# Politics, Corruption, and the Sherman Act After *City of Columbia*'s Blighted View

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## INTRODUCTION

As long as businesses, competition, and government co-exist, businesses will lobby government to undercut their competition. As long as lobbying exists, some supplicants will resort to bribery. Under the *Noerr* doctrine,[1] the antitrust laws[2] do not preclude businesses from lobbying government to undercut their competition. What happens, however, when this lobbying descends into bribery? Up until a short time ago, one could have stated with confidence that bribery was not protected lobbying activity under the *Noerr* doctrine.[3] However, the Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*[4] has undermined this position. In dicta, the Court stated that the Sherman Act does not apply to attempts to restrain trade by bribing government officials.[5] If, as repeated reports in the media suggest, corruption of government officials is not an infrequent problem,[6] then this dicta deserves critical examination.

This examination will proceed in four steps. Parts I through III of this article will provide a background discussion of this area of antitrust law and of the *Omni* case. Part I begins with a brief overview of the interface between the antitrust laws and government actions impacting competition. Two doctrines govern this interface: the *Parker* doctrine immunizing certain state action despite anti-competitive impact,[7] and the *Noerr* doctrine immunizing lobby-

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1 *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *infra* notes 32-64 and accompanying text (discussing *Noerr* doctrine).

2 Principally the Sherman Act, 15 U.S.C. §§ 1, 2 (1988).

3 In fact, I did. *See* Franklin A. Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 U. MIAMI L. REV. 365, 399 (1987) [hereafter *Commercial Bribery*]; Franklin A. Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 211, 271 (1987) [hereafter *Using the Antitrust Laws*]; *see also infra* note 87 (listing additional articles asserting that *Noerr* did not protect bribery).

4 111 S. Ct. 1344 (1991).

5 *Id.* at 1353.

6 *See, e.g.*, AUGUST BEQUAI, WHITE COLLAR CRIME: A 20TH CENTURY CRISIS 41-45 (1978); JOHN T. NOONAN, BRIBES (1984) (tracing bribery throughout history). Nexis lists at least 7322 articles reporting on bribery written since the end of 1992.

7 *See* Parker v. Brown, 317 U.S. 341 (1943); *infra* notes 12-25 and accompanying text (discussing *Parker* doctrine).

ing for government action.[8] Part II will examine the cases decided after the articulation of the *Noerr* doctrine, but before *Omni*, bearing on whether bribery falls within the *Noerr* doctrine. Part III will analyze the *Omni* decision itself.

Part IV will take a critical look at the suggestion in *Omni* that *Noerr* immunizes bribery of governmental officials from antitrust attack. It begins by examining the United States Supreme Court's assertion in *Omni* that the *Noerr* and *Parker* doctrines are two sides of the same coin. In other words, we will look at the proposition that whatever anti-competitive actions *Parker* allows state government to undertake, *Noerr* allows private parties to lobby for, no matter how they do so. Next, Part IV will explore whether the policy arguments for the *Noerr* doctrine justify immunizing bribery from otherwise applicable antitrust laws. Finally, Part IV will challenge the premise in the *Omni* opinion that attacking corruption that produces anti-competitive consequences is foreign to the purposes of the antitrust laws.

## I. The Interface Between Government Activity and Antitrust

The purpose of the antitrust laws is to preserve competition.[9] It is perhaps ironic that while the antitrust laws seek to prevent restraints of trade and monopolies, government actions themselves contribute to many restraints and monopolies. When federal agencies are involved, courts must resolve any resulting antitrust issues by engaging in the familiar process of reconciling two statutory schemes of equal authority.[10] *Omni*, instead of reconciling federal statutes, presented two other problems.[11] First, a municipality had undertaken the challenged government action. The *Parker* doctrine controls the application of the Sherman Act to anti-competi-

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8 *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *infra* notes 32-64 and accompanying text (discussing *Noerr* doctrine).

9 *See* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 695 (1978).

10 *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

11 *See infra* notes 89-144 and accompanying text (discussing *Omni*). Different concerns arise with actions by foreign governments. The act of state doctrine may preclude challenge to the validity of an anticompetitive action by a foreign government, while sovereign immunity may preclude suit against the foreign government itself. *See, e.g.*, International Ass'n of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

tive actions of state or local governments. Second, *Omni* involved a private party's lobbying efforts for that challenged government action. This brings the *Noerr* doctrine into play. A brief overview of these two doctrines is, therefore, useful.

### A. *The* Parker *Doctrine*

The *Parker* doctrine takes its name from the case of *Parker v. Brown*.[12] There, a raisin producer sued to enjoin enforcement of a California statute that created a market allocation scheme to maintain raisin prices. The United States Supreme Court held that the statute did not violate the Sherman Act.[13] The Court explained that Congress never intended the Sherman Act to apply to state action.[14]

Subsequent cases have clarified both the rationale behind, and the limits of, the *Parker* doctrine. Concerning the former, *Parker* itself focused on the Sherman Act's language and legislative history.[15] Neither indicated that Congress contemplated that the Act would apply to state-created restraints.[16] On the other hand, the *Parker* Court pointed to little in the language or history to show that Congress ever really considered the question.[17] Hence, the language and legislative history were inconclusive. Later Supreme Court opinions, including *Omni*, indicate that federalism concerns tipped the balance toward reading the Sherman Act narrowly.[18] To understand these concerns, note *Parker's* timing. The Supreme Court decided *Parker* not long after it ended what is often referred to as the *Lochner* era.[19] In that era, the Court used various constitutional doctrines, principally substantive due process, to invalidate state economic regulations that clashed with laissez faire ideals.[20]

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12 317 U.S. 341 (1943).

13 *Id.* at 351-52; Sherman Act, 15 U.S.C. §§ 1, 2 (1988).

14 *Parker*, 317 U.S. at 351-52.

15 *Id.* at 351.

16 *Id.*

17 *See generally id.*

18 *See, e.g.*, FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2176 (1992); City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1351 (1991).

19 *See, e.g.*, Olsen v. Nebraska *ex rel.* Western Ref. & Bond Ass'n, 313 U.S. 236 (1941); Nebbia v. New York, 291 U.S. 502 (1934).

20 *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (striking down licensing statute for ice business); Ribnik v. McBride, 277 U.S. 350 (1928) (striking down statute controlling employment agency charges); Lochner v. New York, 198 U.S. 45 (1905) (invalidating statute imposing maximum working hours for bakers).

Having just abandoned the notion that federal courts should readily second-guess the economic wisdom of state regulations—thereby leaving the states free to experiment with different regulatory policies—the Supreme Court was reticent to reintroduce such second-guessing through the Sherman Act.

The *Parker* Court was willing to allow states the freedom to regulate economic activity. The Court, however, was not willing to allow states to opt out of the Sherman Act for private anti-competitive conduct within their individual borders.[21] Through several cases, the Supreme Court cast about unable to reach a consensus on how to define the boundary between these two propositions.[22] Finally, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[23] the Supreme Court announced a two-pronged test for applying *Parker*. First, the challenged restraint must be clearly articulated as state policy, and second, the state itself must actively supervise the policy.[24] Hence, a state scheme that, as in *Midcal*, simply authorizes and enforces prices fixed by private parties fails the second prong of the test and violates the Sherman Act.[25]

A question not considered in *Parker*, but relevant to *Omni*, is whether the doctrine extends to actions by local as well as state governments. The Supreme Court considered this question in *Community Communications Co., Inc. v. City of Boulder*.[26] The Court held that *Parker* did not apply to government action based solely on a local articulation of anti-competitive policy.[27] Rather, *Parker* could only apply if the locality acted pursuant to its state's clearly articulated policy to allow such a restraint.[28] In this sense, local government actions stand on the same footing as private actions. The parallel, however, is not complete. The second prong of the *Midcal* test does not apply, so state governments need not actively supervise the locality in its anti-competitive action.[29]

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

22 *See* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

23 445 U.S. 97 (1980).

24 *Id.* at 105.

25 *See, e.g.*, FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169 (1992); Patrick v. Burget, 486 U.S. 94 (1988).

26 455 U.S. 40 (1982).

27 Perhaps the Court was overwhelmed by the prospect of thousands of local governments granting monopolies and restraints based on provincial interests.

28 *Community Communications*, 455 U.S. at 52.

29 Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40 (1985).

Finally, the *Parker* opinion twice mentioned that the case at bar did not involve the state as a participant in a private agreement or conspiracy.[30] This language was the genesis of the so-called conspiracy exception to *Parker* used in some subsequent lower court decisions, including the lower court decision in *Omni*.[31]

### *B. The* Noerr *Doctrine*

The Supreme Court established the *Noerr* (or *Noerr-Pennington*)[32] doctrine in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[33] In *Noerr*, truckers brought an action against a railroad trade association that they accused of violating the Sherman Act.[34] The alleged violation involved the association's public relations and lobbying campaign promoting the adoption and retention of state laws handicapping the trucking industry.[35] As part of this campaign, the railroads attempted to create public hostility towards truckers by broadly disseminating what the truckers claimed were misrepresentations about the trucking industry.[36] The railroads also attempted to convince state legislatures that the public supported anti-trucking legislation by setting up various anti-trucker groups which appeared independent, but were, in fact, sponsored by the railroad association.[37] This campaign apparently succeeded in convincing several state legislatures to increase fees and taxes on truckers and in preventing increased weight limits for trucks in another state.[38] The truckers also claimed that the publicity campaign upset their relations with some customers.[39]

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30 *Parker*, 317 U.S. at 351-52.

31 *See* Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127, 1133 (4th Cir. 1989), *rev'd sub nom.* City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991); Whitworth v. Perkins, 559 F.2d 378, 380-81 (5th Cir. 1977), *vacated*, 435 U.S. 992 (1978), *and cert. denied*, 440 U.S. 991 (1979); Mason City Center Assocs. v. Mason City, 468 F. Supp. 737, 741, 744 (N.D. Iowa 1979).

32 *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

33 365 U.S. 127 (1961).

34 *Id.* at 129.

35 *Id.* at 129-30.

36 Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conf., 155 F. Supp. 768, 779-801 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd*, 365 U.S. 127 (1961).

37 *Id.* at 799.

38 *Id.* at 801.

39 *Noerr*, 365 U.S. at 129, 133, 142.

The Supreme Court held that this conduct did not violate the Sherman Act. To reach this result, the Court began with the proposition established in *Parker* that the Sherman Act generally does not prohibit government actions. The Court then drew as a corollary to this proposition that "mere attempts to influence the passage or enforcement of laws"—even though the laws may result in a trade restraint or monopoly—also do not violate the Act.[40] This result seems unexceptional. After all, if the Sherman Act does not prohibit a government action, how can it forbid a party from doing nothing more than seeking that action? The critical question then becomes what else is needed to make soliciting government action an antitrust violation (if, indeed, anything can).

One possibility in *Noerr* was that the railroads acted together in their lobbying efforts. Since the result of this joint activity was arguably anti-competitive legislation, the Supreme Court had to admit that this might fit within section 1 of the Sherman Act as a "combination . . . in restraint of trade."[41] The Court, however, rejected this joint activity construction for two reasons. First, this is not the sort of combination—such as price-fixing, boycotts, and other agreements that the participants carry out through their roles in the market—that section 1 has traditionally attacked.[42] One might refer to this as the Court's dissimilarity argument. Second, the Court saw a pair of free speech concerns supporting a narrow construction. The Court believed it would hamper the government's ability to legislate if affected groups could not make their wishes known.[43] The Court also worried that interpreting the Sherman Act to prohibit joint lobbying activities might clash with the constitutional right to petition.[44]

The truckers in *Noerr*, and plaintiffs since, have pointed to a number of other factors that might transform lobbying into something more than a mere attempt to influence laws. Unfortunately, judicial responses to such claims have produced tremendous uncertainty.[45] In part, this is because the argument for applying the *Noerr*

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[40] *Id.* at 135-36.

[41] *Id.* at 136. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade . . . ." 15 U.S.C. § 1.

[42] *Noerr*, 365 U.S. at 136-37.

[43] *Id.* at 137.

[44] *Id.* at 138.

[45] For discussions of the uncertainties spawned by *Noerr* and later cases, see Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANTITRUST L.J. 327 (1988); Einer Elhauge, *Making*

doctrine to such cases often rests only on one of the two prongs the Court relied on in *Noerr* to protect joint lobbying. To illustrate the difficulties of applying *Noerr*, consider a claim of harm from lobbying that is independent of government action. The truckers in *Noerr* complained that the public relations campaign against them interfered with their customer relations. The Court rejected any liability for this harm as only incidental to the lobbying campaign.[46] Yet, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[47] the Supreme Court upheld a claim for damages to the plaintiff's customer relations caused by an effort to influence building codes, where the harm occurred independent of those codes.[48]

The Court increased the confusion with a comment in *Noerr* that a different result on the independent harm claim might occur if the publicity campaign had been a mere sham.[49] In other words, publicity designed to interfere directly with a competitor's customer relations, but disguised as an effort to influence government, might create liability. How broad is the concept of "sham"? For example, does the notion of sham mean that an intent to destroy competitors could distinguish lobbying from a mere attempt to influence government? *United Mine Workers of Am. v. Pennington*[50] made it clear that so long as one actually sought government action, the accompanying anti-competitive purpose was irrelevant. Not long after *Pennington*, however, the Supreme Court's opinion in *California Motor Transport Co. v. Trucking Unlimited*[51] seriously confused the definition of a sham.

*California Motor Transport* was also an action by truckers, but, in this case, against competing truckers.[52] The plaintiffs claimed that their competitors had violated the Sherman Act by filing repeated state and federal actions in order to resist the plaintiffs' applications to acquire, transfer, or register operating rights.[53] The

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*Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177 (1992); Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977); Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990).

46 *Noerr*, 365 U.S. at 142-44.

47 486 U.S. 492 (1988).

48 *Id.* at 509-10.

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

50 381 U.S. 657 (1965).

51 404 U.S. 508 (1972).

52 *Id.* at 509.

53 *Id.*

Supreme Court held that the plaintiffs' complaint alleged facts sufficient to bring it within the *Noerr* doctrine's sham exception. Specifically, the Court pointed to allegations that the defendants sought to deny the plaintiffs meaningful access to adjudicating tribunals and claims that the defendants instituted their actions indiscriminately, with or without probable cause, and regardless of the merits of the case.[54] Unfortunately, the opinion does not precisely state why these facts made the defendants' actions a sham. Was it because the defendants did not really wish to obtain favorable government actions? In fact, the alleged goal was to stop competitors from receiving government granted operating rights,[55] and the defendants actually won most of the actions they instituted.[56] Justice Douglas' opinion spends considerable time explaining that the First Amendment may not protect, and the antitrust laws may prohibit, unethical conduct in dealing with administrative agencies or courts.[57] Does this mean that any sort of lobbying conduct which courts do not conclude, based upon First Amendment or other concerns, falls within the *Noerr* doctrine is a sham? The Court returned to these questions in *Omni*.[58]

Confusion also exists with respect to the *Noerr* doctrine's application outside the domestic legislative arena. *Pennington* established that the doctrine applied to lobbying the executive branch (even in its procurement decisions).[59] Nevertheless, *California Motor Transport* and *Allied Tube* both indicate that the protective scope of the *Noerr* doctrine may differ outside of lobbying the legislative branch.[60] More significant to the *Omni* litigation is a remark by the Court in *Pennington* that the case did not involve government acting in conspiracy with a private party.[61] Like similar remarks in *Parker*, this raised the question of whether such a conspiracy would be an exception to the *Noerr* doctrine.[62] Most relevant to this article is

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54 *Id.* at 511-12.

55 *See id.* at 509.

56 Trucking Unlimited v. California Motor Transp. Co., 1967 Trade Cas. (CCH) ¶ 72,298, 84,744 (N.D. Cal. 1967), *rev'd*, 432 F.2d 755 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972).

57 *California Motor Transp.*, 404 U.S. at 512-13.

58 *Omni*, 111 S. Ct. at 1354-55; *see infra* notes 133-44 and accompanying text.

59 *Pennington*, 381 U.S. at 660-61, 669-71.

60 *Allied Tube*, 486 U.S. at 504; *California Motor Transp.*, 404 U.S. at 512-13.

61 *Pennington*, 381 U.S. at 671.

62 *Compare* Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555 (5th Cir. 1984), *cert. denied*, 474 U.S. 1053 (1986) *and* Duke & Co., Inc. v. Foerster, 521 F.2d 1277, 1282 (3d Cir. 1975) *and* Harman v. Valley Nat'l Bank of

the question of whether unethical or illegal conduct can distinguish, for purposes of the doctrine, lobbying from a mere attempt to influence laws. *Noerr* concluded that it made no difference that the railroads engaged in deceptive and unethical tactics.[63] *California Motor Transport*, however, explained that this result may depend upon the context. Specifically, free speech concerns may require courts to tolerate misrepresentations in the political arena which are not protected when dealing with administrative agencies or courts.[64] This leads to the question of whether bribery can take lobbying outside of the protective scope of *Noerr*. Next, this article examines the case law prior to *Omni* dealing with this question.

## II. BRIBERY AND THE *NOERR* DOCTRINE BEFORE *OMNI*

Prior to *Omni*, most of the available authority indicated that *Noerr* did not cover bribery. The Supreme Court expressed this view twice in dicta. In *California Motor Transport*,[65] the Court declared that *Noerr* did not immunize from antitrust scrutiny all unethical or illegal conduct in lobbying courts or government agencies. To make this point, Justice Douglas cited prior cases in which courts had found an antitrust violation for using a patent obtained by fraud,[66] for conspiring with a licensing authority to eliminate a competitor,[67] and, of relevance here, for bribing a public purchasing agent.[68]

More recently, the Supreme Court used bribery as an example of conduct whose lack of protection by the *Noerr* doctrine seemed so obvious that it did not bear discussion. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*[69] involved producers of steel electrical conduit who sought to stem a competitive threat from plastic conduit producers. Specifically, the steel conduit producers packed the meet-

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Arizona, 339 F.2d 564, 566 (9th Cir. 1964) *with* Boone v. Redevelopment Agency, 841 F.2d 886, 897 (9th Cir. 1988), *cert. denied*, 488 U.S. 965 (1988).

63 *Noerr*, 365 U.S. at 140-142.

64 *California Motor Transp.*, 404 U.S. at 512-13; *see also Allied Tube*, 486 U.S. at 504.

65 404 U.S. 508 (1972).

66 *California Motor Transp.*, 404 U.S. at 512-13 (citing Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 175-77 (1965)).

67 *Id.* at 513 (citing Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962) and Harman v. Valley Nat'l Bank of Arizona, 339 F.2d 564 (9th Cir. 1964)).

68 *Id.* at 513 (citing Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966)).

69 486 U.S. 492 (1988).

ing of the National Fire Protective Association[70] with individuals who automatically voted against a proposal to approve plastic in addition to steel conduit in the Association's National Electrical Code.[71] A producer of plastic conduit then sued a steel conduit producer for violating section 1 of the Sherman Act. The steel conduit producer responded by arguing that *Noerr* protected its actions.[72] It pointed out that a substantial number of state and local governments routinely adopted the National Electrical Code as part of state or local building codes. After conceding that the steel conduit producer intended to influence government action and that *Noerr* could apply even to indirect lobbying, the Supreme Court confronted the defendant's contention that *Noerr* protected every effort genuinely intended to influence government.[73] In rejecting this contention, the Court in *Allied Tube* pointed to a series of unacceptable results that would flow from accepting the defendant's argument.[74] For example, the defendant's contention could insulate some cases of price fixing.[75] As a final example, the Court wrote:

> "Nor is it necessarily dispositive that packing the Association's meeting may have been the most effective means of securing government action, for one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection."[76]

In addition to this Supreme Court dicta, a number of lower court decisions prior to *Omni* held that the *Noerr* doctrine did not cover bribery. For example, in *Instructional Systems Development Corp. v. Aetna Casualty and Surety Co.*,[77] a competitor paid off a state official to have the state buy the competitor's driver education simulators. The Tenth Circuit Court of Appeals, without feeling the need for

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[70] The National Fire Protective Association is a voluntary organization which publishes product fire safety standards. *Id.* at 495.

[71] *Id.* at 496-97.

[72] *Id.* at 495.

[73] Note that the defendant's contention is much the same as the flip-side of the *Parker* argument used by the Court in *Omni*. *See infra* notes 142-45 and accompanying text.

[74] *Allied Tube*, 486 U.S. at 503-04.

[75] In fact, one finds the same problem with the flip-side of the *Parker* argument made by the Court in *Omni*. *See infra* notes 147-53 and accompanying text.

[76] *Allied Tube*, 486 U.S. at 504.

[77] 817 F.2d 639, 649-650 (10th Cir. 1987).

much discussion, held that such bribery fell outside of the *Noerr* doctrine. A similar view is found in *Federal Prescription Service v. American Pharmaceutical Ass'n.* There, the District of Columbia Circuit Court of Appeals held that the *Noerr* doctrine protected efforts by the American Pharmaceutical Association to influence state pharmacy boards to promulgate regulations inhibiting the plaintiff's mail order operation.[78] The court explained, however, that "[a] different case would result were it shown that state board members were bribed by the American Pharmaceutical Association."[79] Most interesting is *Bieter Co. v. Blumquist*,[80] a case which might be characterized as *Omni* with bribery. In this case, the plaintiff explicitly alleged that the defendant obtained favorable zoning through bribery. The district court held that the defendant's conduct fell outside of the *Noerr* doctrine's protection.

Several lower court decisions before *Omni*, however, were more ambiguous. In *Metro Cable Co. v. CATV of Rockford, Inc.*,[81] the Seventh Circuit Court of Appeals held that making substantial campaign contributions in order to influence the granting of cable television franchises was protected by the *Noerr* doctrine.[82] According to the district court in *Metro Cable*, however, the plaintiff had failed to specifically plead that the defendants engaged in "corruption."[83] Hence, this case may only stand for the proposition that the *Noerr* doctrine protects legal campaign contributions.[84] Interestingly, *Cow Palace, Ltd. v. Associated Milk Producers, Inc.*,[85] actually

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78 Federal Prescription Serv., Inc. v. American Pharm. Ass'n, 663 F.2d 253, 266-68 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

79 *Id.* at 266; *see also* Oberndorf v. City & County of Denver, 900 F.2d 1434, 1440 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 129 (1990); Video Int'l Prod. v. Warner-Amex Cable Communications, 858 F.2d 1075, 1083 (5th Cir. 1988), *cert. denied*, 490 U.S. 1047 (1989), *and cert. denied*, 491 U.S. 906 (1989); *In re* Airport Car Rental Antitrust Litig., 693 F.2d 84, 85 n.1 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983); Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680, 686, 690 n.3 (S.D.N.Y. 1979); Huron Valley Hosp., Inc. v. City of Pontiac, 466 F. Supp. 1301, 1313 (E.D. Mich. 1979), *vacated on other grounds*, 666 F.2d 1029 (6th Cir. 1981).

80 1990-1 Trade Cas. ¶ 69,083 (D. Minn. May 24, 1990).

81 516 F.2d 220 (7th Cir. 1975).

82 *Id.* at 233.

83 Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350, 358 (N.D. Ill. 1974), *aff'd*, 516 F.2d 220 (7th Cir. 1975).

84 *See also* Boone v. Redevelopment Agency, 841 F.2d 886, 895 (9th Cir. 1988), *cert. denied*, 488 U.S. 965 (1988); Bustop Shelters v. Convenience & Safety Corp., 521 F. Supp. 989, 994 (S.D.N.Y. 1981).

85 390 F. Supp. 696 (D. Colo. 1975).

involved bribery, and the district court appeared to hold that the *Noerr* doctrine applied. This case, however, presented a rather unusual situation. The plaintiff, a milk producer, might have benefitted from the defendant's challenged actions. The defendant, an organization of milk producers, had sought increased milk price supports through bribery. The plaintiff's problem was that the defendant got caught, and, in the backlash against the industry, the Department of Agriculture refused further increases in the price supports.[86] Under these circumstances, one can sympathize with the court's reticence to make the defendant liable for unintended, adverse government action. Hence, while the court pointed to the *Noerr* doctrine as a convenient way to dispose of this case, the real problem was the lack of any anti-competitive activity directed at the plaintiff.

Based upon the preceding authority, it is not surprising that many writers had concluded that the *Noerr* doctrine did not protect bribery.[87] Then came *Omni*.

## III. THE *OMNI* CASE

*City of Columbia v. Omni Outdoor Advertising*[88] arose from the efforts of Omni Outdoor Advertising to break into the billboard market in Columbia, South Carolina. Prior to Omni's arrival, Columbia Outdoor Advertising ("COA") had controlled more than ninety-five percent of the local market.[89] COA was politically well-connected in the city. The mayor and other members of the Columbia City Council were personal friends of COA's major shareholder, and the company and its officers occasionally contributed funds and free billboard space to the mayor's and council members' election campaigns.[90] In 1981, Omni began to put up billboards in and around Columbia.[91] COA responded by increasing its own construction and modernization efforts.[92] It also offered its customers what Omni alleged were artificially low advertising rates

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86 *Id.* at 699.

87 *See, e.g.*, ROBERT BORK, THE ANTITRUST PARADOX 357, 359 (1978); Calkins, *supra* note 45, at 354-56; Fischel, *supra* note 45, at 106, 114, 122; McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 240 (1976).

88 111 S. Ct. 1344 (1991).

89 *Id.* at 1347.

90 *Id.*

91 *Id.*

92 *Id.*

and allegedly spread untrue and malicious rumors about Omni.[93] Most critical to the ensuing litigation, COA urged city officials to enact zoning ordinances restricting billboard construction.[94] In the spring of 1982, Columbia's city council enacted an ordinance requiring the council's approval for new billboard construction.[95] After a state court invalidated this ordinance on state and federal constitutional grounds, the council passed a new ordinance restricting the size, location, and spacing of billboards.[96] Since COA already had billboards in many locations, the effect of the spacing restrictions was to lock Omni out of large areas of the city.[97]

Omni retaliated by suing both COA and the City of Columbia in federal district court for violating sections 1 and 2 of the Sherman Act, as well as South Carolina's unfair trade law.[98] At trial, Omni's theory was that city officials had conspired with COA in passing the ordinances and that this conspiracy made both the *Parker* and *Noerr* doctrines inapplicable. Initially, the district court accepted this legal theory. The court instructed the jury that they could find liability if they concluded that there was a conspiracy between COA and city officials.[99] The jury found that COA and city officials had conspired and, accordingly, returned a verdict for Omni awarding one million dollars in damages (before trebling).[100] The district court judge, however, suffered a change of heart and granted the defendants a judgment notwithstanding the verdict. Omni appealed, and the Fourth Circuit Court of Appeals reversed. The panel's majority chose to follow the view of those circuits which held that the *Parker* doctrine does not immunize a conspiracy between private parties and government officials.[101] The Fourth

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93 *Id.*

94 *Id.* Editorials in the local newspapers, however, had also expressed concern about the recent explosion in billboards, suggesting that COA was not alone in urging restrictions. *Id.*

95 *Id.* at 1348.

96 *Id.*

97 Omni could not place a new billboard within 500-1000 feet of the existing COA billboards. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127, 1135 (4th Cir. 1989), *rev'd sub nom.* City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991).

98 S.C. CODE ANN. § 39-5-140 (Law. Co-op. 1976).

99 *Omni*, 111 S. Ct. at 1351 n.5, 1357 n.2 (Stevens, J., dissenting).

100 The district court, however, retroactively applied the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988), to exempt the city from paying damages. *Omni*, 891 F.2d at 1137.

101 *Id.* at 1132-37.

Circuit also held that COA's lobbying efforts fell within the sham exception to the *Noerr* doctrine.[102] The Supreme Court granted certiorari.

Justice Scalia wrote the opinion for the majority.[103] The Court reversed the decision of the Fourth Circuit, threw out the Sherman Act claims, and remanded Omni's state law causes of action for further consideration. To reach this result, the Court first considered the city's claim of immunity under the *Parker* doctrine.[104] The primary issue was whether a conspiracy exception to the doctrine existed. Before addressing that question, however, the Court had to establish the predicate articulation by the state government of an intent to authorize an anti-competitive policy. Two difficulties existed here. The pertinent South Carolina statute authorized local zoning laws "for the purpose of promoting health, safety, morals or the general welfare of the community."[105] If one accepted Omni's proof, the Columbia billboard law had none of these goals. Omni contended that the billboard law's purpose was to maintain COA's position as a matter of personal favoritism. Hence, the law was not even authorized by the state. The majority decided, however, that it would be inconsistent with the goals of *Parker* to convert a claim that an ordinance was invalid under state law into the basis for a federal antitrust challenge.[106]

This brought the Court to the broader difficulty with meeting the *Midcal* test's clear articulation requirement. The South Carolina statute did not explicitly evince a state policy that localities pursue zoning in order to create billboard or other monopolies. In the *City of Boulder* decision,[107] the Supreme Court had invalidated an anti-competitive municipal action authorized by Colorado's home rule law.[108] The Court explained that Colorado's home rule law granted blanket authority to localities rather than directing them to engage in the challenged anti-competitive actions and, thus, did

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102 *Id.* at 1138-39. The court of appeals thus concluded it was unnecessary to decide if *Noerr* had a conspiracy exception.

103 Justice Stevens wrote a dissent, joined by Justices White and Marshall. *See Omni*, 111 S. Ct. at 1356-64 (Stevens, White & Marshall, JJ., dissenting).

104 *Id.* at 1348-53.

105 S.C. CODE ANN. § 5-23-10.

106 *Omni*, 111 S. Ct. at 1349-50.

107 Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

108 *Id.* at 56.

not meet the first prong of *Midcal*.[109] The same could be said of South Carolina's broad grant of zoning authority. Nevertheless, the majority in *Omni* continued the retreat from *City of Boulder* that the Court began in *Town of Hallie v. City of Eau Claire*.[110] The *Omni* Court ruled that the city need only show that the suppression of competition was a "foreseeable result" of the action the state statute authorized. Since zoning inherently involves displacement of an unfettered market in land use, the majority reasoned that an anti-competitive result was clearly foreseeable.[111]

Coming to the central issue, the majority flatly rejected a conspiracy exception to the *Parker* doctrine. To reach this conclusion, the majority first attempted to explain why in *Parker* the Court found it necessary to note that California had not entered any private conspiracy or agreement. This discussion, the majority reasoned, was intended to refer only to the situation in which the state acts as a market participant (as in operating a state-owned business) rather than as a market regulator.[112] The Court then advanced three rationales for rejecting a conspiracy exception for regulatory action—one for each of three possible interpretations of the exception.

The broadest interpretation, and one the jury instructions might have implied, was that a conspiracy existed any time government officials agreed with private parties to adopt a regulation.[113] This, however, would subject to antitrust scrutiny all government actions

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109 The court characterized Colorado's position as "mere *neutrality*." *Id.* at 55 (emphasis in original).

110 *See* 471 U.S. 34 (1985) (finding no requirement for state supervision of anti-competitive municipal action).

111 *Omni*, 111 S. Ct. at 1350. The problem with the majority's approach to this issue is that it takes a series of positions, each of which may be logical on its own, but the combined effect of which destroys the reason for treating municipal government differently from state government for *Parker* purposes. It is true that zoning can have the incidental effect of constraining the supply of structures and thereby increasing the market power of those businesses with existing facilities. But, as the South Carolina statute shows, this is not the state-authorized purpose for zoning. Accordingly, a zoning ordinance enacted for the purpose of creating market power would not carry out any state, as opposed to parochial, policy. Nevertheless, the majority ruled the purpose was irrelevant to the clear articulation requirement. This might have been acceptable if the state had to supervise anti-competitive municipal actions in order to insure against misuse of authority, but *Town of Hallie* eliminated the active supervision requirement.

112 *Id.* at 1351.

113 *Id.* at 1350-51.

taken in agreement with private groups despite the fact that such agreements are both inevitable and desirable in a representative democracy.[114] A narrower definition would find a conspiracy if the government officials had a "corrupt" motive for agreeing to the actions.[115] In other words, a conspiracy would exist if the government officials' purpose was not to further the public interest. The Court rejected this approach on practicality grounds.[116] The problem is how to test whether government officials enacted regulations to protect the public interest. An objective test would require courts to determine if the regulation is, in fact, in the public interest. This interpretation would require courts to second-guess the public policy determinations of elected officials, a result the *Parker* doctrine sought to prevent. A subjective test would ask if government officials themselves thought that they were acting in the public interest. This, however, would involve the difficult process of divining the intent of public officials, a task the Court generally has sought to avoid.

Finally, and central to this article, the majority addressed the definition that would limit findings of private party/government conspiracies to bribery or other violations of law (besides, of course, the antitrust laws). At this point, the majority's opinion gets carried away with itself. In oral argument, Omni strongly advanced the notion that this case involved bribery,[117] no doubt to build upon *California Motor Transport* and *Allied Tube*. The Court, however, could have ignored the bait. The lower courts had made no findings of bribery in this case. While Omni pointed to various campaign contributions by COA, as suggested earlier in dealing with *Metro Cable*,[118] campaign contributions are not the same as bribes. To be a bribe, there must be an agreed quid pro quo for the payment.[119] The district court never instructed the jury to find such an

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114 *Id.* The majority's position stands in contrast to some academic writers who worry about anti-competitive regulation resulting from the capture of government decision makers by special interests. *See, e.g.*, John S. Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

115 *Omni*, 111 S. Ct. at 1352.

116 *Id.* at 1352-53.

117 Official Transcript at 37-38, City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (No. 89-1671).

118 *See supra* notes 81-84 and accompanying text.

119 *See* United States v. Arthur, 544 F.2d 730, 734 (4th Cir. 1976); United States v. Brewster, 506 F.2d 62, 71-72 (D.C. Cir. 1974). *But see* United States v. L'Hoste, 609 F.2d 796, 807 (5th Cir. 1980), *cert. denied*, 449 U.S. 833 (1980).

agreement.[120] In fact, the evidence for such an agreement was weak. The amounts involved were trivial,[121] and the timing of COA's contribution of billboard space did not coincide with the city council's action.[122] Moreover, Omni's own evidence suggested COA was relying on hometown friendship rather than bribery.[123]

Instead of ignoring the issue of bribery as irrelevant, Justice Scalia decided to lay down broad dicta.[124] *Parker* doctrine immunity applies, the opinion states, even if government officials received bribes.[125] In a case like *Omni*, when a plaintiff seeks damages from a local government,[126] this result might make some sense. After all, the bribed official is the wrongdoer; the locality is another victim of the bribery.[127] Bribery deprives the locality of decisions made in its best interest. In such circumstances, one can question whether the locality should be liable for the wrongful conduct of the bribed officials.[128] This, however, did not provide the basis for the Court's reasoning. The Court simply declared that bribery is irrelevant to the purposes of the Sherman Act and the *Parker* doctrine.[129] These purposes, the Court explained, were to prohibit restrictions of competition for private gain, while allowing restrictions in the public interest.[130] The fact that officials take bribes, the Court speculated, does not mean they would not make the same decisions for the

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120 Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127, 1146 (4th Cir. 1989) (Wilkins, J., dissenting), *rev'd sub nom.* City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991).

121 The campaign contributions totalled less than $300 in cash and $1500 in free billboard space. Stephen Calkins, *The 1990-91 Supreme Court Term and Antitrust: Toward Greater Certainty*, 60 ANTITRUST L.J. 603, 618 (1991).

122 COA gave the mayor space several years before Omni even began putting up billboards, while two council members received space a year or two after the votes. *Omni*, 891 F.2d at 1136.

123 *Id.* at 1134-35, 1146 (Wilkins, J., dissenting).

124 *See Omni*, 111 S. Ct. at 1352-53.

125 *Id.* at 1353.

126 This can no longer occur. Congress ended the liability of local governments for damages for violating the antitrust laws in the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988).

127 *See, e.g.*, Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 859 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

128 *See* Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 138 (5th Cir. 1987) (principal not liable under Sherman Act for acts of its bribed agent).

129 *Omni*, 111 S. Ct. at 1353.

130 *Id.*

public good without the payoff.[131] In any event, the Court noted, other laws exist to combat corruption.[132]

Next, the Court turned to COA's defense based on the *Noerr* doctrine. The Fourth Circuit had concluded that COA's lobbying fell within the sham exception. The majority—in the one part of its opinion agreed with by the dissenters[133]—made easy work of this ruling by following the lead of *Allied Tube.* In *Allied Tube,* the Court had decided to extricate the sham exception from the confusion *California Motor Transport* created. *Allied Tube* held that the concept of sham referred solely to the situation when a competitor used the lobbying process as an anti-competitive tactic in itself and did not genuinely seek the government action.[134] For example, a company might sue a competitor not caring whether it wins or loses, but in order to impose the cost of defending the suit on the competitor.[135] Since, in *Omni,* it was clear that COA's goal was to obtain the ordinance limiting Omni's expansion, there was no sham.[136]

The more difficult issue was whether the *Noerr* doctrine had a conspiracy exception. In one paragraph, Justice Scalia's opinion for the majority categorically rejected a conspiracy exception to *Noerr.*[137] The main argument for this result lies in the assertion that the *Parker* and *Noerr* doctrines "present two faces of the same coin."[138] Since the *Parker* doctrine has no conspiracy exception, neither, under this view, does the *Noerr* doctrine. To appreciate the scope of this argument, it is useful to return to *Noerr.* As discussed earlier,[139] *Noerr* drew a parallel to *Parker* for its starting point: if the *Parker* doctrine protects state action, then the mere fact a private party sought that action cannot, *in and of itself,* violate the Sherman Act. This much is unexceptional. The issue has always been what, if any, conduct goes beyond simply seeking state action and justifies condemnation under the antitrust laws. Here is where the majority opinion appears to represent a major departure. The Court seems

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131 *Id.*

132 *Id.* (citing Hobbs Act, 18 U.S.C. § 1951 (1988)).

133 *Id.* at 1363 (Stevens, J., dissenting).

134 Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 n.10 (1988).

135 *See, e.g.,* Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), *cert. denied,* 461 U.S. 958 (1983).

136 *Omni,* 111 S. Ct. at 1354-55.

137 *Id.* at 1355-56.

138 *Id.* at 1355.

139 *See supra* note 40 and accompanying text.

to assert the absolutist position rejected just three years earlier in *Allied Tube*.[140] The Court seems to contend that so long as there is a genuine intent to obtain government action allowed by the *Parker* doctrine, then the *Noerr* doctrine protects any conduct directed toward this goal.

As justification for this approach to the conspiracy exception to the *Noerr* doctrine, Justice Scalia returned to his discussion of such an exception to the *Parker* doctrine. The same problems with a broadly defined conspiracy exception to the *Parker* doctrine would exist for a broadly defined conspiracy exception to the *Noerr* doctrine.[141] Had the Court confined itself to this parallel, it would be on reasonable grounds.[142] As explained above, it also would have done all that the facts of the case required.[143] The problem (and the reason for this article) is that the Court decided to lump unlawful conduct, such as bribery, into the conspiracy exception which the Court was now rejecting.[144] Why? In addition to the notion that the *Noerr* and *Parker* doctrines are flip-sides of the same coin (and presumably should have the same limits), the Court simply repeats the point that unlawful conduct has nothing to do with the policies of the antitrust laws and notes that *Noerr* itself involved a deceptive and unethical campaign.

## IV. A Dicta Too Much

*Omni's* holdings raise a number of troubling issues. Has the Court eviscerated the clear articulation requirement for anti-competitive municipal actions? Would it really be all that impractical to review the subjective good faith of official actions as demanded by the intermediate interpretation of the conspiracy exception to the *Parker* and *Noerr* doctrines? The dissenting opinion outlines these concerns, and there is little point in rehashing them here. There is no immediate prospect that the Court will overrule its holdings in *Omni*. The Court's discussion of bribery, however, was dicta.

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140 *Omni*, 111 S. Ct. at 1353-55.

141 *See id.* at 1355-56.

142 This is not to say that the opinion would be unequivocally correct. The dissent raises a legitimate question as to whether it really would be that impractical to determine if government officials are motivated by an agreement to achieve anti-competitive ends for private parties rather than by the public interest. *Id.* at 1361-63 (Stevens J., dissenting).

143 *See supra* notes 122-24 and accompanying text.

144 *Omni*, 111 S. Ct. at 1356.

Hence, there is still time to reconsider its wisdom before the Supreme Court or a lower court must actually decide the issue.

This article will leave to others the task of devising grand unified theories which require revising existing jurisprudence under the *Parker* and *Noerr* doctrines—even though such theories yield the same result regarding bribery and the *Noerr* doctrine as advanced here.[145] Instead, my objective is to show that *Omni's* dicta about bribery and *Noerr* was ill-advised under existing case law. This requires that we address three issues. First, we examine the Court's overarching theme that the *Noerr* and *Parker* doctrines represent two sides of the same coin. Second, we will consider corruption and the purposes of the *Noerr* doctrine. Finally, we will look at corruption and the purposes of the antitrust laws.

### *A. The* Parker *Two-Headed Coin*

The notion that what the *Parker* doctrine permits state and local governments to do, the *Noerr* doctrine permits private parties to lobby for—no matter how—possesses a certain elegant symmetry. This notion also allows for economy in judicial writing: by virtue of this equation, Justice Scalia was able to truncate his *Noerr* discussion in *Omni* by cross-referencing back to his earlier rejection of a conspiracy exception to *Parker*.[146] On the other hand, before accepting such a facile formulation, one should ask where it comes from, and what its implications are for future cases. In this regard, the fact that the Court cites no precedent for the proposition should make one a bit suspicious. In fact, one need not go very far before the idea that the *Parker* and *Noerr* doctrines are flip sides of the same coin becomes difficult to reconcile with prior decisions.

#### 1. Comparing the Flip-Side Argument with Decisions Before *Omni*

*FTC v. Superior Court Trial Lawyers Ass'n*,[147] decided only a year before *Omni*, provides a useful starting point. The FTC brought this action against a group of attorneys who represented indigent criminal defendants. The attorneys had agreed among themselves not to accept any further appointments until the District of Colum-

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145 *See* Elhauge, *supra* note 45, at 1243-46.

146 *See Omni*, 111 S. Ct. at 1355-56; *supra* notes 138-45 and accompanying text.

147 493 U.S. 411 (1990).

bia increased the fees it paid to court-appointed counsel.[148] Presumably, a local government setting the fees it will pay to court-appointed attorneys should come within the *Parker* doctrine.[149] Thus, if the *Noerr* doctrine immunizes lobbying for any action allowed by *Parker*, the *Noerr* doctrine should have protected the Trial Lawyers Association. Nevertheless, the Supreme Court rejected this application of the *Noerr* doctrine[150] and held the boycott to be a per se violation of the Sherman Act. This result seems imminently sensible and exposes an immediate practical flaw in the Court's formulation in *Omni*. State and local governments often must procure goods or services, and such procurement would generally seem to fall within the *Parker* doctrine.[151] If the *Noerr* doctrine protects any and all activities directed toward obtaining an allowable government action, then it would immunize price-fixing or bid rigging which victimizes the government as a consumer. This is a result which the Supreme Court has long refused to accept[152] and, in a nutshell, is what was involved in *Trial Lawyers*.

Perhaps we can reconcile the *Omni* Court's *Noerr/Parker* equation with *Trial Lawyers*. Under this reformulation, if the *Parker* doctrine protects a government action, then the *Noerr* doctrine immunizes lobbying for it, *except if the lobbying itself constitutes an anti-competitive activity that renders the government, acting as a consumer, the victim.* Still, even this reformulated expression of the relationship between the *Parker* and *Noerr* doctrines fails to conform with earlier cases. For example, consider *Allied Tube*, decided just three years before *Omni*. As discussed earlier,[153] *Allied Tube* found no immunity under the *Noerr* doctrine for defendants who stacked the meeting of a product standard-setting private association, despite the fact that many local governments adopted these standards. There was no question in *Allied Tube* that the defendant intended to, and did, influence government action.[154] There also seems little question

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148 *Id.* at 414.

149 *See infra* note 151 and accompanying text. Actually, it is difficult to see how this could even create an antitrust challenge against the local government so as to raise the *Parker* issue.

150 *Trial Lawyers*, 493 U.S. at 424-25.

151 *See* Buckley Constr., Inc. v. Shawnee Civic & Cultural Dev. Auth., 933 F.2d 853, 855-56 (10th Cir. 1991).

152 *See, e.g.*, Georgia v. Evans, 316 U.S. 159 (1942) (holding a state can sue price-fixers selling to state for violating the Sherman Act).

153 *See supra* notes 47-48 and accompanying text.

154 Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 502-03 (1988).

after *Omni* that the *Parker* doctrine protects the adoption of product specifications in building codes despite any anti-competitive consequences. General safety (in the case of building codes in *Allied Tube*) and environmental (in the case of zoning in *Omni*) oriented regulations inherently have an incidental effect of limiting the play of free markets. Hence, if the *Noerr* doctrine insulates any bona fide effort to obtain a government action protected by the *Parker* doctrine, how can one explain the result in *Allied Tube*? In fact, the Court in *Allied Tube* expressly rejected what it called the absolutist position that the *Noerr* doctrine protects any conduct genuinely intended to influence government.[155]

Perhaps one might reconcile *Allied Tube* by noting that the Court only condemned the anti-competitive consequences of the defendant's activities which were independent of the government action. Specifically, even where building codes did not limit use of products to those conforming to the Association's standards, members of the building industry often voluntarily adhered to the standards, and, indeed, insurance companies frequently insisted upon such adherence.[156] The Court only allowed the plaintiff to recover for harm based on these effects and not harms related to the adoption of the building codes.[157] Accordingly, we might again reformulate the relationship between the *Noerr* and *Parker* doctrines. This time we could say that if the *Parker* doctrine protects a government action, then the *Noerr* doctrine immunizes lobbying for the action, except insofar as the lobbying constitutes an anti-competitive activity which renders the government, as a consumer itself, the victim, *or the lobbying produces harm independent of the government action.*[158] Yet, even this reformulation will not reconcile other Supreme Court opinions.

Consider *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*[159] In *Walker*, the United States Patent Office issued a patent allegedly based on a party's false application.[160] After the patent holder sued for infringement, the defendant counter-

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155 *Id.* at 503.

156 *Id.* at 496.

157 *Id.* at 500.

158 This overstates the independent harm caveat. The *Noerr* Court refused to allow recovery for such harm if it was merely incidental to the petitioning. *See supra* note 45 and accompanying text.

159 382 U.S. 172 (1965).

160 Food Machinery allegedly swore to the Patent Office that its invention had not, to its knowledge, been in public use in the United States for more

claimed, alleging that the plaintiff had violated section 2 of the Sherman Act.[161] Specifically, the defendant claimed that the plaintiff had engaged in illegal monopolization by fraudulently obtaining and maintaining the patent.[162] The Supreme Court held that, assuming there was proof the patent gave its holder monopoly power in a relevant market, obtaining the patent by willful and knowing misrepresentation violated section 2.[163] Of course, the *Parker* doctrine does not cover granting patents because this is a federal rather than a state or local government function.[164] Nevertheless, the same analysis should apply: if the *Noerr* doctrine protects lobbying for anti-competitive advantages state and local governments can grant under the *Parker* doctrine, then it also should protect lobbying for anti-competitive advantages the federal government can grant.[165] Since the federal government can grant patent monopolies, lying to the Patent Office, under Justice Scalia's formulation, should have been immune under the *Noerr* doctrine. Yet, *Walker*, decided a mere four years after *Noerr*, does not even mention the decision.

*Walker* suggests a final reformulation of the relationship between the *Parker* and *Noerr* doctrines: if government can undertake an action under the *Parker* doctrine, private individuals can lobby for the action under the *Noerr* doctrine, except if the lobbying consists of anti-competitive conduct which makes the government, as a consumer, the victim, or if the lobbying causes harm independent of the government action, *or if the court concludes that the manner of lobbying merits antitrust condemnation.* Put another way, if the *only* complaint is simply that individuals lobbied for permissible anti-competitive action by the government, then there is no antitrust violation. In fact, this formulation is precisely the one drawn by the Court as its starting point in *Noerr*.[166] This is a far cry from Justice Scalia's suggestion that if the *Parker* doctrine allows the requested

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than one year before filing the patent application. However, Food Machinery itself had allegedly engaged in earlier public use. *Id.* at 174.

161 *Id.* at 173-74.

162 *Id.* at 174.

163 *Id.* at 177-78.

164 *See* 28 U.S.C. § 1338 (1988).

165 *Pennington* applied the *Noerr* doctrine to lobbying federal agencies. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669-70 (1965). Additionally, Justice Scalia's majority opinion in *Omni* suggests no differentiation in his analysis between lobbying for state or local action versus lobbying for federal action. *Omni*, 111 S. Ct. at 1348-49.

166 *See supra* note 40 and accompanying text.

action, then the *Noerr* doctrine allows any type of lobbying—even bribery—to get it.

2. The Flip-Side Argument and the Policy Behind *Parker*

At this point, we must choose between the narrow formulation of the relationship between the *Noerr* and *Parker* doctrines which would be consistent with *Trial Lawyers, Allied Tube* and *Walker*, and the broad formulation espoused by the Court in *Omni*. In making this choice, one should ask whether there is anything in the purpose behind the *Parker* doctrine which compels the broader interpretation. As explained earlier,[167] *Parker* is based upon notions of federalism. The Supreme Court did not want the Sherman Act to preclude the states from regulating economic activities. To what extent does this objective call for insulating private individuals dealing with government from antitrust liability? The Supreme Court answered this question in *Southern Motor Carriers Rate Conf., Inc. v. United States*.[168]

*Southern Motor Carriers* involved associations of truckers who submitted joint rate applications to the state agencies that set the rates truckers could charge.[169] The Justice Department brought this action against the associations, claiming that submitting collective rather than individual rate applications constituted price-fixing.[170] The associations argued that their actions were immune under the *Parker* doctrine.[171] In agreeing with the defendants' contention, the Supreme Court first ruled that the *Parker* doctrine covered actions against private individuals as well as state officials.[172] Naturally, if private parties may be liable under the antitrust laws for acting in compliance with a state regulatory scheme, this would destroy the state's ability to regulate. Hence, the Court recognized that the purpose of the *Parker* doctrine requires some protection of private as well as government actors. The more difficult question before the Court was whether the immunity of private individuals should extend to conduct (such as the joint rate applications) which the state scheme allowed, but did not compel. The Court held that compulsion was not necessary.[173] Essentially, the Court

167 *See supra* notes 19-20 and accompanying text.
168 471 U.S. 48 (1985).
169 *Id.* at 50.
170 *Id.*
171 *Id.*
172 *Id.* at 56-57.
173 *Id.* at 59-62.

wanted to leave the states with flexibility in their regulations, rather than constrain them into only having regulations compelling private individuals to engage in anti-competitive behavior. Hence, as long as the state scheme meets the *Midcal* test, the *Parker* doctrine protects private parties doing what the state allows.

What are the implications of this for immunity under the *Noerr* doctrine? First, note that if immunity of private parties is necessary to prevent the frustration of state regulation, then the *Parker* doctrine itself, not the *Noerr* doctrine, provides the protection. Moreover, under the *Parker* doctrine, private immunity only exists if the two prongs of the *Midcal* test are met: (1) the state must articulate a clear and affirmative policy to allow the anti-competitive conduct, and (2) the state must actively supervise the anti-competitive conduct of the private actors.[174] In contrast, since the *Noerr* doctrine lacks the *Midcal* requirements, the doctrine allows private parties greater immunity to lobby for anti-competitive government action than the parties would enjoy under the *Parker* doctrine once the government adopted an anti-competitive scheme. Given these two facts, immunity under the *Noerr* doctrine is not justified by the need to prevent the frustration of state regulation—the federalism purpose behind the *Parker* doctrine—but must stand on its own rationales. Whether these rationales encompass bribery is the subject to which this article next turns. For now, however, it is sufficient to conclude that nothing in the policy behind the *Parker* doctrine compels the Court's broad interpretation of *Noerr*.

### *B. Corruption and the Purposes for* Noerr *Immunity*

The earlier discussion of the *Noerr* doctrine set out the two-pronged rationale the Court used in refusing to find that joint lobbying violated the Sherman Act.[175] One prong involved the dissimilarity of that combination to those traditionally condemned under the Act—the dissimilarity argument.[176] The other involved free speech concerns. This includes both avoiding the possible infringement of private citizens' First Amendment rights and enabling the

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174 *See supra* notes 21-25 and accompanying text. Neither giving nor accepting bribes would meet this test since there is no state policy authorizing bribery, nor does the state actively supervise the conduct (except to try to stop it).

175 *See supra* notes 32-64 and accompanying text.

176 *See supra* note 42 and accompanying text.

government to enact legislation responsive to citizen desires.[177] The relevance of the dissimilarity argument to obtaining government action through bribery will be addressed below. For now, one can make short work of the free speech justifications for protecting bribery. The First Amendment does not protect bribery.[178] Moreover, the government's interest in having citizen input on issues does not call for immunizing bribery. Quite the contrary, bribery is universally illegal because it prevents officials from acting responsively to the interests of citizens other than the briber.[179]

At this point, it is useful to contrast the Supreme Court's earlier approach in *California Motor Transport* and *Allied Tube*, both of which noted the importance of context and recognized the need to draw distinctions,[180] with the Court's sweeping approach in *Omni*. Free speech concerns lead the law generally (and not just in the antitrust context) to tread lightly when it comes to policing arguable misrepresentations and distortions in a political campaign.[181] In this context, truth is too often in the eye of the beholder. Hence, the Court's refusal in *Noerr* to entertain the truckers' claims against the railroads' allegedly unethical and misleading public relations campaign is understandable. Yet, this does not mean, as the Court explained in *California Motor Transport*, that *Noerr* insulates all unethical lobbying.[182] To use an example mentioned there, perjury to a court or an administrative agency is a matter for which the law traditionally has been willing to impose severe sanctions and which has been the basis of recognized antitrust claims.[183] Accordingly, the *Omni* majority's citation to *Noerr* seemingly for the proposition that the doctrine covers all unethical or illegal conduct[184] is itself deceptive.

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177 *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

178 *See, e.g.*, United States v. Brewster, 506 F.2d 62, 76-78 (D.C. Cir. 1974).

179 *See* NOONAN, *supra* note 6 at 703-04.

180 Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 506 (1988); *California Motor Transp.*, 404 U.S. at 512-13.

181 *See, e.g.*, Vanasco v. Schwartz, 401 F. Supp. 87 (S.D.N.Y. 1975), *aff'd*, 423 U.S. 1041 (1976) (striking down sections of the New York Fair Campaign Code prohibiting misrepresentations even when made without actual malice as defined under First Amendment libel cases).

182 *California Motor Transp.*, 404 U.S. at 512-13.

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

184 City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1356 (1991).

Similarly, the Court in *Omni* starts on arguably solid ground in rejecting a broad corruption exception which would have courts or juries second-guess whether legislatures acted in the public interest or in bad faith. Absent bribery, one suspects legislators may often make their decisions to pander to contributors and interest groups rather than to realize any conception of the public good.[185] Serious practical difficulties, however, could attend any effort to expose legislative decisions to challenge on such grounds. Still, this does not mean there should be no limits on acceptable legislative advocacy. In this context, it becomes important to appreciate the significance of bribery as a limit on permissible lobbying. Justice Scalia's majority opinion admits that limiting a conspiracy or corruption exception to bribery or other unlawful acts would avoid the problems of vagueness which led the Court to reject such an exception to the *Parker* and *Noerr* doctrines.[186] This, however, understates the rationale for drawing the line at bribery. The point is not simply to pick a convenient bright line. Rather, the prohibition on bribery is so widespread and longstanding throughout human civilization—despite different forms of government, different legal traditions, and different economic philosophies[187]—as to make it a universally recognized boundary between acceptable politics and unacceptable corruption. Hence, there is simply no reason for immunizing bribery from antitrust attack, unless, like the Court, one concludes that bribery, while justifiably illegal, is inherently irrelevant to the antitrust laws. This is the issue to which this article next turns.

### *C. Corruption and Antitrust Purposes: The Irrelevance Proposition*

It is, of course, true that the primary attack on bribery comes from laws other than the Sherman Act.[188] It is also true that nothing about the bribery of government officials, in and of itself, makes it an antitrust concern. Nevertheless, to conclude from these two facts—as the Court in *Omni* seemingly does—that bribing government officials is always irrelevant to the antitrust laws, betrays a lack of careful analysis. Instead of sweeping generalizations, one needs

185 *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975); Wiley, *supra* note 114, at 725-26.

186 *Omni*, 111 S. Ct. at 1353.

187 *See* NOONAN, *supra* note 6, at 1-392; *Using the Antitrust Laws*, *supra* note 3, at 212 n.4.

188 *See, e.g.*, 18 U.S.C. § 201 (1988).

to thoughtfully compare the types of antitrust claims bribery might produce against the specific purposes and requirements of sections 1 and 2 of the Sherman Act.[189]

### 1. Commercial Bribery, Government Procurement, and Section 1

One category of bribery entails bidders paying off government officials who make (or can influence) government contracting decisions in exchange for the contract. This is an example of classic commercial bribery—bribing an agent in order to get a contract with his or her principal—which can involve either private or government employees.[190] *Trial Lawyers* provides the short answer to whether the *Noerr* doctrine would insulate such a bribe when its recipient is a government official. The government, as the consumer, is the victim of the bribe because it will not get the advantage of a contract resulting from competition rather than conspiracy. As discussed earlier,[191] *Trial Lawyers* establishes the proposition that *Noerr* does not protect anti-competitive conduct which makes the government, as a consumer, the victim.

Despite this easy answer, it is useful to examine commercial bribery and government procurement more carefully in order to assess the Court's assumption that bribing government officials is always irrelevant to the antitrust laws. To begin with, *Rangen Inc. v. Sterling Nelson & Sons*,[192] cited with apparent approval by the Supreme Court in *California Motor Transport*,[193] found a violation of section 2(c) of the Robinson-Patman Act[194] when the defendant paid bribes to gain contracts for the sale of fish feed to the State of Idaho

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189 15 U.S.C. §§ 1, 2 (1988).

190 While many who use the term "commercial bribery" do so to distinguish bribery of private employees from bribery of government officials, this article will use the term "classic commercial bribery" to refer to any bribery to obtain a contract. For a discussion of this definition, see *Commercial Bribery*, *supra* note 3, at 371-72.

191 *See supra* notes 147-53 and accompanying text.

192 Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

193 California Motor Transp., Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

194 15 U.S.C. §§ 13-13b, 21a (1988). The Robinson-Patman Act primarily attacks price discrimination. Section 2(c) deals with unearned brokerage commissions.

Department of Fisheries.[195] Perhaps the Court in *Omni* was only thinking of bribery's relevance to the Sherman Act. Even here, however, a strong case exists for treating classic commercial bribery as a violation of section 1. An earlier article developed this argument in detail.[196] The following is a brief summary of that analysis.

Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies which are in restraint of trade.[197] The agreement between the briber and the dishonest official easily satisfies the first element—that of a contract, combination, or conspiracy.[198] The dispute is whether this is a restraint of trade. In the absence of a Supreme Court decision on point, lower federal courts have gone off in a number of different directions. One line of cases dealing with commercial bribery and the Sherman Act treats the statute as if it consists of a series of neatly defined cubbyholes into which all violations must fit. Because commercial bribery does not come within the traditional categories, courts subscribing to this view have concluded that it is beyond the Act's reach.[199] Another view is

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195 *Rangen*, 351 F.2d at 853. The basis for applying § 2(c) to commercial bribery is rather involved and beyond the scope of this article. For a discussion, see *Using the Antitrust Laws*, *supra* note 3, at 223-27.

196 *Commercial Bribery*, *supra* note 3.

197 15 U.S.C. § 1 (1988).

198 *See, e.g.*, Federal Prescription Serv., Inc. v. American Pharm. Ass'n, 663 F.2d 253, 264-266 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *see also* Dennis v. Sparks, 449 U.S. 24 (1980) (holding that bribery is a conspiracy for purposes of Section 1983 civil rights action).

199 *See* Calnetics Corp. v. Volkswagen of America, 532 F.2d 674, 687-88 (9th Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 940 (1976); Parmelee Transp. Co. v. Keeshin, 292 F.2d 794, 797-805 (7th Cir. 1961), *cert. denied*, 368 U.S. 944 (1961); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 645 (D. Alaska 1982); Sterling Nelson & Sons v. Rangen, Inc., 235 F. Supp. 393, 399-400 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966); Sears, Roebuck & Co. v. Blade, 110 F. Supp. 96, 101 (S.D. Cal. 1953), *appeal dismissed sub nom.*, Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd., 245 F.2d 67 (9th Cir. 1956).

These cases, however, provide only limited authority. *Parmelee Transp.* did not involve classic commercial bribery in which the briber pays the purchaser's agent to award a contract to it. Rather, the defendant bribed a government official who, in turn, offered favorable treatment to railroad companies in exchange for their award of an exclusive station transfer service contract to the defendant. *Parmalee Transp.*, 292 F.2d at 796. Thus, the bribe did not undermine consumers' (here, the railroad companies') ability to obtain the advantages of free competition. It simply enabled the defendant to offer more, albeit illicit, consideration to those companies. Moreover, one recent opinion questioned the *Parmelee Transp.* court's reasoning. *See* Corey v. Look,

to treat commercial bribery as an unfair trade practice that violates the Sherman Act if used to drive out competitors and gain monopoly power. The Fifth Circuit Court of Appeals, in *Associated Radio Service Co. v. Page Airways, Inc.*,[200] adopted this approach.[201] In *City of Atlanta v. Ashland-Warren, Inc.*,[202] the United States District Court for the Northern District of Georgia suggested yet a third way of approaching commercial bribery under section 1 of the Sherman Act. In upholding a claim under section 1 against a contractor for bribing city officials, the court stated that the restraint the bribe created might be "somewhat akin" to a restraint resulting from tying arrangements or reciprocal dealing.[203] Finally, several more recent cases have eschewed working by categorization or analogy and, instead, attempted to examine the competitive effects of commercial bribery itself. While this has produced inconsistent results,[204] it is the approach most called for by basic section 1 jurisprudence.[205]

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641 F.2d 32, 36 (1st Cir. 1981) (noting that the cases upon which *Parmelee Transp.* rested seemed inapposite to the facts before the *Parmelee Transp.* court).

*Sterling Nelson & Sons* involved a classic case of commercial bribery, but the plaintiff prevailed on a Robinson-Patman Act claim and chose not to appeal the district court's ruling on the Sherman Act. *Sterling Nelson & Sons*, 351 F.2d at 854. In *Calnetics*, a typical case of classic commercial bribery, the Ninth Circuit Court of Appeals held that commercial bribery standing alone did not violate the Sherman Act. The court, however, left open the question of under what circumstances commercial bribery coupled with other conduct would constitute a violation of §§ 1 and 2 of the Sherman Act. *Calnetics*, 532 F.2d at 687 & n.20. *Municipality of Anchorage* was bound by *Calnetics*. *Municipality of Anchorage*, 547 F. Supp. at 645. Finally, the opinion in *Sears, Roebuck* is unclear as to whether the court found that the bribe failed to constitute a Section 1 violation or created an insufficient effect on interstate commerce to provide jurisdiction. *Sears, Roebuck*, 110 F. Supp. at 99-101.

200 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

201 *Id.* at 1351-53; *see also* Instructional Systems Dev. Corp. v. Aetna Casualty & Surety Co., 817 F.2d 639, 649 (10th Cir. 1987).

202 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. Aug. 20, 1981).

203 *Id.* at 72,924.

204 *Compare* Federal Paper Bd. Co. v. Amata, 693 F. Supp. 1376 (D. Conn. 1988) (finding no antitrust violation) *with* State v. Fletcher, 1988-1 Trade Cas. (CCH) ¶ 67,925 (Utah App. Mar. 9, 1988) (holding classic commercial bribery violates Utah antitrust law which is analogous to § 1 of Sherman Act). *Cf.* Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983) (not involving classic commercial bribery).

205 *See* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 688-89 (1978).

In order to assess commercial bribery's competitive effect, it is useful to begin by asking what makes an agreement anti-competitive. In an opinion refusing to find commercial bribery anti-competitive, the district court in *Federal Paper Bd. Co. v. Amata*[206] reasoned that the agreement did not prevent sellers from competing vigorously. On the contrary, there was such vigorous rivalry that some sellers resorted to bribing a purchasing agent in order to win the contract.[207] While agreements under which sellers stop competing (in other words, price-fixing agreements) are classic examples of anti-competitive contracts, they are hardly the only type of anti-competitive contract.[208] What makes price-fixing agreements anti-competitive is not simply that sellers stop competing, but rather that this, in turn, deprives consumers of the advantages of free competition.[209] For example, the agreement typically causes prices to rise above the level which would prevail in an unfettered market.[210] Classic commercial bribery has the same effects. Because the bribed agent will not consider the bids of other sellers, an agreement between the briber and the dishonest agent cuts off the buyer's ability to obtain a competitive price just as much as if the other sellers had agreed not to compete.[211] Worse yet, classic commercial bribery precludes the buyer from gaining the advan-

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206 693 F. Supp. 1376 (D. Conn. 1988).

207 *Id.* at 1383.

208 In the case of tying, exclusive dealing, or reciprocal dealing, for example, the agreement is between buyer and seller rather than among competing sellers. In fact, to use the *Amata* court's reasoning, such contracts may show such vigorous competition that one seller uses these tactics to prevail. Nevertheless, tying, exclusive dealing, and reciprocal dealing can violate § 1 of the Sherman Act. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (tying contract); Standard Oil Co. of California v. United States, 337 U.S. 293 (1949) (exclusive dealing contract); Betaseed, Inc. v. U & I, Inc., 681 F.2d 1203 (9th Cir. 1982) (reciprocal dealing).

209 *Cf.* Apex Hosiery Co. v. Leader, 310 U.S. 469, 500-501 (1940).

210 *See* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 84 (1985).

211 Indeed, the court in *Amata* recognized as much. "Of course, Amata's disloyalty and Federal's ignorance thereof resulted in depriving Federal from actually obtaining the benefits of competition among wastepaper suppliers." Federal Paper Board v. Amata, 693 F. Supp. 1376, 1384 (D. Conn. 1988); *see also id.* at 1385 n.10.

tage of competition on quality as well as price—something few price-fixing conspiracies can do.[212]

2. Corruption, Monopoly, and Section 2

The facts in *Omni* did not lead the court to focus on bribery to obtain a government procurement contract. Instead, the defendant there aimed at achieving government action of a different sort. COA sought action making it difficult or impossible for Omni to do business, thereby maintaining COA's monopoly power.[213] In *Omni*, this action involved restrictive zoning, but the possibilities for the government to create an unlevel playing field cover a vast range. The government might condemn a competitor's property,[214] refuse a competitor a license,[215] grant a patent[216] or an exclusive franchise,[217] or pass other discriminatory legislation.[218] In such cases, the potential claim should primarily involve Sherman Act section 2[219] rather than section 1.

The *Omni* opinion appears to stand for the proposition that obtaining monopoly power through government action is invariably not an antitrust concern. This proposition ignores both history and precedent. With respect to the former, the drafters of the Sherman Act professed to be building upon the common law's hostility to monopoly.[220] To the extent the common law was opposed to monopoly, much of this opposition focused on royal (which is to say, government) grants of exclusive privilege.[221] For example, a case often cited as evidence of the common law's attitude toward

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212 Loss of quality competition is one of the Supreme Court's concerns in holding maximum price-fixing per se illegal. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 347-48 (1982).

213 *See* City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1348 (1991).

214 *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).

215 *See, e.g.*, Federal Prescription Serv., Inc. v. American Pharm. Ass'n, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

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

217 *See, e.g.*, Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975).

218 *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

219 15 U.S.C. § 2 (1988).

220 *See* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY—ORIGINATION OF AN AMERICAN TRADITION 181 (1955).

221 *See* William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 356-67 (1954).

monopoly is *Darcy v. Allen*.[222] In *Darcy*, the Court of Queen's Bench voided a patent that Queen Elizabeth had given to her groom granting him the exclusive right to import and manufacture playing cards. Not long thereafter, the English Parliament passed the Statute of Monopolies[223] generally invalidating grants of monopoly by the Crown.[224]

Of more immediate relevance are a number of United States Supreme Court decisions finding illegal monopolization under the Sherman Act based, in whole or in part, on obtaining government action. *United States v. Sisal Sales Corp.*[225] is an early example. The defendants had obtained a monopoly on importing sisal (a fiber used to produce twine) from Mexico into the United States.[226] While the complaint before the Court was less than clear in its allegations, it appears the Justice Department claimed this monopoly resulted from eliminating competitors through two tactics: (1) various unspecified market manipulations, and, of more importance, (2) persuading the governments of Mexico and Yucatan to pass laws that gave the defendants advantages over all other buyers of sisal.[227] The Supreme Court held that these allegations stated a claim of illegal monopolization and illegal combination. Critically, nothing in the Court's opinion suggests that it based this holding solely on the market manipulations and not also on the act of inducing the discriminatory legislation. In fact, in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*,[228] Justice Scalia, writing for the majority, characterized *Sisal* as holding that "obtaining Mexico's enactment of 'discriminating legislation' could form part of the basis for suit under the United States antitrust laws."[229]

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222 77 Eng. Rep. 1260 (Q.B. 1602). The dissent in *Omni* cites this case for the proposition that the common law attacked agreements in restraint of trade between public officials and private parties. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1357 (1991) (Stevens, J., dissenting). The alternate title of the case—*The Case of Monopolies*—suggests a focus, not on agreement, but on monopoly.

223 Statute of Monopolies, 1623, 21 Jam. 1, ch.3 (Eng.).

224 The English common law concern with royal grants may have been more political than economic in its focus. Letwin, *supra* note 221, at 355-56. The point remains, however, that government grants of monopoly power were not foreign to the origins of the antitrust laws.

225 274 U.S. 268 (1927).

226 *Id.* at 270.

227 *Id.* at 273-74.

228 493 U.S. 400, 407 (1990).

229 *Id.* at 407 (citing United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927)).

*Sisal* did not discuss *Noerr*; *Sisal* predated that decision. *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[230] however, did discuss *Noerr*. Continental Ore brought an action alleging that Union Carbide and other firms monopolized the production and sale of vanadium (a metal used principally to harden steel). The portion of Continental Ore's claim relevant here involved actions by a wholly-owned subsidiary of Union Carbide, Electro Met of Canada. Through the Office of Metals Controller, the Canadian government appointed Electro Met the government's exclusive agent to purchase and allocate to Canadian industries all vanadium products needed during the Second World War.[231] Continental Ore attempted to prove that, as part of the defendants' monopolization, Electro Met used its authority to stop Continental Ore from selling vanadium products in Canada.[232] The lower courts prevented introduction of this proof based on the *Noerr* doctrine and Electro Met's agency relationship with the Canadian government.[233] The Supreme Court disagreed. The Court explained that there was no indication that any official "within the structure of the Canadian Government" approved Electro Met's cutting off of Continental Ore or any effort to monopolize.[234] The Supreme Court dismissed the *Noerr* doctrine because the defendants

> "were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr*."[235]

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230 370 U.S. 690 (1962).

231 *Id.* at 702 n.11.

232 *Id.* at 692.

233 *Id.* at 703-704, 707.

234 *Id.* at 706. It is not clear why the court did not consider Electro Met to be an official within the structure of the Canadian government. After all, Electro Met had an official appointment. Was this simply because it was a corporation rather than an individual? Perhaps it was because its actions toward Continental Ore were not intended to carry out government policy. This latter rationale, however, would take actions by a bribed official outside of government acts.

235 *Id.* at 707-08. This language has produced division among the lower courts as to whether there is a commercial activity exception to *Noerr*. Decisions holding or suggesting that the doctrine is inapplicable to commercial acts include: Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358,

One might distinguish *Sisal* and *Continental Ore* as involving foreign governments. In fact, the question of whether *Noerr* extends to lobbying foreign governments has divided the lower federal courts.[236] The principal argument for excluding foreign lobbying from the *Noerr* doctrine presumes that the doctrine rests on the

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1365 (5th Cir. 1983); Federal Prescription Serv., Inc. v. American Pharm. Ass'n, 663 F.2d 253, 263 & n.10 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); Corey v. Look, 641 F.2d 32, 36 & n.6 (1st Cir. 1981); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 592 n.10 (7th Cir. 1977), *vacated*, 435 U.S. 992 (1978); Hecht v. Pro-Football, Inc., 444 F.2d 931, 941 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local No. 150, 440 F.2d 1096, 1099 (9th Cir. 1971), *cert. denied*, 404 U.S. 826 (1971); Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1296-97 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970); City of Atlanta v. Ashland-Warren, Inc., 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. Aug. 20, 1981); General Aircraft Corp. v. Air Am., Inc., 482 F. Supp. 3, 7 (D.D.C. 1979); Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 460 F. Supp. 1359, 1384-85 (D. Haw. 1978). *But see* Greenwood Utils. Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1505 & n.14 (5th Cir. 1985); *In re* Airport Car Rental Antitrust Litig., 693 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983); Household Goods Carriers' Bureau v. Terrell, 452 F.2d 152, 158 (5th Cir. 1971), *cert. dismissed*, 419 U.S. 987 (1974); Bustop Shelters, Inc. v. Convenience & Safety Corp., 521 F. Supp. 989, 996 n.9 (S.D.N.Y. 1981); Reaemco, Inc. v. Allegheny Airlines, 496 F. Supp. 546, 556 n.6 (S.D.N.Y. 1980); United States v. Johns-Manville Corp., 245 F. Supp. 74, 82 (E.D. Pa. 1965).

Regardless of this dispute, the critical point for present purposes is that the monopoly power in *Continental Ore* traced back to government action—at the very least the appointment of Electro Met as exclusive agent. Nevertheless, this fact did not render the resulting monopoly entirely immune to the Sherman Act.

[236] *Compare* Laker Airways v. Pan Am. World Airways, 604 F. Supp. 280, 287 (D.D.C. 1984) (dicta stating doctrine does not apply to the petitioning of foreign governments) *and* Bulkferts, Inc. v. Salatin, Inc., 574 F. Supp. 6, 9 (S.D.N.Y. 1983) (same) *and* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 107-08 (C.D. Cal. 1971) (same), *aff'd per curiam on other grounds*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972) *with* Coastal States Mktg. v. Hunt, 694 F.2d 1358, 1366 (5th Cir. 1983) (petitioning immunity applied to litigation brought in foreign courts) *and* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1157 (E.D. Pa. 1981) (applying *Noerr* to lobbying United States and Japanese governments without discussion of foreign government issue), *aff'd in part and rev'd in part on other grounds*, 475 U.S. 574 (1986). *See also* Associated Container Transp. (Austl.), Ltd. v. United States, 705 F.2d 53, 60 n.10 (2d Cir. 1983) (left issue open); Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 882 n.6 (5th Cir. 1982) (same), *vacated*, 460 U.S. 1007 (1983); Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680, 690 n.3. (S.D.N.Y. 1979) (same).

First Amendment and, like the Amendment, does not apply to dealings with foreign governments.[237] However, if *Noerr* rested solely upon the First Amendment, the holding obviously would not cover bribery.[238] On the contrary, in *Omni*, the Court's dicta concerning bribery and the *Noerr* doctrine presupposes a very different rationale for the doctrine — that lobbying for any government-produced anti-competitive effect is simply irrelevant to the purposes of the antitrust laws. Yet, if this is the rationale, then it is unclear why soliciting foreign government action should be of any greater antitrust concern. It is presumptuous to suggest that a foreign government's determination of economic policy for its country is entitled to less deference than a state or local government's determination. Indeed, the act of state doctrine—which, when dealing with extra-territorial antitrust cases, functions somewhat as the *Parker* doctrine[239]—exists to ensure such deference.[240] One also might note that *Continental Ore* did not dismiss the *Noerr* doctrine out of hand as inapplicable to foreign governments.

In any event, the *Walker* case[241] did not involve a foreign government. It involved a party who obtained a patent by lying to the United States Patent Office. Nevertheless, the Supreme Court in *Walker* was willing to find that a monopoly created by government action could violate section 2 of the Sherman Act.

Given that the Supreme Court on some occasions has been willing to find a section 2 violation based upon obtaining monopoly power through government actions, the questions become (1) how can one determine when this result should follow; and (2) where does bribery fit into this determination. *Walker* points the direction to the answers. The Court in *Walker* did not hold that obtaining a patent by fraud violated section 2. It held that this conduct could be a violation if all the elements of illegal monopolization were

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237 *See* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 108 (C.D. Cal. 1971), *aff'd per curiam on other grounds*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972).

238 *See supra* notes 178-79 and accompanying text.

239 *See* McManis, *supra* note 87, at 236.

240 The act of state doctrine mandates that domestic courts abstain from adjudicating the validity of actions taken by foreign governments in their own territory. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (applying the act of state doctrine to prevent review of whether a foreign expropriation violated international law); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory").

241 *See supra* notes 160-64 and accompanying text.

present.[242] These elements are: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[243]

Note that section 2 has a subtle, but critical difference in approach from section 1. It is sometimes said that section 1 attacks conduct, while section 2 attacks market structure.[244] This is a gross oversimplification, but it alludes to the differences between the two provisions. Section 1 starts by identifying a broad category of conduct (agreements) toward which the law generally has, if anything, a favorable attitude[245] and that normally does not raise antitrust concerns. It then makes a small subset of this category of conduct illegal, that being those agreements that unreasonably restrict competition.[246] Given this approach, one can understand the tendency of a court in a *sui generis* section 1 case to ask whether the challenged agreement is the sort of conduct which has anything to do with the goals of the antitrust laws. Section 2, in contrast, starts by identifying an end result, the existence of monopoly power,[247] toward which the law is hostile and that is normally the concern of the antitrust laws.[248] It then recognizes that in certain circumstances society must grudgingly put up with monopoly power. For example, as explained by Judge Hand in the classic *Alcoa* opinion, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[249] Hence, if a firm obtains or maintains monopoly power solely through superior skill, industry, foresight, or even historical accident, then it does not violate section 2. But if the monopoly power results from any sort of conduct

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242 Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177-78 (1965).

243 United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

244 Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

245 Witness the law's willingness to put society's resources behind the enforcement of private contracts.

246 *See Berkey Photo*, 603 F.2d at 272; *see also* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 687-88 (1978).

247 "Monopoly power is the power to control prices or exclude competition." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

248 *See Berkey Photo*, 603 F.2d at 273.

249 United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

that society need not tolerate, then there is illegal monopolization.[250]

An extreme example illustrates this difference. Assume a firm decided to destroy all of its competitors by dynamiting their plants. One might note that the firm's purchase of the dynamite presumably involved a contract, and its hiring of the saboteurs involved a conspiracy. Since the result of this contract and conspiracy was to destroy competition, one might argue that they violated section 1. On the other hand, a court might rationally question whether these are the sort of agreements against which Congress directed the section. This is not because other laws exist against arson. That is beside the point. Rather, the problem is that the agreements here do not involve the parties acting as market participants which seems to be what section 1 contemplates. This is not a case of competitors agreeing not to compete (as in price-fixing), or of firms agreeing to use their market power to destroy their competitors (as in a boycott),[251] or even an agent agreeing with a briber not to consider other bids (as with commercial bribery).

In contrast, there should be little doubt about the existence of a section 2 claim in the hypothetical. Admittedly, blowing up one's competitors is not the sort of thing one sees in the garden variety section 2 case (like predatory pricing). Yet, there is no reason to put up with a monopoly achieved through such tactics, and an unexcused monopoly is the target of section 2. In fact, this is an easier case than alleged predatory pricing, since such pricing claims involve the need to distinguish between predation and normally desirable price competition.[252] Accordingly, in this context, the fact that the conduct violates other laws actually supports section 2 liability (contrary to the Court's suggestion in *Omni*[253]).

A similar analysis applies in dealings with government. Indeed, part of the problem with Justice Scalia's opinion for the majority in *Omni* is its failure to appreciate the difference between section 1's and sections 2's approaches and the resulting importation of concepts from *Noerr* which are applicable to the former, but not the latter. Recall that *Noerr* involved an agreement among the railroads

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250 *See id.* at 429-30; *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604-05 (1985).

251 *See* Fashion Orginators' Guild v. FTC, 312 U.S. 457 (1941).

252 *See, e.g.*, A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1400 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990).

253 *See* City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1353 (1991).

to undertake a public relations and lobbying campaign. The end result of this campaign was arguably anti-competitive insofar as it achieved legislation hostile to the competing truckers. Accordingly, the plaintiffs asserted a claim under section 1 arguing there was an anti-competitive conspiracy.[254] Nevertheless, the *Noerr* Court questioned whether the Sherman Act addressed this sort of conduct.[255] Seen in its section 1 context, this makes some sense. As in the dynamite hypothetical, the agreement in *Noerr* did not involve the defendants acting together as market participants, which is the conduct of primary concern to section 1. Section 2, however, calls for a different approach. It is the existence of monopoly power which prima facie makes the matter an antitrust concern; the source of the power is only relevant in terms of establishing whether the monopoly is one the law must, nevertheless, tolerate. This does not mean that government action creating monopoly power is irrelevant; quite the contrary. The fact that the power arises out of a government decision normally means that it is a monopoly position the antitrust law must tolerate because the government—through agencies of equal competence to the courts—has determined it is in the public interest. Moreover, the fact that the favored party lobbied for the government-created monopoly is also something the antitrust law must accept for the free speech and other policy reasons supporting the *Noerr* doctrine. But this rational shows its own limits. To the extent a party, in order to obtain the government action, ventures into conduct society has no interest in protecting and the result of this conduct vitiates the competence of the government decision maker, the monopoly ceases to be one that the law need tolerate.

At this point, the *Walker* result becomes self-evident, and the *Omni* dicta, by contrast, stands out as inexplicable. The law accepts monopoly power through patents as the price of encouraging inventions. Deliberate lying to the Patent Office, however, is not something there is any reason to allow, and, therefore, any resulting monopoly can violate section 2. Similarly, bribery to obtain government action should violate section 2 if the result is monopoly power in a relevant market. This is not because bribery in itself is a concern of the antitrust laws. Rather, it is because monopoly power is a concern, and if the government action creating such power is

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254 *Noerr*, 365 U.S. at 129.

255 *Id.* at 136.

the result of bribery, there is no public interest in insulating this conduct.[256]

Justice Scalia's opinion for the majority in *Omni* argues, as a seeming response, that the bribed official might still have made the same decision without the bribe and that this decision might be in the public interest.[257] The causation and public interest questions become even muddier, the Court notes, if the bribery involved a minority of the members of a decision-making group, such as a state legislature or city council. However, the causation argument simply points out what is true in most cases—causation is an issue of fact. It is up to the plaintiff who claims an antitrust violation through bribery to show that, but for the bribe, the government action would have been different. Whatever proof difficulties may exist in a given case, they are no worse than is common in antitrust litigation.[258] In fact, in the bribery situation, the very proof of illegal bribery already goes some distance toward proving causation. In order for a payment to be a bribe, there must be an agreed quid pro quo; in other words, certain agreed upon action in exchange

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256 An additional complication exists when the briber obtains but does not create a monopoly position through payoffs. This occurs when the briber makes a payoff to gain an exclusive franchise which the government otherwise would award to another company. The monopoly exists in this situation with or without the bribe. The payoff simply determines who gets the monopoly. This has led at least one court to conclude that such a payoff has no impact on competition. Bustop Shelters v. Convenience & Safety Corp., 521 F. Supp. 989, 994-97 (S.D.N.Y. 1981).

Two problems, however, exist with such a conclusion. To begin with, the conclusion is inconsistent with other § 2 decisions dealing with natural monopolies. Specifically, in Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961), the court found that two newspapers violated § 2 by using unfair practices against each other despite the fact that they were competing in a community which could only support one paper. Additionally, there is a market for the exclusive franchise itself. Generally, the government will extract some return either for itself (through fees or benefits to the community) or for the consumers (through the best service or lowest price) in exchange for awarding the exclusive franchise. If bribery determines who gets the franchise, then the government loses the benefit of competition between bidders for the exclusive rights.

257 *Omni*, 111 S. Ct. at 1353.

258 *Cf.* Federal Prescription Serv., Inc. v. American Pharm. Ass'n, 663 F.2d 253, 268-72 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); Copper Liquor, Inc. v. Adolph Coors Co., 509 F.2d 758 (5th Cir. 1975); Sakamoto v. Duty Free Shoppers, Ltd., 613 F. Supp. 381, 390 (D.C. Guam 1983), *aff'd on other grounds*, 764 F.2d 1285 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986).

for payment.[259] Given such proof, it is not a far stretch to infer that the official's action would have been different without the bribe. After all, if the briber thought the official would give it what it wanted without the payoff, then why make the deal? Accordingly, despite the difficulties of proving causation in a given case based upon bribery, this is no reason for according blanket antitrust immunity.

The argument that the bribed action might still be in the public interest misunderstands the rationale for deferring to government action. Normally, when a government decision maker decides upon an arguably anti-competitive action, this decision maker presumably has determined that the action is in the public interest either because there is no net anti-competitive effect or because other policies outweigh any such effect. Accordingly, the government action normally is not a concern of the antitrust laws and neither is the act of lobbying for it.[260] It is important to understand, however, that this rationale is not predicated upon the government decision maker being correct in the policy determination—a point Justice Scalia seems to recognize in his rejection of a broadly defined conspiracy exception to the *Parker* doctrine.[261] The issue is one of competence rather than result. If a legislative body or executive agency decides to pursue an arguably anti-competitive action, it may or may not be in the public's best interest. This will typically be a matter upon which reasonable minds will differ. The critical point is that there is no reason to believe a court reviewing the matter under the antitrust laws is more likely to get it right.[262] Once one appreciates this rationale, its inapplicability to bribery becomes evident. While a decision based upon bribery might be in the public interest, such a result is entirely happenstance. Accordingly, there is no reason for a court to defer to a determination of the public interest by another equally competent agency of government—there has been no such determination. More specifically with respect to *Noerr*, there is no reason

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259 *See supra* note 119 and accompanying text.

260 *See* Elhauge, *supra* note 45, at 1198.

261 *Omni*, 111 S. Ct. at 1352 ("*Parker* was not written in ignorance of the reality that determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment . . . .").

262 *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 609 (1972) ("The fact is that courts are of limited utility in examining difficult economic problems.").

to accord immunity to the very conduct which prevented the executive or legislative branch from even attempting to determine the public interest.

## CONCLUSION

For the present, the assertions in *Omni* that the *Noerr* doctrine covers bribery are simply dicta. Given the historical constant of bribery, however, it may only be a matter of time before the Supreme Court will need to squarely confront the issue.[263] The purpose of this article has been to ensure that the *Omni* dicta is not converted into a holding. When it comes to dicta about bribery and the *Noerr* doctrine, the Supreme Court was correct in *California Motor Transport* and *Allied Tube.*

[263] Some lower courts had confronted the issue before *Omni. See supra* notes 81-84 and accompanying text.