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The Legal Structure of American Freedom and the Provenance of the Antitrust Immunities

Christopher Sagers
Cleveland State University, c.sagers@csuohio.edu

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The Legal Structure of American Freedom and the Provenance of the Antitrust Immunities

Christopher L. Sagers

It is a reflection of the subtle relationship between legal doctrine and the larger social context it regulates that, on occasion, some humble point of mere theory proves to be the linchpin of a serious social problem. Often the most pernicious aspect of such a situation will be the very obscurity that causes courts to overlook it.

That is emphatically the case with the issue addressed in this Article. Confusion persists over the seemingly academic question of whether the so-called “Noerr-Pennington” or “petitioning” immunity, a doctrine in antitrust law that protects persons from being sued when they seek action from their government, is: (1) merely a construction of the antitrust statutes, or (2) an application of a First Amendment right which is said to protect the “petition of government for redress of grievances.” The prevalent view, driven mainly by dicta in one United States Supreme Court opinion, is that the immunity is a direct application of the First Amendment. However, the problem is usually either ignored or said to be academic at best.

In fact, this issue is terribly significant. Mistakes here necessarily confuse other First Amendment doctrines, in ways that most observers do not take the time to consider, and ultimately infect the larger legal theory of American political freedom. This Article argues that the immunity should be understood as a rule of statutory construction, or else a range of negative consequences follow, including most significantly a serious donation of public political power into private hands.

The contrary argument has nothing going for it but good intentions and a scattered collection of ambiguous dicta.

*Assistant Professor of Law, Cleveland State University. I wish to thank Jeff Oliver of the Federal Trade Commission, Ed Eliasberg of the U.S. Department of Justice, Antitrust Division, and Professors Greg Mark and Rodney Smolla for their feedback on earlier drafts. The views expressed are my own.
A theoretical problem persists in antitrust law in the area of the political immunities. Namely, disagreement reigns over whether the so-called "Noerr-Pennington" or "petitioning" immunity, which protects people from being sued in antitrust when they seek action from their government, is: (1) simply a pragmatic interpretation of the antitrust statutes, or (2) in fact an application of the First Amendment and therefore a substantive rule of constitutional law.¹

The single most pernicious aspect of this seemingly academic point is its very obscurity. This problem, as it turns out, which has quietly caused untold confusion and is beginning to pose social consequences that are arguably quite serious, is significant enough to begin with but is made all the more threatening by the obscurity that has caused many courts to overlook it.² Indeed, confusion on this mere point of theory once caused the United States Supreme Court itself to give birth to one of the most confusing and unnecessary problems in the law of antitrust immunity³ and has led even the most eminent of the lower courts into

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¹The name Noerr-Pennington derives from Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965). As Einer Elhauge has explained, the name really no longer does the doctrine justice because the it has been altered significantly by later cases, most importantly Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988). Einer Elhauge, Making Sense of the Antitrust Petitioning Immunity, 80 CAL. L. REV. 1177, 1194 (1992). Therefore, I will follow Elhauge's example and refer to the doctrine as "petitioning immunity," "antitrust immunity," or the like. See id.

²Occasionally it is suggested that the provenance of the immunity is in fact unimportant because, even if limited to the antitrust context, some body of law very much like it would simply be supplied directly under the Petition Clause of the First Amendment. See, e.g., Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 889–90 (10th Cir. 2000) (en banc) (observing certain technical distinctions between antitrust immunity and other causes of action while ignoring both the theoretical confusion the problem has already caused and the large-scale precedential effects of haphazardly announcing a new rule of constitutional law). This facile perception is quite dangerous. First, it assumes in a manner only too common in modern litigation that the Petition Clause itself provides a special and powerful protection for "petitioning activity" that is distinct from the protection of political speech under the Speech Clause. It does not. See infra notes 13, 17–18 and accompanying text. Second, it is terribly shortsighted; it considers at most the technical distinctions in application of individual causes of action while ignoring both the theoretically confusing problem that has already caused and the large-scale precedential effects of haphazardly announcing a new rule of constitutional law.

³Namely, an offhand dictum in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512–13 (1972), which was very literally the genesis of this whole problem, caused massive lower court confusion over the seemingly tangential question whether certain kinds of "bad" or "immoral" conduct should be protected by the petitioning immunity. See infra notes 75–81 and accompanying text. As explained below, this confusion arose because, inexplicably and for the first time in the history of the petitioning immunity, the Court assumed that it was constitutional in nature. Cal. Motor, 404 U.S. at 513. For the doctrinal disarray it caused, the California Motor opinion has been severely criticized. See Milton Handler & Richard A. De Sevo, The Noerr Doctrine and Its Sham Exception, 6 CARDOZO L. REV. 1, 10–13 (1984) (discussing confusion concerning scope of Noerr doctrine due to California Motor); cf. Stephen Calkins, Developments
similarly peculiar terrain. Moreover, apart from its practical dangers and the doctrinal disarray it has caused, this misunderstanding frustrates several other cognate theoretical endeavors, for it confuses the legal theory of modern political participation and ignores a very significant aspect of American constitutional history.


4 Most notably, Judge Posner once wrote for the Seventh Circuit that a lawsuit, despite having a reasonable basis in law and fact, could form the basis of an antitrust counterclaim, notwithstanding that by 1982 it was clear that a lawsuit was itself a “petition” of government within the meaning of the antitrust immunity. Grip-Pak, Inc. v. Ill. Tool Works, Inc., 694 F.2d 466, 470–72 (7th Cir. 1982). This result might seem quite surprising if all one had at hand were the Supreme Court’s early decisions, and for that reason, Grip-Pak too has been severely criticized. *See* Handler & De Sevo, *supra* note 3, at 33–40 (analyzing Grip-Pak). It might seem more reasonable were one to accept Judge Posner’s assumption that the petitioning immunity is an application of constitutional law, since the First Amendment itself does not necessarily protect all expressive conduct just because it may be “reasonable.” *See* Grip-Pak, 694 F.2d at 470–71. The logic problem that immediately arose for Judge Posner, however, is that if the immunity is constitutionally grounded, then presumably it only immunizes things that fall under the protection of the First Amendment, or else such time-honored causes of action as abuse of process would be rendered unconstitutional, which is “something that, so far as [the court] kn[e]w, no one believes.” *Id.* at 470–72. But that observation, in turn, required a holding that meritorious lawsuits could themselves be antitrust violations, which seems plainly at odds with Noerr and Pennington. Handler & De Sevo, *supra* note 3, at 33–40. Though Grip-Pak was effectively overruled by Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49, 49 (1993), the case is still worth considering because it shows how much confusion can result from misunderstanding the immunity’s theoretical foundation.
The problem has not gone unnoticed, but the courts remain in disagreement and, indeed, a conflict is blossoming among the federal appellate courts even now. The time has long since been right for the Supreme Court to grant certiorari.


4Compare Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 128–29 (3d Cir. 1999) (holding defendant immune from state law causes of action because its communications to government were not “sham,” and explicitly stating constitutional explanation of petitioning immunity), Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1059 (9th Cir. 1998) (holding defendant immune from common-law business torts for petitions made to state government agency), San Filippo v. Bongiovanni, 30 F.3d 424, 438 (3d Cir. 1994) (stating that scope of petition right depends upon context in which right is exercised), Video Int’l Prods., Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1084 (5th Cir. 1988) (stating that “[t]here is simply no reason that a common-law tort doctrine can any more permissibly abridge . . . petition than can . . . antitrust,” but failing entirely to cite its own contrary precedent in Coastal States Mkting., Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983)), Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 159–60 & n.1 (3d Cir. 1988) (citing antitrust petitioning cases as support, though not direct authority, for rule that tort claims cannot be based on legitimate political activity), Havoco of Am., Ltd. v. Holloway, 702 F.2d 643, 649 (7th Cir. 1983) (establishing constitutional explanation), and Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 614–15 (8th Cir. 1980) (same), with CarToons, 208 F.3d at 890 (“Antitrust cases that grant Noerr-Pennington immunity
on this question, as it already missed a prime opportunity in 1985,\(^7\) and it should take the next appropriate opportunity to give a clear answer once and for all.\(^8\)

The issue as it is traditionally posed—the precise provenance of the petitioning immunity—actually rather misstates the problem, which is in fact broader. The problem is what role the petitioning immunity case law should play in defining the general nature of our political freedom as Americans. This is so because it raises two significant issues, resolution of which pose dramatic consequences for the law of the First Amendment: first, whether the law of petitioning immunity must apply in some way to all causes of action—as it would if it were an application of the First Amendment,\(^9\) and in which case the law as we do so based upon both the Sherman Act and the right to petition.”), and Coastal States Mkts., 694 F.2d at 1364–65 (“Noerr was based on a construction of the Sherman Act. It was not a first amendment decision.”). Cf. Whelan v. Abell, 48 F.3d 1247, 1254 (D.C. Cir. 1995) (holding that while constitutional protections of First Amendment can sometimes bar common-law causes of action, “such constitutional limitations would apply as such, without the filter of Noerr-Pennington, which the [Supreme Court] has so far used only to justify narrow constructions of federal law”); Ray v. Edwards, 725 F.2d 655, 659–61 (11th Cir. 1984) (refusing to find absolute immunity against nonantitrust claims under Petition Clause, which would have been functional equivalent of constitutional explanation, though not directly considering antitrust petitioning immunity case law).

Circuits have occasionally punted on the question, but when they do they have not failed to notice the disagreement in the federal courts. In Davric Maine Corp. v. Rancourt, 216 F.3d 143 (1st Cir. 2000), and Suburban Restoration Co. v. ACMAT Corp., 700 F.2d 98 (2d Cir. 1983), the courts avoided direct consideration of the constitutional question because the state law causes of action before them had been construed by the state courts not to reach conduct like that of the defendant before the court, but both courts noted the ongoing circuit split. Davric Marine, 216 F.3d at 148 n.7; Suburban Restoration, 700 F.2d at 102.

\(^7\)See infra notes 143–48 and accompanying text (discussing McDonald v. Smith, 472 U.S. 479 (1985)). I will explain there why I think the opportunity was missed. The Court also missed a golden opportunity in 1983 when it denied certiorari in Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983). See supra note 4.

\(^8\)Incidentally, the state courts have not been silent on this question. As it happens, they have found the constitutional explanation persuasive and many have explicitly adopted it. See, e.g., City of Long Beach v. Bozek, 661 P.2d 1027, 1029 (Cal. 1983) (holding that city cannot bring malicious prosecution action against individual who sued city because citizen suit was protected by petitioning immunity); Protect Our Mountain Env’t, Inc. v. Dist. Court, 677 P.2d 1361, 1366–69 (Colo. 1984) (en banc) (holding real estate developer’s state law claims barred by petitioning immunity); Cove R. Dev. v. W. Cranston Indus. Park Assocs., 674 A.2d 1234, 1236–38 (R.I. 1996) (holding real estate developer’s state law claims barred by petitioning immunity); RRR Farms, Ltd. v. Am. Horse Prot. Ass’n, Inc., 957 S.W.2d 121, 129 (Tex. Ct. App. 1997) (“[T]he doctrine is a principal [sic] of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity.”); Webb v. Fury, 282 S.E.2d 28, 36–37 (W. Va. 1981) (noting that where allegedly libelous statement was contained in petition to government, libel suit was absolutely barred unless statement was sham).

\(^9\)The Supreme Court has explained that even private causes of action involve sufficient “state action” that they may not infringe upon free speech rights, on the theory that providing such a cause of action by statute or common law is an act of the state. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964). If the petitioning immunity were a rule of First Amendment law, then no cause of
know it would be altered significantly—and second, whether the Petition Clause of the First Amendment provides a right different from that under the Speech Clause. (Understanding that second point may call for some explanation, which shall come in due course.) In other words, the problem is whether the case law on the antitrust petitioning immunity should play a comparatively small role in the legal structure of our political freedom—as merely an interpretation of the antitrust statutes—or a very big role, one in which it would color every aspect of that freedom.

My view is that while the exercise of political rights should not be unduly burdened by retaliatory litigation, and while there should be (and is) a body of law so to provide (namely, Speech Clause jurisprudence), antitrust immunity rules should have nothing to do with it. The immunity should be recognized for what it is: a rule interpreting a peculiar and specialized body of federal statutes (antitrust law), which happen to be uncommonly vague as statutes go and have therefore required the Supreme Court to engage in an unusually aggressive amount of lawmaking. Any different understanding poses major consequences for our political order, including some that many might consider quite negative.12

In this Article, I will argue that the Court's own case law, both in antitrust and elsewhere, makes clear that the petitioning immunity is not about the First Amendment, even if the Court itself has sometimes seemed uncertain on this point. But more importantly, I will stress that the results of thinking of the petitioning immunity as a constitutional rule—a perspective that for the rest of this Article I will call “the constitutional explanation”—are so plainly undesirable that there cannot be such a rule. The first and most significant bad result is an unintended consequence inimical to the very ideals of liberal government that its proponents seek to protect: it simply puts too much power in the wrong hands. A well-intended extension of First Amendment freedoms might render groups

10"Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I.

11"Congress shall make no law . . . abridging the freedom of speech . . . " U.S. CONST. amend. I.

12A word is in order about the normativity that, but for this footnote, will remain implicit in this Article. I will assume that a desideratum of our political philosophy is that, other things being equal, the legal structure of our political order should not favor one person or group over others. Since that point seems relatively uncontroversial, and since I believe this Article requires no other major normative assumptions, I will provide no more discussion of such matters.

As for deeper philosophical issues, and in particular what some might think is a conflict between views I have expressed elsewhere and the very idea of writing a work of what is essentially doctrinal scholarship, see Christopher L. Sagers, Waiting with Brother Thomas, 46 UCLA L. REV. 461 (1998) [hereinafter Sagers, Brother Thomas]; Christopher L. Sagers, Cum Grano Salis (Nov. 19, 2002) (unpublished manuscript, on file with Utah Law Review) [hereinafter Sagers, Cum Grano Salis].
already disproportionately powerful much more so and therefore more threatening—a consequence that advocates of the constitutional explanation have apparently given little thought. Other peculiar problems follow as well. The antitrust immunity’s simple, formalistic rigidity, while it may be perfectly appropriate for antitrust law, makes no sense in the fact-rich, subjective, and problematic First Amendment contexts to which some courts have applied it, and it should be clear that it does not belong there. This awkwardness manifests itself in several ways. First, were the constitutional explanation correct, it would change the law of several common-law causes of action in ways that one might find quite surprising. Similarly, constitutional explanation courts, in their well-intended desire to protect the political rights of some defendants, have without any clear explanation sometimes obliterated the political rights of opposing plaintiffs. This redistribution may or may not be a good outcome, but the point is that the courts have reached it accidentally. Finally, especially fascinating is a historical problem, and because it sets the stage for the rest of the discussion, this Article will begin with it. The constitutional explanation of the petitioning immunity, said by its proponents to be necessary to preserve the political philosophy of the Framers, in fact has no basis in history at all and is at odds with the classical conception of the “right to petition.”

In the end, I think the constitutional explanation has going for it only good intentions and a scattered collection of ambiguous dicta. Opposed to it is not only a competing body of case law evidence, but a series of odd consequences that suggest the constitutional explanation cannot be right. My main thrust will be that to consider the petitioning immunity a rule of constitutional law must be wrong because if it were right it would inexplicably and ill-advisedly change the legal character of our political freedom.

I. THE RELEVANT LAW IN OUTLINE

A. The Law of the Petition Clause and the Changing Practice of Political Participation

The most prominent characteristic of the law arising under the Petition Clause today is that there is not very much of it. Or rather, there is a lot of it, but it does not exist as a doctrine separate from other First Amendment doctrines. It works in the same way that the familiar Speech Clause jurisprudence works, and cases that might very well have been described as petition cases are usually just decided as speech cases.\(^1\)

\[^1^\]See RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 16:3 (6th release 2003) ("When rights of petition are specifically relied upon, the doctrines devised usually mimic precisely the doctrines familiar for free speech cases generally."); Gregory A. Mark, The Vestigial Constitution: The History and
Consider, for example, a paradigmatic case of political petitioning and an especially important decision in First Amendment law: *United States v. O'Brien.* The defendant in that case, a young man eligible for the draft during the Vietnam War, was convicted under a federal criminal statute for burning his draft registration card. He did so, as it happens, on the courthouse steps before a crowd of onlookers. Under the modern conception of “petition,” I think this conduct could not have been more stereotypically a “petition [of] Government for a redress of grievances,” but the case was nonetheless decided as a Speech Clause case. As will be seen, this modern conception of petition is quite different than the one prevalent at the time the Petition Clause was ratified. This historical difference will prove important in the analysis to follow.

In rough outline, in any event, a modern Petition Clause case, which is really just a Speech Clause case, usually goes like this: the court first asks whether the...

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*Significance of the Right to Petition, 66* FORDHAM L. REV. 2153, 2155 (1998) (“[T]oday, to the extent that [the right to petition] is noticed by the courts at all, it has been almost completely collapsed into the other rights that the First Amendment protects.”).


15 U.S. CONST. amend. I.

16 *O'Brien,* 391 U.S. at 376–77. More recently, in *Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001), the Court considered whether Congress could include a provision in an LSC funding appropriation that would prohibit recipients of legal aid funds from advocating welfare reform through litigation. *Id.* at 536–37. The Court held that it could not, for the ban was a content-based restriction on speech. *Id.* at 543–44. The Court could very well have characterized *Velazquez* as a straight Petition Clause case, for the Court had already suggested that there is Petition Clause protection for political litigation in *NAACP v. Button,* 371 U.S. 415, 430 (1963), and its progeny. *See infra* note 169 and accompanying text. Instead, the Court overturned the appropriation ban on Speech Clause grounds, repeatedly characterizing litigation that seeks welfare reform as “speech.” *Velazquez,* 531 U.S. at 551–61. The Court cited neither *Button* nor the cases that followed from it. *See also* Bridges v. California, 314 U.S. 252, 276–77 (1941) (dealing with letter from labor leader to Secretary of Labor, also published in newspapers, as Speech Clause problem).

17 In the modern mind, the nebulous and rarely defined word seems to connote a broad class of expression that includes anything directed more or less toward government, at least so long as it asks for something. *See, e.g.,* McDonald v. Smith, 472 U.S. 479, 488 n.2 (1985) (Brennan, J., concurring) (“[T]he Petition Clause embraces a... broader... range of communications addressed to the executive, the legislature, courts, and administrative agencies... [and] includes such activities as peaceful protest demonstrations.” (citations omitted)); Eric Schnapper, “Libelous” Petitions for Redress of Grievances—Bad Historiography Makes Worse Law, 74 IOWA L. REV. 303, 347 (1989) (assuming that “petitioning” includes “any peaceable concerted speech or action taken to influence the course of government conduct”); *see also infra* note 73 (discussing meaning of “petitioning” for purposes of petitioning immunity).

18 Putting it this way is ambiguous, but the two possible meanings have the same practical consequence; either way, the broad class of political speech we now call “petitioning” gets only the protection provided by the Speech Clause. It might be, on the one hand, that the Petition Clause does in fact protect the broad class of conduct now called “petitioning,” but the protection it provides has come to be no different than that given to speech. On the other hand, it might be that a vestigial right remains in the First Amendment protecting the formal practice of petitioning as it existed in the eighteenth century, but only as it so existed. *See infra* notes 30–38 and accompanying...
government act at issue (assuming it does not involve a “prior restraint,” which is almost automatically illegal9) is directed toward the content of the expression or, rather, is “content neutral.” If the former, it is fairly unlikely that the government act could be legal, since it must normally meet a demanding “strict scrutiny” test, under which the act must serve a “compelling” government interest and be “narrowly tailored” to serve that interest.20 Content neutral acts, by contrast, are considered under the deferential standard set forth in the O’Brien case. Such acts need only serve an “important or substantial” government interest and impose a restriction “no greater than is essential to the furtherance of that interest.”21 In fact, this is just how the Supreme Court itself analyzes antitrust and economic regulation issues when they arise directly under the First Amendment.22 Sometimes the analysis is a little different, as it may be where a court considers the constitutionality of a well established private cause of action. For example, where it is alleged that a libel action is barred by the Petition Clause, a court might well invoke the standards established under the Speech Clause for such actions, as set forth in New York Times Co. v. Sullivan23 and its progeny.24

Thus, the Petition Clause inquiry depends critically on whether the government act at issue reflects the government’s attempt to silence the content of the particular expressive conduct. It is important to observe as well that whether the act is content neutral or not, First Amendment case law calls on the court to balance competing policies. Regardless of whether there is protected expressive activity at issue, the state can restrain it if the court finds the state to have a sufficient “interest.” Built into First Amendment jurisprudence, then, is a particular model of the role of the judiciary vis-a-vis political rights: it is the peculiar province of the courts in this special context to invade the legislative text.

9See SMOLLA & NIMMER, supra note 13, § 15:7 (“[T]he Supreme Court has repeatedly emphasized that prior restraints are presumptively unconstitutional.”).

20Id. § 4:2 & n.1 (citing cases).

21O’Brien, 391 U.S. at 377; see SMOLLA & NIMMER, supra note 13, § 9:4. The O’Brien test is normally stated as having four elements: in addition to the three mentioned (content neutrality, substantial interest, and only essential incidental impact), the law must be within the constitutional power of the government. That final vestigial requirement, however, is redundant. See id.


23376 U.S. 254 (1964). This case is discussed more fully infra note 160 and accompanying text.

24Again, this has been the Supreme Court’s own approach. See McDonald v. Smith, 472 U.S. 479, 485 (1985). Lower court decisions predating McDonald had taken the same path. See Ray v. Edwards, 725 F.2d 655, 659–61 (11th Cir. 1984) (holding that First Amendment protection is not absolute); Londono v. Turkey Creek, Inc., 609 So. 2d 14, 18 (Fla. 1992) (declining to adopt “sham” test). An observant reader might already be wondering why McDonald does not render the issue presented in this Article moot. Perhaps it should, but it has not; this point is discussed in much greater detail below. See infra notes 143–56 and accompanying text.
process and weigh the value of competing policies. This point will be important later on when comparing Petition Clause law to the petitioning immunity.

There is a problem in the modern understanding of the history and role of the Petition Clause. Modern courts and commentators perform a repertoire of glib sound bites concerning the significance of the Petition Clause and the status of the “right to petition” as a cherished freedom in our system, but tend not to examine their problematic assumption that the Framers shared our extremely broad definition of the word “petition.” It turns out that the Petition Clause, at least at the time of its adoption, likely had little to do with the modern notion of “petition of government,” a phrase that today connotes a broad class of any sort of political expression more or less intended for government consumption. Thus, while the modern right to petition has no real life independent of political speech qua speech, at one time the right to petition was sharply distinct and probably more important in defining the nature of private political participation. The difference between then and now reflects broad reasons of historical change, though debate persists about which historical changes caused this difference and why.

The act of “petition,” as the Framers knew it, was a formal, quasi-judicial procedure of address to lawmakers, predominantly employed to request personal

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26See supra note 17.

27Amid the many current disagreements over the Petition Clause, there seems to be agreement at least on this point—that at the time of ratification the right to petition was distinct from other rights contained in the First Amendment. Indeed, those who argue for the absolute petitioning immunity insist on it as evidence for their view. See, e.g., Smith, supra note 25, at 1179.

28I take this from Mark’s article, supra note 13. His sophisticated analysis is the only one so far in the law review literature that works in reverse—that is, he takes the evidence concerning the practice of petitioning and asks what we can learn from it of the nature of early political participation. See id. at 2158 (describing his project). His conclusion is that petitioning was in fact much more important to the individual than was political speech, from colonial times until some time in the nineteenth century. See id. at 2160–61, 2229–30.

29See infra notes 32–43 and accompanying text.
favors. It has been absent from the United States for practical purposes for 150 years. Dating in its most primitive version arguably to some time prior to Magna Carta, "petition" in its classical sense connotes a written plea, drafted according to established requirements, and submitted to a government body of appropriate jurisdiction. In British practice, the petition could be made as a formal matter either to the King or to Parliament, but in America it appears to have been primarily a legislative remedy. In both pre- and post-revolutionary days, and on both sides of the Atlantic, petitions very frequently sought adjudication of private disputes, a reflection of the fact that prior to the nineteenth century there was no sharp distinction between legislative and adjudicatory functions. Accordingly, throughout its history, petitioning was governed by procedural guidelines for the drafting, publication, and receipt of petitions and counterpetitions, and the hearing of them sometimes resembled our modern notion of judicial proceedings. In colonial practice, the hearing of petitions often encompassed elaborate adjudicatory proceedings with rules for the hearing of witnesses and finding of facts. Perhaps the most alien aspect of the procedure to the modern mind was that government representatives were obliged to receive and consider petitions, a duty that is now completely dead in this country.

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31 Mark, supra note 13, at 2163–64.

32 Id. at 2170–74.

33 However, petitions could be and were made to executive officers. See Higginson, supra note 30, at 145–57. According to James Pfander, they were also a prominent means to seek judicial recourse against government wrongs. See James E. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 NW. U. L. REV. 899, 902 (1997).

34 See Higginson, supra note 30, at 145–46; Mark, supra note 13, at 2167–87.

35 See Higginson, supra note 30, at 147–48; Mark, supra note 13, at 2171–74 (describing historical significance of formal details of petition drafting); Pfander, supra note 33, at 929–34 (describing colonial petitioning practice).


37 See Mark, supra note 13, at 2168–69. Some have argued that in the Constitution itself there is not and presumably never was embodied an actual government duty to receive and consider. See Gary Lawson & Guy Seidman, Downsizing the Right to Petition, 93 NW. U. L. REV. 739, 740 (1999). However, there is evidence contemporaneous to the ratification that such a duty existed. Higginson, supra note 30, at 155–56.

In a sophisticated and erudite historical analysis, Greg Mark has shown that the demise of the classical petition procedure reflects fundamental changes in the American political structure. Most obviously, the practical circumstances of American life and government simply changed in ways that made direct petitioning no longer feasible or even desirable as a mode of participation, and as a paradigm of the individual role, it was replaced by the franchise. It is frequently said that the petition as a genuine mode of political participation met its end in the so-called “gag rule” controversy in the House of Representatives in the mid-nineteenth century. However, it also seems generally agreed that even had the gag rule affair never happened, petitions would have waned, and at about the same time, due to the procedural strain of dealing with a growing populace, the rise of a strong and independent judiciary, the gradual change to a more and more representative democracy, the availability of better communications technology, and so on. Additionally, Mark stresses that our Constitution was conceived for a basically republican society, but now governs a basically liberal one. That transformation changed the essential character of individual political participation. Thus, direct representation by petition was replaced by indirect representation through the vote.

These points tend to be lost on advocates of a modern absolute petitioning immunity—that is, the rule of constitutional law that would be implied by the constitutional explanation of the antitrust petitioning immunity. Even extensive historical analyses often ignore the differences over time and geography that separate our political rights from those that have existed at other times and other places.

July 11, 1977). There the court apparently found ridiculous a suit attempting to force Senator Ted Kennedy to receive an individual petition, explaining that “[w]hat a Senator does with petitions is absolutely within his discretion and is not a proper subject of judicial inquiry, even if it might appear that he be grossly abusing that discretion.” Higginson, supra note 30, at 143 n.2.


Higginson, supra note 30, at 158–66. The “gag rule” was a parliamentary rule imposed by Southern House members to stem the flood of petitions submitted by abolitionists. See id. Ironically, by attempting to take advantage of the procedural strain imposed by their barrage of petitions, the abolitionists may well have killed the petition as a United States political institution. See id.

Mark, supra note 13, at 2226–28.

See id. at 2169–70, 2229–30.

See id.

Eric Schnapper, for example, commits pages and pages to the Seven Bishops Case, 87 Eng. Rep. 136, 12 How. St. Tr. 183 (1688), said to be the origin of the petition right in the English Bill of Rights of 1689, which in turn is said to be the origin of our Petition Clause. See Schnapper, supra note 17, at 312–29. However, he never considers how useless his evidence might be to understanding a right adapted for a truly representative government of separated powers, especially one with modern communications technology and a robust media. First, the right as included in the 1689 Bill of Rights may not have reflected the generosity of the Parliament that enacted it, but rather the continual struggle for legislative jurisdiction as to which the reception of petitions was
In any case, an important legal consequence follows from this historical change. Whatever legal immunity may have existed for persons engaged in the act of “petition” at the time of the Framers, they and we have very different definitions for the word “petition.” Thus, while it is true that a common-law privilege protected eighteenth century persons exercising the formal right of “petition” from libel or other persecution for the contents of their petition, and while that privilege very well may have been carried over into the First Amendment, that fact is not relevant to the modern notion of “petitioning.” The traditional immunity was tied to the procedural rules governing the drafting and delivery of petitions, and it did not apply if those rules were not followed. “Pretended petitions,” by contrast—documents not complying with technical drafting requirements—were considered simply libel under subterfuge and bore no more protection than other libels. Similarly, though properly drafted petitions were immunized, the immunity was unavailable if the petition was delivered to a government body that lacked jurisdiction to act upon it. The point is that however broad and majestic the traditional immunity may have been, a point to which advocates have devoted a lot of ink, it applied only to the parliamentary procedure described above and not to the broad notion of “petitioning” as it is a tool of the Parliament. See Mark, supra note 13, at 2168; cf. Higginson, supra note 30, at 152–53 (noting similar purpose in prerevolutionary American petition practice). That struggle largely died with the constitutional separation of powers. Moreover, England in 1689 was not a representative government, and there was no alternative to the petition as a means of political participation for most people, nor was there an alternative means in the seventeenth century for Parliament to gather the information that could be gotten from petitions. In other words, Schnapper’s analysis seems to me wasted without a better explanation of its modern relevance.

But, in any case, this is not the main sin of papers like Schnapper’s, nor the reason that I think they should be disregarded. See infra notes 51–64 and accompanying text.

45Smith, supra note 25, at 1162–68.

46Id. at 1175–77.

47A petitioner was immune from prosecution for the contents of a petition if the petition was the institution of a “course of justice”—a common-law term of art meaning the procedurally proper invocation of government proceedings. See Mark, supra note 13, at 2173–74 (“By the seventeenth century . . . [p]etitions could be, and were, distinguished from other documents, even ones that were addressed to someone in authority and that stated a complaint. The rationale was far more than a formalism. A petition was the beginning of an official action, part of a ‘course of justice,’ not just a passing of information.” (citing Lake v. King, 85 Eng. Rep. 137, 139 & n.2 (1668) (refusing to found liability on distribution of petition to members of appropriate committee because “exhibition of the petition to a Committee of Parliament . . . is in a summary course of justice”))).

48Id. at 2171–74.

49See Schnapper, supra note 17, at 336 (quoting Lake, 85 Eng. Rep. at 139–40 (holding petition immune because it was made “before those who have power to examine” it)).

50See, e.g., Smith, supra note 25, at 1162–69 (discussing 1702 maturation and absolutism of petitioning in England).
nowadays defined. I do not believe there is any relevance for modern law in this now vestigial and essentially procedural right; private participation in politics now has very little to do with the details of parliamentary procedure. In short, the historical significance of the “petition” as an independent right—which for practical purposes ended in the mid-nineteenth century—depended on structural aspects of politics and society that no longer exist.

In any case, as I will now explain, the antitrust petitioning immunity looks very different doctrinally. The difference will become important later.

5Schnapper, for example, asserts that the Petition Clause preserves a common-law petitioning immunity that protected “any peaceable concerted speech or action taken to influence the course of government conduct.” Schnapper, supra note 17, at 347. However, his most important authority, Lake v. King, 85 Eng. Rep. 17 (1668), did not stand for that rule at all, and indeed, it supports the view that the common-law immunity applied only to petitions that complied with procedural rules. As Schnapper himself acknowledges, Lake involved a properly drafted petition delivered in the proper manner to Parliament, and the only question was whether the defendant deserved immunity even though he distributed copies to members of the committee charged with hearing the petition. Schnapper, supra note 17, at 339–40. The court held that he did enjoy such immunity because such publication was an aspect of the normal procedure and therefore was done in “the course of justice.” Id. at 339. The court explicitly reserved the critical question that is really the only one that matters for Schnapper—whether the defendant would also have enjoyed immunity if he had published his petition to the public at large. See generally id. at 334–36 (discussing Lake).

One modern decision appears to have gotten this roughly right, though the opinion is odd in some respects. In Sherrard v. Hull, 456 A.2d 59 (Md. Ct. Spec. App. 1983), the Maryland Court of Special Appeals held that the right to petition was absolutely immune from charges of libel but defined “petitioning” roughly in its classical sense: “Petitioning” is “the direct petitioning of a legislative body.” Id. at 69–70. The odd part is that the court held that whether there was a proper “petition”—a question that might strike one as legal—was a jury question. Id. at 62–63 & n.2.
B. The Law of the Antitrust Petitioning Immunity

When stated in the abstract, the rule of antitrust petitioning immunity seems surprisingly clear and theoretically consistent. In application, however, all of the antitrust immunities are riddled with apparent and as-yet unexplained inconsistencies. Fortunately, it should suffice for present purposes to set forward only an outline.

The Supreme Court has generally resisted application of antitrust to political processes. Even if actions of the government and private lobbying in favor of them might sometimes damage competition, that is a matter to be regulated by the democratic mechanism rather than review by the antitrust tribunal. As the Court has explained, the antitrust laws, “tailored as they are for the business world, are

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52For example, how can the states be "ipso facto immune" from antitrust liability when their acts can be enjoined for compelling private action that violates antitrust? Compare Hoover v. Ronwin, 466 U.S. 558, 568 (1984) (holding that states are “ipso facto immune” from antitrust), with Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982) (holding that litigants “may successfully enjoin the enforcement of a state statute... if the statute on its face irreconcilably conflicts with federal antitrust policy”). Why, on the one hand, must one normally show that an opponent’s lawsuit is both objectively baseless and subjectively evil to avoid a petitioning immunity defense to one’s antitrust counterclaim, but when the opponent sues for patent infringement, one must show only that the patent was procured through misrepresentations? Compare Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 60–61 (1993) (requiring suit to be “objectively baseless” to avoid petitioning immunity defense), with Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (requiring only “knowing[] and willful[] misrepresentation of facts to the patent office”). How do you know if you are just applying the first prong of the so-called Midcal test, which asks whether an alleged state delegation of power to restrain trade is “clearly articulated and affirmatively expressed as state policy,” or rather, that by inquiring into the scope of the state’s delegation of power over trade, you are impermissibly “transform[ing] state administrative review into a federal antitrust job”? Compare Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (discussing different standards for antitrust immunity), with City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 372 (1991) (assessing expansive interpretation of Midcal “clear articulation” requirement). How do you know when you are supposed to apply the petitioning immunity and when you are supposed to apply the Midcal test, when there are circumstances in which either or both might be applicable? See Christopher L. Sagers, Antitrust Immunity and Standard Setting Organizations: A Case Study in the Application of Liberal Models to the Regulation of Business 20–25 (Nov. 19, 2002) (unpublished manuscript, on file with Utah Law Review).
not at all appropriate in the political arena.” Thus arises the law of antitrust immunities.

Though the immunities are often described as three interrelated doctrines—the “state action” immunity of Parker v. Brown, the so-called Midcal rule, and the petitioning immunity—they really are better understood to work together in service of one unitary policy. As Einer Elhauge has explained, the immunities rules provide that resource allocation choices can be made in only two ways: either (1) by private persons in private transactions (for example, by the making of contracts, joint ventures, or by private standard setting) acting under

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53E. R.R. President’s Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 141 (1961). Indeed, though the antitrust statutes themselves make no mention of this issue, it is generally agreed that they would be a peculiar means for Congress to address problems in the political system. As Professor Herbert Hovenkamp observes, legislation to address flaws in the political process would likely curtail “capture” of legislatures and administrative entities. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 680 (2d ed. 1999). But, “if Congress wanted to draft ‘anticapture’ legislation . . . one would hardly imagine that [it] would forbid ‘monopoly’ or ‘combinations in restraint of trade’ while saying nothing explicitly about abuses of governmental process.” Id.

54317 U.S. 341 (1943).


The Midecal opinion, however, was the first to synthesize the prior decisions and clarify the rule as having two components, and it is the case normally cited for the prevailing two-prong test. See, e.g., FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) (citing Midecal opinion as source of two-prong test); 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 217b (same); 2 SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS (FOURTH) 1075 (1997) (“Midecal’s two-pronged test has supplied the essential analytical framework within which subsequent decisions have determined the availability of immunity to private parties.”).

56See Elhauge, supra note 1, at 1193–1203; Einer Richard Elhauge, The Scope of Antitrust Process, 104 HARV. L. REV. 667, 682–91 (1991) (devising new theoretical explanation for Parker and Midecal immunity). Elhauge’s views have been adopted or restated elsewhere, see, e.g., HOVENKAMP, supra note 53, at 679–80 (“[A]ntitrust applies when private parties are able to evade or manipulate the democratic process in such a way as to give themselves effective, unsupervised control over a market . . . . [I]t tries to identify circumstances when the relevant sovereign is not effectively in charge of the challenged conduct.”), though they have yet to gain the influence they deserve with certain of the lower courts.
the pressures of competition, which pressures are kept healthy by antitrust law, or (2) by genuinely accountable public actors, not subject to antitrust, but nevertheless constrained by democratic forces. Only these two mechanisms are permitted because only they provide some assurance that allocations will be made in the public interest. As Elhauge demonstrates, it is only this rationale that coherently explains all of the Supreme Court case law.\(^{57}\)

With this background in mind, the law of antitrust immunity can be seen as two broad norms serving this same rationale. First, the state governments are free to fashion their own trade policies—that is, to restrain trade within their own borders—under Parker’s state action rule.\(^{58}\) The only major limitation on this protection is set forth in Midcal. The basic thrust of Midcal is to give the states freedom to structure their trade policies however they like, including by giving power to private parties to restrain trade.\(^{59}\) Midcal, however, limits the special case of delegation of power, and provides that if a state is going to do it, the state must both clearly articulate the policy as the state’s own policy and then actively supervise the private conduct.\(^{60}\) Otherwise, the state program itself can be enjoined as preempted by federal antitrust,\(^{61}\) and the private participants can be subject to antitrust liability.\(^{62}\) Thus, as a first norm, the law of antitrust immunity provides that state governments can control trade in their own territory in any way they choose, except that they cannot give total freedom to restrain trade to private persons.

As a second norm, the petitioning immunity provides that private persons are free to urge their governments to adopt trade restraints without fear of incurring antitrust liability for their efforts. The petitioning immunity can be seen roughly as the flip side of the first norm: Parker, Midcal and the petitioning immunity “are complementary expressions of the principle that antitrust laws regulate business, not politics.”\(^{63}\) The immunity applies even if the purpose of a person’s petitioning activity is to restrain competition.\(^{64}\) Furthermore, political action is immune

\(^{57}\)See Elhauge, supra note 56, at 696–717. Strictly speaking, Elhauge does not claim that this rationale explains all the case law on the petitioning immunity (as opposed to the other antitrust immunities) because he believes that the Court changed its approach significantly in the 1980s in the case of Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988). However, according to Elhauge, it does explain Allied Tube and the Court’s subsequent petitioning immunity case law. Elhauge, supra note 1, at 1196–1250.

\(^{58}\)317 U.S. at 343.

\(^{59}\)445 U.S. at 110–14.

\(^{60}\)Id. at 105.

\(^{61}\)See id. at 102–06 (enjoining operation of California statute).


\(^{64}\)See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961) (“The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring
whether or not it is successful in reaching its goal, even if it turns out that the goal was unauthorized, or even contrary to the Constitution.\(^{65}\)

A point that will become important is that, at least in theory, the Supreme Court has recognized only one exception to the petitioning immunity, the so-called “sham” exception.\(^{66}\) According to the traditional definition, petitioning is a sham when the petitioner does not actually expect or want the government act he purports to seek but is rather invoking the political process solely to harass a business competitor.\(^{67}\) A sham is not just any evil political activity. The immunity protects not only “good” political activity, but all political activity, even when it is badly intentioned and badly performed.\(^{68}\) Thus, it does not matter if the

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\(^{65}\) See In re Airport Car Rental Antitrust Litig., 693 F.2d 84, 88 (9th Cir. 1982) (holding that Noerr-Pennington exempted efforts of car rental companies to exclude competitor through lobbying unelected officials); 1 AREEDA & HOVENKAMP, supra note 55, ¶ 206 (discussing In re Airport Car Rental).

Note that the petitioning immunity applies no matter which branch of government the defendant petitions. See Cal. Motor Transp. Co. v. Trucking Unltd, 404 U.S. 508, 510 (1972) (“The same philosophy governs the approach of citizens or groups of them to administrative agencies... and to courts.”); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669–71 (1965) (finding immunity for lobbying effort directed at U.S. Department of Labor). The Court has held, however, that the petitioning immunity applies differently in the adjudicatory context. See Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 60–61 (1993) (requiring that in adjudicatory context lawsuit or suits must be shown to be both: (1) objectively baseless, and (2) subjectively intended to interfere with a competitor’s business by abusing political process, as opposed to political outcome); cf. Cal. Motor, 404 U.S. at 512–13 (suggesting for first time that it is easier to show “sham” in “adjudicatory process”).

\(^{66}\) Cf. Omni, 499 U.S. at 379–84 (rejecting numerous other purported exceptions); 3 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 50.04 (Matthew Bender & Co., Inc. eds., 2d ed. 2002) (discussing three proposed exceptions). Strictly speaking, the Court has not ruled out the possibility that there is a “market participant” exception under which the government itself participates in the market being restrained. See Omni, 499 U.S. at 374–75 (holding Parker immunity inapplicable where political entities are involved as conspirators). That possible exception remains nebulous and is only infrequently applied by the lower courts. See HOVENKAMP, supra note 53, at 688 (noting that Omni Court mentioned little about nature and scope of such an exception).

The sham doctrine was recognized in dicta in Noerr itself, where the Court wrote that “[t]here may be situations in which a [political publicity effort]... is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.” 365 U.S. at 144.

\(^{67}\) See Omni, 499 U.S. at 380 (“The ‘sham’ exception to Noerr encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon... A ‘sham’ situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all,.... not one who genuinely seeks to achieve his governmental result, but does so through improper means.” (internal quotation marks and citations omitted)); 1 AREEDA & HOVENKAMP, supra note 55, ¶ 198 (discussing “sham” petitioning).

\(^{68}\) Omni, 499 U.S. at 380; 1 AREEDA & HOVENKAMP, supra note 55, ¶ 199.
defendant had an anticompetitive intent,\(^6\) and, perhaps somewhat surprisingly, it also appears to be irrelevant if the defendant’s methods are evil, perhaps even if they are otherwise criminal.\(^7\)

The sham exception seems simple in principle, but in application it too has caused confusion and its use by the lower courts has generated extensive criticism.\(^8\) Indeed, the exception has been so variously and broadly applied that at one time critics said it meant any conduct the courts considered “improper.”\(^9\) Again, however, debate on this fluid and confusing issue is not important to this Article. What matters here is this: assuming that the challenged conduct is “petitioning” within the meaning of the petitioning immunity—which is roughly to say that the conduct entails private communication directed toward a branch of government with the object of securing some government action\(^10\)—then the only

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\(^6\) Noerr, 365 U.S. at 139.

\(^7\) See Prof’l Real Estate, 508 U.S. at 60 (stating that “inimical intent ‘may render the manner of lobbying improper or even unlawful, but does not necessarily render it a ‘sham’”’ (emphasis added) (quoting Omni, 499 U.S. at 381)); 1 Areeda & Hovenkamp, supra note 55, ¶ 203 (discussing Omni). Thus, for example, bribery of a legislative member has been held not to be an antitrust violation; it is protected by the antitrust petitioning immunity, even though it might be a crime, on the reasoning that though it may be abominable, it is undertaken because the briber genuinely desires the political outcome he is paying for. See Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 230–31 (7th Cir. 1975) (holding that improper campaign contributions to city council members are immune from antitrust claim because their goal was to secure political outcome); cf Noerr, 365 U.S. at 140–41 (“Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity.”).

\(^8\) See Calkins, supra note 3, at 332–33, 359–67 (discussing lack of consensus regarding sham exception); Elhauge, supra note 1, at 1177 (labeling sham exception “a catchall to cover whatever forms of petitioning adjudicating courts deemed ‘improper’”); Handler & De Sevo, supra note 3, at 18–47 (discussing sham exception cases).

\(^9\) See Calkins, supra note 3, at 338–39 & n.63 (describing exception as broad and malleable and citing cases to that effect); Elhauge, supra note 1, at 1178 (arguing that exception encompasses any conduct courts deem “improper”).

\(^10\) As is the case with the modern approach under the First Amendment itself, there is virtually no case law discussion of what constitutes “petitioning” for purposes of the petitioning immunity. One must do the best one can by looking at the facts in the Court’s immunity cases. At a minimum, “petitioning” includes direct communications with a legislature, an executive official, or a court. See, e.g., Noerr, 365 U.S. at 131 (discussing petitioning of legislatures); Pennington, 381 U.S. at 660 (discussing petitioning of executive agencies, specifically Secretary of Labor); Cal. Motor, 404 U.S. at 509 (discussing petitioning of courts and administrative adjudicatory tribunals). Also, at least in the legislative context, it includes public communications that are not presented directly to the government, but are incidental to a valid effort to influence the government such as a public relations campaign in favor of a piece of legislation. See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499–500 (1988) (suggesting in dicta that publicity campaign seeking governmental action would still enjoy antitrust immunity); Noerr, 365 U.S. at 129–30, 143–44 (holding that unless sham exception applies, publicity campaigns seeking to influence legislation are immune from antitrust laws).

It is fairly clear that “petitioning” does not include communications which are wholly private and aimed at government only indirectly—for example, a presentation made to a private standard-
relevant inquiry is whether the defendant genuinely desired to secure the government act in question.\textsuperscript{74}

II. THE COMPETING VIEWS

A. California Motor, the SLAPP “Epidemic,” and the Rise of the Constitutional Explanation

It appears that virtually all of the confusion concerning the provenance of the petitioning immunity finds its origin in one comparatively short passage, entirely in dictum, in one Supreme Court opinion: \textit{California Motor Transport Co. v. Trucking Unlimited}.\textsuperscript{75} Virtually every lower court opinion identifying the petitioning immunity as constitutional cites this series of dicta as its sole or at least primary authority. The passage, in any event, cites no authority for and fails even clearly to state Justice Douglas’s apparent assumption that the petitioning immunity is constitutional in origin, but includes sufficient language to that effect to have thrown the immunity rule into utter doctrinal tailspin.

\textit{California Motor} was only the Court’s third decision on the petitioning immunity, and it came only eleven years after \textit{Noerr}, its first. The case raised the question, novel at that time, whether the immunity identified in \textit{Noerr} and \textit{Pennington} might also bar an antitrust suit brought in retaliation for earlier lawsuits, on the theory that those earlier suits are themselves “petitions of government.”\textsuperscript{76} The Court was of the view that the immunity should be less easily

\textsuperscript{74} University of California Press, 2010.

\textsuperscript{75} 404 U.S. 508, 512–13 (1972).

\textsuperscript{76} Id. at 511.
available in this context. Putting aside the wisdom of that view, the problem is that Justice Douglas, in his opinion for the majority, defended this view by making reference to First Amendment rules. He defended his new, less protective rule for adjudicatory petitions by observing, in dicta, that in the adjudicatory context, the First Amendment tolerates penalties for misrepresentations.

The theoretical quandary for all subsequent courts was the apparent suggestion that the petitioning immunity protects only such things as are protected by the First Amendment itself. The First Amendment does not protect deliberate falsehoods, and thus Justice Douglas’s observation that courts may punish courtroom dishonesties. But this left the lower courts to ask: If the petitioning immunity protects only such things as are protected by the First Amendment, then shouldn’t all deliberate falsehoods be open to antitrust attack, despite the nearly opposite conclusion one might draw from the theoretical basis clearly set forth in *Noerr* and *Pennington*? If so, then would not antitrust to some extent magically federalize the law of abuse of process and malicious prosecution, all in one short, breezy series of dicta in 1972? Could Congress have intended such a thing? The opinion raised another peculiar question: If the purportedly dishonest public smear campaign that had been at issue in *Noerr* was immune from antitrust, and the doctrine of *Noerr* was in fact a First Amendment rule, then is not there a nearly impenetrable First Amendment protection for all libels that are “incidental [to a] campaign to influence governmental action,” even though that result would be drastically at odds with the Court’s own 1964 decision in *New York

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77 *Id.* at 512–13.
78 *Id.* at 512.
79 To wit, Justice Douglas pointed out that “[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.” *Id.* at 513. To prove this, he observed that adjudicatory bodies can penalize perjury and other kinds of dishonesty—and by this he presumably meant to refer to rules of legal ethics and criminal law that punish such conduct. See *id.* at 512–13.
80 As virtually everyone seems to agree, both *Noerr* and *Pennington* stated quite clearly as their basis that the petitioning immunity was a rule of statutory construction, however ominous might be the constitutional overtones surrounding it. See, e.g., LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 733 (2000) (noting that Justice Black’s decision was not based upon First Amendment but upon elements of Sherman Act); Calkins, *supra* note 3, at 329–33 (stating that uncertainty surrounding *Noerr* results from “failure to decide whether the doctrine was based on constitutional principles”); Handler & De Sevo, *supra* note 3, at 10–14 (discussing uncertainty about scope of *Noerr* doctrine).
81 That is, since falsehoods and other dishonest conduct in the adjudicatory context suddenly seemed to be removed from the antitrust immunity, antitrust then seemed to be a potential means of attacking that conduct, work that formerly had been done under the state common-law torts of abuse of process and malicious prosecution.
82 *Noerr*, 365 U.S. at 143.
For this legacy of confusion California Motor has been severely criticized. In any event, however, if the only damage California Motor ever did was to confuse the lower courts as to what constitutes an adjudicatory “sham,” it would be a relatively harmless gaffe, particularly in light of the Court’s own resolution of that problem in 1993. The real damage, and the reason the constitutional explanation is becoming a problem of pressing timeliness, has begun to rear its head in a growing body of case law and commentary concerning so-called “SLAPP” (Strategic Litigation Against Public Participation) suits, and in the influence that the new doctrine on SLAPPs is having elsewhere. The SLAPP phenomenon can be blamed in part on California Motor’s misguided dicta, though it has been aggressively nursed along by others for political purposes. The ideas that there are SLAPPs as a metaphysical matter—that is, that there should be recognized a special class of lawsuits sharing importantly similar characteristics—and that such lawsuits are bad have been put forward by a loosely bound group of scholars, more or less led by two professors at the University of Denver. They have argued on the basis of their empirical research that there has been an epidemic of such litigation, primarily by rich commercial interests against political actors with fewer resources, intended to silence participation in government. Anti-SLAPP activists have won very significant

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83376 U.S. 254, 279–80 (1964) (holding that defamatory claims in newspaper could be target of defamation suit in appropriate circumstances, notwithstanding First Amendment).
84See Handler & De Sevo, supra note 3, at 10–13 (criticizing ambiguity of Justice Douglas’s dictum); cf. Calkins, supra note 3, at 340, 348–52 (discussing difficulty in defining sham exception); Minda, supra note 3, at 927–31 (calling California Motor “an ironic decision”). Indeed, one might say that prior to California Motor, the law of the petitioning immunity was simple. See Handler & De Sevo, supra note 3, at 10–13.
86The professors in question are George Pring, a lawyer, and Penelope Canan, a sociologist. For a small sampling of their large output on the subject, see GEORGE W. PRING & PENELope CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996); George W. Pring & Penelope Canan, Strategic Lawsuits Against Public Participation (SLAPP Suits), 12 BRIDGEPORT. L. REV. 937 (1992). Their work in the SLAPP area has been hugely influential and in some jurisdictions has been all but explicitly incorporated as law. See, e.g., Protect Our Mountain Env’t, Inc. v. Dist. Court, 677 P.2d 1361, 1368 (Colo. 1984) (en banc) (ruling that right to petition is not without limits).
For a careful explanation of the flaws that infect the purportedly objective empirical analysis on which Pring, Canan, and their followers base their claim of a SLAPP “epidemic,” see Beatty, supra note 5, at 88–95 (describing SLAPPs).
sway with state courts and legislatures, several of the latter having passed so-called "anti-SLAPP" statutes intended to stifle SLAPP litigation.\(^8\)

In the typical SLAPP, the plaintiff sues the defendant in retaliation for the defendant's participation in some political activity. According to the informal definition adopted by anti-SLAPP activists, SLAPPs are characterized by individual or small-group defendants, the sort of defendants whose political activity could easily be chilled by the mere pendency of even a meritless SLAPP.\(^8\)

Both state and federal courts have held, originally in stereotypical SLAPP cases but since then in all sorts of cases, and almost always with reference to *California Motor*, that the petitioning immunity states a rule of substantive First Amendment law.\(^9\) That is, for practical purposes, the plaintiff in such a case must

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\(^8\) Representative "anti-SLAPP" statutes include: GA. CODE ANN. § 9-11-11.1 (Supp. 2002); MASS. ANN. LAWS ch. 231, § 59H (Law. Co-op. 2000); NEB. REV. STAT. §§ 25-21-241 to -246 (1995); OKLA. STAT. tit. 12, § 1433.1 (2001); R.I. GEN. LAWS § 9-33-1 (1997); TENN. CODE ANN. § 4-21-1003 (1998). As some courts have now recognized, incidentally, anti-SLAPP statutes themselves may well be unconstitutional if too broadly applicable. *See infra* notes 93–94 and accompanying text. Plaintiffs enjoy an emerging right under the First Amendment to bring lawsuits and have for many years enjoyed a similar, though limited, right as a matter of due process.

\(^9\) In one paradigmatic case, for example, defendant homeowners were displeased by a neighboring landowner's desire to build a shopping mall on his land. The defendants therefore petitioned the local zoning board for a zoning change that would prohibit the project. The entrepreneurial landowner sued, challenging the zoning petition both as vexatious litigation and tortious interference with contract. The court granted the defendants' summary judgment motion, on the view that to hold otherwise would raise First Amendment problems. *Zeller v. Consolini*, No. SV 920060356S, 1999 WL 99192, at *1–4, 7 (Conn. Super. Ct. 1999); *see* *PRING & CANAN*, *supra* note 92, at 8–9 (describing SLAPPs); Edward W. McBride, Jr., Note, *The Empire State SLAPPs Back: New York's Legislative Response to SLAPP Suits*, 17 VT. L. REV. 925, 929 (1993) (discussing consequences of SLAPP suits).

\(^8\) This new law against SLAPPs, guided by the constitutional explanation, apparently begins with a 1972 decision of the federal district court of the Northern District of California, *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972). In that case, a stereotypical SLAPP, the Sierra Club sued a logging outfit to prevent logging on federally protected land, and the company counterclaimed on state law tort theories alleging injury to business relationships. Beginning with the observation that the right to petition "is a basic freedom in a participatory government ... that cannot be abridged if a government is to continue to reflect the desires of the people," the court went on to hold that the antitrust immunity cases were really just an application of the program begun in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), of limiting civil causes of action at the cut-off point of First Amendment rights. *Butz*, 349 F. Supp. at 936–38. Though apparently concerned that it was breaking virginal ground, but taking comfort in *California Motor*, the court seemed confident that "for the reasons given" in *Noerr*, "the malice standard [of *New York Times*] does not supply the ‘breathing space’ that First Amendment freedoms need to survive." *Id.* at 938. The court therefore adopted the antitrust petitioning immunity as a rule of substantive constitutional law. *Id.* at 938–39.

The many, many courts to have followed *Butz* vary in the length and detail of the consideration they give to the question, some of them merely citing one or a few prior decisions, others going on for pages. All, however, share the same casual assumptions—that the Petition
show the challenged political conduct was a "sham" or the case will be dismissed. This trend is surprising, given the Supreme Court's own refusal in the antitrust cases to apply First Amendment analysis, and given that if the lower courts actually approached these matters as raw First Amendment problems, rather than trying to wade through the antitrust case law, they would probably have found significantly less protection for the conduct at stake.

B. The Statutory Explanation

There are, however, both federal and state decisions going the other way. These courts more or less openly recognize that the petitioning immunity serves not directly First Amendment concerns, but the more general concern that the antitrust laws "tailored as they are for the business world, are not at all appropriate for application in the political arena." Other laws, by contrast, including common-law claims such as defamation or malicious prosecution, or statutory unfair competition claims, might be "appropriate" in this sense. These courts also seem cognizant of the risks involved in misapplication of the immunity, like upsetting political balances or violating the countervailing First Amendment rights of plaintiffs. So far, however, the high courts of only two states,

Clause sets forth a right distinct from speech rights, and that this special right was employed by Noerr and its progeny. See supra note 25.

90Protect Our Mountain Env't, 677 P.2d at 1366; Webb v. Fury, 282 S.E.2d 28, 36–37 (W. Va. 1981); Zeller, 1999 WL 99192, at *3. See generally Zauzmer, supra note 5, at 1244–45 (criticizing this case law). Sometimes this interpretation is understandable: state antitrust, consumer protection, and unfair trade statutes sometimes explicitly incorporate federal antitrust law and with it the federal law of antitrust immunities. Likewise, some state consumer protection and unfair trade statutes follow a model statute promulgated by the FTC, and often incorporate federal FTC precedent. Cf. 15 U.S.C. § 45(a)(1) (2000). As an antitrust plaintiff, the FTC is subject to the same immunities as other antitrust plaintiffs, see FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992) (applying antitrust immunities in FTC context), and in states in which FTC law is incorporated in the local statute, the courts might well apply the petitioning immunity in the same manner in which it is applied to the FTC. See Suburban Restoration Co. v. ACMAT Corp., 700 F.2d 98, 101–02 (2d Cir. 1983) (holding that Connecticut unfair trade statute, which explicitly incorporates federal FTC law, is constrained by petitioning immunity because federal courts had held that FTC is so constrained).

Many courts, however, have simply held that the antitrust immunity—on the assumption that the doctrine itself is a rule of constitutional law—applies to any lawsuit that challenges political activity, whether it is based in antitrust or not. See Livingston Downs Racing Ass’n v. Jefferson Downs Corp., 192 F. Supp. 2d 519, 531–32 (M.D. La. 2001); In re Airport Car Rental Antitrust Litig., 474 F. Supp. 1072, 1079–81 (N.D. Cal. 1979).

91See Noerr, 365 U.S. at 132 n.6 (noting that because of interpretation of Sherman Act, it was unnecessary for court to consider First Amendment defenses); see infra notes 100–04 and accompanying text.

92Noerr, 365 U.S. at 141.
Massachusetts and Florida have so held, and the federal courts have established about the same track record. The Fifth and Tenth Circuits have explicitly adopted the statutory explanation, and the Eleventh Circuit effectively did the same in Ray v. Edwards, a case that, though it is slightly odd, presciently predicted the Supreme Court’s own analysis a year later in McDonald v. Smith.


On the most general level, the constitutional explanation seems wrong because, if it were right, it would logically require changes in the basic legal rules that make up our political order. Our system is definitely not one in which we are

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93 See Duracraft Corp. v. Holmes Prods. Corp., 691 N.E.2d 935, 943 (Mass. 1998) (refusing to read Massachusetts anti-SLAPP statute as imposing “sham” test on all SLAPPs, for fear that such rule would be unconstitutional).

94 See Londono v. Turkey Creek, Inc., 609 So. 2d 14, 18 (Fla. 1992) (refusing to displace prevailing Florida requirement of “express malice” in defamation cases challenging statements to public officials). A much more detailed discussion of this issue can be found in the later Florida case of Florida Fern Growers Ass’n, Inc. v. Concerned Citizens, 616 So. 2d 562, 570 (Fla. Dist. Ct. App. 1993) (“[E]xtending absolute immunity to such activities would seem to extend to these activities a broader protection than the Constitution itself guarantees.”).

95 See Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1364–65 (5th Cir. 1983) (“Noerr was based on a construction of the Sherman Act.”).

96 See Cardtoons, L.C. v. Major League Baseball Ass’n, 208 F.3d 885, 890 (10th Cir. 2000) (en banc) (noting distinction between petitioning immunity cases based on construction of Sherman Act and those based solely on constitutional right to petition).

97 725 F.2d 655, 658–61 (11th Cir. 1984).

98 472 U.S. 479, 480–85 (1985). McDonald is discussed in more detail below. See infra notes 143–56 and accompanying text. The Tenth Circuit simply held that nonantitrust causes of action are not governed by the petitioning immunity, but by the potentially quite different standards to be applied directly under the First Amendment. See Cardtoons, 208 F.3d at 890 (noting importance of distinction between antitrust immunity cases and First Amendment right to petition cases). The Fifth Circuit held that because the petitioning immunity merely construes the antitrust statutes, it could immunize a lawsuit brought in a foreign court from being the basis of antitrust liability, a result that would not prevail under the constitutional explanation. Coastal States Mktg., 694 F.2d at 1364–65. In Ray, the Eleventh Circuit considered a defamation claim brought by a terminated public employee against a private organization that had lobbied for his dismissal. The defendant organization apparently failed to cite the antitrust case law but nevertheless argued that it had an absolute immunity under the Petition Clause. Defendant cited the First Amendment discussion in NAACP v. Claiborne Hardware Co., 458 U.S. 886, 888 (1982), and, rather inexplicably, the antiquated and very different case of In re Quarles, 158 U.S. 532 (1895). Ray, 725 F.2d at 658–61. The court was unimpressed and held that even though the facts may have comprised “petition [of] Government for a redress of grievances,” the case was governed not by any special, absolute petitioning immunity, but by the Supreme Court’s general defamation rules. Id. at 659–61 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964)).
free to engage in any activity directed generally toward government without fear of any sort of legal reprisal, nor would it be wise for us to make it that way.

The point could perhaps be made simply on review of the Supreme Court case law, but I will delay discussion of the cases until the end because there has been so much argument about what the language means, and proponents of different views have been able to find evidence for completely opposite positions. Therefore, I think the better approach is to consider carefully the consequences of the constitutional explanation. When one considers how problematic it really is, it appears that the textual evidence marshaled to support it could not and should not mean what it is said to mean.

The first and most interesting unintended result of the constitutional explanation is one that I should think its proponents would care about, but to which they apparently they have not given much thought: it results in an inadvertent and very serious shift of political power into private hands.

A problem that sometimes comes up when well-intentioned people crusade for political freedom is that they have only one sort of political actor in mind, even though they advocate rights of broad application. Thus, it seems natural to activists to seek a protection as broad as the petitioning immunity for the benefit of, say, environmentalists and civil rights organizations. The problem is that if such a rule is secured as a First Amendment protection, it will also protect General Motors. More to the point, it will protect trade organizations and other well-funded commercial entities and will enable them to evade judicial scrutiny of their political conduct, which normally will be both driven by self-interest and supported with extensive financial resources. As I have written elsewhere, misapplication of political rights enables powerful groups with inherently selfish incentives to dilute and injure the delicate freedoms of individuals, and to do so while cloaking the most nefarious conduct in the self-righteous garb of political expression.\(^9\)

Consider, for example, a private trade organization of manufacturing firms that produce electrical wiring products. If they promulgate, say, a fire safety code that is so influential as to be simply rubber-stamped into law by state governments, then that group holds significant power to help or hinder the marketplace, as well as to regulate the public safety.\(^10\) As a group of horizontal competitors, however, it might also find its regulatory soapbox an advantageous competitive tool, and might use it, for example, as a way to outlaw new products

\(^{9}\)See Sagers, \emph{supra} note 52, at 27.

\(^{10}\)However implausible that may sound, in fact it happens with astonishing frequency. \emph{See id.} at 27–30 (discussing Sessions Tank Liners, Inc. v. Joor Mfg. Co., 17 F.3d 295 (9th Cir. 1994)). There are several hundred standard setting organizations that hold some sway with state governments in the United States, and together they promulgate more than 30,000 model codes and standards per year, hundreds of which are adopted as law. \emph{See Hovenkamp, supra} note 53, at 696–97; Hurwitz, \emph{supra} note 5, at 90–93; Sagers, \emph{supra} note 52, at 27–30.
THE LEGAL STRUCTURE

offered by nonmember competitors. That seems like a bad enough situation to begin with, but it is made much worse if the group is then said, on the constitutional explanation, to be merely a private petitioner with a virtually impenetrable First Amendment immunity. It would be empowered to regulate its own market without any threat of judicial review, without constraints either from constitutional law or democratic pressures, and with no need to deal with the normal mechanism of democracy.

Admittedly, part of the problem has to do with application of the petitioning immunity itself, as opposed to whether the immunity is constitutional in nature. That is, the better solution might be to hold that this conduct is not even “petitioning” within the meaning of the petitioning immunity, and therefore subject to full antitrust review. But if such an organization is held to be merely a “petitioner” for purposes of the antitrust immunity—as at least four federal circuits and one district court have now held—and then the constitutional explanation is adopted, the private organization has been made into a genuine constitutional monster. It will act as a de facto state regulatory agency, but it will be free of the electoral pressures and partisan constraints that limit true state policymakers, from administrative review by courts, from antitrust, and—by way of the constitutional explanation—it will be free from everything else. Indeed, were the activities of such an organization protected by the First Amendment in a manner so absolute and rigid as the protection described in the petitioning immunity, with no balancing of interests by the courts and no exceptions whatsoever for government intrusion into any “petitioning” (i.e., “regulating”) that is not totally insincere (that is not a “sham”), then how could it be controlled by anyone? Could rules of the Federal Trade Commission or a state government regulate its affairs? Could Congress do so by statute? It seems not.

102 Sagers, supra note 52, at 27–28.
103 See Mass. Sch. of Law v. Am. Bar Ass’n, 107 F.3d 1026, 1034–44 (3d Cir. 1997) (holding ABA immune for law school accreditation activities); Sessions Tank Liners, 17 F.3d at 302 (immunizing deliberate misrepresentations to standard setting organization as valid attempts to influence government action); Lawline v. Am. Bar Ass’n, 956 F.2d 1378, 1387 (7th Cir. 1992) (holding ABA immune for promulgation of model ethical rules); Sherman Coll. of Straight Chiropractic v. Am. Chiropractic Ass’n, 813 F.2d 349, 349 (11th Cir. 1987) (holding chiropractic trade association immune for school accreditation activities); Zavaletta v. Am. Bar Ass’n, 721 F. Supp. 96, 98 (E.D. Va. 1989) (holding ABA immune); cf. Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 250 (7th Cir. 1994) (holding that although psychiatric certification board’s decisions were basis of granting certain state benefits, board was not “state actor”).
104 Strictly speaking, FTC regulations are already out of the picture, due to some handy lobbying by a group of influential standard setting organizations in the late 1970s. See 15 U.S.C. § 57a(a)(1)(B) (2000) (“The Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section.”). The fact that the FTC is rendered yet more
Consider another kind of organization. Suppose several state universities, acting through their agents, establish a nonprofit corporation of which they then become the members. The corporation might be erected to establish and monitor standards for the licensing of university logos to third-world clothing manufacturers, for example, or for establishing uniform standards and procedures for intercollegiate athletic events. Let us suppose as well that the organization establishes a self-government procedure by which each member university appoints a member to a council, and decisions of the council are framed as "recommendations" or "rulings" directed to the individual schools, enforceable perhaps by expulsion or other measures. Now, the Supreme Court has made clear its great lack of interest in treating such organizations as being themselves "state actors," even when they become so powerful as to be able to issue orders to state government members. But nonprofit corporations, just like other corporations, have First Amendment rights, and if this "private" entity does no more than issue "recommendations" to its government members, isn't it a "petitioner"? There is case law suggesting as much. The Third Circuit, for example, has held that where a private organization issues opinions or rulings directed to state governments they are protected by the antitrust petitioning immunity, even when such groups are so powerful that for practical purposes they are the state. The Supreme Court's own thoughts on the matter suggest that even an organization founded by state government actors can be so separate from its founders as to hold the same civil rights as citizens. But, if both the Third Circuit reasoning and the constitutional explanation were adopted, then such an entity: (1) would not be the "state," and would therefore be subject neither to administrative review by courts nor the constraints of constitutional law, and (2) would, as a private "petitioner," be protected from virtually any other sort of lawsuit or regulation. But this is a bad result, since the "recommendations" of such a group could have negative impacts on the universities' students, employees, business partners, and other constituencies. On what possible political philosophy should such a powerful entity be removed from any sort of government oversight?

Consider a related problem. It is now well established that a private person can be sued for violations of constitutional rights under § 1983 so long as it can powerless by this provision, and the fact that the organizations themselves were powerful enough to get it passed, shows how serious this problem is.

105 See Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 199 (1988) (holding that NCAA was not susceptible to suit under § 1983 for due process violations even though state school member punished its employee, plaintiff Tarkanian, on NCAA's coercive insistence).

106 See Mass. Sch. of Law, 107 F.3d at 1043. It is by no means only the Third Circuit that has reached this result. See supra note 103.

107 Cf. Tarkanian, 488 U.S. at 191–95 (rejecting argument that NCAA was state actor because it "misused power that it possessed by virtue of state law").

be shown that the person’s conduct was “state action.” But what happens if that very “state action” also sort of looks like “petitioning” and is therefore immunized according to the constitutional explanation? This recently happened, for example, in the controversial case of *Tarpley v. Keistler.*

Keistler was a local official in the Illinois Republican Party. He pulled some strings with state officials to secure a temporary state job for one of his local party loyalists, and the evidence showed that he was able to do so because a Republican administration was in power. The Supreme Court had already made clear that this sort of “patronage” can violate the First Amendment, and Tarpley accordingly sued. His theory was that Keistler was, for all practical purposes, a “state actor” and that he had violated Tarpley’s First Amendment rights.

The Seventh Circuit disagreed. What is troubling is that the court dismissed the suit because it accepted the constitutional explanation, even though the court was willing to accept Tarpley’s theory of state action. The court held that Keistler, assertedly only a “petitioner,” was absolutely immune even from a § 1983 suit, even though the court was willing to assume that Tarpley’s own First Amendment rights had been violated.

The problem is not the court’s purported balancing of the competing First Amendment rights of the two parties, but the substantive harm caused by

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110 188 F.3d 788 (7th Cir. 1999).
111 Id. at 790.
112 Id.
113 See Rutan v. Republican Party, 497 U.S. 62, 74 (1990) (“Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment Freedoms.”).
114 *Tarpley*, 188 F.3d at 790.
115 Id. at 797.
116 See *id.* at 791–93 (citing, among others, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). The court wrote that “Tarpley’s evidence could suggest that the state embraced Keistler’s recommendations, transforming them into state action and making Keistler a state actor . . . . If those were the only relevant considerations, we might be inclined to reverse the district court’s grant of summary judgment.” *Id.* at 793.
117 *Id.* at 797. Presumably, if it were not for the constitutional explanation, the court would have reversed summary judgment and would have held that if the conspiracy theory of state action was substantiated, then Tarpley could make out a cause of action under the Rutan First Amendment theory.
118 Strictly speaking, the court refused to rank the competing rights, and held instead that “[t]he machinery of the courts may not be invoked to protect one First Amendment right at the expense of another.” *Id.* at 796 n.7. It is hard to see, however, how the court actually avoided establishing such a hierarchy, as the constitutional explanation by its very nature elevates the alleged “petitioning” right above other First Amendment freedoms. Moreover, as a practical matter, a defendant would only ever raise *Tarpley* in defense of petitioning rights because logically it does not protect any other rights. For example, if a defendant asserted a *Tarpley* defense in a garden variety defamation case, on the theory that “[t]he machinery of the courts may not be invoked to
extension of this well-intentioned immunity too broadly. If the court was willing to believe that Keistler was a state actor—that by the particular facts of his relationship to the Illinois administration he was, to some extent, a part of that administration—then it should not have said that he was simultaneously a private "petitioner" who enjoys First Amendment protection, or at least not of the nearly limitless version of the antitrust immunity. The two things should be mutually exclusive. Keistler's conduct was bad conduct, of the kind that the Supreme Court has found to be damaging to our political system, and was bad precisely because Keistler held some state power. By cloaking that conduct in First Amendment protection, the Tarpley court undermined the opportunity for § 1983 judicial review that is the very purpose of the coconspirator rule. This is shown by the fact that Tarpley would never be extended to actual government agents. We would not say, for example, that the governor of Illinois has a First Amendment right to act as governor, nor that his official acts are immunized from judicial review. On the contrary, government acts are open to review for violations of constitutional, administrative, and other law. There is an obvious theoretical reason for this: the legal theory of our political freedom provides that we live under a rule of law safeguarded by an independent judiciary. The Tarpley court took away a piece of this special freedom by holding that conduct the court was willing to characterize as "state action" was immunized from judicial review. Indeed, Tarpley threatens to eradicate the coconspirator rule altogether, for when will there be a case of conspiracy by a private person with the government that does not also arguably fit within the broad modern notion of "petition)?

This is then a major reason not to overextend the antitrust immunity. However good it might sound when you have, say, the typical SLAPP suit in mind, if you make a constitutional right out of it you shield from review some conduct that, under our prevailing theory of political freedom, should be open to review. There is a varied body of private conduct that poses potential injury in

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199See Elrod v. Burns, 427 U.S. 347, 355-56 (1976) (stating that patronage contrary to First Amendment impedes free political association, encourages entrenchment of single political party, and injures "the free functioning of the electoral process").

120The court tried to explain itself by holding that Keistler "was simply playing politics"—simply lobbying his government—and therefore was merely "doing what Tarpley can also do." Tarpley, 188 F.3d at 795. But indeed he was not merely "doing what Tarpley [could] do" because Tarpley was not a Republican official shown by the facts to be a government coconspirator who was able to wield the power of the state.

121It is precisely for this reason, interestingly enough, that the Supreme Court has refused to recognize a "conspiracy" exception to the antitrust immunities. See City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 377 (1991).
society and therefore should be subject to the rule of law, but that in one way or another involves private actors talking to or working with government actors.

It would be an advantage to SLAPP activists and the like if they sought only general First Amendment protection against legal retaliation and just gave up on the petitioning immunity. Unlike the antitrust doctrine, modern First Amendment doctrine well recognizes the significance of distinguishing between commercial expression, on the one hand, and more purely political conduct with more legitimate and important claims to freedom on the other hand. Thus, the modern Court has consistently held that First Amendment protections of political speech and association vary depending on the character of the expressive actor.

Businesses and commercial groups cannot cloak self-interested and financially motivated conduct in the same impenetrable protection as that which protects, say, civil rights activism. This is a good thing, too, given the power and incentive for abuse often held by such actors.

IV. THE REASON THE CONSTITUTIONAL EXPLANATION MUST BE WRONG: OTHER UNINTENDED CONSEQUENCES

Several other significant and patently unintended consequences would follow from the constitutional explanation, and this Part will consider them in sequence. What I really hope to convey here is not that there happen to be several technical difficulties in extending the petitioning immunity to non-antitrust. Rather, my point is that, again, in the big picture the constitutional explanation simply tells a different story of American political liberty than is in fact currently the case, and a story that in many respects is arguably a bad one. To see that, however, it helps to consider the details, and we shall do so in the following.

A. A Difference in Fundamental Character

First of all, the constitutional explanation would imply a body of doctrine to protect a discrete class of expressive conduct that would be different than the doctrine that protects all other expression. Putting aside the case law evidence suggesting that that would be an incorrect outcome, let us consider briefly just how dramatically different these two doctrines would be and whether the Court could really have intended to create such a distinction.

In an antitrust petitioning case, the court simply asks whether the challenged conduct was a “petition” of government. If so, and unless the conduct was a

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122This point is explored in much greater detail infra notes 133–43 and accompanying text.
123See infra notes 132–40 and accompanying text.
124See Sagers, supra note 52, at 27–28 (noting ability of groups to abuse power under current concept of immunity).
125See supra notes 106–09, 119 and accompanying text.
“sham,” the conduct is immune and the case is over, period. The immunity is usually not very concerned with facts of the petitioning itself and it is never concerned with balancing the competing values between antitrust enforcement versus nonenforcement. In short, nonsham petitioning can never be subject to antitrust, no matter what the competing government interests might be.

That synopsis does not describe traditional First Amendment analysis at all. In free speech cases, for example, the Court has repeatedly explained that the Speech Clause is not absolute (despite its apparently absolute language), but rather subject to balancing against government interests. For example, in an important discussion in *Konigsberg v. State Bar of California*, the majority reject[ed] the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are “absolutes,” not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.

This seems directly contrary to the constitutional explanation, because that argument would require that “where the constitutional protection exists it must prevail.” Thus, while the First Amendment assigns to courts the job of deciding how important a particular policy is within the constitutional scheme, the antitrust immunity never does. Moreover, as explained above, genuine First Amendment analysis would demand a threshold inquiry into whether the government act at issue in a particular case is “content specific” or “content neutral.” The antitrust immunity, by contrast, could care less; it is irrelevant to the immunity what the purpose of the regulation (that is, antitrust) might be.

And let us consider briefly why the two doctrines are different. While the Court has never explained (or even directly considered) this difference, it is clear that the very different consequences of the two doctrines demand different

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126 Under current doctrine it will be only in infrequent situations that a court must give much consideration to the facts of the petitioning itself. Namely, under *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 509–10 (1988), and *FTC v. Superior Court Trial Lawyers’ Ass’n*, 493 U.S. 411, 453 (1990), there are some cases in which the “nature and context” of the challenged conduct are so unlike the concept of “petitioning” embodied in the antitrust case law that for reasons of antitrust policy it must be excluded from the definition of “petitioning.” These points are explained supra note 73 and accompanying text.

127 That is, once it is determined that the conduct is “petitioning” and that it is not a “sham,” no consideration whatsoever will be given to the competing value of antitrust enforcement. See supra notes 66–67.


129 *Id.* at 49–51.

130 *Id.*

131 See supra notes 18–24 and accompanying text.
treatment. The petitioning immunity is a bullet through a plaintiff's heart. However, at least when constrained only to antitrust, it means only that the defendant's conduct is protected from antitrust. Once that same conduct is cloaked in the First Amendment, by contrast, it enters a privileged world in which it is likely removed from any judicial review of any sort and presumably would also be very difficult to regulate by other means. Accordingly, it might seem quite reckless were the Court to toss around something so powerful as a constitutional civil liberty in the rigid and formalistic manner of the antitrust immunity.

So could the Court have intended to create a distinct class of ultra-protected conduct, which would combine the absolute protection of the immunity and the absolute breadth of constitutional rights? I have attempted to show how unlikely it seems as a matter of instinct, but it so happens that there is also a significant doctrinal argument against it as well. The constitutional explanation would be directly at odds with an emerging trend in the Court's First Amendment cases concerning economic regulation of public political expression—the very conduct that in the modern mind constitutes "petitioning." In two significant recent decisions, the Court has made clear that such regulation, when applied to commercial market actors for the purpose of protecting competition, is "content neutral" regulation, to be judged under the permissive standard of *United States v. O'Brien*.132

The linchpin of the Court's reasoning is the commercial character of the conduct normally challenged in such lawsuits. First, in *NAACP v. Claiborne Hardware Co.*, the Court held that civil rights activists were protected from tort liability for the economic injuries they caused through a political boycott of local businesses. The Court held that the states may not "prohibit peaceful political activity such as that found in the boycott in this case." However, the Court also noted that "[t]he presence of protected activity . . . does not end the relevant constitutional inquiry," and pointedly distinguished the case from economic boycotts that do not have a political purpose, saying that nonpolitical boycotts can be prohibited notwithstanding some purported expressive purpose.138

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132 See *supra* notes 25–28.
133 391 U.S. 367 (1968); see *supra* notes 14–24 and accompanying text. *O'Brien*, again, provides that where a law is content neutral, it is consistent with the First Amendment if: (1) it "furthers an important or substantial governmental interest," and (2) "the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377.
135 *Id.* at 894.
136 *Id.* at 913.
137 *Id.* at 912.
138 See *id.* ("Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the...")
Significantly, the Court added that “[t]he right of business entities to ‘associate’ to suppress competition may be curtailed,” and for that rule cited an antitrust case. Next, in FTC v. Superior Court Trial Lawyers Ass’n, the Court explicitly adopted what had only been dicta in Claiborne Hardware. The Court held that a boycott by attorneys who practiced as court-appointed criminal defenders could be attacked by the government in antitrust. Because the defendants’ objective was “to increase the price at which [they] would be paid for their services,” the Court held that “[s]uch an economic boycott is well within the category that was expressly distinguished in the Claiborne Hardware opinion itself.”

Therefore, where the conduct to be regulated is predominantly commercial, engaged in for the defendant’s own economic benefit, economic regulation of it is not barred by the First Amendment. Thus, the Court has made clear that such regulation, at least insofar as it is used merely to protect market conditions, is content neutral regulation that is consistent with the Court’s rules under O’Brien. In other words, if it were just a question of First Amendment law, and the petitioning immunity were ignored, it would very likely be permissible to subject most petitioning by commercial interests to antitrust review, without regard to whether it is a “sham.” This suggests that the Court could not have intended to create the two distinct bodies of doctrine discussed above.

Finally, what must be the most damning evidence is that if ever there were a case in which the Court decided a Petition Clause case qua Petition Clause case, it was Claiborne Hardware, but that case emphatically did not rely on the antitrust petitioning immunity. The Court held that civil rights boycott protected by the First Amendment, but not before asking whether any competing state interest might justify infringement of the boycotters’ rights. If the constitutional explanation were right, the petitioning immunity—a doctrine well established by the time of the Claiborne Hardware decision in 1982—would have quickly and cleanly ended the case without any consideration of government interests. The boycott was not a “sham” by any stretch, and therefore on the constitutional explanation it would plainly have been absolutely immunized.

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139Id.
140See id. (citing Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 681 (1978) (upholding antitrust liability against trade association that, by ethical standard, prohibited its members from advertising their prices)).
142Id. at 427.
143This is true even when the commercial activity is partially political or altruistic, so long as the participants in the restraint “stand to profit financially from a lessening of competition in the [affected] market.” Id. (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 (1988)).
B. The Case of McDonald v. Smith and the Flat Hierarchy of the First Amendment

Another reason to believe that the Supreme Court never intended to establish two dramatically different First Amendment standards is that, in the non-antitrust case of *McDonald v. Smith*, it explicitly said so.\(^{14}\) Really, *McDonald* should have done away with the constitutional explanation long ago, but it absolutely has not—apparently because it is written in such a confusing and problematic way that it has allowed some advocates to argue their way out of it and many others just not to notice it.

*McDonald* held that a person could be sued for sending libelous letters to the President or other government officials, even though the letters were sent to protest the appointment of a particular person (who happened to be the libel plaintiff) to government office.\(^{145}\) Notwithstanding that such conduct plainly fits the modern notion of “petition,” and notwithstanding the defendant’s explicit invocation of the antitrust immunity case law, the Court held that the traditional First Amendment rules should apply.\(^{146}\) The Court wrote that “[a]lthough the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel.”\(^{147}\) Indeed, “[t]o accept petitioner’s claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble.”\(^{148}\)

*McDonald* has by no means escaped criticism,\(^{149}\) and it may well be, as is often said, that the Court based its decision on a flimsy or false understanding of the history of the First Amendment. The critics, however, have missed the point because they fail to appreciate the degree to which *McDonald* reflects the difference between our political structure and the one for which the Petition Clause was drafted—how limited in scope the classical right was, however broad

\(^{14}\) 472 U.S. 479, 485 (1985)
\(^{145}\) Id. at 480, 485.
\(^{146}\) Id. at 485.
\(^{147}\) Id. at 483.
\(^{148}\) Id. at 485.
\(^{149}\) See Schnapper, *supra* note 17, at 304 (criticizing Court’s approach in *McDonald*); Smith, *supra* note 25, at 1183–88 (discussing how “the *McDonald* court failed to give adequate consideration to the history, textual development, and draftsman’s intent of the right to petition and to the purposes and interests it serves”).
it may have been in its immunity, and how unimportant the classical right is to modern Americans.¹⁵⁰

In any case, because McDonald might seem so plainly to have resolved this whole problem, it is worth pausing briefly to consider why it has had comparatively little effect—why, indeed, at least five federal circuits continue to adhere to the constitutional explanation.¹⁵¹ The answer appears to be that Chief Justice Burger's incredibly brief and laconic opinion for the majority is written in such a confusing and problematic way that it simply has not been noticed. First, and quite surprisingly, none of the opinions in McDonald explicitly mention the antitrust immunity, even though the defendant—represented by the late Bruce Ennis, one of the nation's preeminent First Amendment lawyers—explicitly argued it. The Court also ignored the explicit holding in the district court's long and very careful opinion that the antitrust immunity was merely a statutory construction doctrine¹⁵² and neglected as well the Fourth Circuit's explicit affirmation of that holding.¹⁵³ Second, the Chief Justice introduced a mind-busting logic problem by way of an apparently poorly considered citation to California Motor Transport Co. v. Trucking Unlimited.¹⁵⁴ The citation, given without explanation, seems on close examination to imply that the petitioning immunity in fact is a constitutional rule, but also that the protection of the Petition Clause

¹⁵⁰Schnapper's paper, for example, sins dramatically in this respect. While the volume of historical material he consults is duly impressive, he forgets that the right as it existed in the lives of the Framers would not have applied at all to most of the conduct now called "petitioning" because most of that conduct would not meet the definition or the procedural requirements of the classical petition. Moreover, even if the letters at issue in McDonald would have qualified under eighteenth century law as "petitions," and his historical analysis were thereby rendered relevant to the McDonald case, that point is not relevant because protection for such a "petition" is not at all what Schnapper wants. He does not want immunity for a defunct and forgotten parliamentary procedure now used by essentially no one; he wants absolute immunity for any sort of political communication with government. Schnapper, supra note 17, at 347 & n.249.

This is not always entirely true of the absolute immunity proponents. Norman Smith observes that the modern right should not protect "conduct [that] passes beyond the limit of that which is uniquely necessary to petitioning," Smith, supra note 25, at 1190, perhaps arguing that the modern right should be limited to the eighteenth century contours of the practice. It is not clear where he thinks the limit should be, though, and it seems clear that he believes at least some conduct incidental to petitioning—assembly, for example—should enjoy absolute immunity. Assembly, however, was not accorded absolute immunity, either in the eighteenth century common law, nor in any law under the Petition Clause. Again, the immunity protected only the contents of a properly drawn and delivered petition. See supra notes 30–38 and accompanying text.

¹⁵¹See supra note 103.
¹⁵³Smith v. McDonald, 737 F.2d 427, 429 (4th Cir. 1984).
is not absolute even in the purely political context (i.e., in nonadjudicatory contexts).\textsuperscript{155} However, \textit{McDonald} itself renders that result impossible.\textsuperscript{156}

These points, however, only explain why \textit{McDonald} has been overlooked. None of them could change the fact that the constitutional explanation would necessarily rank the Petition Clause as different and more absolute than the

\textsuperscript{155}See \textit{id.} at 513 (noting limitations of petitioning immunity).

\textsuperscript{156}The Chief Justice cited \textit{California Motor} for his view that “the Court’s decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is [not] absolute.” \textit{McDonald}, 472 U.S. at 484 (citing \textit{Cal. Motor}, 404 U.S. at 513). It is apparent from the context that he meant to invoke the passage in which the \textit{California Motor} Court announced for the first time that “[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.” \textit{Cal. Motor}, 404 U.S. at 513. Thus, the \textit{California Motor} Court suggested that sometimes misrepresentations (including, presumably, libelous ones) would not be immunized from antitrust. But the conduct at issue in \textit{McDonald} did not take place in the adjudicatory context; rather, the defendant was sued in libel for letters he wrote to executive and legislative branch officials. 472 U.S. at 480–81. Indeed, on the very page cited, the \textit{California Motor} Court wrote that “[m]isrepresentations [are] condoned in the political context,” as opposed to the adjudicatory context, implying that in the legislative context nonsham lobbying efforts are absolutely immune from antitrust—practically the \textit{opposite} of what the Court held in \textit{McDonald}. See \textit{Cal. Motor}, 404 U.S. at 513. Therefore, if the Chief Justice meant to imply that \textit{California Motor} stated a rule of First Amendment law, then he would seem to imply that libelous statements in the political context are absolutely immune from any litigation—including libel—unless they are “shams.” But that would be directly contrary to the Court’s very holding in \textit{McDonald} since mere libelous statements to legislative officials—the conduct at issue in \textit{McDonald}—are classic examples of conduct that may be bad but are nevertheless immune from antitrust claims under the petitioning immunity.
Speech Clause, and that, under *McDonald* and other authority,\(^{157}\) such a position is irreconcilable with prevailing American law.

### C. The Scope Problem

Moreover, in many applications, the constitutional explanation produces simply silly and unintended results.\(^{158}\) Indeed, as I will explain in this section, it

\(^{157}\) It is not only *McDonald* that has signaled that the First Amendment sets out only one integrated right of expression, though admittedly *McDonald* is the only explicit Supreme Court holding on point. First, the much older case of *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), considered facts like those in *McDonald*. Nicholls wrote the President and the Treasury Secretary that White was unfit to serve as customs collector. *Id.* at 267–68. The Court held that the right to petition was subject to “well-defined qualifications.” *Id.* at 287. To prevail on his defamation suit, White had to show only “express malice.” *Id.* at 291. Though *Nicholls*, decided before ratification of the Fourteenth Amendment, was not based on the First Amendment itself, it was based on the analogous right at common law. See *McDonald*, 737 F.2d at 429 (finding *Nicholls* nevertheless controlling of First Amendment issue). Of course, *Nicholls* must be understood in the very different historical context in which it was decided—in the midst of the “gag rule” controversy in the House of Representatives, for example—and in light of the different meaning of “petition” in the nineteenth century. See *supra* notes 30–43 and accompanying text. The usefulness of *Nicholls* for modern purposes is open to question.

Second, a series of dicta in the Supreme Court opinions has been taken as indicating that, in modern law, there is no hierarchy amongst First Amendment rights. See *Claiborne Hardware*, 458 U.S. at 911–12 (“The established elements of speech, assembly, association, and petition, ‘though not identical, are inseparable.’” (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945))); United Mine Workers v. Ill. State Bar Ass’n, 389 U.S. 217, 222 (1967) (“[T]he rights to assemble peaceably and to petition . . . are intimately connected, both in origin and purpose, with the other First Amendment rights of free speech and free press.”); *Gibson v. Fla. Legislative Investigation Comm.*., 372 U.S. 539, 546 (1963) (suggesting that same doctrinal analysis should apply whether government act “intrudes into the area of constitutionally protected rights of speech, press, association [or] petition”); *Thomas*, 323 U.S. at 531 (“[T]he First Amendment gives freedom of mind the same security as freedom of conscience. Great secular causes, with small ones, are guarded. The grievance for redress of which the right of petition was insured, and with the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.” (citations omitted)); see also *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (“The right of peaceable assembly is a right cognate to those of free speech and free press, and is equally fundamental.”).

Finally, even though the opaque *McDonald* opinion has often been overlooked, some courts have in fact noticed it and have held that the Petition and Speech Clauses are the same. Cardtoons, L.C. v. Major League Baseball Players Ass’n, 208 F.3d 885, 891 (10th Cir. 2000) (en banc); *Martin v. City of Del City*, 179 F.3d 882, 887–89 (10th Cir. 1999); *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990); *Day v. S. Park Indep. Sch. Dist.*, 768 F.2d 696, 697 (5th Cir. 1985); *Harris v. Adkins*, 432 S.E.2d 549, 552–53 (W. Va. 1993).

\(^{158}\) If you, the reader, notice an apparent inconsistency between the text above and my views on the reductio ad absurdum, see Sagers, *Brother Thomas*, *supra* note 12, at 487–91, then I am deeply in your debt for having read my work so carefully. In any case, however, see *Sextus Empiricus*, OUTLINES OF SCEPTICISM 9 (Julia Annas & Jonathan Barnes trans., 1994) (setting forth basic concepts of ancient scepticism, most notably importance of reserving judgment); Sagers, Cum...
would change the shape of our law as we know it, because it would render many ancient and familiar causes of action unconstitutional, and because it would needlessly impede the political freedom of many plaintiffs.

1. Overprotection: Limitations on Existing Causes of Action

Perhaps most dramatically, the constitutional explanation would render several familiar causes of action unconstitutional in any case in which the defendant's challenged conduct could be described as "petitioning" or "incidental to a valid effort to influence government." Indeed, the rule would amount virtually to sub silentio reversal of some of the Supreme Court's own First Amendment decisions.

*Webb v. Fury,* a decision of the West Virginia Supreme Court, is one particularly striking example of this problem. That case involved a suit by a coal company against an environmentalist who, among other things, had allegedly libeled the company in a newsletter. Notwithstanding the Supreme Court's own firmly established libel rules for political speech, and the fact that the case was if anything a fortiori to the facts in the Supreme Court's own decision in *New York Times Co. v. Sullivan,* the court held that conduct absolutely immune from the libel action. Citing *Noerr* and progeny (and notably *California Motor*), the court inexplicably wrote that "the right to petition protects activity alleged to be malicious or knowingly false," and held that rule applicable to the defendant's publicly disseminated newsletter, which the court likened to the "incidental" petitioning that was immunized from antitrust in *Noerr.*


160Id. at 30.
161376 U.S. 254, 279–80 (1964). Namely, in *New York Times* the Court held that even a public figure could sue a newspaper in libel, so long as the public figure could prove that the paper's statements were deliberately or recklessly false. *Id.* It is clear under *New York Times* and its progeny, which was established well enough prior to *Webb,* that purely private plaintiffs like the coal company are held to an even less strict showing of the libelant's bad motives. Thus, if *The New York Times* could be sued in libel by a politician for defamatory comments in its newspaper pages, then a fortiori a wholly private plaintiff could sue a man for defamatory statements made in the pages of a publicly disseminated newsletter.
162*Webb,* 282 S.E.2d at 40.
163Id. at 41–42. The challenged conduct in *Noerr* was a publicity campaign directed in part toward the general public, but the *Noerr* Court immunized it from antitrust because it was "incidental [to a] campaign to influence governmental action." 365 U.S. at 143.
The decision was plainly incorrect and the court later reversed itself.\textsuperscript{164} However—and critically—if the court had been right in its initial premise that the antitrust immunity is a constitutional doctrine, then its holding on the merits would have been correct. The decision was correct as an application of the immunity; the defendant’s conduct was “incidental petitioning” of the sort protected in \textit{Noerr} and it was not a sham,\textsuperscript{165} and therefore if the coal company had raised an antitrust claim, the defendants’ conduct would have been immune. Therefore, the blind adoption of the immunity in all contexts seems seriously contrary to established First Amendment precedent.

Moreover, the immunity protects a range of conduct from antitrust that we well know can otherwise be regulated by the state. Because the doctrine was crafted to reflect the view that “[t]he antitrust laws regulate business, not politics,”\textsuperscript{166} and, “[i]nsofar as the [Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity,”\textsuperscript{167} the courts have frequently recognized that just because some political conduct by a competitor might seem bad, that does not make it an antitrust violation.\textsuperscript{168} Indeed, courts and commentators have always suspected that when petitioning activity is not a “sham,” it does not violate the antitrust laws even though it may otherwise be criminal.\textsuperscript{169}

\textsuperscript{164}\textit{See} Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993). In the court’s defense, a portion of its opinion was not plainly incorrect until the U.S. Supreme Court’s later ruling in \textit{McDonald v. Smith}, 472 U.S. 479 (1985). Under \textit{McDonald}, it became clear that the \textit{Webb} court had also been incorrect as to the other piece of its ruling, which was that the environmentalist was also immune from libel, under the petitioning immunity, for defamatory statements contained in communications made directly to government agencies.

\textsuperscript{165}\textit{See supra} notes 64–68 and accompanying text.


\textsuperscript{167}\textit{Noerr}, 365 U.S. at 140–41.

\textsuperscript{168}As Judge Friendly once wrote, “[c]ombining an assertion of general antitrust violation with a claim of injury from breach of contract or tort [or anything else] does not automatically make the latter a claim arising under the antitrust laws.” Salerno v. Am. League of Prof’l Baseball Clubs, 429 F.2d 1003, 1004 (2d Cir. 1970).

\textsuperscript{169}\textit{See supra} note 52 (citing cases). For example, in the improbably named \textit{Cow Palace, Ltd. v. Associated Milk Producers, Inc.}, 390 F. Supp. 696 (D. Colo. 1975), plaintiff’s complaint in antitrust alleged that an agricultural cooperative bribed public officials to influence milk price regulations. \textit{Id.} at 699. The court dismissed, holding that the antitrust doctrine immunizes even bribery from antitrust liability. \textit{See id.} at 701–02; \textit{see also} Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 229 (7th Cir. 1975) (ruling that fact that defendant made improper campaign contributions did not render its conduct sham); Schenley Indus., Inc. v. N.J. Wine & Spirit Wholesalers Ass’n, 272 F. Supp. 872, 884 (D.N.J. 1967) (rejecting argument that if defendant’s conduct is “sufficiently illegal apart from its antitrust aspect, [it] is not shielded from liability under the Sherman Act”). To the contrary, however, is Elhauge, \textit{supra} note 1, at 1243–46 (suggesting that in peculiar case of bribery, as opposed to other badly motivated petitioning, petitioning immunity should not apply because bribe renders government decision financially interested, control of which is therefore within purposes of antitrust law under Elhauge’s “functional process” approach).
2. Overprotection: Violation of Countervailing First Amendment Rights

Moreover, if the constitutional explanation were correct, then one must wonder what suddenly happened to the First Amendment rights of all the litigants that otherwise would have had causes of action. It has become clear that private persons enjoy an emerging First Amendment right to bring causes of action that are provided for by substantive law. They have this right to bring claims like abuse of process, defamation, tortious interference with contract, and all the other claims that might implicate the political activity of a defendant, even when that activity is not a "sham." This is so because filing a complaint is also petition of government—it is a request that the judicial branch of government redress the plaintiff's grievance. However, if the constitutional explanation strips such plaintiffs of their causes of action, whose rights win? There is no clear answer, though no obvious reason would support a view that plaintiffs should just always lose their right to redress in every case unless the defendant’s political conduct was so completely baseless as to constitute a sham. This would again simply amount to a reorganization of our political order in a manner we might find quite

In any event, however, there is no question that the states may make bribery or other bad political conduct criminal, even though such acts are (strictly speaking) “petitioning.” See Cal. Motor, 404 U.S. at 514 (“It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.” (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language.”))).

The Supreme Court apparently recognized this right for the first time only about forty years ago. However, and though its location in the Petition Clause seems awkward in light of that Clause's history, see supra notes 30–39 and accompanying text, it now appears well established. See Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 742–43 (1983) (“Considering the First Amendment right of access to the courts . . . we conclude that the Board’s interpretation of the [NLRA] is untenable.”); Cal. Motor, 404 U.S. at 513; Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 7 (1964) (“The State can no more keep these workers from using their cooperative plan [of employing in-house counsel] than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.”); NAACP v. Button, 371 U.S. 415, 429–30 (1963) (“[A]bstract discussion is not the only species of communication which the Constitution protects . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving . . . lawful objectives [and is] thus a form of political expression.”); Andrews, supra note 36, at 580–89.

Indeed, though the right to petition courts is sometimes downplayed or minimized in relation to petitioning the other branches, the classic right to petition would have its most natural application—and its greatest importance—in the judicial context since historically the petition was often used to secure what was effectively judicial relief. See Lawson & Seidman, supra note 37, at 757–58. Logically, then, the Petition Clause right to petition the courts arguably includes a First Amendment right to have the petition acted upon. The “duty to exercise jurisdiction” that the courts sometimes identify might thus not be a merely prudential, judge-made doctrine, as it is said to be, but a constitutional one. See id. Indeed, Article III arguably encapsulates that portion of the theretofore not rigidly separated government’s "petition" function. See id.
surprising if we gave it any thought: it would produce a regime in which a person talking to the government can do anything, say anything, and cause any damage of any sort and no state or federal entity could do anything about it so long as the petitioner genuinely wants and anticipates the havoc to be wrought. Some statutory explanation courts have recognized this problem, but constitutional explanation advocates tend to ignore it.

V. TEXTUAL EVIDENCE

Though for my money the case is made plainly enough from the preceding discussion, a reasonably good case also appears from review of the Supreme Court opinions, and I will set that forth here. In addition, it is important to respond to the textual arguments in favor of the constitutional explanation for, as I said, proponents of that view have found a fair amount of support in the opinions.

A. Plain Statements

One argument in favor of the statutory explanation is that the Supreme Court has explicitly stated it and has been doing so ever since it devised the doctrine. In the very decision that gave birth to the immunity the Court wrote that “[t]he proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena,” and therefore the “essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act... constitute[s] a warning against treating [political] conduct as though it amounted to a common law trade restraint.” Therefore, even though “[t]he answer to the

171 See supra notes 92–94 and accompanying text.
173 Incidentally, I will ignore what I believe is the weakest textual argument because I do not think it deserves attention. One is mistaken to make too much of offhand dicta in the Court's opinions, like the following frequently emphasized tidbit from Noerr: “[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.” 365 U.S. at 138. Familiarity with the Court's case law suggests that by this the Court did not mean that it could not impute such an intent to Congress. The Court has made the same move in many other contexts, see, e.g., Crowell v. Benson, 285 U.S. 22, 62 (1932) (“[I]t is a cardinal principal that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”); 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 23.10 (3d ed. 1999) (discussing duty to avoid constitutional issues); 3A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 74.11 (5th ed. 1992) (same), but in these other contexts such a construction is not taken as evidence of the content of the underlying constitutional law.
174 Noerr, 365 U.S. at 141.
175 Id. at 136–37.
[plaintiff's] complaint also interposed the contention that the activities complained of were constitutionally protected under the First Amendment," the Court found it "unnecessary to consider [that] defense[]." Moreover, though the decision admittedly was based to some extent on First Amendment concerns, it was only "when th[e] factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purposes of [petitioning]" that the immunity was born. But, if the immunity is mandated by the First Amendment, what need was there for consideration of "essential dissimilarity," or anything else? In any case, the Court's immunity case law contains other dicta suggesting the statutory explanation.¹⁷⁸

The Supreme Court has also made clear that its other antitrust immunity rules are about statutory interpretation, even though they, too, have an obvious constitutional aroma. The petitioning immunity finds its origin in one of the state-action cases—Parker v. Brown.¹⁷⁹ The Noerr Court considered the petitioning immunity as a corollary of the immunity recognized in Parker, which protects state governments themselves from antitrust.¹⁸⁰ The Parker Court, in turn, had noted that its decision raised constitutional issues but made clear that it did not decide on those grounds, writing that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress."¹⁸¹

¹⁷⁶Id. at 132 n.6; see also id. at 137 ("To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.").
¹⁷⁷Id. at 137.
¹⁷⁸See, e.g., Cal. Motor, 404 U.S. at 510 ("We cannot . . . lightly impute to Congress an intent to invade [First Amendment] freedoms." (emphasis added)); United Mine Workers v. Pennington, 381 U.S. 657, 669 (1965) ("The Sherman Act . . . was not intended to bar [political] action" (emphasis added)).
¹⁸⁰See Noerr, 365 U.S. at 137 & n.17 (noting that use of Sherman Act to regulate political activity "would have no basis whatsoever in the legislative history of that Act").
¹⁸¹317 U.S. at 351.
On any reasonable reading it must be admitted that Justice Douglas’s majority opinion in *California Motor* assumed that the petitioning immunity is constitutional, and it is from this assumption that the constitutional explanation draws virtually all of its authority. However, even putting aside the criticism that already exists of this opinion, an important point can be made so that the statutory explanation can be accepted notwithstanding *California Motor*: namely, all the First Amendment discussion in the opinion is *defensive* in nature.

It is important first to observe that all of the First Amendment discussion in *California Motor* is dicta and was unnecessary to the Court’s ruling. Next, a critical but generally ignored fact is that *California Motor* found the defendant’s conduct not immune. Thus, as a matter of fact, the First Amendment discussion was defensive in posture and seemed necessary only to show that the Court’s decision itself was not unconstitutional. In other words, the opinion can be read to explain not that there was no immunity because the First Amendment would provide no protection, but rather that there was no immunity as a matter of statutory interpretation and, as a subsidiary matter, such a reading of the statute was not itself unconstitutional.

It is worth noting, too, that the Court later said that in *California Motor* “we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff’s anticompetitive intent or purpose in doing so, unless the suit was a ‘mere sham’ filed for harassment purposes.”

One other offhand dictum has caused some trouble as well. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, the Supreme Court wrote that “[w]hether applying Noerr as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.” In fact, I think that this sentence shows just how clear it is to the Court that the petitioning immunity is *not* constitutional. Justice Thomas chose his words carefully: he wrote that the Court has followed this understanding “[w]hether applying Noerr as an antitrust doctrine or invoking it in other

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182 See, e.g., Calkins, *supra* note 3, at 333 n.34 (noting confusion resulting from *California Motor*); Handler & De Sevo, *supra* note 3, at 2, 8–14 (discussing confusion concerning scope of Noerr doctrine due to *California Motor*).
183 See *Cal. Motor*, 404 U.S. at 509.
184 Judge Posner appears once to have argued something similar. See *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 471–72 (7th Cir. 1982) (characterizing Court’s invocation of First Amendment rights as “the fulcrum to lever the petitioners out of range of the First Amendment by characterizing Court’s invocation of First Amendment rights as ‘the fulcrum to lever the petitioners out of range of the First Amendment by characterizing the alleged conspiracy as one to prevent the [plaintiffs] from exercising their legal rights to obtain and transfer operating rights’”).
187 *Id.* at 59 (citations omitted).
In other words, the Court applies the immunity in antitrust contexts, but merely invokes it in others.189

VI. CONCLUSION

In sum, a variety of odd and dramatic consequences counsel that the constitutional explanation should be abandoned. There exists already an extensive body of law to deal with the problem of legal retaliation against political conduct—namely, Speech Clause jurisprudence—which is designed to accommodate the fact-rich, policy-laden, and inherently subjective contexts in which such matters inevitably arise. Indeed, the constitutional explanation really has nothing going for it but good intentions, and ranged against it are all sorts of problems. Therefore, I think the petitioning immunity should be recognized for what it is: an interpretation of a peculiar and uncommonly vague body of federal statutes that by their nature require a lot of interpretation.

188Id. (emphasis added).
189Note as well that Justice Thomas’s only evidence of “invocation” of the antitrust case law outside antitrust was in the area of labor relations, another federal statutory area in which the Court has been tasked with an unusual amount of lawmaking, and the case to which Justice Thomas alluded was another in which the Court made very clear that it was merely construing a statute to avoid constitutional issues. See id. (citing Bill Johnson’s Rests., 461 U.S. at 743–44).

Justice Thomas also cited a brief discussion in NAACP v. Claiborne Hardware Co., 485 U.S. 886, 913–14 (1982), where the Court quoted dicta from Noerr to the effect that protection for political speech does not depend on the motive of the speech. Neither Claiborne Hardware nor Justice Thomas’s citation to it could possibly be support for the constitutional explanation, however, because Claiborne Hardware is the quintessential case of the treatment of petitioning as political speech, rather than as absolutely immune. See supra notes 133–39 and accompanying text.