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Antitrust & Corruption: Overruling *Noerr*

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We live in a time when concerns about influence over the American political process by powerful private interests have reached an apogee, both on the left and the right. Among the laws originally intended to fight excessive private influence over republican institutions were the antitrust laws, whose sponsors were concerned not just with monopoly, but also its influence over legislatures and politicians. While no one would claim that the antitrust laws were meant to be comprehensive anticorruption laws, there can be little question that they were passed with concerns about the political influence of powerful firms and industry cartels.

Since the 1960s, however, antitrust law's scrutiny of corrupt and deceptive political practices has been sharply limited by the *Noerr-Pennington* doctrine,¹ which provides immunity to antitrust liability for conduct that can be described as political or legal advocacy. The doctrine was created through apparent First Amendment avoidance, based on the premise that the Sherman Act could not have been intended to interfere with a right to petition government.²

The *Noerr* decision, dating from 1961, was strained when it was decided and has not aged well. As an interpretation of the antitrust laws, it ignored Congressional concern with political mischief undertaken by conspiracy or monopoly. Its legitimacy has always rested on avoidance of the First Amendment, and while *Noerr* itself may have legitimately reflected such avoidance, the subsequent growth of a *Noerr* immunity has blown past any First Amendment-driven defense of its existence. For that reason, others have suggested a reformulation of the doctrine.³ The better answer is that, lacking constitutional or statutory foundation, *Noerr* should be overruled.

The First Amendment guarantees freedom of speech, assembly, and “to petition the government for a redress of grievances.” It therefore protects efforts to influence political debate as well as legitimate petitioning in the legislative, judicial or administrative processes.⁴ The First Amendment does not, however create a right to bribe

¹ The doctrine's name comes from two cases that were decided close in time: *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

² See *Noerr Motor Freight*, 365 U.S. at 132 n.6.

³ For critiques of the *Noerr* doctrine see, e.g., Fed. Trade Comm'n, FTC Staff Report, *Enforcement Perspectives on the Noerr-Pennington Doctrine* (2006); Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 Rutgers L. Rev. 965, 1011 (2003); Karen Roche, *Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines*, 45 Loy. L.A. L. Rev. 1295, 1341 (2012); see also, Robert P. Faulkner, *The Foundations of Noerr-Pennington and the Burden of Proving Sham Petitioning: The Historical-Constitutional Argument in Favor of A "Clear and Convincing" Standard*, 28 U.S.F. L. Rev. 681, 696 (1994).

⁴ Not all authorities agree that lawsuits are “petitions”, see *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 403 (2011) (J. Scalia, concurring and dissenting) (“I find the proposition that a lawsuit is a constitutionally protected “Petition” quite doubtful.”); U.S. Const. amend. I (“Congress shall make no law...abridging the freedom of speech,

government officials, deceive agencies, file false statements, or abuse government process through repeated filings designed only to injure a competitor. Nonetheless, each of these activities has, in some courts at least, been granted immunity under the overgrown *Noerr* immunity.⁵ It is an extraconstitutional outlier ripe for reexamination.

The case for overruling *Noerr* is buttressed by the fact that, since its decision, *Noerr*'s theoretical foundations have weakened,⁶ and are "wobbly and moth-eaten."⁷ Written before the dawn of public choice theory or contemporary understanding of interest group influence, it relies on an exceptionally stylized model of politics that understates the potential for corruption and denial of majority will.

Moreover, several decades of experience with a judge-made immunity have shown a pronounced tendency for doctrinal creep -- a well-known problem for doctrines anchored in avoidance (so-called "avoidance creep").⁸ Constitutional avoidance, as Charlotte Garden argues, yields decisions that deliberately interpret the statute in a manner at odds with Congressional intent. Subsequent decisions building on that interpretation can easily leave behind both Congressional intent and the original justifications for the original reason for the avoidance.⁹ The result is a free-floating doctrine, as with *Noerr*, that becomes untethered to either statutory goals or Constitutional principle.

Overruling *Noerr* would not make political petitioning illegal. It would, instead, require defendants to rely on the First Amendment when seeking to defend what would otherwise be conduct that is illegal under the antitrust laws. Doctrinally, this is to force courts to address whether conduct in question is actually an antitrust violation, and if, so whether it is protected by the First Amendment or not, drawing on an established jurisprudence for some of the problems presented in the *Noerr* context. For example, while the First Amendment protects false statements in some contexts,¹⁰ it has never protected perjury, or the making of false statements to government agencies.¹¹ It should take no great leap of insight to conclude that the First Amendment might be the superior vehicle for adjudging a defendant's First Amendment interests.¹²

or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

⁵ See *infra* text and accompanying notes 36-54.

⁶ As argued in Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 *Hastings L.J.* 905, 910 (1990).

⁷ *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996).

⁸ See Charlotte Garden, *Avoidance Creep*, *U. Penn. L. Rev.* (forthcoming 2020).

⁹ See *id.*

¹⁰ *United States v. Alvarez*, 567 U.S. 709 (2012) (reversing prosecution of man who lied about military medal).

¹¹ *Id.* at 720 (dicta suggesting that criminalization of false statements to the government and perjury are constitutional); *U.S. v. Gilliland*, 312 U.S. 86 (1941) (false statements to government agencies).

¹² Another, perhaps minor advantage of overruling *Noerr* would be the better development of a petitioning jurisprudence. As it stands, it is unclear whether various putative forms of petitioning government are actually protected by the First Amendment, and the existence of a *Noerr* immunity has served to obscure. See Maggie McKinley, *Lobbying and the Petition Clause*, 68 *Stan. L. Rev.* 1131 (2016).

Noerr could be overruled by the Supreme Court in an appropriate case. It could also be overruled by Congress. The legislature, of course, is not in a position to overrule the aspects of *Noerr* immunity that are anchored in the First Amendment.¹³ But Congress could do what this article calls for, namely, return the immunities granted political speech and petitioning to their Constitutional limits, while reaffirming the purposes of the antitrust laws.

Part I outlines where *Noerr* itself went wrong; Part II, details the problem of doctrinal creep; Part III argues that *Noerr* should be overruled; and Part IV details what a First Amendment replacement would look like.

I. Where *Noerr* went wrong

The *Noerr* litigation arose out of a long-running battle over the 1930s through 1950s between two natural competitors: the railroad and the trucking industry, whose mutual animosity was the stuff of legend. The railroads were the older of the two industries, and had already had many run-ins with the antitrust laws.¹⁴ By the 1930s the railroads began to suffer from the competitive inroads being made by the newer trucking industry. In response, the railroads began a series of anti-truck campaigns to hold their market position by any means necessary.

The railroads began using a technique then relatively new to the business world: a public relations campaign piloted through front groups and promulgated through the mass media. Among the front groups used were “the Empire State Transport League” the “Save Our Highways Clubs,” and the “New Jersey Tax Foundation.”¹⁵ These groups portrayed truckers as villainous creatures whose driving of heavy vehicles destroyed bridges, fractured roads, and created other public dangers. As the trial court found, the campaign was “made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by [a PR firm] and paid for by the railroads.”¹⁶ The court summarized the approach as a “deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information.”¹⁷ The trial judge wrote that “I prefer to treat the whole procedure in its true light, which is the technique of the ‘Big Lie.’”¹⁸

If unseemly, however, the campaigns were unquestionably legislative campaigns. The railroads had clear, if anticompetitive, political goals: to lower the statutory weight limits that kept truckers out of heavy transport and to increase the taxes they paid. To that end, the front groups presented data (allegedly false, though we don’t know for sure)

¹³ *Cf.* *City of Boerne v. Flores*, 521 US 507 (1997)

¹⁴ *See, e.g.*, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

¹⁵ *See Noerr Motor Freight, Inc. v. E. R. Presidents Conference*, 155 F. Supp. 768, 799 (E.D. Pa. 1957).

¹⁶ *Noerr Motor Freight*, 365 U.S. at 130.

¹⁷ *Noerr Motor Freight*, 155 F. Supp. at 799.

¹⁸ *Id.*

that, they claimed, revealed the damage done by trucks to roads and bridges. The other main deception, at least as found by the district court, concerned the question of just whom was presenting the information.¹⁹ As suggested already, the complaints were made to seem as if they were from disinterested third parties, concerned citizens, when in fact, they were not.

As a First Amendment case, *Noerr* is not an easy one. The railroads have in their favor that they were associating to engage in political speech, to present information relevant to government, and ask for changes in the law. As the Supreme Court put it “No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices.”²⁰ The core speech at issue, moreover, if not impartial, was of value, expressing, as it did, the view that the truckers damaged public roads. More generally, as the Court held, a rule that would “disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information.”²¹

The trickier part comes from the deception: the use of the front groups to deceive government as to the source of the information presented, and the allegation that some of the information provided was false. No one has ever suggested that bans on impersonation in an official context violate the First Amendment, and the crime of making false statements to government is routinely prosecuted.²² The First Amendment defense is particularly challenging if it is true that plaintiffs intentionally and maliciously submitted false information to achieve an anticompetitive result — fraud on the legislature — and therefore were like the applicant who submits false information to obtain a patent.²³ But if *Noerr* was just a case of creating a false impression of public support, something which is certainly unethical but happens with distressing regularity in public discourse, the question remains difficult.

But leaving the First Amendment aside, what was the proper construction of the Sherman Act? Imagine the same case without government as the target of the campaign. It seems implausible that the Sherman Act would grant an automatic immunity in a case where an industry conspires to exclude a competitor by manipulating a body with the power to determine the conditions of competition. An effort to hamstring a rival by rigging a process to set exclusionary standards was the kind of thing condemned in cases like *Allied Tube* and *Broadcom Corp. v. Qualcomm Inc.*²⁴ It is the kind of thing meant

¹⁹ *Id.*

²⁰ 365 U.S. 144.

²¹ *Id.* at 139.

²² For example, a lobbyist paid by foreign sources who lies about his funding will not find a defense in First Amendment doctrine when charged with a crime. Lobbying regulation “does not seek to limit what lobbyists are allowed to say” and thus does “not violate freedoms guaranteed by the First Amendment.” Jahad Atieh, *Foreign Agents: Updating Fara To Protect American Democracy*, 31.4 U. PA. J. INT’L L. 1051, 1072-73 n.123 (2010) (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)).

²³ *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

²⁴ *Allied Tube v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 303 (3d Cir. 2007). Other cases finding deception to potentially violate the antitrust laws include *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001) (finding a violation of Section 2 where Microsoft deceived software

for a rule of reason analysis: as Justice Brandeis wrote in *Chicago Board of Trade*, the question would be whether the conduct is such that “promotes competition, or whether it is such as may suppress or even destroy competition....”²⁵ Perhaps the railroads would have argued the weight-limits were competition enhancing in some way, yet it seems more likely that they were more of a bad-faith effort to exclude their competitors.

But *Noerr* did involve bodies of government, and not a standard setting body. That could lead some to believe that the campaigns, even if deceptive, are still not the kind of thing that the Sherman Act or other antitrust laws were intended to have jurisdiction over. Yet even the quickest tour of the history of the passage of the Sherman, Clayton and FTC Acts reveals that this is a grossly mistaken view of what Congress was concerned with when it passed the antitrust laws.

The famous editorial cartoons of the Standard Oil Octopus always have its tentacles encircling legislatures.²⁶ More specifically, among the abuses of which companies like Standard Oil, and later, J.P. Morgan’s New Haven railroad were accused was the bribing of public officials to disadvantage smaller competitors, or to wrongly grant monopolies.²⁷ The legislative history is replete with evidence of such concerns.²⁸ As Robert Faulker

developers into developing software that would only work with Microsoft’s operating system); *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 396–97 (3d Cir. 2000) (reversing dismissal of a Section 2 claim based in part on a deceptive marketing campaign disparaging a competitor); *Nat’l Ass’n of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 914–17 (2d Cir. 1988) (reversing dismissal of a Section 2 claim based on letters sent to pharmacists disparaging a rival drug company); *Int’l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1257–58 (8th Cir. 1980) (affirming a finding of Section 1 and Section 2 violations based on a deceptive advertising campaign).

²⁵*Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

²⁶Joseph Kepler, *Next!*, PUCK MAG., Sept. 7 1904, at centerfold.

²⁷See, e.g., Report of the Commissioner of Corporations on the Petroleum Industry, Part I: Position of The Standard Oil Company In The Petroleum Industry 153 (1907) (“Standard [Oil] has interfered with the construction of independent pipe lines in various ways. Having once constructed its own line it has used its influence to prevent the passage of laws giving [other] pipe lines the right of eminent domain.”); LOUIS D. BRANDEIS, BUSINESS — A PROFESSION 294 (1914) (“[T]he powerful New Haven monopoly, by threat, bribe or other influence, stopped construction and secured the abandonment of the competitive project. The laws of Massachusetts and of Rhode Island were nullified; the will of the people of two supposedly sovereign States was defied; and there is no power of regulation now possessed by, or which can be conferred upon, any State railroad commission or the Interstate Commerce Commission which could prevent or redress such a wrong to the people.”); THURMAN WILLIAM VAN METRE, ECONOMIC HISTORY OF THE UNITED STATES 510 (1921) (“The interstate commerce commission in its report concerning the New Haven Railroad monopoly said to ‘achieve such monopoly meant the reckless and scandalous expenditure of money; it meant the attempt to control public opinion; corruption of government; the attempt to pervert the political and economical instinct of the people in insolent defiance of law.’”); see also Ida Tarbell’s expose which is credited for arousing the public fury that led to the eventual breakup of Standard Oil: IDA TARBELL, HISTORY OF THE STANDARD OIL COMPANY 167-171 (detailing how the first Interstate Commerce bill was “pigeon-holed” by “Standard’s friends”). Tarbell collected primary sources in her appendices which expressed similar complaints, *id.* at 387 (producers complaining that an “anti-discrimination” act that would require railroads transporting petroleum in Pennsylvania to charge equal rates was “killed in the [Pennsylvania] House by the familiar means employed by legislative agents in disposing of measures objectionable, but not debatable.”).

²⁸See, e.g., 30 CONG. REC. 1701 (1897) (Remarks of Sen. Pettigrew on the topic of trusts and tariffs) (“It is for us to say whether we will stop the march of events in their course, and make this again a government of the people, by the people, and for the people, or allow the present to crystallize and thus continue to be what we now are—a government of the trusts, by the trusts, and for the trusts—a plutocracy of artificial persons, sustained by bribery.”); 30 CONG. REC. 1785 (1897) (Remarks of Sen. Mills on the topic of trusts and tariffs) (“we are loading up our manufacturer not for

writes, “there is nothing on the face of the [Sherman] Act to suggest that the Fifty-first Congress wanted to exempt concerted, unethical and anti-competitive activity.”²⁹ He adds that it would be strange to do so “on the ironic premise that the Act permits a business combination to destroy or do grievous harm to a competitor by applying large sums of money to deceive elected officials.”³⁰

The best reading of the Sherman and Clayton Act is that the framers had an overarching concern about monopoly influence over democratic institutions, but also a more specific concern with the obtaining or maintaining monopoly through corrupt means, and especially through bribery or fraud.³¹ For that reason, whether in pursuit of monopolization or the restraint of trade, corruption and fraud on the government ought to be understood as one form of prohibited conduct.

If that’s so, it leads to the conclusion that *Noerr* must be understood as an exercise in constitutional avoidance, a conclusion many other scholars have also reached; or alternatively, that the deception wasn’t quite bad enough to amount to fraud on the legislature.³² That ambiguity is what makes the case frustrating, for despite Justice Black’s bold writing, the *Noerr* opinion, by inventing an immunity instead of resolving the question, took the easy way out.

At this point we need briefly address an alternative view of *Noerr* that has nothing to do with the First Amendment but has shown up in Supreme Court opinions. That view holds *Noerr* to be a necessary implication of *Parker* immunity (and therefore, potentially, independent of the First Amendment). *Parker* stands for the proposition that state action is immune from antitrust scrutiny.³³ Hence, if the federal government, or even the states,

the benefit of the laboring man in this country, but in order to build up magnificent trusts to dominate the legislation of this country, as they are doing”); 21 CONG. REC. 2457 (1890) (Remarks of Sen. Sherman) (“If the concentrated powers of this combination are intrusted[sic] to a single man, it is a kingly prerogative, inconsistent with our form of government.”); see also E. Benjamin Andrews, *Trusts According to Official Investigations*, 3 Q.J. ECON. 117, 150 (1889) (explaining the contents of the 1888 House Committee on Manufactures Investigation into the Standard Oil Trust) (“Our sources show that the witchery of the Standard Oil interest has penetrated even the political world. For some years it influenced, not to say dominated, in at least one great State, the legislature, executive, and courts. Its wiles in that field, described with large detail in the records of the Congressional committee, render very clear the political menace resident in these stupendous aggregations of wealth.”). For a host of commentators, past and present, offering similar interpretations, see also HENRY LEE STAPLES, *THE FALL OF A RAILROAD EMPIRE; BRANDEIS AND THE NEW HAVEN MERGER BATTLE*, 197 (1947) (“Brandeis not only warned of the dangers in the creation of the New Haven monopoly; he saw its significance as part of a larger movement of economic concentration that was threatening the foundations of American democracy.”); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1227 (1988) (citing RICHARD HOFSTADER, *THE AGE OF REFORM* 229 (1955)) (“Economic might was seen to bring with it ominous political power. Into the midst of this system of diffused power and unorganized strength the great corporations and investment houses had now thrust themselves, gigantic units commanding vast resources and quite capable of buying up political support on a wholesale basis, just as they bought their other supplies.”).

²⁹ See Faulkner, *supra* note 3, 691.

³⁰ *Id.*

³¹ *Cf.* Walker Process, 382 U.S. 172.

³² Faulkner, *supra* note 3; Roche, *supra* note 3; Lao, *supra* note 3; Minda, *supra* note 6. It remains possible that the court’s implicit statutory finding was that the deception in this case didn’t quite go far enough to be considered an illegitimate effort to corrupt the legislature.

³³ *Parker v. Brown*, 317 U.S. 341, 352 (1943).

decide to establish a monopoly, that is nonetheless not a violation of the antitrust laws. That has led some — most notably Justice Scalia — to suggest that *Noerr* immunity is simply “a corollary to *Parker*” because as it is within the rights of government act anticompetitively, “the federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government.”³⁴

If superficially appealing, this logic evaporates on further inspection. To pursue monopoly is not the same thing as to pursue it corruptly, but the view just described brushes over the difference. As already discussed the framers of the Sherman Act considered the activity of corruptly seeking of a state-granted monopolies to be within the concerns of the law, especially through bribery, threats or deception. Even if government can override the antitrust laws, it does not necessarily follow that the courts need immunize efforts to obtain state action, especially if they should go beyond the normal protections for advocacy provided by the First Amendment.

This conclusion is reinforced by examining immunities outside of the antitrust context there is no such blanket “corollary” to be found. The government, unlike a private citizen, has special immunities when it puts people to death or seizes property. Yet those seeking to convince government to use those powers enjoy no special immunity to bribery laws, lobbying laws, or other criminal prohibitions. They have, instead, only the protections for political advocacy that come from the First Amendment. The existence of a government power has, outside of antitrust, never been read as a license to pursue it using independently illegal means. It all returns to question of what the First Amendment protects, which returns us to the case for overruling *Noerr*.

These are conclusions that are further buttressed by the Court’s recognition of a sham exception in *Noerr*.³⁵ Were *Noerr* meant to be the perfect mirror image of *Parker*, it might be thought that any purported effort to influence government, no matter how distasteful, might be thought to be immunized. But the sham exception better suggests First Amendment avoidance, because it tracks the well-known position that the First Amendment has limits, and does not protect *everything* that might plausibly be described as speech or petitioning. The sham exception looks very much like a placeholder for the limits of the First Amendment. Just like conduct falsely claiming to be speech is not protected by the First Amendment, anti-competitive activity falsely claiming to be political petitioning is not afforded undue protection.³⁶

Finally, the idea that *Noerr* was constitutional avoidance is buttressed by other cases finding fraud on the government to be actionable under the antitrust laws. In *Walker Process*, a party was alleged to have intentionally lied to the patent office about the state of the “prior art” so as to obtain a patent.³⁷ The Court declined to create any special immunity for such conduct, instead stating that “the enforcement of a patent

³⁴ *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379–80 (1991).

³⁵ The political conduct is “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.” *Noerr Motor Freight*, 365 U.S. at 144.

³⁶ *Id.* at 140.

³⁷ 382 U.S. 172.

procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present.”³⁸ That result impeaches any idea that the Sherman Act was not meant to reach efforts to defraud government for anticompetitive purpose.

All this suggests that while constitutional avoidance may be appropriate in some cases, it was mistaken in *Noerr*, because *Noerr* was hardly a one-off. It gave birth to a judge-made immunity, and in the process left a critical matter undetermined: it would always be unclear whether a court, invoking *Noerr*, need rely on Constitutional avoidance to do so, and thereby conduct a First Amendment analysis; or whether it was free to just invoke *Noerr* as a free-floating immunity. That would, in time, allow the immunity to expand far beyond any constitutional or statutory mandate.

A different way of stating the critique is this: *Noerr* does not give the courts the tools or mandate to address the competing values of the First Amendment and the Antitrust laws in the cases it addresses. Unlike, say, the overlap between patent and antitrust, where the conflict is made explicit, it was instead buried by constitutional avoidance. That burial would lead the courts to expand the immunity in directions entirely unrelated to First Amendment value, a matter to which we now turn.

The Relationship between the First Amendment and Antitrust Laws

The antitrust laws and the First Amendment have shared goals. Both laws envision open societies and have their anchor in liberty. Both take as their device the promotion of competition in actual or metaphorical markets. And both have been justified as means for preventing abuses of power, whether by government or the monopolist. There is even some similarity in their methods: what is censorship if not the exclusion of a competitor from the marketplace of ideas?³⁹

As laws serving roughly the same ends with similar philosophies, it might seem unlikely that the laws might come into conflict. But the tension we’ve seen arises from the fact that, as *Noerr* and similar cases show, the First Amendment blesses conduct -- petitioning -- that can be used to obtain anti-competitive ends. However, the First Amendment does not protect everything that might conceivably be called “speech,” suggesting it might be important to take a closer look at just what speech values are implicated in political influence campaigns.

Imagine that the coal industry were concerned with the rise of wind power, an obvious competitor. It might react in more than one way. First, the coal industry or its owners might distribute information (here assumed to be factual) showing that wind power, in fact, creates its own waste problems or is more expensive than generally thought. It might distribute information suggesting that coal is not actually as “dirty” as

³⁸ *Id* at 174.

³⁹ There are, to be sure, differences. The First Amendment has an obsession with discrimination among speakers not shared by the antitrust law, with the partial exception of the unenforced sections of the Robinson-Patman Act. It is also relatively indifferent to the questions of power and censorial effect, happy to punish anything done by a state actor, unlike the antitrust law, which often demands demonstrations of market power or monopoly power.

widely believed (“clean coal”). And it might formally petition government with economic arguments for abandoning its subsidies of wind power.

These activities are all within the core of First Amendment protection. The strongest argument for their protection is that, by providing information to government and the public relevant to an important debate, they serve the process of democratic self-government,⁴⁰ both through the formation of public opinion and the provision of information necessary to making important public decisions. It is true that the volume of speech that the coal industry can afford might be said to give its speech an unfair advantage; yet as it stands, the First Amendment has stood for the premise that more is more in that context.⁴¹

So much for a “clean” campaign of political influence that relies on the publication of factual information, correctly attributed. What about when the campaign becomes increasingly deceptive, corrupt, and abusive? The answer is that the First Amendment interests weaken until they, at some point, they disappear entirely. This point is key to understanding the First Amendment / antitrust analysis and a point largely neglected by *Noerr* and its Supreme Court progeny: not all the techniques of political influence are “speech” or petitioning at all.

The coal industry might, as in *Noerr*, use front groups who lie about their funding to present its criticism of wind power, thereby deceiving the public and government as to the source of the critiques. It might, next, publish demonstrably false, or even defamatory information, such as the suggestion that wind turbines are highly harmful to human health (“wind power syndrome”).⁴² Finally, the coal industry might intentionally and maliciously present false information — say, false pricing information, or the defamation of individuals involved in wind — in its petitions to government. It might file endless procedural challenges to block the approval of wind farms by local authorities. Finally, it might give cash bribes to government officials in exchange for a local ban on wind power. Or it, at the extreme, hire thugs to sabotage wind turbines under the cover of darkness.

As we run through these increasingly dirty advocacy campaigns, the First Amendment interests become progressively weaker to non-existent. Laws that ban bribery, defamation, deception of government and sabotage have all survived First

⁴⁰ See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment: Masses Publishing Co. v. Patten*, 61 U. Colo. L. Rev. 1 (1990).

⁴¹ *Whitney v. California*, 274 U.S. 357, 375 (1927) (J. Brandeis dissenting) (“[T]he fitting remedy for evil counsels is good ones.”); *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment[.]”); *accord* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350 (2010).

⁴² Jeffrey Ellenbogen *et al.*, *Wind Turbine Health Impact Study: Report of Independent Expert Panel January 2012* 13 (2012) (“There is insufficient evidence that the noise from wind turbines is directly [...] causing health problems or disease.”)

Amendment challenges, either based on the strength of the government interest, or the idea that there really is no protected speech at issue, but merely conduct.⁴³

On the antitrust side of the ledger, the strength of the government's interests would similarly seem to depend on the spectrum of deception through outright corruption. Despite occasional academic suggestions that the antitrust laws should be indifferent to anticompetitive intent or malicious conduct, the nature of the conduct matters, as evidenced both by case law condemning intentional monopolization,⁴⁴ deception,⁴⁵ and other tortious conduct, like fraud or sabotage.

This short section cannot capture every conceivable type of advocacy campaign. But what is notably lacking in *Noerr* is *any* consideration of the relative strength of the First Amendment and antitrust interests. And as we shall see, it has led the courts — especially district courts — to extend *Noerr* immunity beyond any justifiable boundary.

II. Leaving behind the Constitution

If it might originally have been defended as an exercise in Constitutional avoidance, over the decades the *Noerr* doctrine has grown into its own creature, too unconnected and insensitive to the competing concerns of antitrust policy and the First Amendment. At its worst, it has provided immunities to classes of conduct, like bribery, abuse of government process, and lying to government which it seems clear that the antitrust laws were meant to punish and for which there are no constitutional protections.

The 1991 decision *City of Columbia v. Omni Outdoor Advertising, Inc* did the most to make the doctrine insensitive to the competing concerns in this area.⁴⁶ The jury, at trial, had found a corrupt conspiracy between the city of Columbia and a billboard company. Despite the fact that the First Amendment does not generally protect conspiracies, Justice Scalia's majority nonetheless held the conduct protected by *Noerr*.⁴⁷ The key doctrinal move in *Omni* was to limit *Noerr*'s sham exception — which, as we've seen can be understood as a proxy for the First Amendment's limits. The Court limited it to one category of sham, bad faith abuse of the political process, and declined to find any other possible exceptions, such as the "conspiracy" exception found by the court of appeals. Given that the sham exception can be understood as standing in for the limits of the First Amendment, *Omni* gave courts an open door to use *Noerr* to protect conduct that would not be protected by the First Amendment.

⁴³ *United States v. Halloran*, 821 F.3d 321, 340 (2d Cir. 2016) (holding that the First Amendment does not protect bribery); *United States v. Yermian*, 468 U.S. 63 (1984) (never suggesting that 18 U.S.C. §1001 which makes it a federal crime to knowingly lie to the government poses first amendment issues); *see also* *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 732 ("A baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by the [NLRA is] not within the scope of First Amendment protection[.]")

⁴⁴ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁴⁵ *Microsoft*, 253 F.3d 34; *Union Oil Co. of Cal. (Unocal)*, FTC Dkt. No. 9305, slip op. at 16 (2004); *Walker Process*, 382 U.S. 172.

⁴⁶ *Omni Outdoor Advertising*, 499 U.S. 380 (1991).

⁴⁷ *Id.*

Since that time, *Noerr* has, in lower courts, come to protect a range of conduct that would not be protected by the First Amendment, including not just conspiracy, but bribery, false statements to government, deceit, and even abuse of process—so long as some political objective can be claimed. Over-broad *Noerr* immunity and an under-inclusive sham exception made courts reluctant to recognize areas of clearly anticompetitive action that should not enjoy any constitutional protection.

Consider the following example of how *Noerr* is invoked to immunize bribery. In 2001, a district court in Louisiana heard allegations that a riverboat company was bribing government officials so as to prevent competitors from obtaining a license to operate.⁴⁸ The court rejected the idea that “bribery, extortion and corruption” would “abrogate antitrust immunity.”⁴⁹ It did so based on the premise that even corrupt and criminal activity is immune from antitrust scrutiny, under *Omni*, so long as the ultimate object is a favorable political outcome.⁵⁰

In another departure from First Amendment principle, some courts have also interpreted *Noerr* to protect the making of false statements to government. For example, in a 2013 dispute between two asphalt firms, one alleged the other had lied to municipal governments about the relevant regulations so as to trick the governments into excluding rivals.⁴⁸ When targeted in an antitrust suit the court upheld immunity,⁵¹ despite the analogy to obtaining a fraudulent patent condemned in *Walker Process*,⁵² evidence of effects on competition, and the fact the First Amendment, with rare exceptions, does not protect false statements made to government.

Finally, there are courts that have, unaccountably, immunized conduct that is nearly impossible to describe as political speech or petitioning. Conduct that *Noerr* itself named as unprotected — the use of political process as an anticompetitive weapon (such as through repetitive, baseless filings).⁵³ Even when the goal of the filing is for “the principle purpose of harming [a] competitor,” courts have refused to consider the filing a

⁴⁸ See *Astoria Entm't, Inc. v. Edwards*, 159 F. Supp. 2d 303 (E.D. La. 2001).

⁴⁹ *Id.* at 322 (finding *Noerr* immunity for defendant “even taking plaintiff’s allegations as true . . . that the defendants engaged in corrupt political lobbying.”). In some cases, the courts have entangled *Noerr* immunity with Parker immunity, which insists the Sherman Act does “not apply to anticompetitive restraints imposed by the States ‘as an act of government.’” 317 U.S. 352. But as discussed above, that the government itself cannot be guilty of an antitrust violation, should not mean that successful private bribery of legislatures should immunize the private actors.

⁵⁰ “Liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did so by *bribery*, deceit or other wrongful conduct that may have affected the decision-making process.” *Armstrong Surgical Ctr., Inc. v. Armstrong Cty. Mem’l Hosp.*, 185 F.3d 154, 162 (3d Cir. 1999) (emphasis added) (holding that because injury resulted from state denial of certificate to plaintiff, the hospital and physicians were immune from antitrust liability despite bribery and deceit in certification process.); see also *Sandy River Nursing Care v. Aetna Cas.*, 985 F.2d 1138, 1147 (1st Cir. 1993).

⁴⁸ See *Asphalt Paving Sys. v. Asphalt Maint. Sols., LLC*, No. 12-2370, 2013 U.S. Dist. LEXIS 46017, at *17–18 (E.D. Pa., Mar. 28, 2013) (stating that lying was irrelevant because there were technically other ways for municipalities to find the correct information to counterbalance the lies).

⁵¹ *Id.*

⁵² 382 U.S. 172.

⁵³ See, e.g., *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (explicitly labeling “a pattern of baseless, repetitive claims” as an example of a sham.).

sham.⁵⁴ Courts have protected series of filings that petitioners never expected to win on.⁵⁵ Similarly they have fully ignored distinction between standards for single and multiple filings and insisted on firm proof of “objective unreasonableness” for each action despite the obvious increased harm that comes from fielding many specious claims.⁵⁶

Other examples of dubious extensions to *Noerr* include an immunity premised on the communication of a list of school accreditation to the state,⁵⁷ private and secret meetings at a governor’s mansion,⁵⁸ and even boycotting competitors.⁵⁹ At the risk of stating the obvious, the First Amendment goals served by immunizing these forms of conduct is unclear at best.

It is worth pointing out that not every court has ignored the First Amendment foundations of the *Noerr* doctrine.⁶⁰ Courts have sometimes insisted on a First Amendment analysis prior to granting *Noerr* immunity. For example, consider litigation from the early 2000s, centered on allegations that a drug manufacturer sought to delay the entry of competitive generic drugs by wrongly listing its patent in the FDA’s orange book. In rejecting a *Noerr* defense, the district court agreed with the FTC that the listing was not a petition protected by the First Amendment, and therefore not entitled to *Noerr* immunity. It did so on the premise that, as the FTC argued, the FDA’s actions were ministerial, as opposed to discretionary: there is no *Noerr* immunity when the “government does not perform any independent review of the validity of the statements, does not make or issue any intervening judgment and instead acts in direct reliance on the private party’s representations.”⁶¹ Similarly, the FTC, at least, believes that

⁵⁴ *Westmac, Inc. v. Smith*, 797 F.2d 313, 317–318 (6th Cir. 1986).

⁵⁵ *P.R. Tel. Co. v. San Juan Cable LLC*, 874 F.3d 767, 772 (1st Cir. 2017) (“Of course the absence of any outright victory in so many forays similarly makes it quite clear that the likelihood of prevailing was not paramount in [the petitioner’s] calculus when deciding whether to petition. But the task here is to identify sham litigation, not probable winners.”) (holding that 24 petitions were not baseless and thus protected, despite finding petitioner did not expect to win).

⁵⁶ *See id.*; *see also Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 200 (3d Cir. 2015) (“After all, if *Noerr-Pennington* immunity shields objectively reasonable actions when considered individually, it should continue to shield them when they are aggregated[.]”).

⁵⁷ *Mass. Sch. of Law v. Am. Bar Ass'n*, 107 F.3d 1026, 1029, 1038 (3d Cir. 1997) (finding *Noerr* applicable despite the fact that the ABA’s current “petitioning conduct” involved merely the communication of its list of accredited schools to the states).

⁵⁸ *Astoria Entm't, Inc. v. Edwards*, 159 F. Supp. 2d 322 (E.D. La. 2001) (finding *Noerr* immunity despite the fact that the “case involves activity completely extraneous to the lawmaking [and adjudicatory] process.” And instead involved “meetings between the various defendants...held in private at the Governor’s mansion and not in a public atmosphere.”)

⁵⁹ *VIBO Corp. v. Conway*, 669 F.3d 675, 684 (6th Cir. 2012) (“Some courts have held that a competitor’s conduct of boycotting constitutes protected petitioning intended to induce government action, so long as the boycotting is not for the purposes of contracting for higher prices and does not amount to direct marketplace injury.”) (citing *Armstrong* 185 F.3d 157-60); *Sandy River*, 985 F.2d 1141-44; *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 296-97 (8th Cir. 1978).

⁶⁰ *See, e.g., Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982); *In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 363, 370 (S.D.N.Y. 2002).

⁶¹ *In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 370.

misrepresentative communications to government are not protected by the First Amendment, and also not protected by *Noerr*.⁶²

This might be a fine approach if followed generally, but is not, and the very inconsistency strengthens the case for overruling *Noerr*. While the approach of the cases just discussed is the better one, nothing obliges a court to follow this formula when deciding a case, and the Supreme Court itself has ignored it.⁶³ Hence, until *Noerr* is overruled, the immunities that attach to speech and petition will remain a hodge-podge of immunity associated with First Amendment protections, that is purely judge-made, and inconsistent with the anti-corruption purposes of the Sherman Act.

III. Reasons to Overrule Noerr

The problem of *Noerr*'s expansion is hardly unrecognized by commentators.⁶⁴ Even Robert Bork's *Antitrust Paradox*, not generally understood as a manual for vigorous antitrust enforcement, suggested that *Noerr* had gone too far in its licensing of anticompetitive conduct.⁶⁵ There have, over the years, been several prominent calls for courts to adjust or narrow the *Noerr* doctrine,⁶⁶ including a study by the FTC in 2006,⁶⁷ but the calls for substantive reform have had influence only at the margins.⁶⁸

If it can be agreed that *Noerr* has gone beyond any defensible basis in the First Amendment, there are three good reasons to overrule it. The first and most obvious is the duty of the Courts to fulfill their duty to apply the Sherman Act and similar laws as Congress intended. The text of the statute does not contain exceptions for seeking monopolization or restraint of trade through governmental means. And as suggested earlier, the legislative history of the antitrust laws does not suggest a Congress that wanted to exempt bribery, deception or other abuses from antitrust scrutiny.⁶⁹ *Noerr* has therefore prevented government from confronting some of the problems that the antitrust laws were meant to solve.

The second reason to overrule *Noerr* is to ensure greater consistency in the courts. As it stands, some courts consider First Amendment limits when deciding *Noerr* cases; but others feel free to treat *Noerr* as a free floating doctrine that can be extended

⁶² See Unocal, FTC Dkt. No. 9305, at 16 (opinion of the Commission).

⁶³ Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993).

⁶⁴ See David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 Harv. J.L. & Pub. Pol'y 293 (1994); Minda, *supra* note 6; Lao, *supra* note 3; FTC Staff Report, *supra* note 3 at 2 fn. 2 ("We treat here [...] three varieties of conduct, frequently alleged to be Noerr protected, that the Commission has learned from experience are often used for anticompetitive ends.").

⁶⁵ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 347 (1993).

⁶⁶ See Faulkner, *supra* note 3 681, 696 (1994); Roche, *supra* note 3, 1341; Lao, *supra* note 3, 1011; 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, 1324 (1984).

⁶⁷ FTC Staff Report, *supra* note 3.

⁶⁸ The FTC made some progress on its advocacy of a ministerial exception to Noerr in *In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 370. The FTC also brought a complaint against Viropharma for filing petitions and complaints in order to slow a generic of their product to market. However, the case was dismissed at summary judgement on non-Noerr grounds. *FTC v. Shire ViroPharma, Inc.*, 917 F. 3d 147 (3rd Cir. 2019).

⁶⁹ See *supra* notes 23-25 and accompanying text.

regardless of its basis in the First Amendment. The current approach is a recipe for inconsistency and circuit splits.

In part this is accomplished by breaking the analysis into its constituent parts, so that it becomes obvious whether any given ruling is statutory or constitutional. One would ask, first, whether the conduct in question represents the kind of thing that Congress meant to prohibit in Section 1 or 2 of the Sherman Act, Section 3 or 7 of the Clayton Act, or Section 5 of the FTC Act. Once that is done, the Court can then consider whether the conduct is, nonetheless, protected by the First Amendment, relying on established First Amendment doctrine. Doing this would not allow courts to mix the issues and consequently avoid analysis of either.

The third reason is related: maintaining the coherence of the respective Constitutional and statutory doctrines. Because *Noerr* does not clearly call for either, it has created a pronounced danger of doctrinal creep.⁷⁰ To the extent protected speech or petitioning under the First Amendment is implicated, the First Amendment's own jurisprudence is best suited to provide an answer. To the degree that hard statutory questions are presented — just when is anticompetitive bribery a violation of the FTC Act? — such questions should be answered, as opposed to brushed away with a citation to *Noerr*.

An alternative to overruling *Noerr* is to demand that courts to consider the First Amendment in the course of applying *Noerr* immunity. This is better than the current state of affairs, but has the problem of being too convoluted. Take the bribery case just described. It would require the court, in the midst of an antitrust analysis, to consider the scope of any Constitutional right to bribery, potentially to create a bribery exception (or expand the sham exception) and then return to the antitrust point. It is simpler, as is the normal style, to assess whether the conduct in question violates the law, and if so, whether it is nonetheless protected by the First Amendment, and then, if so, whether the government's interests outweigh the speech interests.

The doctrine of *stare decisis* might be read to caution against overruling *Noerr* and restoring First Amendment analysis. However, because our understandings of business and economics tend to evolve over time, if there is one area of federal law where *stare decisis* has held little weight, it has been antitrust. Relying on such changed understandings over the last 30 years, the Supreme Court has overruled major opinions across the board, even opinions that once to set the rules of the road for commerce, such as the *per se* bans on retail price maintenance and vertical price fixing.⁷¹

⁷⁰ Cf. Charlotte Garden, Avoidance Creep, U. Penn. L. Rev. (forthcoming 2020) (Courts “should use avoidance only if its implementation would be at least minimally consistent with the doctrine’s stated rationale—a low standard that courts nonetheless currently fail to meet when they use avoidance to resolve as-applied challenges.”).

⁷¹ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007) (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)); *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967)); *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)).

Here, the problem of the “moth-eaten” foundations of *Noerr* are important. *Noerr* may not be entirely naive, but it was written before the dramatic increases in lobbying budgets that occurred in the 21st century, and a better understanding of the private influence on legislatures.⁷² In the same sense that changing economic understanding caused the courts to overrule some of its *per se* rules, similarly, the changing understandings of political influence have changed the circumstances under which *Noerr*'s viability should be understood.

We can add to this, finally, that the usual reason for declining to overrule a case — longstanding reliance by parties — should not be a major factor in this case. The reason is that the First Amendment would remain to protect core political activities; indeed political advocates are already constantly relying on the First Amendment. What would be newly subject to antitrust liability is conduct like bribery, fraud or deception of government. But it seems hard to imagine that parties can be said to have reasonably relied on *Noerr* to immunize conduct that is *malum in se*.

The better approach, both in terms of fidelity to Congressional intent, and also to reduce the variation among lower courts, is to overrule *Noerr*, and ask defendants to rely on the First Amendment should they believe their speech or petitioning is constitutionally protected. This overruling of *Noerr* could be accomplished by the Supreme Court. But it could also be accomplished by Congress. In the course of antitrust reform, Congress can specify that *Noerr* immunity, to the extent it is not based on the Constitution, is overruled. If Congress wanted it could also, create particular exemptions for political organizing at the same time.

IV The First Amendment as a Replacement for *Noerr*

In the absence of *Noerr*, the defendant who claims to be petitioning government or expressing political views would not be left helpless. Instead, such a defendant would raise the First Amendment as a defense, as is typical in other areas of the law.⁷³ This section considers, briefly, what such a defense might look like in practice.

A defendant engaged in concerted anti-competitive activities that involve the government would defend itself by asserting that it is engaged in either political speech, petitioning, or both. Faced with such a defense, the main two questions before the court would be this: was the defendant in fact engaged in speech or petitioning, or, instead, in some category of conduct, such as bribery, deception of an agency, abuse of process, or other such categories? Second, if the defendant was engaged in protected speech or

⁷² Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *Perspectives on Politics* 564 (2014) (arguing that “that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence.”).

⁷³ *Noerr*, 155 F. Supp. 827, rev'd, 365 U.S. 127 (1961) (“The defendants' conduct is not within that broad expanse of conduct which is protected by the First and Fourteenth Amendments. What the defendants have combined to do is something more than free speech; [...] freedom to assemble; [and freedom to petition]. They have engaged in a course of conduct designed to destroy the good will of a competitor in order to secure a monopoly[.]”); see also *Bill Johnson's Restaurants*, 461 U.S. 731 (comparable first amendment analysis in labor law).

expressive conduct, do the governments' interests — understood as preventing monopolistic corruption of the political process — outweigh those interests?

As the first step suggests, an important doctrinal tool in a First Amendment defense of *Noerr* like conduct is the speech / conduct distinction. The speech / conduct distinction is a familiar First Amendment trope most famously associated with Holmes' example of shouting "fire" in a crowded theater. As implied by that example, the Court has never taken everything that might, in some sense be called "speech" to be protected expression under the First Amendment. Many so-called "speech acts," such as true threats, criminal conspiracy, harmful lies and most procedural court filings are not granted protection as speech under the First Amendment.⁷⁴ Hence, a defendant who claims that their conduct, otherwise illegal under the Sherman Act, is in fact protected speech, would need to demonstrate that what is claimed as speech enjoys protection at all.⁷⁵

Much anticompetitive speech would still be protected. The railroad company that expresses its passionate support for climate change laws, knowing that such laws will disadvantage the trucking industry, is protected by the First Amendment. In fact, even if the industry supports such measures *because* emission requirements might hurt its competitors would still be engaged in protected speech — the premise being that it is participating in the debate. But a company that issues false statements in a government proceeding to hurt a competitor or competition is not protected, as in the example of the oil company that lies about its patents to a state agency formulating a regulation,⁷⁶ or the filing of false claims to the FDA to try and extend the life of a patent.⁷⁷ That kind of claim could be decided by *United States v. Gilliland*,⁷⁸ which affirmed that intentionally false declarations to the government are unprotected by the First Amendment. The Court held

⁷⁴ *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 573 (1942) (threats); *N. L. R. B. v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (“[A] threat of retaliation based on misrepresentation and coercion[is] without the protection of the First Amendment.”); *Aikens v. State of Wisconsin*, 195 U.S. 194, 206 (1904) (“The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.”); *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (“Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech.”) *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563, (1980) (“Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it[.]”); *Bill Johnson's Restaurants*, 461 U.S. 731 (court filings); *see also* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 983 (2016).

⁷⁵ *Cf. Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”)

⁷⁶ *Unocal*, FTC Dkt. No. 9305.

⁷⁷ *Cf. In re Bupirone Antitrust Litigation*, 185 F. Supp. 2d 370.

⁷⁸ 312 U.S. 86 (1941).

that it was legitimate to protect “agencies from the perversion which might result from the deceptive practices described”⁷⁹ and prosecutions for such lies are now routine.

A similar analysis obtains for bribery. Bribery can be thought of as a form of expressive conduct, in the same way that the assassination of a political figure might be. But if the courts sometimes take a very narrow view of bribery, they have not been willing to afford a Constitutional defense to those convicted of bribery.⁸⁰

It is important to understand how this analysis would differ from the invoking of *Noerr*'s sham exception. As it stands, the sham exception has been limited by the Supreme Court to a form of conduct unprotected by the First Amendment (purely baseless abuse of process). The court using existing First Amendment analysis would necessarily be forced to consider whether other forms of expressive conduct, like bribery or deceit, were protected or not.⁸¹

Even if they are not engaged in protected speech, antitrust defendants might argue, alternatively, that they were engaged in petitioning, which is separately protected by the First Amendment. But to invoke this defense, the defendant would have to demonstrate that what they were doing was actually petitioning. As the FTC puts it, petitioning is not “all activity involving communication with the government;” but is limited to a “request to a government decision maker to exercise its discretion to decide in a certain way.”⁸²

Consequently, the manufacturer who petitions the Commerce department for an exception to a steel tariff is protected by the Constitution. (Many forms of lobbying would likely be protected as well; though strictly speaking the Court has yet to explicitly rule that lobbying amounts to protected petitioning.⁸³) But there are such a thing as a communication with government that is not a petition.⁸⁴ For example, purely ministerial or procedural filings, over which the government exercises no discretion, are not good

⁷⁹ *Id.* at 93.

⁸⁰ See *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014) (holding that the court has a legitimate interest in combating quid pro quo corruption); *Halloran*, 821 F.3d 340; *United States v. Menendez*, 291 F. Supp. 3d 606, 621 (D.N.J. 2018) (“The Government alleges that Defendants engaged in a *quid pro quo* bribery scheme, not that either defendant violated campaign finance regulations. In other words, the charges in this case concern bribery, not political speech.”); *United States v. McGregor*, No. 10-186, 2011 WL 1576950, at *3 (M.D. Ala. Apr. 4, 2011) (“If at trial the Government can show that there was a bribery scheme to deprive the citizenry of honest services, then Defendants' conduct, not their speech, will have been regulated by the statute.”) (emphasis added); but see Eugene Temchenko, *A First Amendment Right to Corrupt Your Politician*, 103 Cornell L. Rev. 465 (2018) (arguing that *McDonnell v. United States*, 136 S. Ct. 2355 (2016) may have created an inadvertent First Amendment right to bribery).

⁸¹ In a few cases — say, the use of front groups, or dissemination of false information — the court may recognize the underlying conduct as protected speech and the antitrust laws as regulation targeted at the anti-competitive impact of the speech. Whether such cases would be taken as content-neutral or not is hard to say in the abstract; but in any case they yield the challenge of balancing the interests of the government as expressed in the antitrust laws against their effects on speech. The difficulty of such balancing was probably what led to *Noerr* in the first place. But the most important insights of this piece are for the speech which obviously lacks First Amendment value.

⁸² See FTC, *supra* note 3, at 16.

⁸³ See Mckinley, *supra* note 10.

⁸⁴ *In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 370.

faith efforts to persuade the government of anything.⁸⁵ Similarly, the party who lies to the patent office in a patent application has indeed tried to influence government in their favor, but in a form that cannot be termed a legitimate petition.⁸⁶

The First Amendment protections afforded litigation would remain a slightly complex matter. The Supreme Court has, under the First Amendment, protected the activities of lawyers, at least when “resorting to the courts to seek vindication of Constitutional Rights.” The Court has also said that “the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.”⁸⁷ That, and the protection granted litigation under existing *Noerr* doctrine, would tend to suggest a baseline of constitutional protection for suits that are allegedly filed for anticompetitive purposes. That said, the Constitutional protection afforded litigation is obviously limited. Courts have long felt themselves free to punish lawyers who bring frivolous suits, lie to the court during litigation, or induce perjury. Hence, baseless or repetitive litigation brought purely for harassment purposes would be unprotected.

Conclusion

Corruption of government and private gaming of regulatory process are broadly felt concerns. In that context, the *Noerr* decision’s foundations look increasingly dubious. As efforts to narrow *Noerr* have not succeeded, the overruling of *Noerr* by the courts or Congress is an important step.

I do not deny (who could) the possibility that the First Amendment doctrine is capable of its own doctrinal creep. But the problem with avoidance creep is that the underlying justifications of both the statute and the Constitution go unexamined, as the doctrine takes on a life of its own. When First Amendment doctrine creeps, its consequences are broader. For example, a decision immunizing false statements in agency proceedings under the First Amendment, even if in an antitrust case would necessarily have broader effects. Under *Noerr*, such concerns can be isolated and ignored in the cloud of immunity that the doctrine has created. And that is why, among other reasons, that *Noerr* should be overruled.

⁸⁵*Id.*

⁸⁶ See *Walker Process*, 382 U.S. 172.

⁸⁷ *Guarnieri*, 564 U.S. 379; *but see id.* at 403 (J. Scalia dissenting) (“I find the proposition that a lawsuit is a constitutionally protected ‘Petition’ quite doubtful.”).