

Noerr-Pennington Immunity From Antitrust Liability Under *Clipper Express v. Rocky Mountain Motor Tariff Bureau Inc.*: Replacing the Sham Exception With a Constitutional Analysis

Lawrence D. Bradley

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Lawrence D. Bradley, *Noerr-Pennington Immunity From Antitrust Liability Under Clipper Express v. Rocky Mountain Motor Tariff Bureau Inc.: Replacing the Sham Exception With a Constitutional Analysis*, 69 Cornell L. Rev. 1305 (1984)
Available at: <http://scholarship.law.cornell.edu/clr/vol69/iss6/4>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

NOERR-PENNINGTON IMMUNITY FROM ANTITRUST
LIABILITY UNDER *CLIPPER EXPRESS V. ROCKY
MOUNTAIN MOTOR TARIFF BUREAU, INC.*:
REPLACING THE SHAM EXCEPTION WITH
A CONSTITUTIONAL ANALYSIS

INTRODUCTION

Federal antitrust laws prohibit activity that restrains trade or reduces competition.¹ The antitrust statutes' prohibitions collide with first amendment rights² when the trade restraint results from petitioning the government. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*³ and *United Mine Workers of America v. Pennington*,⁴ the Supreme Court held that activity is immune from antitrust liability if the imposition of such liability would infringe upon the actor's right to petition the government. This *Noerr-Pennington* doctrine does not, however, protect ostensible petitioning that is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with . . . a competitor."⁵

Considerable confusion has developed regarding what one party must show to establish that another party has engaged in "sham" petitioning.⁶ Some courts have automatically awarded alleged petitioning activity a *Noerr-Pennington* exemption from antitrust liability and then have had to determine whether that activity fit into a "sham exception," which would make the activity susceptible to renewed antitrust challenges.⁷ In *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*,⁸ the Ninth Circuit replaced this "exception-to-the-exemption" analysis with a clear first amendment analysis; under the Ninth Circuit's approach, *Noerr-Pennington* immunity attaches only if the activity at issue is protected by the first amendment.⁹

¹ See, e.g., Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1982); Clayton Act, 15 U.S.C. § 15 (1982).

² 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").

³ 365 U.S. 127 (1961).

⁴ 381 U.S. 657 (1965).

⁵ *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961).

⁶ See *infra* notes 54-57 and accompanying text.

⁷ The Supreme Court formulated this analysis in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); subsequent lower court decisions have further developed it in interpreting *California Motor Transport*. See *infra* notes 38-57 and accompanying text.

⁸ 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

⁹ *Id.* at 1255.

This Note asserts that the *Noerr-Pennington* doctrine's history indicates that the Supreme Court based the doctrine squarely on the first amendment.¹⁰ It argues that the *Clipper* court's first amendment approach to the *Noerr-Pennington* doctrine is sounder than prior courts' exception-to-the-exemption analysis.¹¹ It examines the two types of activity that do not deserve *Noerr-Pennington* immunity under a first amendment approach—sham petitioning¹² and petitioning that the government may constitutionally restrict.¹³ Finally, this Note demonstrates that the *Clipper* court's constitutional approach is, for all forms of petitioning, doctrinally consistent with the existing body of *Noerr-Pennington* case law.¹⁴

I

BACKGROUND

The basic goals of antitrust laws are to protect competition and prevent monopolies.¹⁵ Antitrust doctrine is for the most part judicially created,¹⁶ as are various immunities from antitrust coverage.¹⁷ One

¹⁰ See *infra* notes 15-57 and accompanying text.

¹¹ See *infra* notes 100-21 and accompanying text.

¹² See *infra* notes 109-21 and accompanying text.

¹³ See *infra* notes 122-30 and accompanying text.

¹⁴ See *infra* notes 131-64 and accompanying text.

¹⁵ See *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 (1951) (“Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.”) (quoting *Staley Mfg. Co. v. FTC*, 135 F.2d 453, 455 (7th Cir. 1943)). See generally 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 103 (1978). Specifically, two goals underlie antitrust law: an economic goal of maximizing productivity through efficient allocation of finite resources among competing users, and a populist goal that considers noneconomic factors, such as broadening economic opportunity. See *id.*

Antitrust law plays an important role in the American economic structure, where the public sector exercises limited control over a private sector that makes the basic economic decisions. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”).

¹⁶ Although the Sherman and Clayton Acts and their legislative history are regarded as inexplicit and unilluminating, they form the foundation for a large body of case law. See 1 P. AREEDA & D. TURNER, *supra* note 15, ¶ 106.

¹⁷ Professor Kennedy distinguishes between “exemptions” and “immunities.” Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 993 n.43 (1982) (“‘Exemption’ implies that the activity would be covered by the Act except for some other act of Congress that removes it from coverage. ‘Immunity’ implies that Congress did not intend that the activity be covered in the first place.”). This distinction is not altogether accurate. Although a distinction, albeit inconsequential for the purposes of this discussion, may exist between judicially-created exemptions, see, e.g., *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254-55 (9th Cir. 1982) (“[t]he *Noerr-Pennington* doctrine is . . . a judicially created exception to the application of the antitrust laws”), *cert. denied*, 459 U.S. 1227 (1983), and legislatively-created exemptions, see, e.g., *Capper-Volsted Act*, 7 U.S.C. §§ 291-92 (1982) (agricultural and horticultural organizations); *Clayton Act*, 15 U.S.C. § 17 (1982) (labor, agricultural and horticultural organizations); *Webb-Pomerene Act*, 15 U.S.C. §§ 61-64 (1982) (export trade

such immunity, the *Noerr-Pennington* immunity, is based on the principle that "no violation of [antitrust laws] can be predicated upon mere attempts to influence the passage or enforcement of laws."¹⁸

A. The Origins of the Immunity: *Noerr* and *Pennington*

The Supreme Court first considered whether antitrust immunity should attach to efforts to influence governmental decisionmaking in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*¹⁹ In *Noerr*, an organization of railroad companies hired a public relations firm to direct a publicity campaign against the trucking industry that allegedly was "designed to foster the adoption and retention of laws . . . destructive of the trucking business."²⁰ The railroads' lobbying convinced the governor of Pennsylvania to veto a bill that would have increased the weight limit for trucks on state highways.²¹ The truckers filed an antitrust action against the railroads,²² claiming that the defendants had conspired to restrain trade in, and monopolize, the long-distance freight business in violation of sections 1 and 2 of the Sherman Act.²³

The *Noerr* Court rejected the truckers' claim, holding that "the Sherman Act does 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."²⁴ The Court construed the limits of the Sherman Act to be coterminous with the boundaries of first amendment protection but it did not explicitly ground its holding in the Constitution.²⁵ Instead, the Court pointed to three considerations that together precluded application of the antitrust laws to the defendants' activities. First, the Court emphasized the "essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of

associations); the term "exemption" itself does not imply the latter and the term "immunity" does not imply the former. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 795 (4th ed. 1976) ("exemption . . . : freedom from any charge or obligation to which others are subject: immunity"); *id.* at 1130 ("immunity . . . : freedom or exemption from a charge, duty, obligation . . . especially as granted by law to a person or class of persons").

¹⁸ *Noerr*, 365 U.S. at 135. Even if a plaintiff establishes that a defendant's activity is undeserving of *Noerr-Pennington* immunity, the court will not automatically enter judgment for plaintiff. The plaintiff still must prove that the defendant has actually violated the antitrust laws. See 1 P. AREEDA & D. TURNER, *supra* note 15, ¶ 201.

¹⁹ 365 U.S. 127 (1961).

²⁰ *Id.* at 129.

²¹ *Id.* at 130 ("the 'Fair Truck Bill' . . . would have permitted truckers to carry heavier loads over Pennsylvania roads").

²² *Id.* at 129.

²³ 15 U.S.C. §§ 1, 2 (1982).

²⁴ 365 U.S. at 138.

²⁵ See *id.* at 137-38; see also Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 82-84 (1977).

the [Sherman] Act."²⁶ Second, the Court argued that a contrary holding would impair the government's power to "act in [its] representative capacity" by preventing the people from making their wishes known to their representatives.²⁷ Finally, the Court contended that a construction of the Sherman Act that would have prohibited the defendants' activity "would raise important constitutional questions," adding that "[t]he 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."²⁸

At the end of the majority opinion, Justice Black cautioned that the immunity would not automatically extend to any activity susceptible of being labelled as "petitioning"; he noted that activity "ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor" would not receive *Noerr-Pennington* protection.²⁹ This statement became the foundation for the confusing and often misleading exception-to-the-exemption interpretation of the *Noerr-Pennington* doctrine.³⁰

In *United Mine Workers of America v. Pennington*,³¹ the Court extended the immunity granted in *Noerr* to activities designed to influence public officials who act in a nonlegislative capacity.³² In *Pennington*, the United Mine Workers Union (UMW) was accused³³ of conspiring with certain large coal operators to urge the Secretary of Labor to establish a high minimum wage for coal workers, and to dissuade the Tennessee Valley Authority from buying nonunion coal.³⁴ The UMW and the large operators hoped that these governmental actions would drive the small coal operators out of the market.³⁵

The *Pennington* Court interpreted *Noerr* as "shield[ing] from the

²⁶ 365 U.S. at 136.

²⁷ *Id.* at 137.

²⁸ *Id.* at 138.

²⁹ *Id.* at 144.

³⁰ See *infra* notes 54-57 and accompanying text.

³¹ 381 U.S. 657 (1965).

³² See Fischel, *supra* note 25, at 85-86.

³³ The UMW sued the owners of the Phillips Brothers Coal Company for unpaid royalty payments; the defendants filed an answer and a counterclaim alleging an antitrust conspiracy. 381 U.S. at 659.

³⁴ See *id.* at 660.

³⁵ The UMW and the large coal companies agreed to a scheme by which they would eliminate the smaller companies. "The [large] companies and the union jointly and successfully approached the Secretary of Labor to obtain . . . a minimum wage for employees of contractors selling coal to the TVA, such minimum wage being much higher than in other industries and making it difficult for small companies to compete . . ." *Id.* at 660. Additionally, the conspirators "urged [the TVA] to curtail its spot market purchases" for nonunion coal. *Id.* at 660-61.

The union hoped that the scheme would result in increased wages, increased royalty payments into the welfare fund, and effective control over the fund's use. The large coal

Sherman Act . . . concerted effort[s] to influence public officials regardless of intent or purpose.”³⁶ The Court therefore found the defendant’s activity to be immune from the antitrust laws. Although the Court in *Pennington* did not directly refer to sham activity, its choice of the phrase “concerted effort to influence public officials”³⁷ intimates that it regarded only sincere attempts to affect governmental decisionmaking as deserving of immunity.

B. The Extension of Immunity to Adjudication and the Creation of the Sham “Exception”: *California Motor Transport*

The *Noerr* and *Pennington* opinions did not contain any express reference to an “exception” to antitrust immunity.³⁸ In both cases, the Court simply noted that if the activities at issue are not genuine efforts to influence governmental decisionmaking, the rationale underlying the *Noerr-Pennington* immunity, and thus the immunity itself, do not apply.³⁹ The Supreme Court first mentioned a sham “exception” to *Noerr-Pennington* immunity in *California Motor Transport Co. v. Trucking Unlimited*,⁴⁰ a case involving a suit between two associations of trucking firms. The complaint alleged that the defendant association had attempted to prevent the plaintiff firms from entering the California market by instituting administrative and judicial proceedings “so as to deny them ‘free and unlimited access’”⁴¹ to the courts and administrative agencies involved.

companies, in return, would obtain control over the market upon elimination of the smaller companies. *Id.* at 660.

³⁶ *Id.* at 670. “Intent or purpose” here refers to the UMW’s ultimate goal of squeezing the smaller operator out of the market. Read in context with the rest of the *Pennington* opinion, the statement quoted above means that even if the UMW desired such an anticompetitive result, its apparent effort to influence the Secretary of Labor deserves protection from antitrust laws because it was a concerted effort to influence governmental decisionmaking. *Cf.* *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896 (2d Cir. 1981) (defendants’ appeals were denied immunity because “defendants had no reasonable hopes of winning”); *Mark Aero, Inc. v. TWA*, 580 F.2d 288, 297 (8th Cir. 1978) (activities—including a publicity campaign, attempts to induce others to make false and misleading statements, and economic coercion—held immune from antitrust laws because defendant genuinely sought to influence the Federal Aviation Administration).

For consistency, this Note uses the term “intent” to refer to a party’s ultimate goal (e.g., the UMW’s “intent” was to force the smaller operators out of the market). The Note uses the terms “genuinely seek” or “sincere effort” to refer to a concerted effort to influence public officials.

³⁷ 381 U.S. at 670.

³⁸ The *Noerr* Court referred to a “sham,” 365 U.S. at 144, but not to an “exception.” The Court in *Pennington* referred to neither.

³⁹ See *supra* notes 29-30, 36-37 and accompanying text.

⁴⁰ 404 U.S. 508 (1972).

⁴¹ *Id.* at 511.

The conspiracy alleged is a concerted action by [the defendants] to institute state and federal proceedings to resist and defeat applications by [the plaintiffs] to acquire operating rights or to transfer or register those rights. These activities, it is alleged, extend to rehearings and to reviews or appeals from agency or court decisions on these matters.

Justice Douglas, writing for the Court, recognized that "[t]he right of access to the courts is indeed but one aspect of the right of petition"⁴² and concluded that potential imposition of antitrust liability would impair this first amendment right.⁴³ Thus, the *California Motor Transport* Court extended *Noerr-Pennington* immunity to efforts to influence governmental decisionmaking in the adjudicative context and correctly based the immunity on the first amendment right to petition the government.

At the same time, Justice Douglas carved out an "exception" to the *Noerr-Pennington* immunity. The plaintiffs did not allege that the defendants intended "to influence public officials," but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process."⁴⁴ Justice Douglas concluded that "such a purpose or intent . . . would be 'to discourage and ultimately to prevent the [plaintiffs] from invoking' the processes of the administrative agencies and courts and thus fall within the *exception* to *Noerr*."⁴⁵

Justice Douglas acknowledged the difficulty of discerning whether a party's litigation activities constitute an abuse of process from which antitrust liability may result.⁴⁶ But in a passage often cited by lower courts as setting out requirements for the applicability of the sham exception,⁴⁷ Douglas attempted to distinguish bona fide petitioning from sham activity by stating "[o]ne claim, which a court or agency may think baseless, may go unnoticed; but a *pattern of baseless, repetitive* claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused."⁴⁸ The Court found that the *California Motor Transport* plaintiffs' allegations concerning the defendants' access barring activities on their face fell within the sham "exception" to *Noerr-Pennington* immunity and remanded the case for trial.⁴⁹

Id. at 509. The Court of Appeals for the Ninth Circuit had reversed a federal district court's dismissal of the complaint for failure to state a cause of action. 432 F.2d 755 (9th Cir. 1970).

⁴² *Id.* at 510. Other forms of petitioning include: lobbying for legislative action, *Noerr*, 365 U.S. 127; attempts to influence executive action, *Pennington*, 381 U.S. 657; and political boycotts, *see infra* notes 149-53 and accompanying text. *See also* Fischel, *supra* note 25, at 82-88.

⁴³ We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

404 U.S. at 510-11.

⁴⁴ *Id.* at 512 (quoting *Pennington*, 381 U.S. at 670). The Court "[took] the allegations of the complaint at face value" because it was reviewing the Ninth Circuit's reversal of the district court's dismissal of the complaint for failure to state a cause of action. 404 U.S. at 515.

⁴⁵ 404 U.S. at 512 (quoting *id.* at 518 (Stewart, J., concurring)) (emphasis added).

⁴⁶ *See* 404 U.S. at 513.

⁴⁷ *See infra* notes 75-78 and accompanying text.

⁴⁸ 404 U.S. at 513 (emphasis added).

⁴⁹ *See id.* at 516.

Although the *California Motor Transport* Court's conclusion is consistent with *Noerr*,⁵⁰ the Court's analysis is flawed. Justice Douglas, in "adapt[ing *Noerr*] to the adjudicatory process,"⁵¹ reasoned that the mere act of filing suit constitutes petitioning and therefore merits *Noerr-Pennington* protection without a preliminary inquiry into whether the plaintiff bringing the initial suit genuinely sought to prevail.⁵² Consequently, the party seeking to establish that the plaintiff's actions violate the antitrust laws must show that the plaintiff's suit was a sham before this presumptive immunity is removed. This analysis conflicts with the reasoning of the *Noerr* Court, which clearly indicated that any insincere effort to influence governmental action is unworthy of immunity in the first instance.⁵³

The unfortunate result of the *California Motor Transport* opinion was the creation of a confusing approach to *Noerr-Pennington* immunity:⁵⁴ the exception-to-the-exemption analysis. Using this approach, a court first presumes that any act of filing a claim or lodging a protest is protected and then determines whether the activity fits within the sham "exception" Justice Douglas outlined in *California Motor Transport*.⁵⁵ As a result of the lower courts' differing interpretations of Justice Douglas's language and, thus, their adoption of disparate "requirements" for a finding of sham activity, parties trying to demonstrate the presence of the sham "exception" face a myriad of evidentiary requirements.⁵⁶ Justice

⁵⁰ The Court's holding that defendants' activity is subject to antitrust liability is consistent with the *Noerr* Court's statement that *Noerr-Pennington* immunity does not extend to activity that is not "directed toward influencing governmental action." *Noerr*, 365 U.S. at 144. Here, defendants used the judicial and administrative proceedings only to "harass and deter [plaintiffs] . . . so as to deny them 'free and unlimited access' to those tribunals." 404 U.S. at 511.

⁵¹ 404 U.S. at 516.

⁵² The *California Motor Transport* Court stated that the right of access to the courts "is part of the right of petition protected by the First Amendment," *id.* at 513, implying that "access" to the courts is the protected right and not the actual attempt to influence governmental decisionmaking. The Court seemed to indicate that any act of "accessing" the courts constitutes petitioning.

One finds further support for this interpretation in the Court's long discussion supporting its statement that first amendment protection "does not necessarily give [the defendants] immunity from the antitrust laws." *Id.* This statement indicates that the Court considered the defendants' behavior an exercise of a first amendment right. Additionally, the lengthy discussions accompanying the statement would have been unnecessary had the Court concluded that the defendants' activity was outside the scope of first amendment protection because it was not designed to influence governmental decisionmaking.

⁵³ See *supra* text accompanying note 29.

⁵⁴ See Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFFALO L. REV. 39, 47 (1980).

⁵⁵ See *supra* text accompanying note 46. For examples of applications of this approach, see *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171 (10th Cir. 1982); *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir. 1981); *Virginia Academy of Clinical Psychologists v. Blue Shield*, 625 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

⁵⁶ See *infra* notes 75-78 and accompanying text.

Douglas's vague discussion of practices that may result in antitrust liability makes a court's task in determining applicability of the *Noerr-Pennington* immunity even more difficult.⁵⁷

II

CLIPPER EXXPRESS V. ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.

The Ninth Circuit attempted to clear up this confusion in *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*⁵⁸ The court rejected the exception-to-the-exemption approach, choosing instead to employ a clear first amendment analysis to determine the applicability of *Noerr-Pennington* immunity. The *Clipper* court's approach is doctrinally consistent with the Supreme Court's holdings in *Noerr, Pennington* and *California Motor Transport* and is easier for trial courts to apply. Moreover, it protects first amendment rights that may be compromised under the exception-to-the-exemption approach.

A. Facts and Procedural Posture

Clipper Exxpress was an Interstate Commerce Commission (ICC)-regulated freight forwarder⁵⁹ competing in the motor shipping market. The defendants were certain ICC-regulated trucking companies and a rate bureau, Rocky Mountain Motor Tariff Bureau (RMMTB), which established freight rates for its member firms.⁶⁰ To compete with unregulated forwarders, Clipper gradually reduced its rates.⁶¹ The defend-

⁵⁷ 404 U.S. at 513 ("[t]here are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations"). Justice Douglas, however, gave no clear indication of what constitutes "reprehensible practice." See *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1175-76 (10th Cir. 1982) (court reluctant to find defendant's suit a sham in part because "the Supreme Court has not yet decided whether litigation activity in the context of one lawsuit, filed without probable cause, is conduct subject to the 'sham exception'").

⁵⁸ 690 F.2d 1240 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983). This amended opinion was issued upon the denial of rehearing and the denial of rehearing en banc. The original opinion appears at 674 F.2d 1242 (9th Cir. 1982). The amendments are minor and do not affect this discussion.

⁵⁹ A freight forwarder ships no goods, but rather "assembles and consolidates small shipments into single lots for shipment by carrier companies." *Id.* at 1245.

⁶⁰ RMMTB is a rate bureau formed under the [Interstate Commerce Act]. A rate bureau is an organization formed by an agreement among common carriers. Through the bureau the carriers act collectively to initiate, consider and establish rates and fares for members of the bureau. When acting in conformity with an ICC-approved agreement, joint rate setting action is not subject to the antitrust laws. . . . RMMTB's membership consists of approximately 1,400 motor carriers, and represents approximately 80 percent of the transcontinental surface transportation market.

Id. at 1245-46.

⁶¹ ICC rate regulation of freight forwarders such as Clipper is provided in 49 U.S.C. § 1005, recodified as 49 U.S.C. §§ 10762. Under § 1005, a freight for-

ants lodged protests with the ICC before each proposed rate reduction.⁶² The ICC investigated and found in Clipper's favor in each instance.⁶³

Clipper sued the RMMTB and the various trucking companies for antitrust violations alleging, inter alia, that the defendants' protests were shams.⁶⁴ The district court granted the defendants' third motion for summary judgment on the ground that the *Noerr-Pennington* doctrine immunized their activity from antitrust challenge as a matter of law.⁶⁵ Clipper appealed the granting of summary judgment.

B. Eliminating the Sham Exception-to-the-Exemption

The Ninth Circuit reversed the district court's decision and, in the process, reformulated the sham analysis component of the *Noerr-Pennington* doctrine.⁶⁶ First, the *Clipper* court recognized that although "[t]he *Noerr-Pennington* doctrine is . . . based on the first amendment [right to petition],"⁶⁷ sham activity does not warrant first amendment protection because it is not petitioning.⁶⁸ The court reasoned that

warder seeking a rate change publishes a new rate. In the absence of a protest, the rate will take effect automatically thirty days later.

Id. at 1246.

⁶² "If there is a protest, the ICC can suspend effectiveness of the rate while investigating the protest. The ICC also retains power to suspend any new rate sua sponte, but this power is rarely exercised." *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1246-47 ("Clipper contended that defendants' protests of [Clipper's rate reductions] were sham protests filed 'for the purpose of directly restricting, lessening, and prohibiting the legitimate competition' of freight forwarders.")

In addition, Clipper asserted that the defendants supplied fraudulent information to the ICC in violation of the *Walker Process* doctrine, which extends antitrust liability to those who commit fraud on a court or agency to gain a competitive edge. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). Clipper also alleged that the defendants' protests were part of an overall scheme to reduce competition, *see United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963). *Clipper*, 690 F.2d at 1247.

⁶⁵ *Clipper*, 690 F.2d at 1248. In making its ruling, the district court relied on *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

⁶⁶ In addition, the court held that the *Walker Process* doctrine, *see supra* note 64, applies to nonpatent cases such as the instant case, *see Clipper*, 690 F.2d at 1260 n.31. It directed the trial court to determine "whether the defendants' actions constituted an antitrust violation in that they perpetrated fraud on an administrative agency, for predatory ends." *Id.* at 1260; *see Note, Antitrust—Walker Process Extended to Fraud in Nonpatent Area—Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), 1983 ARIZ. ST. L.J. 137.

The court was equally receptive to Clipper's "overall scheme" argument, *see supra* note 64, stating that "[i]f Clipper can prove that the defendants engaged in activities which violated the antitrust laws, those violations do not become immune simply because the defendants used legal means . . . to enforce the violations." *Clipper*, 690 F.2d at 1264. The court, therefore, remanded the case in order to give Clipper the opportunity to factually establish its "overall scheme" theory.

⁶⁷ *Clipper*, 690 F.2d at 1254-55 (footnote omitted).

⁶⁸ The sham exception, on the other hand, reflects a judicial recognition that not all activity that appears as an effort to influence government is actually an

where an activity implicates no first amendment right, as in a sham protest, *Noerr-Pennington* immunity does not attach in the first instance.⁶⁹ Thus, instead of using the *California Motor Transport* Court's exception-to-the-exemption analysis,⁷⁰ the *Clipper* court examined the defendants' apparent efforts to influence the ICC to determine whether those efforts were sincere and thus exercises of a first amendment right.

Clipper contended that the defendants had protested Clipper's rate changes "automatically, without regard to merit or possible success before the ICC, and therefore without any intent to induce favorable action by the ICC."⁷¹ The defendants stipulated that "they had done exactly what Clipper alleged in its complaint."⁷² The court concluded that based on these statements, a trier of fact could find that the defendants used the administrative process to harass Clipper, not to win a favorable judgment from the ICC. The court further noted that if the defendants did not genuinely attempt to influence the ICC, they were not petitioning; thus, antitrust laws could be applied to the defendants' activity without infringing on a first amendment right.⁷³ The *Clipper* court therefore reversed the district court's summary judgment order and remanded the case for trial.⁷⁴

exercise of the first amendment right to petition. At times this activity, disguised as petitioning, is simply an effort to interfere directly with a competitor. In that case, the "sham" petitioning activity is not entitled to first amendment protection, *because it is not an exercise of first amendment rights.*

Id. at 1255.

⁶⁹ "If the activity is not genuine petitioning activity, the antitrust laws are not suspended and continue to prohibit the violating activities. Because application of the antitrust laws is not suspended, it will prohibit sham activity . . ." *Id.* at 1255.

⁷⁰ See *supra* text accompanying notes 54-56.

⁷¹ 690 F.2d at 1254.

⁷² *Id.* at 1250. The defendants made various stipulations for their summary judgment motion:

For the purposes of this motion, the court may assume the existence of the conspiracy alleged in Clipper's interrogatory responses. It may further assume that everything was done that Clipper says was done to further that conspiracy.

. . . .
Again, for the purpose of this motion, the court may accept Clipper's allegations as fact and assume that defendants expressly agreed among themselves not to cut rates to divert traffic from one another—or to put it more bluntly, that they agreed that their rates would be exactly the same. Such an agreement would be perfectly lawful and immunized from antitrust liability.

. . . .
This court may assume for purposes of this motion that the object behind each of the protests was just what Clipper says it was—that the defendants who filed them were simply trying to eliminate or destroy competition.

Id. (quoting without citing defendants' memorandum accompanying their summary judgment motion).

⁷³ See *id.* at 1255; see also *supra* notes 67-69 and accompanying text.

⁷⁴ At trial, Clipper still would need to prove that the defendants did not genuinely seek to influence the ICC before the court would deny the defendants *Noerr-Pennington* immunity from antitrust liability. 690 F.2d at 1253-54; see *supra* note 18.

C. Reconciling the *California Motor Transport* Decision with the *Clipper* Court's First Amendment Approach

Various lower courts have derived from Justice Douglas's attempt to define sham activity in *California Motor Transport*⁷⁵ one or more "requirements" for a finding of sham activity: (1) a pattern of repetitive claims⁷⁶ (2) that are baseless⁷⁷ and (3) that bar access to an agency or tribunal.⁷⁸ The *Clipper* court systematically applied its first amendment analysis to each purported requirement and concluded that none was required.⁷⁹

The court first looked to the "theoretical underpinnings"⁸⁰ of the *Noerr-Pennington* doctrine and concluded that the doctrine is a judicially created exception to the antitrust laws that is based on the right to petition.⁸¹ It then reasoned that the "sham exception" simply represents a judicial recognition that a claim or protest may not be a genuine attempt to influence the government and, consequently, may not be petitioning.⁸² If an activity is not petitioning, immunity is unnecessary because prohibiting the activity does not interfere with a constitutional right. Thus, the court concluded, the *Noerr-Pennington* doctrine does not immunize nonpetitioning activity, regardless of how many claims or protests make up that activity,⁸³ a single claim may be as unworthy of immunity as multiple claims.⁸⁴

⁷⁵ See *supra* text accompanying notes 46-48.

⁷⁶ See, e.g., cases cited in Balmer, *supra* note 54, at 46 n.33; cases cited in Fischel, *supra* note 25, at 108 n.151.

⁷⁷ See, e.g., *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678, 688 (4th Cir. 1982), cert. denied, 104 S. Ct. 231, 104 S. Ct. 259 (1983).

⁷⁸ See, e.g., Balmer, *supra* note 54, at 46 & n.32.

⁷⁹ See 690 F.2d at 1254-59.

⁸⁰ *Id.* at 1254.

⁸¹ The court stated that:

The *Noerr-Pennington* doctrine is itself a judicially created exception to the application of the antitrust laws based on the first amendment. First amendment protection is extended and application of the antitrust laws suspended because a legitimate effort to influence government action is part of the guaranteed right to petition.

Id. at 1254-55 (footnote omitted) (citation omitted).

⁸² *Id.*; see *supra* note 68.

⁸³ The court stated that: "If the activity is not genuine petitioning activity, the antitrust laws are not suspended Because application of the antitrust laws is not suspended, it will prohibit sham activity, whether that activity consists of single or multiple sham suits." 690 F.2d at 1255.

⁸⁴ The *Clipper* court conceded that the defendant's institution of multiple suits would facilitate the plaintiff's task in establishing the lack of a genuine effort to influence the government. It went on to point out, however, that in a review of summary judgment, the court is not concerned with a party's ultimate ability to persuade the factfinder as long as a possibility exists that he may succeed. Thus, the court concluded that "it is entirely conceivable that the requisite sham intent can be proven when there is only a single sham suit." *Id.* at 1255 n.22. Commentators agree with the *Clipper* court's conclusion. See, e.g., Balmer, *supra* note 54, at 55-56; Fischel, *supra* note 25, at 110.

The *Clipper* court also relied on the fraud and bribery examples Justice Douglas men-

The *Clipper* court then sidestepped the issue of baselessness. It found the fact that the defendants failed in all their protests sufficient to establish a triable issue regarding baselessness.⁸⁵ This finding indicates that the court considers unsuccessful protests evidence of baselessness. The opinion left unanswered the question of whether baselessness is a requisite element of nonpetitioning behavior.⁸⁶

The *Clipper* court then addressed the defendants' contention that a showing of access barring is required to establish the existence of sham activity. Relying on the Supreme Court's decision in *Otter Tail Power Co. v. United States*,⁸⁷ the court rejected the defendants' contention.⁸⁸ The Ninth Circuit correctly read *Otter Tail* as indicating that "access barring" refers only to one type of abuse of judicial or administrative process and that "access barring" need not be present for the maintenance of a suit under the sham exception."⁸⁹ Thus, the *Clipper* court concluded that a plaintiff need not show that the defendant's activity denied him access to a judicial or administrative tribunal to prove that the activity

tioned in *California Motor Transp.*, 404 U.S. at 512-13, (both examples involved only a single act), to illustrate abuses of the judicial and administrative processes that are also antitrust violations. 690 F.2d at 1255-56. Finally, the *Clipper* court refused to read *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) as requiring multiple suits. 690 F.2d at 1256 n.24.

⁸⁵ See 690 F.2d at 1257.

⁸⁶ The court's reasoning would have been more consistent if it had concluded that baselessness was not required but rather was evidence of a sham. The court's general holding was that nonpetitioning activity, that is, activity that does not seek to influence governmental decisionmaking, does not deserve *Noerr-Pennington* immunity. Specifically, the court found that multiple suits, see *supra* notes 81-84 and accompanying text, and access barring, see *infra* notes 87-90 and accompanying text, are not requirements for a finding of sham activity but may be used as evidence that a defendant did not genuinely seek to influence governmental decisionmaking. Baselessness may be treated similarly. The fact that a defendant filed baseless suits or protests supports the contention that he did not intend to win and therefore did not seek to influence governmental decisionmaking. See *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 841 (9th Cir. 1980) (unsuccessful suits imply less than genuine effort).

Furthermore, baseless protests, even if genuine, have little first amendment value. Therefore, such protests may be restricted if they sufficiently threaten an important governmental interest. See *infra* notes 122-30 and accompanying text. The *Clipper* court, however, failed to recognize this argument.

⁸⁷ 410 U.S. 366 (1973).

⁸⁸ See *Clipper*, 690 F.2d at 1257-59. The *Clipper* court also relied on *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), and *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) to support this conclusion. 690 F.2d at 1257 n.26.

⁸⁹ 690 F.2d at 1257 (footnote omitted).

The defendants attempted to distinguish *Otter Tail* on the ground that the petitioning activity in that case was directed toward the courts rather than toward an administrative body, as in *Clipper*. The *Clipper* court correctly found no distinction, reasoning that "[t]he same dangers that the antitrust laws seek to prohibit flow from instituting sham administrative proceedings as flow from instituting sham judicial proceedings." *Id.* at 1258. The many differences between the administrative and the judicial process are unimportant in discussing *Noerr-Pennington* immunity. Such a discussion focuses on the genuineness of a party's effort to influence a governmental body—the particular characteristics of the governmental body involved are immaterial.

is unworthy of *Noerr-Pennington* immunity.⁹⁰

D. Effects of *Clipper*: Ease of Stating a Claim, Reduction of Predatory Litigation, and Possible Chilling Effect

The *Clipper* court's rejection of the requirements other courts have imposed on plaintiffs seeking to prosecute a suit under the sham exception, proof of access barring and the defendant's institution of repetitive, baseless claims, makes it easier for a plaintiff to state a claim for an antitrust violation and survive a defendant's summary judgment motion.⁹¹ A plaintiff can more easily show, for the purposes of summary judgment,⁹² that the defendant's goal in filing a claim or protest was not to secure a favorable outcome in the proceedings, thereby establishing that the defendant was not petitioning and does not deserve *Noerr-Pennington* immunity. For example, an allegation that a defendant brought a single unsuccessful suit without regard to merit would be sufficient for a plaintiff to state a claim and survive a motion for summary judgment.⁹³

⁹⁰ See *id.* at 1259 ("we conclude that to invoke the sham exception, some abuse of process, although not necessarily access barring, must be alleged").

The *Clipper* court failed to recognize the argument that access barring, like baseless claims, has little first amendment value. Restricting access barring may be constitutionally justified even if it cannot be shown to be sham activity. See *infra* notes 122-30 and accompanying text.

⁹¹ Most decisions in this area involve appellate review of summary judgment rulings. See, e.g., *Clipper*, 690 F.2d 1240. In this posture, courts view the pleadings in the light most favorable to the nonmoving party. See *id.* at 1250. These decisions are not helpful in determining the amount of evidence a court will deem sufficient to establish a defendant's lack of genuine effort. Courts may develop various presumptions and burden-shifting devices as more cases are tried and then reviewed on the basis of sufficiency of evidence. For example, the burden of persuasion may shift to the defendant if the plaintiff produces evidence of repeated, unsuccessful suits. Because the defendant is in a better position to prove his sincerity, shifting the burden to him is logical. See *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976), *cert. denied*, 104 S.Ct. 231, 104 S.Ct. 259 (1983). No such devices have yet replaced a case-by-case approach, in which the trier of facts decides the ultimate question of genuineness.

⁹² Compare *Clipper*, 690 F.2d at 1250 (standard of review of summary judgment motion), with *Mark Aero, Inc. v. TWA*, 580 F.2d 288, 296 (8th Cir. 1978) (standard of review of motion to dismiss for failure to state a claim).

⁹³ But see *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 651 (7th Cir. 1983) (plaintiff must allege specific facts to demonstrate sham); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1081 (9th Cir. 1976) (plaintiff's complaint must allege means by which defendant planned to bar access), *cert. denied*, 430 U.S. 940 (1977).

At trial, however, a plaintiff must establish factually that the defendant did not intend to influence governmental decisionmaking. See *supra* note 18. The proceedings would take the following course. Plaintiff brings an antitrust action against defendant alleging that defendant engaged in behavior that had, or was designed to have, an anticompetitive effect. Defendant argues that he genuinely sought to influence governmental decisionmaking and, therefore, should be awarded *Noerr-Pennington* immunity. Plaintiff then carries the burden of persuading the trier of fact that defendant's motive was not what defendant represented it to be. See *Energy Conservation, Inc. v. Heliodyne, Inc.*, 698 F.2d 386, 389 (9th Cir. 1983). Plain-

Because *Clipper* makes it easier for plaintiffs like Clipper Express to bring antitrust actions against competitors and survive summary judgment motions,⁹⁴ competitors will be more reluctant to use the judicial and administrative processes to harass each other. Predatory litigation not only places burdens on the judicial and administrative bodies involved, but also helps to perpetuate monopolies.⁹⁵ Thus, by facilitating the means by which a harassed competitor can obtain redress, *Clipper* has neutralized an anticompetitive device and furthered the objective of antitrust legislation.

Unfortunately, *Clipper* also may have a chilling effect on competitors' prosecution of good faith claims against their rivals;⁹⁶ although a party may bring an action genuinely seeking to win, it faces the possibility of having to defend an antitrust action if it loses.⁹⁷ A litigant who claims to have been the victim of a competitor's sham suits need only allege that the competitor did not genuinely seek to influence governmental decisionmaking and produce evidence of the competitor's unsuccessful suits.⁹⁸ Using the *Clipper* analysis, a court would deny the

tiff may sustain his burden by bringing forth evidence of access barring, lack of probable cause, and repetitive, baseless suits. See *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1372 n.46 (5th Cir. 1983). A court may encounter difficulty in determining defendant's true purpose for initiating the litigation; but, as Judge Posner states, "no more . . . than in many other areas of antitrust law." *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2430 (1983).

Furthermore, the *Clipper* approach requires courts to apply a lower level of proof to establish a sham. Under the exception-to-the-exemption analysis, a court automatically awards a defendant *Noerr-Pennington* immunity when it files a claim or protest. See *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983). In this posture, a plaintiff appears to be trying to take a pre-existing right away from the defendant. Under *Clipper*, a plaintiff can show that defendant's protests or claims do not deserve *Noerr-Pennington* immunity in the first place by showing that they were not genuine attempts to influence governmental decisionmaking.

⁹⁴ This result is consistent with the rigorous standard of review applied to dismissals of antitrust claims. See *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976), *cert. denied*, 104 S. Ct. 231, 104 S. Ct. 259 (1983). But see *Energy Conservation, Inc. v. Heliodyne, Inc.*, 698 F.2d 386, 389 (9th Cir. 1983) ("Courts may properly be more critical in reviewing complaints which invoke the sham exception to the *Noerr-Pennington* doctrine since the conduct is presumptively protected by the first amendment"); *Balmer*, *supra* note 54, at 61.

⁹⁵ See *Balmer*, *supra* note 54, at 63; *Kaler*, *The Sham Exception to the Noerr-Pennington Antitrust Immunity: Its Potential for Minimizing Anticompetitive Abuse of the Administrative Regulatory Process*, 12 TOLEDO L. REV. 63, 76 (1980).

⁹⁶ The Ninth Circuit recognized this danger in *Franchise Realty*, 542 F.2d at 1082. The court required that a complaint allege "specific activities" so as not to endanger first amendment guarantees.

⁹⁷ See, e.g., *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250 (9th Cir. 1982) (plaintiff faced a counterclaim for alleged antitrust violations even though district court granted summary judgment on plaintiff's original claim and plaintiff had prevailed in similar suits with other parties).

⁹⁸ In the alternative, a plaintiff could present evidence that the defendant's actions barred entry to a market. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) (defendant's pending suits prevented the approval of bonds necessary for plaintiffs to enter

competitor's motion for summary judgment,⁹⁹ and the case would then proceed to the costly discovery phase. This scenario could discourage the competitor from bringing legitimate claims in the first instance and thus from exercising its right of petition.

III DISCUSSION

The *Clipper* court's refusal to recognize a repeated claims requirement¹⁰⁰ or an access barring requirement,¹⁰¹ and its discussion regarding a baselessness requirement¹⁰² evidence its well-reasoned analysis of an issue that has confused courts since *California Motor Transport*.¹⁰³ Because it rejected the exception-to-the-exemption approach,¹⁰⁴ the Ninth Circuit was free to use the first amendment foundation of *Noerr-Pennington* immunity to transform a confusing analysis that relied on artificial requirements into a consistent theory of antitrust liability in cases where alleged petitioning of adjudicative tribunals restrains trade. According to the Ninth Circuit's theory, antitrust liability applies to all activity that is not protected by the first amendment right to petition.¹⁰⁵ The right to petition protects all genuine attempts to influence governmental decisionmaking except in certain instances where the government may constitutionally regulate the petitioning activity.¹⁰⁶ Consequently, a plaintiff bringing an antitrust action against a defendant who appears to have been petitioning may establish that *Noerr-Pennington* immunity does not apply to the defendant's activity by: (1) showing that the defendant's activity was not, in fact, petitioning, that is, it was not a genuine effort to influence governmental decisionmaking;¹⁰⁷ or (2) showing that, under traditional first amendment analysis, the petitioning activity sufficiently threatens a government interest to

market); *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 841 (9th Cir. 1980) (litigation prevented plaintiff from entering market); *see also Litton Syss., Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984).

⁹⁹ *Clipper*, 690 F.2d at 1253-54. *But see Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 651 (7th Cir. 1983) (plaintiff must do more than merely allege that defendant's conduct was a sham).

¹⁰⁰ *See supra* notes 80-84 and accompanying text.

¹⁰¹ *See supra* notes 87-90 and accompanying text.

¹⁰² *See supra* notes 85-86 and accompanying text.

¹⁰³ *See supra* notes 54-57 and accompanying text.

¹⁰⁴ *See supra* notes 54-55 and accompanying text.

¹⁰⁵ *See Clipper*, 690 F.2d at 1255 ("If the activity is not genuine petitioning activity, the antitrust laws are not suspended and continue to prohibit the violating activities.").

¹⁰⁶ In selected instances, the Supreme Court has allowed the government to compromise first amendment activity. *See TWA v. Hardison*, 432 U.S. 63 (1977) (religion); *Pell v. Procunier*, 417 U.S. 817 (1974) (press); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (petitioning); *United States v. O'Brien*, 391 U.S. 367 (1968) (speech); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (commercial speech).

¹⁰⁷ *See infra* notes 109-21 and accompanying text.

justify restricting that activity.¹⁰⁸

A. Analyzing Apparent Petitioning to Determine Whether It Merits *Noerr-Pennington* Immunity

1. *Sham Activity Remains Subject to Antitrust Liability: The Clipper Court's Approach*

The *Noerr* Court stated that ostensible petitioning activity that is, in fact, a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor"¹⁰⁹ will remain subject to antitrust laws. In the first case to find an example of such sham activity, the *California Motor Transport* Court wrote a poor opinion that left lower courts confused as to how to define sham behavior.¹¹⁰ In *Clipper*, the Ninth Circuit resolved much of this confusion for cases involving alleged petitioning in the adjudicative context.

According to the *Clipper* court, *Noerr-Pennington* immunity is based on petitioning rights, which exist if a party genuinely seeks to influence governmental decisionmaking.¹¹¹ Thus, in the adjudicative context, a party bringing an action must genuinely intend to win in order to receive *Noerr-Pennington* immunity.¹¹² Courts need only look to evidence of the party's sincerity in bringing the claim¹¹³ rather than proceeding through the exception-to-the-exemption analysis. The advantage of the Ninth Circuit's approach is that it provides clear guidelines to trial courts based on traditional first amendment analysis.¹¹⁴ Such guidelines

¹⁰⁸ See *infra* notes 122-30 and accompanying text.

¹⁰⁹ *Noerr*, 365 U.S. at 144.

¹¹⁰ See *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1371 (5th Cir. 1983) ("The Supreme Court has never defined with precision the standard for determining when litigation is a sham."); see also *supra* notes 50-57 and accompanying text.

¹¹¹ See *supra* notes 66-74 and accompanying text.

¹¹² See *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982) ("litigation is actionable under the antitrust laws . . . when [defendant's] purpose is not to win a favorable judgment against a competitor"), *cert. denied*, 103 S. Ct. 2430 (1983); cf. *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1372 (5th Cir. 1983) (requiring that "a genuine desire for judicial relief [be] a significant motivating factor underlying the suit" for immunity to be granted).

For an application of the *Clipper* court's first amendment approach to other forms of petitioning, see *infra* notes 132-39, 149-64 and accompanying text.

¹¹³ See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379 n.9 (1973) (fact that defendant knew its pending suits prevented issuance of bonds necessary for plaintiff to enter market was evidence that defendant did not seek to influence governmental decisionmaking); *Litton Syss., Inc. v. AT&T*, 700 F.2d 785, 811 (2d Cir. 1983) (filing suits with "no realistic hope" of success is evidence of sham), *cert. denied*, 104 S. Ct. 984 (1984).

Unlike the exception-to-the-exemption approach, the *Clipper* approach does not contain specific evidentiary requirements. The factfinder simply determines if defendant genuinely sought to win on the basis of all relevant evidence.

¹¹⁴ The *Clipper* test is not simply an abuse of process or malicious prosecution test. See Kaler, *supra* note 95, at 82. But see Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715, 715-16 (1973) (arguing that "the underlying policies and substantive

should produce a consistent body of case law that safeguards first amendment rights.

A simple example may best illustrate the desirability of the *Clipper* court's approach.¹¹⁵ Suppose *A* plans to build a shopping center but the proposed location must be rezoned before the project can proceed. *B*, the owner of a nearby shopping center, files protests with the zoning board in an attempt to delay construction of *A*'s shopping center. *A* successfully defends against each of *B*'s protests but the struggle exhausts *A*'s financial resources. As a result, *A* is forced to abandon the project. *A* then brings an antitrust action against *B* alleging that *B*'s protests restrained trade.

Under the exception-to-the-exemption approach, a court would automatically exempt *B* from the antitrust laws under *Noerr-Pennington*.¹¹⁶ *A* would then bear the burden of producing evidence that *B*'s activity

rules of these torts could profitably be employed in the antitrust context in determining when concerted conduct by participants in court and agency proceedings is unlawful").

The tort of abuse of process requires that the defendant commit a specific tortious act outside the administrative or judicial proceedings. The *Clipper* court's first amendment test, on the other hand, applies regardless of whether the defendant committed any extraneous acts. The fundamental distinction is that the abuse of process tort is designed to catch those who legitimately use the legal process for illegitimate purposes. See *Kaler*, *supra* note 95, at 82. The purposes of using the legal process do not matter under *Clipper*; they may be anticompetitive or otherwise illegitimate. See *Pennington*, 381 U.S. at 670. The *Clipper* approach focuses on the question of whether defendant's activities are legitimate efforts to influence governmental decisionmaking.

Activity may be an abuse of process yet be immune from the antitrust laws under *Noerr-Pennington*. For example, if one party files suit genuinely seeking to prevail on the merits but uses the suit to extort concessions from its competitor, that party may receive *Noerr-Pennington* immunity but may be liable to its competitor for abuse of process. Some courts have erroneously interpreted *Noerr* and its progeny to hold that the test for abuse of process is identical to the test for sham activity. See, e.g., *Ad Visor, Inc. v. Pacific Tel. & Tel. Co.*, 640 F.2d 1107, 1109 (9th Cir. 1981) ("the 'sham' exception . . . test . . . can be characterized as an abuse of process" test).

Malicious prosecution and similar violations in administrative proceedings require a higher level of proof than does the *Clipper* test. Cf. *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983) (distinguishing between malice and sham); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 476 (7th Cir. 1982) (rejecting the proposition that a nonmalicious lawsuit can never violate antitrust law), *cert. denied*, 103 S. Ct. 2430 (1983). The action must terminate in favor of the victim before he can state a claim for relief under malicious prosecution. W. PROSSER, *THE LAW OF TORTS* § 119, at 838 (4th ed. 1971). The *Clipper* approach contains no such requirement. In addition, malicious prosecution requires a finding that the defendant lacked probable cause for his suit, W. PROSSER, *supra*, at 841, while the *Clipper* approach requires only a finding that the goal of the action be other than seeking redress. See also *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1176 (10th Cir. 1982) (a "'sham' is something more than a mere 'absence of probable cause'"). Under *Clipper* a party may have probable cause but still not earn *Noerr-Pennington* immunity because he initiated his suit as a pretext for achieving some collateral objective.

¹¹⁵ This hypothetical case is derived from *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir. 1981).

¹¹⁶ See *supra* notes 51-55 and accompanying text.

fits into the *California Motor Transport* Court's sham exception.¹¹⁷ In contrast, a court applying the *Clipper* approach would examine *B*'s underlying objective in filing its protests with the zoning board. If *A* could show that *B* filed the protests not in a genuine effort to influence the zoning board but merely to harass and delay *A*,¹¹⁸ then *Noerr-Pennington* immunity would not apply because filing the sham protests is not petitioning activity protected by the first amendment.

A survey of cases decided after *Clipper* indicates that the Ninth Circuit's treatment of the sham claim issue has met with approval. Some courts have adopted the *Clipper* court's approach with limited modifications.¹¹⁹ Others have followed the spirit of the Ninth Circuit's analysis without citing *Clipper*.¹²⁰ The trend is to replace the exception-to-the-exemption approach with the *Clipper* court's first amendment

¹¹⁷ For example, *A* would have to show that *B*'s protests barred *A*'s access to the zoning board, or that the protests were baseless and repetitive.

¹¹⁸ A showing of harassment or desire to delay is neither necessary nor sufficient to establish the sham character of *B*'s protests. These are just examples of evidence that would tend to show that *B*'s objective was *not* to influence the zoning board.

¹¹⁹ For example, the Fifth Circuit followed the *Clipper* decision in *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983). The plaintiff in *Hunt* alleged that the defendant's "well-publicized threat to litigate wherever and whenever necessary" had an anticompetitive effect and was not immunized petitioning. *Id.* at 1367. After citing *Clipper*, Judge Rubin stated that "[a] litigant should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for judicial relief is a significant motivating factor underlying the suit." *Id.* at 1372.

The Ninth Circuit followed the *Clipper* approach in *Energy Conservation, Inc. v. Heliodyne, Inc.*, 698 F.2d 386 (9th Cir. 1983). In *Heliodyne*, a corporation sued its competitor and its competitor's law firm, alleging that they conspired to bring a sham lawsuit. The district court dismissed the action at least partially on the ground that a single suit cannot constitute a sham. *Id.* at 388. In reversing the district court, the *Heliodyne* court followed the *Clipper* approach closely, reiterating that the factfinder must determine whether the claim is a genuine attempt to influence governmental action. *Id.* at 389.

¹²⁰ For example, the Second Circuit applied the *Clipper* approach in *Litton Syss. Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 105 S. Ct. 984 (1984). The defendant, AT&T, had filed tariffs with the ICC that required customers to purchase an additional piece of AT&T equipment to hook up Litton's device to the phone lines. Litton alleged that AT&T filed these tariffs to buy time until AT&T could develop its own device. *Id.* at 801. The court held that AT&T's tariffs were shams because they were filed with no realistic hope of success. *Id.* at 811. Although the *Litton* court only cited the *Clipper* court's holding that "a single claim can be a sham," *id.* at 811 n.38, it clearly applied the *Clipper* approach, basing the application of *Noerr-Pennington* immunity on the genuineness of the actor's efforts to seek favorable action before the ICC.

The Seventh Circuit took an approach very similar to that used by the *Clipper* court in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2430 (1983), although it did not specifically rely on *Clipper*. The defendant in *Grip-Pak* had filed lawsuits against the plaintiff in an effort to prevent the plaintiff's entry into the six-pack holder manufacturing market. 694 F.2d at 468. In an opinion that never mentions "sham exception," Judge Posner analyzed the defendant's purpose in filing the suits to determine whether it was entitled to *Noerr-Pennington* immunity. The judge reasoned that "[t]he line [determining antitrust liability] is crossed when [the defendant's] purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating." *Id.* at 472.

analysis.¹²¹

2. *Petitioning Activity Remains Subject to Antitrust Liability if the Government May Constitutionally Restrict the Activity*

The *Noerr-Pennington* doctrine is grounded in the first amendment right to petition.¹²² Activity protected by the right to petition merits *Noerr-Pennington* immunity from antitrust laws. Thus, *Noerr-Pennington* analysis derives directly from petitioning rights analysis. The Supreme Court has never drawn a clear distinction between the right to petition and other first amendment rights. Rather, the Court has regarded these rights as an inseparable collection of cognate rights.¹²³ An analysis of the right to petition for purposes of evaluating the applicability of *Noerr-Pennington* immunity therefore mirrors the analysis of other first amendment rights such as free speech and free expression.¹²⁴

Under traditional first amendment analysis, the Court has interpreted the Constitution to allow the government to restrict the content of behavior that poses a "clear and present danger" to a sufficiently important governmental interest.¹²⁵ It follows that a statutory construction of the Sherman Act¹²⁶ that results in a content-based restriction¹²⁷

¹²¹ Not all courts have completely freed themselves from the exception-to-the-exemption trap. Notwithstanding its decision in *Grip-Pak*, see *supra* note 120, the Seventh Circuit in *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643 (7th Cir. 1983), affirmed the district court's decision to grant summary judgment for the defendants and adopted the district court's conclusion that the sham exception does not apply because "unlike . . . *California Motor Transport* . . . there is no pattern of baseless, repetitive claims." *Id.* at 650.

¹²² See *Noerr*, 365 U.S. at 138 (basing immunity on statutory construction of the Sherman Act as protective of petitioning rights); *Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553, 556 (D. Del. 1980) ("the scope of the *Noerr* exemption is properly defined by reference to the scope of protection afforded by the First Amendment"); Fischel, *supra* note 25, at 100. *But see* *Suburban Restoration Co. v. Acmat Corp.*, 700 F.2d 98, 101 (2d Cir. 1983) (expressly refusing to base decision on first amendment grounds).

¹²³ In *Thomas v. Collins*, 323 U.S. 516 (1945), the Supreme Court stated:

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Article's assurance.

Id. at 530.

¹²⁴ See *Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553, 557-58 (D. Del. 1980) (applying free speech jurisprudence to question of *Noerr-Pennington* immunity); Fischel, *supra* note 25, at 100-04 (reasoning that "the values promoted by the first amendment free speech guaranty and those advanced by the *Noerr* doctrine are very similar").

¹²⁵ See *Haig v. Agee*, 453 U.S. 280, 308-09 (1981) (disclosure of national security and intelligence operations information not protected). For an important application of the "clear and present danger" test, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (invalidating Ohio statute that punishes mere advocacy and assembly because statute failed to draw distinction between inciting or producing imminent lawless action and mere abstract teaching).

¹²⁶ See *supra* notes 16-17 and accompanying text.

¹²⁷ Returning to the shopping center hypothetical discussed above, see *supra* notes 115-19 and accompanying text, a construction of the Sherman Act that denies *Noerr-Pennington* im-

on petitioning activity is unjustified without a showing that the petitioning activity circumscribed poses a clear and present danger to the government's interest in maintaining free competition. A content-neutral restriction, on the other hand,¹²⁸ must satisfy the balancing test set forth in *United States v. O'Brien*.¹²⁹ The *O'Brien* test requires that the governmental interest in regulating the circumscribed conduct be sufficiently important to outweigh any incidental limitation on a first amendment freedom. If either of these tests justifies governmental restriction of first amendment rights, then *Noerr-Pennington* immunity from antitrust laws must be denied even if the defendant was genuinely seeking to influence governmental decisionmaking.¹³⁰

B. Applying a Consistent *Noerr-Pennington* Analysis to Lobbying, Lawsuits, and Political Boycotts

Petitioning may take many forms, ranging from a simple letter to a congressman to a terrorist kidnapping. Courts applying the *Noerr-Pennington* analysis have focused on three categories of petitioning: legislative lobbying, lawsuits or protests before an administrative-adjudicative tribunal, and political boycotts. Courts have taken seemingly different approaches to the issue of *Noerr-Pennington* immunity in each of these three areas.¹³¹ Upon closer examination, the decisions and opinions in some important cases in each area may be reconciled by reference to a single theory of *Noerr-Pennington* immunity—all genuine attempts to in-

munity to *B's* protests simply because of their anticompetitive nature would constitute a content-based restriction.

¹²⁸ An interpretation of the Sherman Act that denies immunity to all protests before zoning boards would constitute a content-neutral restriction.

¹²⁹ 391 U.S. 367 (1968). In *O'Brien*, the defendant burned his draft card to symbolize his opposition to the Vietnam War. He contended that the federal statute that prohibited destruction or mutilation of draft cards was unconstitutional because it violated his first amendment right to free speech. The Court applied a four-part balancing test in concluding that the defendant's activity was not protected by the first amendment:

[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

¹³⁰ This conclusion is inescapable when one considers first amendment cases involving behavior such as a terrorist kidnapping or the bribery of a public official. If this activity is undertaken with a genuine desire to influence governmental decisionmaking, then it is bona fide petitioning activity. However, it would be ludicrous to assume that such behavior merits protection under the first amendment given the government's overriding interest in restricting such behavior.

Cf. 1 P. AREEDA & D. TURNER, *supra* note 15, ¶ 205 (arguing that "[n]ot every incident of lawful political activity should be immune from antitrust law").

¹³¹ Furthermore, courts have taken different approaches to cases within the same category of petitioning. *See supra* notes 76-78 and accompanying text.

fluence governmental decisionmaking shall be immune from antitrust liability if there is no constitutionally justifiable governmental restriction of the activity.

1. *Lobbying as Petitioning Activity*

In *Noerr*, the defendants engaged in lobbying,¹³² which, in and of itself, was not anticompetitive. Only through legislation "could [the publicity campaign] have had the effect of damaging the competitive position" of the plaintiffs.¹³³ To find that the defendants' activity was subject to antitrust liability, the *Noerr* Court would therefore have had to construe the Sherman Act to prohibit petitioning that ultimately is designed to reduce competition. Such an interpretation would have created a content-based statutory restriction that infringes upon the right to petition.¹³⁴

In testing the constitutionality of a content-based statutory restriction on the right to petition, a court must determine whether the activity poses a "clear and present danger" to a significant governmental interest.¹³⁵ In the antitrust context, the governmental interest at stake is free competition.¹³⁶ Given the stiff requirements of the "clear and present danger" test,¹³⁷ the *Noerr* defendants' activity would not have sufficiently threatened free competition to warrant suppression of their first amendment rights. Therefore, the *Noerr* Court properly awarded immunity to the defendants' petitioning because no justification for governmental restriction of the petitioning existed.¹³⁸

¹³² *Noerr*, 365 U.S. at 140 ("the railroads' campaign was directed toward obtaining governmental action"). The defendant in *Noerr* also employed a "third party technique," which "was aptly characterized by the District Court as involving 'deception of the public'" and which "depends upon giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups." *Id.* at 140. The Court, however, did not consider this practice to be distinguishable from the defendant's other petitioning activities under the *Noerr-Pennington* doctrine. *See id.* at 140-42; *see also* *Missouri v. National Org. for Women*, 620 F.2d 1301, 1314 (8th Cir.) (third party technique is mere tool to influence governmental decisionmaking), *cert. denied*, 449 U.S. 842 (1980). *But see* *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1080 (9th Cir. 1976) (interpreting *Noerr* to extend immunity to publicity campaigns only), *cert. denied*, 430 U.S. 940 (1977).

¹³³ *Noerr*, 365 U.S. at 139 n.18.

¹³⁴ *Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553, 557 (D. Del. 1980).

¹³⁵ *See supra* note 125 and accompanying text.

¹³⁶ *See* *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

¹³⁷ *See* *Widmar v. Vincent*, 454 U.S. 263, 270-71, 276 (1981) (holding that state university's policy of excluding religious groups from participating in the same open forum as other student groups was an invalid content-based restriction of first amendment activity, stating "[we] have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content"); *see also* J. NOWAK, R. ROTUNDA & J. NELSON, *HANDBOOK ON CONSTITUTIONAL LAW* 740 (1978) (arguing that the Court should apply the "clear and present danger" test in a strict manner).

¹³⁸ The *Noerr* Court failed to articulate this analysis beyond stating that "[an opposite]

The sham issue does not often require much attention in lobbying cases. The competitive advantage lobbyists seek would accrue from the passage of the legislation for which they are lobbying, not from the lobbying activity itself. Thus, lobbying activity will rarely be an insincere effort to influence governmental decisions.¹³⁹

2. *Adjudication as Petitioning Activity*

In an adjudicative setting,¹⁴⁰ the sham issue requires greater attention.¹⁴¹ The mere filing of a suit or lodging of a protest often may harm a competitor.¹⁴² Thus, a court must determine whether a party genuinely attempted to influence governmental decisionmaking in initiating its action before awarding the party *Noerr-Pennington* immunity. In this context, a party does not genuinely attempt to influence governmental decisionmaking when he does not seek to win the confrontation.¹⁴³

Even in the adjudicative context, petitioning may be regulated under traditional first amendment analysis if there is a constitutionally justifiable governmental restriction of the activity. For example, restrictions on access barring suits may be constitutionally acceptable despite the fact that the suits are petitioning. Thus, if an enterprise controlled a significant portion of the market, but its grip was so tenuous that it believed it could only maintain its market share by filing suit against any and all those seeking to enter the market, a court would not find the

construction of the Sherman Act would raise important constitutional questions," *Noerr*, 365 U.S. at 137-38, because *Noerr* predated the *Brandenburg* "clear and present danger" test by nine years.

The *Pennington* Court's decision also is consistent with this analysis. An interpretation of the Sherman Act that would have prohibited the defendants' activity would have been content-based; it would have prevented the UMW and large coal operators from jointly approaching the Secretary of Labor just because they sought an anticompetitive mandate from that official. *See* 381 U.S. at 669-70. As in *Noerr*, this activity does not sufficiently threaten free competition to satisfy the "clear and present danger" test. *See supra* note 125. Thus, no justified governmental restriction of this activity exists.

¹³⁹ *See* *Mark Aero, Inc. v. TWA*, 580 F.2d 288, 297 (8th Cir. 1978) ("Normally, in a nonadjudicative setting, such as the legislative arena, [the sham issue] presents no particular problem."). The *Noerr* Court briefly addressed this issue, warning that sham lobbying would exist if the defendant's activity was "nothing more than an attempt to interfere directly with the business relationships of a competitor," but concluded that "this certainly is not the case here."

The *Pennington* Court found discussion of the sham issue unnecessary, probably because it was factually established that the UMW and the large operators genuinely sought to convince the Secretary of Labor to set a higher minimum wage. *See* 381 U.S. at 656.

¹⁴⁰ The following discussion applies to administrative adjudicative processes as well as judicial processes. *See supra* note 89.

¹⁴¹ *See* *Mark Aero, Inc. v. TWA*, 580 F.2d 288, 297 (8th Cir. 1978) ("in the adjudicative setting the question [of sham activity] can become more complex").

¹⁴² *E.g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) (plaintiff could not sell bonds while litigation was pending); *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 835-36 (9th Cir. 1980) (same).

¹⁴³ *See supra* notes 111-18 and accompanying text.

suits to be shams if the enterprise genuinely sought to win them. The enterprise's litigation activity may be subject to antitrust liability if the resultant incidental restriction on the enterprise's right to petition is justified under the *O'Brien* balancing test.¹⁴⁴

A construction of the Sherman Act that prohibits access barring suits would be content-neutral because it would prohibit all claims that barred access regardless of the content of those claims. Thus, one must apply the *O'Brien* balancing test to determine whether the restriction is constitutionally permissible. First, the Sherman Act is within the constitutional power of the government.¹⁴⁵ Second, the protection of free competition is an important governmental interest.¹⁴⁶ Third, interpreting the Sherman Act to prohibit this activity would result in only incidental infringement of a first amendment right. Finally, the restriction on petitioning is no greater than necessary for the furtherance of free competition.¹⁴⁷ On balance, a prohibition on access barring suits would be constitutionally acceptable despite the incidental effect such a prohibition would have on the litigant's right to petition.¹⁴⁸

¹⁴⁴ See *supra* note 129. An interpretation of the Sherman Act restricting such access barring conduct would be content-neutral because it would prohibit all incidents of multiple suits that delay a competitor's entry into the market, regardless of the goal behind the suits.

Another possible approach would be to determine whether a party would have brought suit against a potential competitor even if the suit could not prevent or delay entry into his market. See *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1371-72 (5th Cir. 1983). Such an approach, however, would involve the court in a business judgment analysis and is therefore less desirable than the approach suggested above.

In contrast to restrictions on all access barring suits regardless of their purpose, an interpretation of the Sherman Act that would prohibit a single suit brought for an anticompetitive purpose, see *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1256-58 (9th Cir. 1982), would be a content-based restriction of the right to petition because the restriction would be based on the goal of the suit. The "clear and present danger" test therefore would be applicable. See *supra* note 125. It is extremely unlikely that a single lawsuit will sufficiently threaten free competition for the "clear and present danger" test to justify a content-based restriction of the activity. Cf. *supra* note 130.

¹⁴⁵ See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 229-35 (1948) (Congress may promote competition under its commerce power).

¹⁴⁶ See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.")

¹⁴⁷ The *California Motor Transp.* Court intimated this when it based its reversal of summary judgment in part on the allegations that the result of defendants' suits:

was that the machinery of the agencies and the courts was effectively closed to [the plaintiffs], and [the defendants] indeed became "the regulators of the grants of rights, transfers and registrations" to [the plaintiffs]—thereby depleting and diminishing the value of the business of [the plaintiffs] and aggrandizing [the defendants'] economic and monopoly power.

404 U.S. at 511.

¹⁴⁸ The *California Motor Transp.* Court implicitly endorsed this analysis, stating that access barring suits could be restricted even if such activity was "part of the right of petition protected by the First Amendment." 404 U.S. at 513. Although the Court's treatment of this

3. *Political Boycotts as Petitioning Activity*

Political boycotts are refusals to buy, sell, or deal with a person, organization, or with groups of organizations in an effort to coerce legislators or policymakers to pass certain laws or set certain policies.¹⁴⁹ On their face, these boycotts involve efforts to influence governmental decisionmaking.¹⁵⁰ They also are "combination[s] . . . in restraint of trade"¹⁵¹ and consequently fall within the express prohibitions of the Sherman Act.¹⁵² Therefore, a court must decide if the *Noerr-Pennington* doctrine immunizes political boycotts from antitrust challenges.¹⁵³

A political boycott will rarely be found to be a sham. The sponsors of and participants in a group boycott sacrifice the option to buy or sell certain goods or services to put political pressure on legislators.¹⁵⁴ Thus, unless a plaintiff can show that a defendant initiated the boycott solely to harass a competitor and not to effect a change in laws or governmen-

issue was not thorough, its conclusion is consistent with traditional first amendment analysis. See *supra* notes 144-47 and accompanying text.

Professors Areeda and Turner advocate use of a similar approach. See 1 P. AREEDA & D. TURNER, *supra* note 15, ¶ 205. They assert that a court should consider "(i) the severity of the danger to competition, (ii) the obviousness of a less dangerous alternative, and (iii) the customary political character of the challenged behavior." *Id.* Because access barring lawsuits "are not customary forms of political expression and are very dangerous to competition," *id.*, Areeda and Turner would reach the same result as that derived from application of the *O'Brien* test in cases involving restrictions on access barring litigation.

¹⁴⁹ See, e.g., *Missouri v. National Org. for Women*, 620 F.2d 1301, 1302 (8th Cir.) (boycott of Missouri convention halls in attempt to coerce Missouri legislators to ratify Equal Rights Amendment), *cert. denied*, 449 U.S. 842 (1980).

Participants in commercial boycotts, on the other hand, seek to coerce a private individual or private organization into taking some desired action. See, e.g., *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 461-62 (1941) (combination of manufacturers of original women's garments and manufacturers of textiles used for those garments refused to deal with retailers who sold copies of original garments in an effort to induce retailers not to market copies).

¹⁵⁰ Political boycotts could be categorized as a type of lobbying. See *supra* notes 132-39 and accompanying text. But because they are solely an economic form of coercion, and the antitrust laws are designed to control certain economic behavior, political boycotts deserve independent analysis.

¹⁵¹ Sherman Antitrust Act, 15 U.S.C. § 1 (1982).

¹⁵² The Supreme Court has held that group boycotts are per se illegal. See *Silver v. New York Stock Exch.*, 373 U.S. 341, 347-49 (1963); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 210-12 (1959); *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 467-68 (1941).

¹⁵³ The purpose of this discussion is to illustrate that a constitutional analysis of antitrust immunity can be, and has been, applied to all forms of petitioning, including political boycotts. For more thorough analyses of the constitutional aspects of boycotting activity, see Kennedy, *supra* note 17; Note, *NOW or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 COLUM. L. REV. 1317 (1980) [hereinafter cited as Note, *NOW or Never*]; Note, *Commercial Entities and Political Boycotts: First Amendment Protection versus Sherman Act Prohibitions*, 14 CONN. L. REV. 391 (1982) [hereinafter cited as Note, *Commercial Entities*]; Note, *Political Boycott Activity and The First Amendment*, 91 HARV. L. REV. 659 (1978); Comment, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131 (1980).

¹⁵⁴ E.g., *Missouri v. National Org. for Women*, 629 F.2d 1301 (8th Cir.) (plaintiffs sacrificed ability to hold conventions in Missouri), *cert. denied*, 449 U.S. 842 (1980).

tal policies, a court will find that the defendant is engaging in petitioning activity because it is genuinely attempting to influence governmental decisionmaking.¹⁵⁵

Determining whether petitioning activity in the form of political boycotts may constitutionally be restricted is a more difficult problem. Because an interpretation of the Sherman Act prohibiting all political boycotts would be content-neutral,¹⁵⁶ a court would apply the *O'Brien* balancing test to determine if the governmental interest in regulating political boycotts is sufficiently important to justify the incidental limitation on the right to petition.

The Delaware District Court applied this analysis in *Osborn v. Pennsylvania-Delaware Service Station Dealers Association*.¹⁵⁷ In *Osborn*, an organization of Delaware service stations planned and executed a boycott of gas sales to the public to express their dissatisfaction with the gas ceiling price established by the Department of Energy.¹⁵⁸ The court concluded that "[i]f a boycott designed to influence governmental action has produced an anti-competitive effect of the kind [the antitrust acts] were intended to guard against, . . . relief can ordinarily be granted with little threat to First Amendment values."¹⁵⁹

The Supreme Court expressed an analogous view in *International*

¹⁵⁵ This analysis is analogous to the sham analysis of lobbying activity, by which sham lobbying will be found only where there is no "genuine effort to influence legislation." *Noerr*, 365 U.S. at 144; see *supra* note 139 and accompanying text.

¹⁵⁶ That is, such an interpretation would prohibit all political boycotts regardless of the content of those boycotts. See *Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553, 557 (D. Del. 1980). But see *Kennedy*, *supra* note 17, at 1012 (arguing that per se illegality of political boycotts fails fourth prong of *O'Brien* test).

¹⁵⁷ 499 F. Supp. 553, 557-58 (D. Del. 1980).

¹⁵⁸ *Id.* at 555.

¹⁵⁹ *Id.* at 558. For a criticism of the *Osborn* decision, see Note, *Commercial Entities*, *supra* note 153.

A Pennsylvania district court reached an opposite conclusion and awarded *Noerr-Pennington* immunity in a case involving a similar factual situation. See *Crown Cent. Petroleum Corp. v. Waldman*, 486 F. Supp. 759 (M.D. Pa.), *rev'd on procedural grounds*, 634 F.2d 127 (3d Cir. 1980). The *Waldman* court applied the *O'Brien* test and apparently found that the second and fourth requirements of that test were not met. See *id.* at 768. After the judgment was reversed, the district court decided it on other grounds. See *Crown Cent. Petroleum Corp. v. Waldman*, 515 F. Supp. 477 (M.D. Pa. 1981). The district court noted that its antitrust discussion was therefore moot but still asserted its validity. See *id.* at 487 n.8.

The *Waldman* court's reasoning cannot withstand scrutiny. Its analysis of the antitrust issue overemphasized the incidental restriction on first amendment freedoms and underemphasized the governmental interest in maintaining free competition. The court argued that "[f]or us to hold that [the defendants] must have continued to rely upon strictly written and oral communication would be to deny them what may have been their only effective means of communication—arousing public sentiment." 486 F. Supp. at 769. The right of petition, however, guarantees only that citizens are able to make their wishes known to their government. It does not guarantee petitioners success in persuading government officials to act in accordance with those wishes. Written and oral communications are extremely effective means by which the dealers could have made their wishes known to the Department of Energy (DOE). The fact that the DOE was not convinced by these communications is not for

*Longshoremen's Association v. Allied International, Inc.*¹⁶⁰ The case involved section 8(b)(4) of the National Labor Relations Act,¹⁶¹ which prohibits secondary boycotts.¹⁶² The Court, citing *O'Brien*, dismissed the defendants' claim that restriction of their secondary boycott of Russian products, instituted to protest the Russian invasion of Afghanistan, would

the court to consider when analyzing the dealers' claim that their petitioning rights were violated.

The Eighth Circuit faced the political boycott issue in *Missouri v. National Org. for Women*, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980). It awarded *Noerr-Pennington* immunity to the National Organization for Women's (NOW's) boycott of convention facilities in states that had not yet ratified the Equal Rights Amendment (ERA). NOW's goal was to coerce the legislators of those states to ratify the ERA. The court drew a distinction between politically motivated boycotts (those aimed at producing social legislation) and commercially motivated boycotts (those aimed at producing economic legislation). See *id.* at 1311-12. The court reasoned that Congress did not intend the Sherman Act to apply to politically motivated boycotts, stating that "the NOW boycott is a tool, not just a competitive purpose, just as the 'publicity campaign/third-party technique' in *Noerr* was a tool. The results of the tools are the same." *Id.* at 1314; see also Note, *Commercial Entities*, *supra* note 153, at 405. But one may question whether the results truly are the same. The lobbyists in *Noerr* were concerned with economic legislation. 365 U.S. at 129. Therefore, *Noerr* cannot support the *NOW* court's distinction between political and commercial boycotts. See Note, *NOW or Never*, *supra* note 153, at 1122-25; Comment, *supra* note 153, at 1136-40. Indeed, the Court's decision in *Pennington* indicates that this distinction is altogether inaccurate. See *Pennington*, 381 U.S. at 670 ("Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."). According to the *Pennington* analysis, the economic or social character of the desired legislation is unimportant when considering the issue of antitrust immunity.

A better approach to the *NOW* case would be to apply the *O'Brien* test. It is obvious that *NOW*'s boycott was indeed petitioning and therefore was not sham activity. Because this was a consumer boycott rather than a boycott by competitors, see *Osborn*, 499 F. Supp. 553 (D. Del. 1980) (boycott by competing gas dealers), the threat to free competition is minimal. Restricting political/consumer boycotts is therefore not justified under *O'Brien*, see *supra* note 129, and the court's award of *Noerr-Pennington* immunity is justified.

¹⁶⁰ 456 U.S. 212 (1982).

¹⁶¹ 29 U.S.C. § 158(b)(4) (1982).

¹⁶² Section 158 provides:

(b) It shall be an unfair labor practice for a labor organization or its agents— . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees

. . . .

Although no antitrust violations were alleged, defendants' activity had a sufficient impact on free trade to create at least a colorable antitrust claim.

infringe on their first amendment rights.¹⁶³ The Court would likely use similar reasoning to deny participants in a political boycott *Noerr-Pennington* immunity from antitrust liability.¹⁶⁴

CONCLUSION

From the inception of the *Noerr-Pennington* doctrine, the Supreme Court has indicated that *Noerr-Pennington* immunity from antitrust challenges is based on the first amendment right to petition. When the *California Motor Transport* Court "adapted [*Noerr*] to the adjudicatory process," however, it strayed from this foundation. The *California Motor Transport* analysis seemed to require courts to award *Noerr-Pennington* immunity to any ostensible petitioning activity and then determine whether the activity fell within the sham "exception" to *Noerr-Pennington* immunity. This "exception-to-the-exemption" approach shifted the focus of *Noerr-Pennington* analysis from its first amendment base, a shift that was reinforced by some lower courts' use of a rigid set of "requirements" to determine the applicability of the sham "exception."

In *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, the Ninth Circuit reconciled *California Motor Transport* with *Noerr* and *Pennington* by restoring *Noerr-Pennington* analysis to its first amendment origins. Under the Ninth Circuit's first amendment approach, sham claims or protests are not petitioning because they are not genuine attempts to influence governmental decisionmaking; such activity therefore does not deserve *Noerr-Pennington* immunity in the first instance because it is not an exercise of a first amendment right. The final aspect of a fully constructed *Noerr-Pennington* analysis based on the first amendment is a logical extension of the *Clipper* court's analysis. Petitioning that would otherwise warrant *Noerr-Pennington* immunity may be restricted if it threatens a sufficiently important governmental interest to justify, under traditional first amendment analysis, the infringement of first amendment freedoms.

Fully stated, *Noerr-Pennington* immunity shields all genuine attempts to influence governmental decisionmaking from antitrust attack unless the government may constitutionally restrict the activity. A close examination of *Noerr-Pennington* case law reveals that this analysis explains

¹⁶³ 456 U.S. at 226-27.

¹⁶⁴ Although the Court seemed more concerned with protecting the right of free speech than protecting the right of petition, *see id.* at 226 ("It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment."), the Court's reluctance to award constitutional protection to group boycotts based on their coercive nature indicates that the Court probably would find a justified governmental restriction of the highly coercive political boycotts and thus would deny *Noerr-Pennington* immunity.

many of the seemingly inconsistent decisions of antitrust cases involving different forms of petitioning.

Lawrence D. Bradley