONST. art. VI, cl. 2. Thus, any conflict between constitutional law and antitrust law must be decided in favor of the Constitution. However, as the doctrine currently exists, the Court is not just giving deference to the Constitution since the Court said that antitrust law was not meant to regulate in this area. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). If the Court explicitly recognizes the conflict between the First Amendment and antitrust law, even though the First Amendment must prevail, the Court can still narrow *Noerr* while respecting the tension between and the hierarchy of these principles.

175. See McGowan & Lemley, *supra* note 27, at 300 (“The Court is clear that it does not want to encroach on the First Amendment rights identified in *Noerr*. . . . But the Court has not used First Amendment principles in defining the scope of the doctrine.”).

176. *Id.* (The “doctrine [has] developed solely by the desire to avoid a problem—trampling upon First Amendment rights—without reference to a theory that tells us when that problem arises or why.”).

177. See *id.* at 300–01, 363.

1. Is the Sham Exception Itself a Sham?

The Court could have used the sham exception as a tool to narrow the reach of *Noerr* immunity.¹⁷⁸ However, the exception has grown increasingly confusing and has been narrowed to the point where it is almost impossible to claim that something is a sham.¹⁷⁹ As such, it is ineffective as a limit to *Noerr*.¹⁸⁰ The result of such a narrow exception is the immunization of too many petitions that, whether or not successful, give petitioners room to overcharge consumers and eliminate competitors.¹⁸¹ Petitioners are able to use the petitioning process to raise costs for their competitors or to delay the entry of competitors into the market. Even if the petition is eventually unsuccessful, the effect of the petition itself may eliminate competition and allow the petitioner to raise prices without competing products or services to bring those prices down.¹⁸²

*a. The PRE test raises the bar too high
and fails to protect the consumer*

While the language of the *PRE* test may seem straightforward,¹⁸³ it is unclear how the test should be applied in practice. Much of this confusion was caused by the language Justice Thomas used in *PRE*.¹⁸⁴ He did not clearly explain what “objectively baseless” meant, but instead defined an objectively baseless lawsuit as one in which “no reasonable litigant could realistically expect success on the merits”; one that lacked probable cause, as in the tort of

178. See Lao, *supra* note 65, at 980–81 (arguing that the *Allied Tube* Court drastically narrowed the sham exception where, given the breadth of the exception at the time, it could have held that the conduct in *PRE* was a sham and therefore not immune from antitrust liability).

179. See *id.* at 981 & n.116.

180. See Stacey B. Lee, *Is a Cure on the Way? The Bad Medicine of Generics, Citizen Petitions, and Noerr-Pennington Immunity*, 20 KAN. J.L. & PUB. POL'Y 98, 119–20 (2010) (describing how sham is ineffective in keeping out sham petitions in the brand drug industry).

181. *Id.* at 124.

182. *Id.*

183. In order for a petition to be considered a sham, the two-part *PRE* test requires first that the petition be objectively baseless so that “no reasonable litigant could realistically expect success on the merits[,]” and second, that the petitioners’ subjective motivation for the petition was an attempt to directly disrupt the business of a competitor. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993); see also *supra* Part II.A.4 (discussing the *PRE* test).

184. *Prof'l Real Estate Investors*, 508 U.S. at 60, 62–63, 65; see also Lao, *supra* note 65, at 985–86 (describing the various ways Justice Thomas defined “objectively baseless”).

malicious prosecution; and one that was not warranted by existing law or based on a good faith argument for the modification of the law, as in Federal Rule of Civil Procedure 11 (“Rule 11”).¹⁸⁵ Justice Thomas borrowed the language of Rule 11 and the requirements for malicious prosecution to define objectively baseless, but, as Justice Souter pointed out in his concurrence, the Rule 11 test and the requirements for malicious prosecution are not the same.¹⁸⁶ Thus, what it means for a petition to be objectively baseless is unclear at best. As one commentator pointed out, “Many cases may be sufficiently weak that a reasonable litigant could *not* realistically expect success and yet not be so devoid of merit as to lack probable cause.”¹⁸⁷ Moreover, while most people read *PRE* as a narrowing of the Court’s earlier application of the sham exception, the Ninth Circuit views the *PRE* and *California Motor Transport* tests as inconsistent and attempts to “reconcile these cases by reading them as applying to different situations.”¹⁸⁸ The Ninth Circuit applies the two-part *PRE* analysis to cases in which a single action may be sham petitioning but applies *California Motor Transport* to cases where a whole series of legal proceedings may constitute sham petitioning.¹⁸⁹ In the latter situation, the court does not look at whether any of the proceedings had merit but instead looks at whether collectively they are brought for the purpose of harming or harassing a market rival.¹⁹⁰ The lack of clarity surrounding the *PRE* test makes it much more difficult for those harmed by petitions to claim an antitrust violation since it is unclear what will be enough to prove a sham.

Additionally, the test that Justice Thomas articulated, which equates objectively baseless petitions with a lack of probable cause, is far too broad.¹⁹¹ The *PRE* Court said that a winning lawsuit

185. *Prof'l Real Estate Investors*, 508 U.S. at 60, 62–63, 65; see also Lao, *supra* note 65, at 985–86 (describing the various ways Justice Thomas defined “objectively baseless”).

186. *Prof'l Real Estate Investors*, 508 U.S. at 66–67 (Souter, J., concurring).

187. Lao, *supra* note 65, at 986.

188. *Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033, 1046 (2009) (quoting *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 810 (9th Cir. 1994)).

189. *Id.*

190. *Id.*

191. Lee, *supra* note 180, at 120 (“[T]he sham exception is unnecessarily restricted when the majority equates objectively baseless with a lack of probable cause.”).

precludes a finding that the suit is objectively baseless.¹⁹² Further, the court must not assume that a losing lawsuit was unreasonable or without foundation.¹⁹³ Thus, from the outset, it will be difficult to find that a petition is objectively baseless.¹⁹⁴ The current test “allows [an antitrust defendant] to present a sufficiently weak citizen petition with no reasonable expectation of success” and protects that petition because it is “not so devoid of merit as to lack probable cause.”¹⁹⁵ This sets the bar too high for proving a sham petition and often results in increased cost to the consumer, who without the sham exception has no tools to prove an antitrust violation.¹⁹⁶ For example, in *Louisiana Wholesale Drug Co. v. Sanofi-Aventis*,¹⁹⁷ the court held that a petition to the FDA was not a sham, even though the defendant petitioner may have had no reasonable belief that the petition was viable.¹⁹⁸ Instead, the court believed that the petitioner’s arguments were “arguably warranted by existing law or at the very least []based on an objectively good faith argument for the extension, modification or reversal of existing law.”¹⁹⁹ Using this language to determine whether the petition was objectively baseless allowed the court to conclude that the petition was not a sham, regardless of the fact that

192. Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 n.5 (1993).

193. *Id.*

194. See Lee, *supra* note 180, at 120; see also Lao, *supra* note 65, at 1025 (discussing the requirements and effect of the objectively baseless requirement).

195. Lee, *supra* note 180, at 120.

196. If the petition is not considered a sham, unless the petition involves fraudulent or false information and the jurisdiction recognizes a misrepresentation exception that applies to that case, the petition will be immunized by *Noerr* and those harmed by the anticompetitive effects of the petition have no recourse through antitrust law to protect themselves.

197. No. 07 Civ. 7343(HB), 2008 WL 169362 (S.D.N.Y. Jan. 18, 2008).

198. *Id.* at *5 [hereinafter LWD Ruling on Motion to Dismiss].

199. *La. Wholesale Drug Co. v. Sanofi-Aventis*, No. 07 Civ. 7343(HB), 2009 WL 2708110, at *4, (S.D.N.Y. Aug. 28, 2009) [hereinafter LWD] (internal quotation marks omitted). In this case, Aventis, a drug manufacturer, filed a citizen petition with the FDA requesting that the FDA deny approval of any generic version of its drug, Arava. *Id.* at *1. The FDA denied the citizen petition, noting that Aventis' petition appeared to be based on a false premise. *Id.* at *2 (internal quotation marks omitted) (brackets in original). LWD, a wholesale drug company, then filed an antitrust action against Aventis claiming that Aventis's petition was a sham designed to delay the entry of the generic drug into the market. *Id.* at *1. At trial, LWD introduced evidence that Aventis's request for relief in the petition was contrary to FDA regulations and practices, and that the petition lacked scientific basis. *Id.* at *2. On Aventis's motion to dismiss, the court had even pointed out that it was plausible that Aventis could have had no reasonable belief that its petition was viable. LWD Ruling on Motion to Dismiss at *5. Aventis was familiar with the FDA regulations and practices and had been subjected to the same regulations it now contested. *Id.*

the petition seemed to have little merit and was clearly harmful to the plaintiff and other consumers.²⁰⁰ The *PRE* test's high bar allowed the defendant to submit its petition without antitrust liability and protected the petitioner's activity at the expense of the consumer.²⁰¹

*b. The subjective intent requirement
swallows the sham exception*

If the plaintiff is able to overcome the objectively baseless hurdle, the court then asks whether the petitioner's subjective intent was to disrupt a competitor's business rather than to obtain action from the government.²⁰² This extra requirement makes the sham exception essentially ineffective.²⁰³ First, even if the petition is objectively baseless, there will almost never be a situation where the petitioner does not wish for success on the merits.²⁰⁴ Even if he does not expect to win, winning would ultimately help him, and thus, it is very difficult to prove that a petitioner's sole intent was to interfere with the business of his competitor.²⁰⁵

Second, by focusing on whether a petitioner's intent was to achieve anticompetitive action through the results of a successful petition, the Court fails to look at how these results were obtained.²⁰⁶ Even if a defendant uses the petition itself to harm the competitor, as long as the defendant actually wanted the results of a successful petition, the defendant's conduct will be immunized. This allows the

200. The court considered Aventis's arguments enough to give Aventis probable cause to file the petition, which precluded the petition from being objectively baseless. LWD at *7. Thus, the court protected the petition, which the FDA and even the court believed to have little to no merit, even though the petition allowed Aventis to maintain a monopoly over the drug for five months. Complaint at 2, *La. Wholesale Drug Co. v. Sanofi-Aventis*, No. 07 Civ 7343, 2007 WL 3320445 (S.D.N.Y. Aug. 17, 2009) [hereinafter LWD Complaint].

201. LWD alleged that the monopoly created by the petition allowed Aventis to overcharge direct purchasers of the drug "by millions of dollars by depriving them of the results of competition from cheaper generic versions of Arava." LWD Complaint at 9. Additionally, within three months of the generic drug being approved and starting to sell on the market, Aventis lost almost 80 percent of its \$235 million in annual sales of the drug. *Id.* at 8.

202. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993).

203. *Lee*, *supra* note 180, at 120; *see also Lao*, *supra* note 65, at 986 (arguing that the subjective prong may eviscerate the sham exception).

204. *See Lao*, *supra* note 65, at 986–87.

205. *Id.* at 983 ("[P]etitioners usually have mixed motives: they wish to secure the sought-after government action, and they also wish to harm competitors through the process.").

206. *See id.*

defendant to abuse the system at the expense of the consumer.²⁰⁷ For example, in *Kaiser Foundation Health Plan, Inc. v. Abbott Laboratories, Inc.*,²⁰⁸ the Ninth Circuit held that the filing of seventeen lawsuits did not constitute sham petitioning because the petitioner, Abbott, sought success on the merits.²⁰⁹ However, the court, in applying the subjective prong, failed to consider the fact that whether or not Abbott desired the intended result of the lawsuits, it was nevertheless able to delay the introduction of the generic drug, a drug that would cost significantly less for the consumer.²¹⁰ Abbott was protected from antitrust liability because the current test only looks at whether it was possible to win the lawsuits and whether there was a chance that the petitioner really wanted to win the lawsuits.

*c. Sham immunizes antitrust defendants
that can afford to pay for protection*

The test for sham petitioning also provides protection for antitrust defendants that have the money to achieve the results they desire at the cost of the consumer.²¹¹ For example, in *Omni*, the

207. See, e.g., *Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033 (9th Cir. 2009); *Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem'l Hosp.*, 185 F.3d 154 (3d Cir. 1999). In *Armstrong*, the court held that a hospital's petition was not a sham, regardless of its merit, because the hospital genuinely sought the results of its petition. *Armstrong*, 185 F.3d at 158 n.2. There, a local hospital presented false information to the Department of Health, which was at the time considering whether to approve a competing surgical facility. *Id.* at 155–56. The court refused to consider whether the hospital's opposition was a sham because even if the petition was objectively baseless, the hospital's purpose was to obtain denial of the application. *Id.* at 158 n.2.

208. 552 F.3d 1033 (9th Cir. 2009)

209. *Id.* at 1047. Abbott, a prescription drug manufacturer, filed seventeen lawsuits against other drug manufacturers that sought approval by the FDA to introduce a generic version of Abbott's drug. *Id.* at 1046. By filing the lawsuits, Abbott received an automatic thirty-month stay on FDA approval of the generic drugs. *Id.* at 1039. The court concluded that these seventeen suits did not constitute a sham, even though Abbott lost ten of them, because Abbott brought them in order to protect its patents. *Id.* at 1047.

210. *Id.* at 1041. The plaintiff, a healthcare provider that purchased large quantities of prescription drugs, had paid 67–70 cents per tablet. *Id.* After the generic brand was available, it paid only 10 cents per tablet. *Id.* The drug at issue in the case generated \$540 million in sales in 1998 alone. *Id.* at 1038. Thus, the automatic thirty-month stay on all applications to produce the generic drug that resulted from the filing of patent infringement suits, whether or not Abbott actually expected or wanted to win those suits, could have resulted in over a billion dollars in revenue for the company.

211. See *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 368–69 (1991).

Court considered that Columbia²¹² sought anticompetitive results through the product of its lobbying efforts rather than through the lobbying itself. The Court held that Columbia's petition was not a sham and thus was protected from antitrust liability.²¹³ Under the Court's current test, the petition in question clearly was not a sham. However, the Court was so focused on the fact that Columbia actually wanted to see the legislation passed that it held that "any denial to Omni of 'meaningful access to the appropriate city administrative and legislative fora' was achieved by [Columbia] in the course of an attempt to influence governmental action that, far from being a 'sham,' was if anything more in earnest than it should have been."²¹⁴ Because Columbia's goal of getting the legislation passed was the only thing that mattered in determining whether the petition was a sham, the Court actually sanctioned the fact that Columbia's competitors were denied access to the city council because Columbia had essentially bribed its members.²¹⁵ As a result, Columbia, which essentially bought legislation from its city council that prevented other companies from effectively competing with it, was immunized from liability.²¹⁶ This problem is compounded by the lack of conspiracy exceptions in both the *Noerr* and state action doctrines.²¹⁷

212. Columbia was a billboard company that controlled 95 percent of the billboard market. *Id.* at 367. Columbia sought to interfere with the business of Omni, a competing billboard company, by petitioning the city council for legislation that would prohibit the construction of new billboards. *Id.* at 368. Columbia was run by a family with strong ties to the community and with close personal relationships with many of the city's public officials. *Id.* at 367. Columbia provided funds and free billboard space to the council members from whom it sought this legislation. *Id.*

213. *Id.* at 383–84.

214. *Id.* at 382.

215. *See id.*

216. *Id.* at 384.

217. Because *Omni* held that a conspiracy does not preclude immunity under either doctrine, "a corrupt purpose to restrain competition in a state or state-authorized municipal regulatory program will not defeat immunity." Bob Nichols & Eric Schmitt, *Antitrust Violations*, 48 AM. CRIM. L. REV. 335, 358 (2011).

2. The Lack of a Misrepresentation Exception Undermines the Democratic Process

Because the Court has left open the question of whether a fraud or misrepresentation exception exists, lower courts have been highly inconsistent in recognizing and applying the exception.²¹⁸ The courts that do recognize the exception have done so on a limited basis, such as by recognizing the exception *only* in an adjudicative proceeding and then requiring that the misrepresentation be both intentional and material.²¹⁹ Additionally, the Supreme Court has said that if such an exception exists, it applies only to adjudicatory petitions, not to administrative or legislative petitions.²²⁰

Because the Court has excluded petitioning activity from the reach of antitrust law rather than creating an exception for petitions due to First Amendment concerns, the courts can and have immunized petitions based on intentional misrepresentations, even though that petitioning activity would not be protected under the First Amendment.²²¹ This has resulted in a doctrine under which citizens are allowed to ask the government to suppress competition

218. *United States v. Phillip Morris USA Inc.*, 566 F.3d 1095, 1123–24 (D.C. Cir. 2009) (declining to extend *Noerr* immunity where defendants falsely “publicly denied, distorted, and minimized the hazards of smoking for decades” because *Noerr* “does not protect deliberately false or misleading statements”); *Michael v. Letchinger*, No. 10 C 3897, 2011 WL 3471082, at *11 (N.D. Ill. Aug. 5, 2011) (recognizing a “fraudulent misrepresentation” exception within the sham exception but granting *Noerr* immunity to defendants because the petition was not made in an adjudicative setting); *see also* Lao, *supra* note 65, at 988 (discussing different courts’ treatment of the exception).

219. *See, e.g.*, *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 843 (7th Cir. 2011) (requiring that the misrepresentation be “intentionally made, with knowledge of its falsity [and] material, in the sense that it actually altered the outcome of the proceeding”); *Chemisor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 124 (3rd Cir. 1999) (“[A] *material* misrepresentation that affects the very core of a litigant’s . . . case will preclude *Noerr-Pennington* immunity.”); *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998) (“[L]itigation can be deemed a sham if a party’s knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.”) (quotations and citations omitted).

220. *See* *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499–500 (1988); *Cal. Motor Transp. Co. v. Trucking Head Unlimited*, 404 U.S. 508, 513 (1972). Although these cases indicated that misrepresentation or fraud would only preclude *Noerr* immunity in the adjudicatory context, the Court later reopened the issue in *PRE. Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 n.6. (1993). However, lower courts continue to apply the exception only to adjudicatory petitions. *See* *Mercatus Grp.*, 641 F.3d at 844 (quoting language from both *Allied Tube* and *Cal. Motor Transport*).

221. The First Amendment does not protect petitions that are based on a misrepresentation or fraud. *Philip Morris USA*, 566 F.3d at 1123.

even if the information they give the government in support of that petition is knowingly false.²²² For example, in *Mercatus Group, LLC v. Lake Forest Hospital*, the court gave *Noerr* immunity to the defendant's petitions even though the petitions were based on false information because it found that the board considering the petitions was acting in a legislative rather than an adjudicative capacity and that the misrepresentation exception therefore did not apply.²²³ Immunizing petitions that are based on false and fraudulent information fosters an abuse of the governmental process.²²⁴ The democratic process relies on accurate information to make informed decisions. Petitions based on false information impede the ability of the democratic system to work the way it is meant to work.²²⁵ Based on the foregoing, there does not appear to be any justification to protect this type of unethical and harmful petition.

*C. The Parker Court's Failure to Recognize
the Conflict Between Antitrust Laws and Federalism Principles
Has Left State Action Essentially Unregulated*

The Court's choice to ignore the conflict between the principles of federalism and the national antitrust laws has essentially left state action unregulated.²²⁶ By holding that antitrust law does not apply in the area of state action, the Court has created a state action doctrine that is both unclear and overly broad.²²⁷ This choice has eroded the protection that antitrust law is meant to provide to the consumer.²²⁸

222. See *Mercatus Grp.*, 641 F.3d at 849.

223. *Id.* In *Mercatus*, Mercatus Group intended to open a new physician center that would compete with Lake Forest Hospital. *Id.* at 837. In order to protect itself from this competition, the Hospital petitioned members of the Village Board to deny the permits and approval necessary for Mercatus to build its center. *Id.* at 837–38. The Hospital also launched a public-relations campaign designed to get the community to pressure the Board to stop the construction of the new center. *Id.* Mercatus claimed that the hospital, both in its petitions to the Village Board and its public relations campaign, “drastically misrepresented, among other things, the extent to which the Mercatus physician center would harm the Hospital.” *Id.* at 841. Mercatus alleged that the Hospital's claims that it would lose \$2 million, would be unable to provide charity care, and would ultimately go out of business was a lie. *Id.* All of this information, which the court assumed was misrepresented by the Hospital, informed the Village Board's decision to deny approval for construction of Mercatus's center.

224. Lao, *supra* note 65, at 1016.

225. *Id.*

226. See *infra* Part III.B.1–3.

227. See Hettich, *supra* note 111, at 108. The Supreme Court recently granted certiorari in a case that will review the scope of the state action doctrine. See *FTC v. Phoebe Putney Health*

1. *Midcal* Foreseeability

Regardless of whether the foreseeability standard for municipalities and private actors is read broadly or narrowly, within the context of state action immunity generally, the standard is too broad.²²⁹ As one commentator put it, “the foreseeability standard has proven to be of no bite.”²³⁰ Unless a state specifically authorizes anticompetitive action, the broader the state’s grant of authority, the more likely a court will hold that anticompetitive conduct was foreseeable.²³¹ If the state does not specify what type of conduct it is authorizing, anticompetitive conduct could almost always be a foreseeable result.²³² Thus, the foreseeability standard significantly waters down the requirements of the first prong of the *Midcal* test and makes it much easier for a court to grant *Parker* immunity.²³³

When courts immunize conduct because it was simply foreseeable rather than expressly authorized by the state, they are immunizing conduct that does not fall within the regulatory policy of the state. Because the state action doctrine says that the Sherman Act was not meant to regulate in this area, this type of conduct can be immunized.²³⁴ On the other hand, if the state action doctrine was bound by the guidelines of federalism, this type of conduct would likely not be protected because it is not the state’s clearly articulated policy that is being protected, but rather what the *court* thinks could logically have resulted from the state’s policy. This immunity comes at the expense of the consumer, who is subjected to the effects of anticompetitive behavior—behavior that does not actually further the policy of the Sherman Act or correspond to what the Court is aiming to protect. Without the protection of antitrust law, there would be a

Sys., 663 F.3d 1369 (11th Cir. 2011, *cert. granted*, 2012 U.S. LEXIS 4852 (U.S. June 25, 2012)). The Court will decide whether the clear articulation and active supervision requirements are met in a case involving a local government entity, and it may provide some clarification to the doctrine. See Matthew Bush, *Petition of the Day*, SCOTUSBLOG (May 4th, 2012, 11:43pm), <http://www.scotusblog.com/?p=144433>.

228. See *infra* Part III.B.1–3.

229. McGowan & Lemley, *supra* note 27, at 358 (“The clear statement requirement is not particularly rigorous.”).

230. Hettich, *supra* note 111, at 126.

231. *Id.*

232. See *id.*

233. *Id.* at 127.

234. *Parker v. Brown*, 317 U.S. 341, 351 (1943).

shortage of competitors to drive down prices, and, consequently, the consumer would have to pay more for services.

Many cities have exclusive contracts with utilities or cable companies that states do not expressly authorize but that courts nonetheless protect because they consider it foreseeable that the city would enter into these contracts when the state gives them the authority to regulate in these areas.²³⁵ Thus, the consumers—the residents of the city—ultimately pay more for utilities and television than they would otherwise because there is nobody to compete with the cable company or waste services provider and thus drive prices down. For example, in *Massengale*, because the Court held that it was foreseeable that the city would grant an exclusive contract for waste disposal in the wake of a state statute that authorized cities to manage their waste disposal, the plaintiff was required to pay for trash and recycling services that he did not use.²³⁶ This change resulted in an increase of the cost of waste disposal from about \$1.56 per month to \$15.65 per month.²³⁷

2. Active Supervision

The second prong of the *Midcal* test, the active supervision requirement, is as problematic as the first prong. The requirement is unclear and, with the exemption for municipalities, it is far too broad.

a. Unclear standard requires courts to make subjective determination about what is sufficient

Because it is unclear what is sufficient to satisfy this requirement, it is difficult for private actors to determine whether they are protected by antitrust immunity.²³⁸ This ambiguity unfairly

235. See, e.g., *Massengale v. City of Jefferson, Mo.*, No. 10-CV-4232-NKL, 2011 WL 3320508, at *1 (W.D. Mo. Aug. 2, 2011); *Elec. Inspectors, Inc. v. Vill. of E. Hills*, 320 F.3d 110 (2d Cir. 2003), *cert. denied*, 540 U.S. 982 (2003) (upholding several municipalities' grant of monopoly over fire inspections to the New York Board of Fire Underwriters, because other inspectors' "complete exclusion from the market for required electrical inspection services [was] a foreseeable result of a statute that require[d] municipalities to enforce a uniform fire code").

236. *Massengale*, 2011 WL 3320508, at *1.

237. *Id.* at *1–3.

238. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 640 (1976) (Stewart, J., dissenting) ("Henceforth, a state-regulated public utility company must at its peril successfully divine which of its countless and interrelated tariff provisions a federal court will ultimately consider 'central'").

subjects those actors to antitrust liability when they happen to guess wrong.²³⁹ Additionally, without clear standards, the reviewing court will inevitably impose its own judgment about whether the economic regulation in question is wise.²⁴⁰ Had the Court adhered to the principles of federalism—instead of saying that antitrust law simply did not apply in the context of state action—it would have developed a standard that required accountability by the state rather than one that requires courts to make determinations about the state’s intention or the scope of the state’s authorization.²⁴¹ Instead, the standard defeats the purpose of the active supervision requirement, which is to ensure that the private actor is engaging in conduct that is deemed to be the conduct of the state itself.²⁴²

*b. Misguided faith
in municipalities*

Although the Supreme Court attempted to strengthen its requirements for active supervision in *Ticor* and some circuits do use a narrow definition,²⁴³ the Court exempted municipalities from the active supervision requirement, thereby creating a wide open door to

or ‘imperative.’ If it guesses wrong, it may be subjected to treble damages as a penalty for its compliance with state law.”); *see also* Hettich, *supra* note 111, at 138 (arguing that requiring regulated parties to guess whether they will be protected by antitrust immunity is inherently unfair).

239. Hettich, *supra* note 111, at 138.

240. *Id.*

241. *See* OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 54 (2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>. The Task Force reported that “[t]hrough the active supervision requirement, the Court is furthering the fundamental principal of ‘accountability’ that underlies federalism, by ensuring that, if allowing anticompetitive conduct proves to be unpopular with a state’s citizens, the state’s legislators will not be ‘insulated from the electoral ramifications of their decisions.’” *Id.* While the Task Force Report correctly pinpoints the aims of the active supervision requirement, the doctrine currently fails to further the principle of accountability. *See infra* Part III.B. The changes to the doctrine suggested in this Article aim to achieve this.

242. *See, e.g.*, REPORT OF THE STATE ACTION TASK FORCE, *supra* note 241, at 53–54; Hettich, *supra* note 111, at 136; McGowan & Lemley, *supra* note 27, at 346.

243. *See, e.g.*, *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 231–32 (2d Cir. 2004) (“New York has failed to provide for any state supervision, much less active supervision, [having] no mechanism . . . whereby New York may review the reasonableness of the pricing decisions.”) (quotations and citation omitted); *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 258 (3d Cir. 2001) (finding insufficient active supervision for immunity because the “States . . . lack oversight or authority over the tobacco manufacturers’ prices and production levels,” which were decided “entirely [by] the private actors”).

state action immunity.²⁴⁴ The Court reasoned that municipalities are likely to act in the public interest and that there is little risk that a municipality will become involved in private anticompetitive conduct.²⁴⁵ However, the Court's faith in municipalities has proven naïve.²⁴⁶ Often, municipalities act in their own best interest, implementing regulations that are harmful to the consumer.²⁴⁷ Since there is no conspiracy exception to state action immunity, local politicians acting for the municipality are free to enter into agreements, which are harmful to the consumer and often arguably corrupt, without the threat of liability.²⁴⁸ The Court's decision in *Omni* provides a striking example.²⁴⁹ There, the city council had to show only that anticompetitive conduct was a foreseeable result of the South Carolina statute that authorized municipalities to regulate the construction of structures within its boundaries, a condition that was "amply met."²⁵⁰ Problems with the foreseeability standard aside, the Court never even considered whether South Carolina had actively supervised its grant of authority because the actor in *Omni* was a municipality.²⁵¹ The reason for this, though not stated in *Omni* itself, is that the Court operated under the assumption that the municipality was acting in the best interest of the public.²⁵² Yet, in reality, the majority owner of the billboard company was friends with many of the city council members and was funding their campaigns.²⁵³ The members of the city council, in protecting their friends at the billboard company, were acting in their *own* best interest rather than in the public interest.²⁵⁴ This type of self-interested behavior by

244. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

245. *Id.*

246. See William J. Martin, Comment, *State Action Antitrust Immunity for Municipally Supervised Parties*, 72 U. CHI. L. REV. 1079, 1085 (2005).

247. See, e.g., *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Active Disposal, Inc. v. City of Darien*, 635 F.3d 883 (7th Cir. 2011); see also Martin, *supra* note 246, at 1085 ("Despite *Hallie's* assurances to the contrary, municipal defendants sometimes threaten competition as much as private parties.").

248. See, e.g., *Omni*, 499 U.S. at 372.

249. *Id.* For facts see *supra* Part II.A.

250. *Omni*, 499 U.S. at 370–73.

251. *Id.* at 390–91.

252. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

253. *Omni*, 499 U.S. at 367.

254. See *id.* at 368.

municipalities is not uncommon.²⁵⁵ Thus, the Court's assurances in *Hallie* appear to carry little weight, and exempting municipalities from the active supervision requirement is actually very harmful to the consumer.²⁵⁶

*c. Exemption of regulatory agencies from
active supervision broadens state action
beyond its intended purpose*

The Court's exemption of municipalities from the active supervision requirement also impacts its treatment of nonsovereign subsidiaries of the state, such as regulatory boards, because courts have not decided whether to treat these entities more like a private actor or a municipality.²⁵⁷ Although the Court has addressed the issue, it has not clearly determined which subdivisions of the state should be regarded as sovereign state actors.²⁵⁸ Thus, it is not clear whether the state must actively supervise these nonsovereign actors.

Further, the Court's suggestions regarding how to treat the agencies are troubling. Based on a footnote in *Hallie*, the Court

255. Just recently, in *Active Disposal, Inc. v. City of Darien*, 635 F.3d 883 (7th Cir. 2011), the Seventh Circuit upheld a regulation enacted by several Illinois municipalities whereby a person in need of a dumpster must use a specific company with which the municipality has an exclusive contract. *Id.* at 885. The court itself recognized that "these contracts often have a financial benefit for the municipality [and] also impose a cost on consumers who would prefer a different, probably less expensive, trash hauler." *Id.* However, because active supervision is not required, and the court found that the anticompetitive consequences of an exclusive contract, which was authorized by the state, were foreseeable, state action immunity applied, and the municipalities were free to continue to act in their own best interest. *Id.* at 889.

256. See Martin, *supra* note 246, at 1085.

257. Compare *Stratlenko v. Chattanooga-Hamilton Cnty Hosp. Auth.*, No. 1:07-CV-258, 2009 WL 736007, at *24 (E.D. Tenn. Mar. 17, 2009) (requiring that "the State exercise ultimate control over the challenged anticompetitive conduct" before granting immunity to a hospital authority's peer review committee), with *Shames v. Cal. Travel & Tourism Comm'n*, 607 F.3d 611, 618-19 (9th Cir. 2010), *rev'd on rehearing en banc*, 626 F.3d 1079 (holding that the California Travel and Tourism Commission was exempt from the active supervision requirement because it "possesse[d] enough of the qualities of a state agency." The case was reversed and remanded when the Ninth Circuit reheard it en banc, but there, the court found that California had not authorized the anticompetitive conduct and did not address the active supervision issue.). See also Cooper & Kovacic, *supra* note 100, at 1575-76 (explaining that the Court has not determined how to treat nonsovereign subsidiaries); Hettich, *supra* note 111, at 117 ("[C]ase law does not provide clear guidance with regard to the question of which subdivisions of the state should be regarded as state actors."); Hettich, *supra* note 111, at 134 ("There are no uniformly applied or even clear criteria to determine the status of these entities.").

258. Hettich, *supra* note 111, at 134 ("While case law is still clear that private actors are subject to the supervision requirement, it is still unclear which hybrid or local entities are exempted from supervision.").

seemingly would not require active supervision for state agencies,²⁵⁹ but state agencies often act more similarly to a private party than to a state.²⁶⁰ If active state supervision is not required, these agencies are essentially free to implement their own anticompetitive regulations without the potential for liability.²⁶¹ This expands *Parker* beyond its goal of preserving state sovereignty and makes the immunity too broad.²⁶² This broadening of the doctrine frustrates antitrust legislation and harms the consumer by allowing the agencies to advance their own interests instead of the consumer's.²⁶³ The Court has even said that it is "obvious that the fact that . . . the conscious desire on [a state agency's] part may have been to benefit [private parties] . . . cannot transmute [the agency's] official actions into those of a private organization."²⁶⁴ Yet, if the goal of the state agency is to protect private parties, why should the agency be afforded the same leniency that municipalities are given?²⁶⁵ The purpose of the state action doctrine is to allow states to implement their own regulatory policies.²⁶⁶ Immunizing agencies that act on behalf of

259. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985); *see supra* II.B.1.

260. *F.T.C. v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987) (noting that state agencies may engage in the same activities as a private party); *see also* *Wash. State Elec. Contractors Ass'n v. Forrest*, 930 F.2d 736, 737 (9th Cir. 1991) (remanding the case for findings on active supervision as well as a clearly articulated state policy after noting that the defendant rate-setting commission had "both public and private members, and the private members [had] their own agenda which may or may not be responsive to state labor policy").

261. *Cooper & Kovacic*, *supra* note 100, at 1577-78 (arguing that active supervision for state agencies should be required because state agencies enact so many anticompetitive regulations, which they can usually find the authority for in state legislation, making a clear articulation requirement insufficient on its own).

262. Elizabeth Trujillo, *State Action Antitrust Exemption Collides with Deregulation: Rehabilitating the Foreseeability Doctrine*, 11 *FORDHAM J. CORP. & FIN. L.* 349, 363 (2006) ("The problem with the *Midcal* test has been that it does not necessarily advance the interests of the state as *Parker* had originally intended for state action to do.").

263. *See id.* ("[D]elegation to regulatory agencies allows for regulated entities such as public utilities with close ties to the same entities regulating them to advance their own interests.").

264. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 411 n.41 (1978).

265. *See Cooper & Kovacic*, *supra* note 100, at 1595-96 (footnote omitted) ("Much anticompetitive conduct is not the result of legislation, but rather emanates from regulatory boards made up of decision makers who wear their regulatory hat at the board's monthly meetings, but earn a living in the very profession that they have been charged to regulate the other 353 days of the year. Given their financial self interest, there seems to be no principled reason to consider these actors anything but private.").

266. *See* Timothy J. Muris, *Clarifying the State Action and Noerr Exemptions*, 27 *HARV. J.L. & PUB. POL'Y* 443, 445 (2004) ("*Parker* stands for the proposition that the federal antitrust laws, and the Sherman Act in particular, were not intended to restrict the lawmaking power of state legislatures.").

private parties, rather than the state, does nothing to advance this purpose. Further, while the immunized action may benefit some private party, surely, if it is anticompetitive, it is at the expense of another.²⁶⁷ Regulatory boards, such as state dental boards, state bar associations, or state real estate boards “acting under the guise of consumer protection” can implement anticompetitive regulations that make it more difficult for others to practice in that area.²⁶⁸ Courts immunize this conduct if the agency can show that the state authorized or foresaw this type of regulation.²⁶⁹ When this conduct is immunized, there is no protection for those who would otherwise claim that they were harmed by an antitrust violation, and the regulatory agencies are free to act in their own best interest at the expense of the consumer.

3. Market Participant Exception

Another area where the Court has created uncertainty within the state action doctrine concerns whether there is a market participant exception.²⁷⁰ In *Omni*, the Court held that there is a “possible market participant exception”²⁷¹ and that “[*Parker*] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.”²⁷² Courts have been left to guess whether such an exception exists.²⁷³ The court in *Pennsylvania v. Susquehanna Area Regional Airport Authority*²⁷⁴ noted this uncertainty, saying that the Court “has [not] clearly articulated the parameters of the market participant exception.”²⁷⁵ The court also cited two Third Circuit cases, one holding that a market participant exception does exist, and the other holding that it

267. See Cooper & Kovacic, *supra* note 100, at 1577–78.

268. *Id.* at 1577 n.99.

269. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985); see *supra* II.B.1.

270. See Cooper & Kovacic, *supra* note 100, at 1577–78.

271. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379 (1991) (emphasis added).

272. *Id.* at 374–75 (emphasis added).

273. See *Sisters of St. Francis Health Servs., Inc. v. Morgan Cnty., Ind.*, 397 F. Supp. 2d 1032, 1046 (S.D. Ind. 2005) (finding no authority or support for a market participant exception); see also *Pennsylvania v. Susquehanna Area Reg'l Airport Auth.*, 423 F. Supp. 2d 472, 482 (M.D. Pa. 2006) (assuming a market participant exception exists, but holding that challenged activity did not qualify as market participation).

274. 423 F. Supp. 2d 472.

275. *Id.* at 482 n.16.

does not.²⁷⁶ The court “assume[d] recognition of the market participant exception [until] further clarification from the Third Circuit and Supreme Court” is given.²⁷⁷

Having no market participant exception, or an unclear exception, makes it too easy for the state to abuse its protected regulatory power and favor state-owned or state-affiliated enterprises.²⁷⁸ For example, a municipality, without antitrust liability, could require solid waste to be treated at a city-run facility, rather than at competing private facilities.²⁷⁹ The municipality is not acting pursuant to a state policy but is acting as a seller of waste services.²⁸⁰ If the purpose of the state action doctrine is to preserve the principles of federalism and to respect state sovereignty, the state’s decision to act as a market participant should not be immunized. In that situation, the state is not regulating private conduct but rather acting as a private party would when it enters the market. Protecting a state when it is acting in this capacity does nothing to further the principles of federalism. Similarly, cities or agencies that purchase particular commodities use their power “to reduce prices below the competitive level, to impose terms and conditions on sellers, or to favor local businesses at the expense of out-of-state companies.”²⁸¹ Such conduct is an abuse of the state’s regulatory power, and immunizing this type of state action thwarts the goals of antitrust law by harming the consumer.

IV. RECOMMENDATIONS

Because the *Noerr* and state action doctrines are broader than is justified by the principles that should shape them, the Court should narrow the doctrines. It should do so by aligning the *Noerr* doctrine with the First Amendment and aligning the state action doctrine with the principles of federalism. Doing this will narrow the doctrines sufficiently to preserve the goals of antitrust law, but it will also still

276. *Id.* (quoting *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001) (recognizing exception) and *Mariana v. Fisher*, 338 F.3d 189, 203 (3d Cir. 2003) (no market participant exception)).

277. *Id.*

278. *See* Hettich, *supra* note 111, at 151.

279. *See* *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1077 (1st Cir. 1993).

280. *See* Hettich, *supra* note 111, at 150.

281. *McGowan & Lemley*, *supra* note 17, at 320 (footnotes omitted).

give deference to the underlying principles of the First Amendment and federalism.

*A. Narrowing Noerr and Bringing It Within
the Parameters of the First Amendment*

The Court should narrow *Noerr*—first, by clearly defining what a “petition” is, and second, by adopting limitations similar to those already placed on the First Amendment, such as a fraud exception and a strengthened sham exception.

1. The Court Should Clearly Define “Petition”

Because *Noerr* is based on the First Amendment right to petition, the conduct that *Noerr* protects should align with the rights that the First Amendment protects.²⁸² However, since the Court has not used First Amendment principles to define the scope of the doctrine, the scope of protection under *Noerr* is currently broader than is justified by the First Amendment.²⁸³ Thus, the Court should first narrow the scope of *Noerr* by more narrowly defining what constitutes a petition. Doing an analysis now to determine what is and is not protected by the First Amendment right to petition will inform where the boundaries of *Noerr* immunity should be drawn. For this reason, the Court needs to evaluate what a “petition” is and define the term more specifically, taking guidance from the kind of petitioning activity the First Amendment protects.²⁸⁴ The Court should start by looking at the First Amendment itself, which says, “Congress shall make no law . . . abridging . . . the right of the people peaceably . . . to petition the Government for a redress of grievances.”²⁸⁵ To qualify as a petition entitled to government protection, the communication must be a request to the government for some action.²⁸⁶ Thus, activity, such as filings with the

282. *See id.* at 381.

283. *Id.* at 300.

284. *Id.* at 301 (“The only reason for exempting petitioning activity is that the Constitution takes precedence over the antitrust laws. It follows that when the First Amendment protections of speech and petitioning are inapplicable, anticompetitive petitioning activity should be subject to antitrust liability . . .”).

285. U.S. CONST. amend. I.

286. *Id.*; *E. R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 136 (1961) (describing a petition as “an attempt to persuade the legislature or the executive to take particular

government, that is not aimed at directly influencing the government to take a particular action should not be immunized.²⁸⁷ The Court can use this definition of petitioning as a framework to create boundaries to *Noerr* immunity.

2. The Court Should Adopt First Amendment Limitations

The right to petition is not absolute.²⁸⁸ The First Amendment does not protect petitions that are based on fraud or misrepresentation.²⁸⁹ The Court has stated, “[T]here is no constitutional value in false statements of fact.”²⁹⁰ Nor does the First Amendment protect petitions that are designed to harass an opponent rather than obtain relief.²⁹¹ Further, the right to petition and the right to free speech—although distinct rights—are related and, as such, are subject to the same constitutional analysis.²⁹² Speech that is not protected by the right to free speech is likewise not protected by the petition clause.²⁹³ For example, petitions that “express damaging falsehoods” are not protected speech according to libel law²⁹⁴ and

action with respect to a law”); *see also* Lao, *supra* note 65, at 1004 (giving different definitions for petition).

287. *See* Lao, *supra* note 65, at 1007 (“The First Amendment Right of Petition mandates the protection of citizens’ efforts to influence governmental action. If the nature of the filing is such that it is primarily mechanical and does not attempt to persuade any official to do anything, it is not a petition, and hence, does not implicate the right of petition.”). One area where this would have a significant impact is in the regulation of brand-name drugs. A drug manufacturer that wishes to sell a new brand-name drug is required to submit a listing identifying all patents. *Id.* at 993. This listing is filed in what is known as the Orange Book. *Id.* Where a drug company files an Orange Book listing, the FDA engages in no review. *Id.* The company does not ask the FDA for any particular action, yet it receives benefits from simply filing the listing. *See id.* at 994. Because the drug company does not seek specific action from the FDA, this should not be considered a petition, and *Noerr* immunity should not be given without even getting to the question of whether an exception applies. *Id.* at 1005. This type of analysis would apply anywhere communication is made with the government without the petitionary component. *See id.* at 1004–07.

288. *McDonald v. Smith*, 472 U.S. 479, 483–85 (1985).

289. *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) (*per curiam*).

290. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

291. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 932 (9th Cir. 2006) (“[N]either the Petition Clause nor the *Noerr-Pennington* doctrine protects sham petitions, and statutes need not be construed to permit them.”).

292. *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985).

293. *See McDonald*, 472 U.S. at 485.

294. *Id.* at 484.

therefore should not be protected by *Noerr* either.²⁹⁵ Even beyond the well-known areas of the law where false statements are not protected by the First Amendment, such as defamation, perjury, and fraudulent solicitation of money, numerous federal laws restrict the making of false statements.²⁹⁶ Thus, *Noerr* should not protect these types of petitions.

a. The Court should create an exception for fraud and intentional misrepresentations

Using these guidelines, the Court should implement a fraud and misrepresentation exception to *Noerr* that is separate and distinct from the sham exception. This exception should deny immunity to petitioners that make intentional misrepresentations, and it should apply in legislative and regulatory settings as well as in the adjudicatory context. The Court should create a fraud exception because “false speech does not advance any First Amendment interests.”²⁹⁷ In order to protect legitimate speech, the Court has offered some protection for false speech.²⁹⁸ This should hold true in the *Noerr* context. It would be antithetical to First Amendment goals to stifle petitions by imposing the fear of antitrust liability on petitioners whose claims are based on information that is not entirely true. Thus, only intentional misrepresentations should preclude a petition from immunity.²⁹⁹ However, it is potentially very dangerous to implement anticompetitive laws and regulations based on false information.³⁰⁰ Lawmakers and adjudicators rely on the petitioner for

295. Lao, *supra* note 65, at 1008 (discussing *McDonald* and arguing that “[i]f the right of petition is not absolute vis-à-vis libel because of that law’s competing interests, then neither should it be absolute vis-à-vis antitrust enforcement for the same reason”).

296. See Brief of Professors Eugene Volokh & James Weinstein as Amici Curiae in Support of Petitioner at 2, *United States v. Alvarez*, 132 S. Ct. 457 (2011) (No. 11-210), 2012 WL 6179424 (arguing that the Supreme Court should treat knowing falsehoods as an exception to First Amendment protection, with some limited exceptions that would prevent a chilling effect on true statements, and listing numerous examples of areas where the Court has upheld the restriction of false speech).

297. Cooper & Kovacic, *supra* note 100, at 1606.

298. *Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964)).

299. Some commentators have argued that this concern only applies to petitions in a legislative setting, where people should be able to engage in open debate. See, e.g., Lao, *supra* note 65, at 1009–10. In an adjudicatory setting, petitioners must already act in accordance with the court or agency’s procedures. *Id.* Thus, the requirement that the misrepresentation be intentional should only apply to petitions made in a legislative setting. *Id.*

300. See *supra* Part III.B.2.

accurate information so that they can make the best-informed decisions.³⁰¹ If petitions based on false information are protected, these governmental systems cannot function properly.³⁰² Thus, the same protection given to false speech in the First Amendment context need not be given here. The only extra requirement should be that the fraud or misrepresentation was intentional. Beyond that, extra protections for false speech should not be required, because the danger of these laws and regulations outweighs the danger of stifling legitimate petitions.³⁰³

*b. Intentional misrepresentations should
not be immunized in any context*

The Court and many commentators suggest that any misrepresentation exception should be limited to petitions in an adjudicatory context.³⁰⁴ Some commentators cite evidentiary concerns.³⁰⁵ Others, like the Court, suggest that misrepresentations are inevitable and acceptable where lobbying is done in a political context but are not acceptable inside the courts, which require accuracy.³⁰⁶ However, as Part III.B.2 of this Article has discussed, misrepresentations in the legislative setting can be equally as harmful as those in an adjudicative setting.³⁰⁷ Therefore, the chilling effect of sanctioning misrepresentations in a legislative setting can be

301. See Lao, *supra* note 65, at 1016 (arguing that this is not the case in legislative proceedings where, because of the nature of lobbying, “some misrepresentations may be inevitable”).

302. See *id.* at 1016–17.

303. *Id.* at 1024 (“While it is generally true that speech restraints may deter the free flow of information to government, the type of petitioning that implicates anticompetitive concerns is typically made by business interests with an economic stake in the subject matter of the petition. It is reasonable to assume that their economic self-interest in the sought-after action would counterbalance, to some extent, the fear of immunity loss and neutralize (or minimize) the chilling effect.”).

304. See, e.g., Cooper & Kovacic, *supra* note 100, at 1607; Lao, *supra* note 65, at 1016.

305. Cooper & Kovacic, *supra* note 100, at 1607.

306. Lao, *supra* note 65, at 1016.

307. See *supra* Part II.B. (discussing *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 843 (7th Cir. 2011), where a hospital presented false information about effects of a new health center, and based on this information the Village Board denied approval for construction of the new health center).

adequately addressed by withholding *Noerr* protection only when the misrepresentation is intentional.³⁰⁸

Additionally, the misrepresentation exception needs to be separate from the sham exception because the purpose of the sham exception is to keep out those who do not genuinely seek governmental action.³⁰⁹ If the sham exception is the only exception, petitioners who intentionally misrepresent their cause are not necessarily precluded from immunity because their petition is “genuine.”³¹⁰ In fact, those employing fraud and misrepresentations in their petitions do likely want to obtain a particular result; otherwise, they would not need to lie. Furthermore, since a winning lawsuit is by definition not a sham,³¹¹ a lawsuit won based on misrepresentations would still be immune from liability.³¹² Thus, misrepresentations cannot fall within in the sham exception.

3. Broadening Sham to Protect the Consumer

Finally, the sham exception needs to be broadened significantly. First, the Court should clarify the objective part of the test and specifically define what “objectively baseless” means. Using probable cause and the language of Rule 11 as alternative definitions is confusing because they have different meanings.³¹³ Additionally, this language makes the requirement for proving a sham too

308. The District of Massachusetts recently made a similar argument in response to a claim that the sham exception only applies in an adjudicatory capacity. *In re Prograf Antitrust Litigation*, No. 1:11-md-2242-RWZ, 2012 WL 293850, at *5 (D. Mass. Feb. 1, 2012). The court asserted that “if the sham exception applied only to adjudicative processes, then any act of advocacy before a legislative or quasi-legislative body would be shrouded in *carte blanche* immunity regardless of purpose or sufficiency—even if the activity was utterly baseless, an abuse of process, and motivated solely to stifle competition. Such a result is inconsistent with the reasoning underlying the doctrine espoused in *Noerr* and reiterated in subsequent Supreme Court cases.” *Id.*

309. See *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961).

310. Lao, *supra* note 65, at 1021–22 (“Without a separate misrepresentation exception . . . even litigation tainted with fraud and used as an anticompetitive tactic could be immunized under the *Noerr* doctrine, on the theory that the purpose of the litigation (fraud-tainted or not) was to obtain a successful judicial outcome and not merely to harass the competitor through the litigation process itself.”).

311. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 n.5 (1993).

312. Lao, *supra* note 65, at 1022.

313. See *supra* Part III.A.1.a.

narrow.³¹⁴ “Objectively baseless” should therefore mean that there is no reasonable expectation of success. This would help limit the number of petitions that *Noerr* immunizes. While the test would be strong enough to protect losing claims from automatically being considered a sham,³¹⁵ it would limit the exception by denying immunity to those petitions that have probable cause but nonetheless have no reasonable expectation of success. This would strengthen the safeguard against claims that a petitioner intended to abuse the consumer through the *process* of petitioning rather than the result of the petition.

Second, the Court should eliminate the subjective part of the test. Looking at whether the petition was objectively baseless serves a similar function as the subjective part of the test in that it keeps out those who petitioned for the purpose of abusing the process rather than obtaining a favorable result.³¹⁶ Likely, petitioners actually seeking success on the merits will not bring an objectively baseless lawsuit. However, the objective test does not create an easy way for petitioners to retain immunity by showing that they wanted the result of the petition, as the subjective part of the test does. Thus, eliminating the subjective part of the test leaves an exception that is able to achieve its purpose—to protect against baseless lawsuits meant to harass opponents. Limiting the sham exception in this way keeps out lawsuits that are not entitled to First Amendment protection and that thus do not deserve immunity under *Noerr*.³¹⁷ Further, the sham exception recognizes the importance of protecting the petitioning process.³¹⁸ While petitions are protected under the current doctrine, they cannot be protected adequately and effectively if people are able to abuse the system that hears and responds to petitions.³¹⁹ This is another reason to broaden the sham exception.³²⁰

314. See *supra* Part III.A.1.a.

315. The Court has been concerned with a backward-looking rule whereby courts make a determination based on the knowledge that the petition has been unsuccessful. *Prof'l Real Estate Investors*, 508 U.S. at 60 n.5.

316. Lao, *supra* note 65, at 1025 (“If a lawsuit is already shown to be objectively baseless, the institution of suit itself implicitly shows a degree of lack of good faith; therefore, any further requirement of proof of the litigant’s subjective intent in bringing the suit is redundant.”).

317. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 932 (9th Cir. 2006); Lao, *supra* note 65, at 1026.

318. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511–12 (1972).

319. Lao, *supra* note 65, at 1015–16.

*B. Narrowing the State Action Doctrine
and Aligning It with
the Principles of Federalism*

State action immunity needs to be defined by the principles of federalism. The Court has made it clear that it wants to be deferential to the regulatory policies of the states, even where the Supremacy Clause would permit preemption.³²¹ However, if deference is the goal, the Court should immunize state action that actually represents “the substantive principles of governance expressed in the Court’s respect for the role of the states in our federal system.”³²² The doctrine should be defined narrowly so that it immunizes only state action that regulates domestic commerce, not policies implemented for the benefit of private parties without state guidance or review.³²³ In order to do this, certain changes must be made to the doctrine.

1. Narrowing the Doctrine
by Strengthening the
Clear Articulation Standard

First, the Court must strengthen the clear articulation standard by requiring more than foreseeability.³²⁴ In *Cantor v. Detroit Edison Co.*,³²⁵ the Court held that state action should be immunized from

320. *Id.* (“The need to protect government decision-making from corruption and abuse militates *against* too narrow an interpretation of sham.”).

321. This reflects a general attitude of the Supreme Court toward state sovereignty in the last few decades. See JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 191–98 (2011). Justice Stevens criticizes the Rehnquist Court for its expansion of state sovereignty. *Id.* Rehnquist operated under the assumption that “when a state acts as a state in the conduct of governmental functions . . . the federal power is not supreme.” *Id.* at 192 (discussing Rehnquist’s majority opinion in *National League of Cities v. Usery*, 426 U.S. 823 (1976), which was later overturned, but which, according to Stevens, shaped the way Rehnquist treated state sovereignty in later cases). Stevens criticizes this view and the way that Rehnquist used it to expand the doctrine of sovereign immunity. *Id.* at 195.

322. McGowan & Lemley, *supra* note 27, at 299. In Justice Stevens’ view, the current view of state sovereignty is far too broad. *Id.* He argues that “[d]epriving a state of the mysterious right to protect its dignity from its own citizens is . . . necessary to protect the federal rights of those citizens.” STEVENS, *supra* note 321, at 196. The current application of the state action doctrine seems to comport with the Court’s broad grant of sovereignty to the fifty states. While this Article proposes that the state action doctrine may be restricted in a way that does not conflict with the principles of federalism, the Court may first have to narrow its broad view of state sovereignty before it is willing to make these types changes.

323. See STEVENS, *supra* note 321, at 196.

324. See REPORT OF THE STATE ACTION TASK FORCE, *supra* note 241, at 51.

325. 428 U.S. 579 (1976).

antitrust liability only to the extent necessary to make the state's act work.³²⁶ The Court should return to its holding in *Cantor* as a guide to narrowing the doctrine. To determine whether anticompetitive conduct comes within the purview of a state's policy, courts should inquire whether the state actually authorized the specific anticompetitive conduct. In 2001, the FTC created a State Action Task Force (the "Task Force") to look into the state of the doctrine.³²⁷ In 2003, the Task Force issued a report in which it concluded that courts applied the doctrine in a way that threatened competition, and it recommended a narrowing of the doctrine to "help ensure that robust competition continues to protect consumers."³²⁸ With respect to the clear articulation standard, the Task Force recommended, as does this Article, that courts find both that the state authorized the specific conduct and that the state has adopted a policy to displace competition in the manner at issue.³²⁹ This two-part test should mandate that the state actually intended the anticompetitive result.³³⁰ Some scholars, even while arguing that the clear articulation standard needs to be narrowed, have said that the courts can still use the foreseeability standard to determine whether the state's policy to displace competition includes the conduct in question as long they narrowly construe it to the specific conduct at issue.³³¹ However, it seems that the foreseeability standard is too easy to stretch to the point that it no longer has any teeth, which results in a return to the current state of the doctrine.³³²

Still, requiring the state to expressly point to which areas it intends its policy to extend seems too burdensome. Thus, the Court should create certain guidelines that could be used to determine whether a state policy included the conduct at issue. Courts could look at the legislative history of the policy, the actual language of the statute, and other conduct that the state may expressly authorize.³³³

326. *Id.* at 596 n.34; *see also* Hettich, *supra* note 111, at 127 (discussing *Cantor* and clear articulation standard).

327. *See* REPORT OF THE STATE ACTION TASK FORCE, *supra* note 241, at 51.

328. *Id.* at 1.

329. *Id.* at 51.

330. *See id.*

331. *See* Trujillo, *supra* note 262, at 356.

332. *See supra* Part B.1.

333. *See* REPORT OF THE STATE ACTION TASK FORCE, *supra* note 241, at 51 n.220.

While this looks somewhat similar to the foreseeability standard, a case-by-case analysis using set factors would ensure that courts take a careful look at what the state's policy authorizes, rather than just concluding that the policy could foreseeably include the conduct at issue. Additionally, requiring the state to expressly authorize the conduct would eliminate state action immunity where the court finds only a general regulatory scheme to displace competition rather than authorization of the specific conduct.³³⁴ This approach narrows the doctrine enough to protect consumers from anticompetitive conduct where the state neither intended nor authorized the conduct. However, the approach still protects the underlying goal of the state action doctrine—that antitrust law is deferential to state regulatory policy, as long as that policy is clearly articulated and specifically intends to displace competition in the particular area at issue.

2. Narrowing the State Action Doctrine by Strengthening the Active Supervision Requirement

Second, the Court should create clear guidelines that strengthen what is sufficient for active supervision. The ultimate purpose of the active supervision requirement is to grant antitrust immunity to private actors *only* when the private actor is engaging in conduct deemed to be the conduct of the state itself.³³⁵ To start, the Court should require the state to actually engage in some level of supervision.³³⁶ Next, the Court should require that the actor show that the state, not the private actor, is responsible for the anticompetitive conduct. Some commentators have argued for a sliding-scale approach, by which the Court would look at the entity engaging in the anticompetitive conduct, and the conduct itself, to

334. *See id.* at 50–52.

335. *See id.* at 53–54.

336. This is what the court held in *Ticor*. F.T.C. v. Ticor Title Ins., 504 U.S. 621, 637–38 (1992). However, that case has been applied narrowly and only to very extreme situations, because the court found that there was no supervision there at all. *Id.* at 638; *see also* Hettich, *supra* note 111, at 137–38 (explaining that *Ticor* only clarified the active supervision requirement for extreme cases); REPORT OF THE STATE ACTION TASK FORCE, *supra* note 241, at 37 (noting that *Ticor* provided little if any specific guidance about what constitutes active supervision). Still, this should be the starting point for all active supervision analyses.

determine how strictly it should apply this standard.³³⁷ However, such an approach would be hard to administer and would be very similar to the existing test, where courts make subjective determinations about what qualifies as sufficient supervision. Thus, to determine whether the actor made a sufficient showing of responsibility, courts should look at certain factors, including whether the state

has ascertained the relevant facts, examined the substantive merits of the private action, assessed whether the private action comports with the underlying statutory criteria established by the state legislature, and squarely ruled on the merits of the private action in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than private choice.³³⁸

Furthermore, the Court should reverse its holding in *Hallie* and require active supervision for municipalities, using these same guidelines. While the Court has held that municipalities presumptively serve the public interest, it is clear that too often this is not the case.³³⁹ Under the current doctrine, local politicians, acting on behalf of municipalities, are able to conspire with constituents who have something to offer them.³⁴⁰ This result undermines the Court's reasoning and suggests that state supervision of local officials is necessary. Likewise, the Court should treat nonsovereign subsidiaries of the state as private parties rather than state actors and should require active supervision for these entities as well. One option is for the courts to first determine whether the activities of the regulatory board or other subdivision of the state are essentially that of a private party by looking at "how the Board functions in practice,

337. See Hettich, *supra* note 111, at 147 (discussing a "tiered approach to determine immunity, as favored by" John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 ANTITRUST L.J. 1075, 1089–90 (2005)).

338. REPORT OF THE STATE ACTION TASK FORCE, *supra* note 241, at 54. The Task Force also recommended implementing procedural guidelines, which would require that the private actor show that the state had developed a factual record, had made an assessment about how the private action comported with these standards, and had put that in a written decision. *Id.* at 55.

339. See *supra* Part III.C.2.b.

340. See *supra* Parts III.B.1.c, III.C.2.b.

and . . . the role played by its [private] members.”³⁴¹ However, courts could more easily administer a bright-line rule that requires active supervision. Additionally, requiring the state to actively supervise the municipalities and regulatory agencies that are implementing its regulatory policies would ensure that these bodies were acting in accordance with the state’s policies.³⁴² While this may create extra work for the states, it will incentivize them to think carefully about the anticompetitive policies they wish to enact.³⁴³ If the state does not want to implement its own policy, it will have to actively supervise any party that does.³⁴⁴ This requirement creates a higher bar for immunity. Additionally, it would “[f]ocus the inquiry on the relevant question of whether in a given case there actually are deliberate and intended state policies that would justify setting aside national antitrust goals.”³⁴⁵ Further, this approach does not encroach on the principles of federalism, because any policy that is actually authorized and supervised by the state will still be protected.³⁴⁶

3. Implementing Market Participant and Conspiracy Exceptions

Finally, the Court should implement market participant and conspiracy exceptions to state action immunity. When a state government enters the market to buy or sell goods in competition with private firms, it acts as a market participant.³⁴⁷ When the state creates a monopoly or acts in an otherwise anticompetitive way in this capacity, it simply acts to exclude its own competition.³⁴⁸ Because the state is no different from any private actor in this situation, in the sense that it is acting as any other buyer or seller of goods rather than regulating the market, its anticompetitive conduct

341. *F.T.C. v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987); *see also* REPORT OF THE STATE ACTION TASK FORCE, *supra* note 241, at 55 (listing “laundry list of factors” currently used to determine whether the state must actively supervise a quasi-governmental entity).

342. *See* REPORT OF THE STATE ACTION TASK FORCE, *supra* note 241, at 54.

343. *Id.*

344. *Id.*

345. *Id.* at 52.

346. *See id.*

347. *See McGowan & Lemley*, *supra* note 27, at 320.

348. *Id.*

should not be immunized.³⁴⁹ There are already other areas of the law where the Court has created an exception for states acting as a market participant.³⁵⁰ For example, there is a market participant exception to the Dormant Commerce Clause.³⁵¹ Action that “constitute[s] a direct state participation in the market” is immune from the Dormant Commerce Clause, but regulatory action is not.³⁵² There is no reason why this exception should not extend to antitrust cases as well.

The State Action Task Force recognized that “a state may elect to allow market participation by municipalities.”³⁵³ However, this just underscores the need for municipalities to be subject to the active supervision requirement.³⁵⁴ Creating a market participant exception, which would subject states and municipalities to antitrust liability for acting anticompetitively, would protect those that the state or municipality competes against.

Further, adding a conspiracy exception to *Parker* would eliminate the opportunity for states to abuse their regulatory immunity by entering into conspiracies with private parties.³⁵⁵ Because the current state of the doctrine fosters corruption within the political system,³⁵⁶ a conspiracy exception is needed to prevent corrupt agreements between state actors and individuals. A conspiracy exception would also bolster the market participant

349. Hettich, *supra* note 111, at 150 (“There is no reason to treat states differently from private actors if a state is becoming a participant in a private agreement or in a combination with others to restrain trade.”).

350. *See, e.g.,* Reeves, Inc. v. Stake, 477 U.S. 429 (1980) (recognizing the market participant exception to the Dormant Commerce Clause where state entered the market as a seller); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (recognizing the market participant exception to the Dormant Commerce Clause where the state entered market as a purchaser).

351. A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 265 n.55 (3d Cir. 2001).

352. *Id.* (internal quotation marks omitted) (citing Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 593 (1997) and New Energy Co. v. Limbach, 486 U.S. 269, 277 (1988)).

353. REPORT OF THE STATE ACTION TASK FORCE, *supra* note 241, at 57.

354. *See id.* A municipality’s action as a market participant should not be immunized because the municipality’s actions are likely in their own best interest rather than the public’s when they act as a competitor in the market. *Id.*

355. *See* Hettich, *supra* note 111, at 151. Hettich argues that when the state enters the market as a competitor, its role as a market participant creates a conflict of interest with its role as a regulator. *Id.* Creating a conspiracy exception along with a market participant exception will close the door on the states’ ability to abuse their regulatory power. *Id.*

356. *See supra* Parts III.B.1.c, III.C.2.b.

exception by treating such conspiracies as private action rather than state action.³⁵⁷ These exceptions would not take away from the necessary deference required by federalism, because in this situation, the state is acting as a private party and thus is owed no deference.³⁵⁸

V. CONCLUSION

Courts and scholars today recognize that the First Amendment right to petition is the basis for the *Noerr-Pennington* doctrine and that federalism is the root of the state action doctrine.³⁵⁹ However, these two doctrines have evolved far beyond what the First Amendment and federalism require. This departure can be traced to the Court's holdings that petitioning and state action were "essentially dissimilar" from what antitrust legislation was designed to regulate. Contrary to the Court's decisions, antitrust law *is* and should be concerned with regulating petitioning and state action.³⁶⁰ The doctrines in their current states are immunizing anticompetitive conduct that is very harmful to the consumer and that neither the First Amendment nor the principles of federalism protect. Consumers are left without the protection of antitrust law and end up paying far more than they should for goods and services. While these important constitutional protections deserve deference, the consumer is being harmed in the name of that deference by doctrines that do not align with what these principles require. Thus, the Court should narrow the reach of *Noerr* and *Parker*. By acknowledging that these doctrines concern constitutional protections and abandoning the notion that the Sherman Act simply does not apply in these contexts, the Court can use the First Amendment and federalism to define the

357. Hettich, *supra* note 111, at 151.

358. See REPORT OF THE STATE ACTION TASK FORCE, *supra* note 241, at 1 ("Because the state action doctrine rests on principles of federalism, the doctrine shields sovereign *activities of the State itself*." (emphasis added)).

359. See, e.g., *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 841–42 (7th Cir. 2011) (explaining that the First Amendment protects the right of people to try to persuade the government that monopoly is preferable to the policy of the Sherman Act); *In re Flonase Antitrust Litig.*, 795 F. Supp. 2d 300, 309 (E.D. Pa. 2011) (recognizing *Noerr* as a First Amendment doctrine); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372 (1991) (recognizing that *Parker* is designed to protect the interests of federalism).

360. See McGowan & Lemley, *supra* note 27, at 293 ("[P]etitioning and state action present precisely the sorts of problems with which the antitrust laws are concerned—exploitation of consumers through the charging of supracompetitive prices.").

outer limits of *Noerr* and *Parker*. This will afford more protection to the consumer and can be done without sacrificing the individual's right to petition or detracting from a state's sovereignty.