The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law

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Antitrust practitioners that believe that competition results in the best outcomes for consumers have long taken a skeptical view of the exemptions and immunities that shield certain sectors of the economy from antitrust law. The American Bar Association's Section of Antitrust Law has analyzed the place of exemptions and immunities in U.S. competition law.[1] This paper will explain the positions that the Section has expressed in the past, and will then apply the logic of those positions to determine how other, as yet unaddressed, exemptions and immunities should be treated.

I. Introduction to Exemptions

In general, antitrust exemptions arise for three main reasons.

First, it is widely accepted that the purpose of the antitrust laws is to protect and preserve competition in the free market. For the most part, protecting competition will mean preventing competitors from acting collectively to raise prices and suppress competition. However, many organizations or industries seeking to obtain or maintain an exemption argue that an exemption is warranted because facially anticompetitive activity is actually procompetitive or otherwise beneficial. But antitrust jurisprudence in the wake of the Supreme Court's ruling in *Continental T.V. v. GTE Sylvania*[2] has undermined much of the justification for these exemptions. The courts have widened the use of the rule of reason in antitrust cases, opening the door for many restraints on trade that could be justified on other procompetitive grounds to be analyzed on their merits, rather than being found *per se* unlawful. Thus, it is unlikely that exemptions are necessary to protect procompetitive behavior. Indeed, even the classic example of a procompetitive restraint—a sports league, where otherwise competitive teams join together to create a common organization that sets rules, organizes events, and excludes other potential entrants—is now subject to a more sophisticated analyses of joint conduct than simply being declared exempt from antitrust enforcement. In *American Needle v. NFL*, the Supreme Court found that, though the NFL itself may be a legitimate joint venture that protects individual teams from liability when they work in the common interest of the league, the teams can still be found to

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[2] 433 U.S. 36 (1977).

violate the antitrust laws in other areas where no such common interest exists, such as in licensing their intellectual property.[3]

Second, anticompetitive conduct will be exempted when a value deemed greater than antitrust is at play. For example, petitioning the legislature, courts, or administrative bodies to change or interpret the laws to allow for activity that would violate the antitrust laws if done by private actors alone is protected from antitrust liability under the *Noerr-Pennington* doctrine. For instance, it would not be illegal for an industry group to lobby Congress to create a new exemption allowing competitors within the industry to agree on common prices, even though it would clearly be illegal for these entities to form such agreements themselves. This immunity lies in the citizens' constitutional rights to petition their government to change its laws under the First Amendment. As such, its basis is relatively uncontroversial, though issues arise as to its proper scope, which we discuss in more detail below.

Third and most importantly, many exemptions exist that were originally justified under the theory that, in certain industries, regulation was preferable to competition or that there were natural monopolies that needed to be controlled. For instance, the railroads, insurance companies, ocean shippers, and certain agricultural cooperatives have been granted special statutory immunities to do things like set prices, agree to common terms of service, and form joint ventures as an industry. In large part, these exemptions arose out of the late nineteenth and early twentieth century economic theories of the "benevolent cartel," whereby prominent economists and regulators believed that organizing industries into highly regulated cartels that would orient their collective industry decisions in light of the common good would be most beneficial to the national economy.[4] Since then, economic theory has evolved to reject this foundation. The consensus view now holds that consumers benefit most when competitors freely compete, and that economic regulation is better suited to preserving a competitive marketplace than to structuring the market around deliberately anticompetitive cartels. For these and other reasons, the ABA Section on Antitrust Law generally opposes this type of exemption, unless it can be justified on a few narrow grounds.

II. Problems with Exemptions

Regardless of the original justification for a given exemption, antitrust exemptions are subject to a few common problems. The most obvious problem is that they frequently distort competition in ways that may hurt consumers. Allowing certain industries the power to jointly set prices or other competitive terms will tend to increase the prices for services beyond what they would otherwise be in the presence of competition, as well as give the industries more power vis-à-vis the consumers than they would otherwise have. In 2002, Congress established the Antitrust Modernization Commission ("AMC") to conduct a full-scale appraisal of the antitrust laws and determine whether

[3] *See American Needle, Inc. v. NFL*, 560 U.S. 183, 195-197 (2010).

[4] *See, e.g.,* ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 9-10 (2007).

and to what extent those laws need to be updated.[5] The section of the AMC's final Report that discussed exemptions noted that

> [n]umerous studies of sectoral deregulation in the United States show that the unleashing of market forces has greatly increased efficiency and provided substantial benefits to consumer welfare. One comprehensive survey of empirical evidence on the U.S. deregulation experience concluded that the U.S. economy has gained at least $36 to $46 billion annually (in 1990 dollars) from deregulation, primarily in the transportation industries. On a more specific level, an econometric analysis of trucking rates in states that continued to regulate trucking found that in the less-than-truckload (LTL) segment, regulation of entry increased rates by more than 20 percent, rate regulation increased those rates by 5 percent, and antitrust immunity for certain conduct increased rates by about 12 percent above what they would be absent regulation.
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> These data give a sense of the order of magnitude of the costs imposed on U.S. consumers and the U.S. economy by government restraints on competition.[6]

Accordingly, the Commission concluded that "Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition."[7] Yet many of the existing exemptions are not based on this careful analysis, but rather rely on old theories in need of modernization. There is no reason to assume, for instance, that deregulation of the railroads would lead to markedly different results than occurred in the deregulation of the trucking industry. Thus, if trucking rate regulation deserved to be repealed, railroad rate regulation does too.

Moreover, exemptions are often broader than they need to be. The McCarran-Ferguson Act of 1945, for instance, provides insurance companies with a sweeping and total exemption from the antitrust laws, so long as they do not agree to boycott, coerce, or intimidate[8] and so long as the insurance business is already regulated by state law.[9] But to

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5 *See* ANTITRUST MODERNIZATION COMMISSION, REPORT & RECOMMENDATION 1 (2007). The AMC's membership included both the Antitrust Division's Assistant Attorney General Makan Delrahim and members of the ABA Section on Antitrust Law.

6 *Id.* at 334.

7 *Id.*

8 15 U.S.C. § 1013(a)-(b) ("[The Sherman Act, Clayton Act, Federal Trade Commission Act, and Robinson-Patman Act] shall not apply to the business of insurance or to acts in the conduct thereof. Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.").

9 *Id.* at § 1012(b).

the extent that insurance companies find themselves in similar positions to a sports league, where they need to be able to organize collectively to bring about certain unique procompetitive results, those results could be facilitated through less sweeping means. In testimony before Congress regarding proposed antitrust reform legislation for the health insurance industry, then-ABA Antitrust Section Chair Ilene Knable Gotts emphasized that the ABA has long supported wholesale repeal of the McCarran-Ferguson Act, to be replaced with a few narrowly-tailored safe harbor provisions to allow insurers to do things like develop standardized policy forms and enter joint underwriting agreements.[10] Given the harm to consumers that will likely flow from anticompetitive regulations, it makes sense that exemptions should be drawn as narrowly as possible. Unfortunately, that is not the case for many existing exemptions.

Finally, even when exemptions are ill-considered, they are difficult to remove. Exemptions create a classic public-choice problem: they create a concentrated group of industry beneficiaries who benefit greatly from their special privileges, while the consumers who suffer higher prices are diffuse, are harmed individually only in small amounts, and therefore are unlikely to exert much effort for the repeal of existing laws, even if the laws' macroeconomic harm is great. To be fair to the exempt industries, removing the exemption would require a fundamental change in the way that they have built their business and expectations, making a rapid removal of the exemption difficult to implement. The corresponding "stickiness" of these exemptions is evidenced by the fact that many of the existing exemptions were passed nearly a hundred years ago and still exist today, even after economic theory has moved away from the theoretical foundations on which they were originally built.

III. The ABA Section's Approach

Due to these problems, the ABA Section of Antitrust Law has expressed skepticism about antitrust exemptions. The most recent statement of the Section's position was outlined in its Statement in Opposition to three proposed healthcare reform bills of 2011, which sought to allow health care providers to join together to agree on price and service terms.[11] The bills were intended to grant healthcare *providers* the same power of collective action that healthcare *insurers* already enjoyed under the McCarran-Ferguson Act. In opposition to this expansion of anticompetitive activity, the Section offered Congress a four-part test to determine when exemptions are appropriate:

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[10] Statement of Ilene Knable Gotts, Before the Subcommittee on Courts and Competition Policy Judiciary Committee, Concerning H.R. 3596, "The Health Insurance Industry Antitrust Enforcement Act of 2009" (Oct. 8, 2009), at 2, 4-5, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/statement_2009oct8_gottstestimonyh_t.authcheckdam.pdf.

[11] The Acts were the Quality Health Care Coalition Act of 2011, H.R. 1409; the Preserving Our Hometown Independent Pharmacies Act of 2011, H.R. 1946; and the Community Pharmacy Fairness Act of 2011, H.R. 1839.

> *First*, Congress should grant antitrust exemptions and immunities rarely and only after rigorous consideration of the impact of the proposed exemption or immunity on consumer welfare. *Second*, Congress should only grant those exemptions and immunities that are drafted narrowly, so that competition is reduced only to the minimum extent necessary to achieve the intended goal. *Third*, Congress should enact antitrust exemptions and immunities only when the proposed exemption or immunity achieves a Congressional goal that significantly outweighs the aims of the antitrust laws in a particular situation. *Finally*, the Section proposes that no exemption or immunity should be granted or renewed unless it contains a sunset provision.[12]

By requiring Congress to pass new exemptions only after "rigorous consideration," this test would discourage the passage of most new exemptions in the first place. It also would sharply cabin the scope of any new exemption that Congress did pass, by insisting that new exemptions are "drafted narrowly," that they achieve significant non-antitrust goals, and that they contain sunset provisions. This is in keeping with the ABA's general position that, aside from being economically unjustified, many antitrust exemptions do not serve procompetitive purposes that are not already protected through the existing and much simpler Sherman Act.[13]

When the ABA laid these principles out in response to the three healthcare reform proposals, it took a hard stand against the proposed bills. For one reason, the bills did reflect adequate consideration for consumer welfare, thus violating prong 1. Their express goal was to increase the bargaining power of healthcare providers such as doctors and hospitals as against health insurance companies. But nowhere did Congress explain how allowing new price-fixing to counteract the effects of old price-fixing would benefit consumers. Just as in the case of insurance cartels, the ABA noted that

> provider cartels lead to higher reimbursement rates and higher insurance premiums for consumers. This result is just as likely in those markets in which payor [i.e., insurer] market power is a genuine problem, as in markets in which payors lack market power: legalized collusion can introduce bilateral monopoly. Where a market is dominated on each side by a powerful seller and a powerful purchaser, there is little incentive to reduce prices for consumers. Rather, the seller and

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[12] Letter from Richard M. Steuer, Chair, Section of Antitrust Law, to the House Judiciary Committee, "Re: H.R. 1409, H.R. 1839, and H.R. 1946: Antitrust Exemptions to Legalize Collusion Among Health Care Providers" (Oct. 20, 2011), at 2, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20111020.authcheckdam.pdf (emphases added).

[13] *Cf.* Statement of Ilene Knable Gotts, *supra* note 10, at 1.

> purchaser can simply divide between them whatever surplus can be extracted from consumers through their combined market power.[14]

Likewise, the bills were not narrowly tailored in that they applied to large swaths of healthcare providers, regardless of market power; allowed for anticompetitive activity like joint boycotts and price-fixing that lacked any procompetitive justification; and—as is often the case in similar bills—lacked a sunset provision.[15] Thus, the Acts contravened essentially all of the ABA's prongs and presented an easy case of opposition.

Even when the ABA has not specifically enumerated its principles, the four prongs have consistently guided the ABA's analysis of proposed antitrust exemptions in recent years. The Chair of the Section testified before Congress in favor of reforming the McCarran-Ferguson Act in 2006 and 2009. As discussed above, McCarran-Ferguson provides a sweeping exemption from the antitrust laws for all insurance providers, with barely any limitation on activity, scope, market power, or time, thus contravening at least the ABA's prongs 2 – 4. Moreover, as the Chair recognized, the impetus for the McCarran-Ferguson Act stemmed from the specific historical circumstances of the late nineteenth century, wherein the Supreme Court acted to assert the individual states' regulatory power over insurance companies that were then trying to resist state regulation on the grounds that insurance is inherently interstate commerce.[16] The post-New Deal Court later changed course and brought insurance regulation under federal purview via the Commerce Clause; McCarran-Ferguson was an attempt to overrule the Court and reimpose the *status quo ante*.[17] But whatever the merits of each side in these old disputes, the antitrust laws have significantly evolved since then, most notably in the principle that antitrust protects "competition not competitors" and that it should always be oriented toward protecting consumer through low prices, not through imposing regulatory schemes for extraneous goals. Therefore, McCarran-Ferguson likely violates the ABA's prong 1 (on consideration of consumer welfare) as well.

The ABA also publicly supported[18] removing the limited immunity for the railroad industry that the Supreme Court created in *Keogh v. Chicago & Northwestern Railway*.[19] The *Keogh* Court created a new doctrine that exempted railroads from certain antitrust damages if allegedly collusive tariff rates were filed and approved with the appropriate regulatory board. Again, this doctrine is a "legac[y] of a

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[14] Letter from Richard M. Steur, *supra* note 12, at 6.

[15] *Id.*

[16] Statement of Ilene Knable Gotts, *supra* note 10 at 3 (citing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868)).

[17] *Id.*

[18] *See* ABA Section of Antitrust Law, Comments on the Railroad Antitrust Enforcement Act, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_hr1650_s772.authcheckdam.pdf.

[19] 260 U.S. 156 (1922).

bygone era" insofar as it understood competition regulation to involve creating regulatory cartels to control and monitor competition, which is no longer the accepted view.[20] As evidence of how far economic thinking on these issues has changed, even the original regulatory body to which *Keogh* required railroads to file their rates—the Interstate Commerce Commission—was dissolved as part of the Congressional trend toward transportation deregulation in the 1970s.[21] Thus, the Railroad Antitrust Enforcement Act sought to harmonize the railroad industry with the general deregulatory recommendations of the Antitrust Modernization Commission by treating railroads much like other industries under the antitrust laws and abolishing the *Keogh* doctrine.[22] As an—ultimately unsuccessful—effort to undo an old legislative imprimatur on price-fixing cartels, the railroad reform earned the ABA's approval.[23] The Act was revived most recently in 2015, but has still not broken through the inertia surrounding many of these exemptions.

Finally, and most recently, the ABA Antitrust Section had cause to opine on similar developments in the European Union, in a November 17, 2017 comment on the European Commission's "initiatives to improve the food supply chain." Among these initiatives was a proposal to allow competitors in certain agricultural sectors to secure their supplies by sharing profit and cost information with each other. While recognizing a lack of expertise in certain uniquely European matters, the Section nonetheless noted that such an exemption would be disfavored in the United States, and recommended that the European Commission treat proposed exemptions skeptically and insist on all proper safeguards.[24]

IV. Application of the ABA's Section's Analysis

The above positions may be used to imply the proper analysis of other exemptions, which the Section has not addressed publicly. We provide a few examples below.

First, the Sports Broadcasting Act of 1961 ("SBA") allows exclusive television agreements in professional sports, which grant individual television networks like NBC or CBS the exclusive rights to broadcast professional football, basketball, baseball, and hockey games.[25] This law was passed at a time when broadcasting was dominated by a few big networks with large monopoly power, whereas sports leagues were relatively weak and did not generate large amounts of revenue from television broadcasts. Granting the exclusive sale of

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[20] ABA Comments on Railroad Antitrust Enforcement Act, *supra* note 18, at 5.

[21] *See id.* at 6.

[22] *See, e.g.*, *id.* at 10.

[23] *See id.* at 13.

[24] Comments of the American Bar Association Section of Antitrust Law on the European Commission's Initiative to Improve the Food Supply Chain (Nov. 17, 2017), at 1, 4-5, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20171117.authcheckdam.pdf.

[25] *See* FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW, *supra* note 4, at 217.

broadcast rights would allow the weak leagues to compete at greater parity with the strong networks.[26]

Today, the law has changed. The collective negotiation of a broadcast agreement by a sports league would likely be viewed under the rule of reason and seems unlikely to be found unlawful.[27] Likewise, the sports broadcasting market and the technologies underlying it have changed in dramatic ways since Congress passed the 1961 Act. Now, the same sports leagues make hundreds of millions—if not billions—of dollars in media income every year, so that any "protection" from competition that they once needed is clearly needed no longer.[28] At the same time, broadcasting has followed any inverse trend, where the big networks have been weakened and decentralized into many competing cable networks and online streaming services, which could get the same content to consumers much more cheaply than the old monopolies. Streaming services in particular have shaken the traditional cable networks framework, providing customers more services and at lower prices, yet these changes have had a much smaller effect on sports broadcasting, as a result of these longstanding exclusivity agreements with the large network providers. This in particular shows the importance of ABA's prong 4 ("the sunset provision"), which, had it been in place in the original Act, would have afforded the opportunity to re-evaluate the cable network landscape and make necessary adjustments as the competitive market changed. Even if we accept that Congress gave rigorous consideration to the need for this exemption in 1961, the factors it considered are unlikely to apply in any market decades later. Moreover, it is unlikely that the SBA would satisfy ABA's prong 3 (achieving a goal that "significantly outweighs" the antitrust laws) because its chief aim—even at the time it was passed—was to protect certain market actors. It does not serve any higher purpose like free speech or federalism, but simply intends to create artificial conditions that allow sports leagues to obtain higher profits. Since, as discussed above, the goal of competition law is to protect consumers, these kind of anticompetitive restrictions go against the grain of existing law.

To take another example, several federal laws—most notably the Capper-Volstead Act of 1922—allow limited exemptions for certain farm cooperatives.[29] In its relevant part, the Capper-Volstead Act allows farmers to form cooperatives to act in concert to raise prices, specifically, by exempting cooperatives from antitrust liability when they work collaboratively for the purpose of producing, handling, and marketing farm products. This was meant to improve the position of farmers relative to buyers, under the belief that buyers had undue power to pressure the price of agricultural products down.[30]

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[26] *Id.* at 225 – 231.

[27] *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

[28] *Id.* at 217-225.

[29] *See id.* at 88 – 89. The other relevant provisions are Section 6 of the Clayton Act, the Cooperative Marketing Act, and the Agricultural Marketing Agreement Act.

[30] *Id.* at 91.

A recent Section publication studied the effects of Capper-Volstead cooperatives and concluded that, notwithstanding their legal protections, farm cooperatives have been unable to exert significant monopoly power and thus have had little effect on the prices that consumers actually pay.[31] Of course, this is not by itself enough to justify the Capper-Volstead Act. Even if the Act has not been able to achieve its intended effects, it is still clear those effects were intended to be anticompetitive; the entire justification for the Act was to raise the power of producers as against consumers. Thus, the Act is flawed for the same reasons as the railroad or sports broadcasting exemptions and is likely in need of serious reform, if not outright repeal.

Capper-Volstead has several other flaws too. Many of its beneficial effects for farmers could likely be achieved through more narrowly-tailored means, such as joint ventures that are already permitted under the existing antitrust laws. Thus, even if repeal occurred, solutions would exist that would satisfy the ABA's criteria and cause little disruption to farmers. Moreover, the existing statutorily-created cooperatives have also been found to suffer from poor oversight and lack of transparency.[32] It is likely that private joint ventures would eliminate many of these bureaucratic problems, just as they have in other deregulated industries.

The shortcomings in Capper-Volstead, notably its failure to satisfy prongs 1 ("benefiting consumer welfare") and 4 ("the sunset provision"), are mirrored in the concerns that the Antitrust Section expressed regarding the food supply chain proposals in the European Union. The food supply chain is integral to the livelihood of nations and, as such, receives special attention from legislatures globally. Agriculture is vulnerable to production volatility, being subject to such uncontrollable variables as the whims of the weather. Therefore, on the surface, it would seem that policy should favor collective procurement and storage that can help to ease farming instability. Nonetheless, these goals are not realized through providing antitrust exemptions, but rather in letting competition flourish. Many of the U.S. farm exemptions gained prominence during the Great Depression, when falling prices for agricultural goods was a national concern.[33] Now, when low consumer prices are seen as the express purpose of competition law, it seems that the original basis for Capper-Volstead has been vitiated. Similar concerns can explain why the Section advised the European Commission against allowing similar types of price-sharing in its own agricultural sectors. To the extent additional kinds of agricultural regulation are necessary, they should come from other authorities; the object of competition law should only be to promote competition.

Lastly, the *Noerr-Pennington* doctrine[34] protects people who petition the legislature, courts, administrative bodies, or other organs of the government from antitrust liability if their petition would be

[31] *Id.* at 125-26.
[32] *Id.* at 129-30.
[33] *Id.* at 93.
[34] *See E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

anticompetitive. This is typically justified on the grounds that the First Amendment right to petition the government is more fundamental than antitrust law, or, alternatively, on the ground that the government is not bound by existing law and can modify it as it sees fit.

In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*[35] the Supreme Court unanimously limited the *Noerr-Pennington* doctrine to exclude sham litigation. "Objectively baseless" litigation that was initiated only in an attempt to interfere in a competitors' business would not be exempt from antitrust liability. Additionally, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[36] the Supreme Court drew a line separating restraint resulting from private conduct (or even quasi-legislature conduct) from that of government conduct. In order for *Noerr* immunity to apply, the restraint must result from government conduct. Quasi-legislative bodies to which authority has not been conferred cannot provide *Noerr* immunity. These cases help illustrate examples of the judiciary's attempt to cabin an abuse of *Noerr's* application.

But such narrow application has not always been the case. Indeed, many other questionable extensions exist. In one enforcement action that the FTC initiated[37] against the oil company Unocal, the FTC alleged that Unocal engaged in unfair trade practices by misleading a California regulatory body in proceedings related to auto emissions. It claimed that Unocal knowingly misrepresented itself to the California board by falsely claiming that it lacked patent rights in certain emissions research, in order to induce the board to adopt regulations that would benefit Unocal by requiring oil refineries to reconfigure themselves in ways that would be subject to Unocal's undisclosed patent claims.[38] Unocal resisted the FTC in part on the grounds that its statements to the regulatory board were petitions to the government that are protected under *Noerr*.[39] The case ended in a consent decree, so the merits of this position were never definitively established.[40] In *FTC v. Superior Court Trial Lawyers Ass'n (SCTLA)*,[41] a group of Washington, D.C, court-appointed lawyers for indigent clients formed a joint boycott to refuse additional clients until the D.C. government increased their compensation.[42] Against allegations that their boycott was a classic anticompetitive restraint on trade, they claimed that they were protected antitrust enforcement by *Noerr*'s immunity in petitioning the

[35] 508 U.S. 49 (1993).

[36] 486 U.S. 492 (1988).

[37] Author John Roberti served as one of the FTC lawyers on the trial team.

[38] In the Matter of Union Oil Company of California, FTC Dkt. No. 9305, Opinion of the Commission, at 1, https://www.ftc.gov/sites/default/files/documents/cases/2004/07/040706commissionopinion.pdf.

[39] *Id.*

[40] *See* ABA SECTION OF ANTITRUST LAW, MONOGRAPH 25, THE *NOERR-PENNINGTON DOCTRINE* 103 (2009).

[41] 493 U.S. 411 (1990).

[42] *Noerr-Pennington Doctrine*, *supra* note 40, at 100.

government.[43] Ultimately, the Supreme Court held that even though the conduct in question “plainly was undertaken with the goal of influencing the government” *Noerr* immunity is not available when the outcome is intended to garner higher prices or other economic advantages from the government.[44] Another example of attempts to expand *Noerr* in an overreaching manner is seen in suggestions that applying for a patent is enough to confer *Noerr* immunity.[45] Distorting *Noerr* into these other areas, which are far afield from the intended “petitioning the government” justification threatens to violate the ABA’s prong 2 (“drafted narrowly”) and allows immunity for a wide range of conduct not directly tied to the original justification for *Noerr-Pennington*.

These case studies indicate that the proper application of the ABA’s test would likely preclude most existing exemptions. However, this is not to imply that all exemptions would necessarily violate the test. In 1998, Congress passed the Year 2000 Information and Readiness Disclosure Act.[46] The Act was passed under the then-prevalent belief that large numbers of computer systems would be unable to read dates in the year 2000, which would incapacitate large segments of the economy, as well as expose important software companies to extensive legal liability.[47] Accordingly, Congress created a temporary immunity for businesses to share with each other their year 2000 readiness information, as a means of preparing for and better counteracting the perceived threat. The law was narrowly tailored to achieve an important goal—avoiding disaster for the technology industry—and specifically limited the antitrust exemption to cover the narrow category of information-sharing intended to avoid or correct year 2000 systems failures.[48] Indeed, avoiding all ambiguity, section 5(d) of the Act set forth a “Rule of Construction” which provided that “[t]he exemption granted by this section shall be construed narrowly.” Equally importantly, the Act also contained a sunset provision specifying that its exemptions would lapse on July 14, 2001.[49] The Act thus represents a paradigmatic case of Congress creating a limited, reasonable exemption to address a clearly delineated problem, which then expires once the problem has been solved. Such exemptions may be rare, but they are not impossible.

V. Conclusion

However well-intentioned antitrust exemptions may be, most of them threaten to institutionalize anticompetitive conduct, often in sweeping ways that could be better addressed through more narrowly-tailored reforms that do not otherwise conflict with the modern, procompetitive thrust of the antitrust laws. As such, most of the existing

[43] *Id.*
[44] *SCTLA*, 493 U.S. at 422, 424-25.
[45] *See Noerr-Pennington Doctrine*, *supra* note 40, at 98.
[46] Pub. L. No. 105-271, 112 Stat. 2386.
[47] *See id.* at § 2(a).
[48] *Id.* at § 5(a).
[49] *Id.* at § 5(b).

exemptions run afoul of at least one of the Section's strictures, which has caused the ABA Section of Antitrust Law to publicly recommend that many of them be altered or abolished.

Moreover, as shown in the examples above, exemptions are sticky and difficult to remove, so any proposals for new exemptions should be treated with great caution. The authors believe that this Section's four prong test provides an appropriately cautious, skeptical, and narrow lens through which to view both existing and proposed exemptions. Going forward, viewing antitrust exemptions through this lens will help to mitigate ill-conceived loopholes that fail to promote competition or to benefit consumers.