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Tarpley v. Keistler: Patronage, Petition, and the Noerr-Pennington Doctrine

James Filkins

TARPLEY v. KEISTLER: PATRONAGE, PETITION, AND THE NOERR-PENNINGTON DOCTRINE*

INTRODUCTION

"Politics, *n.* A strife of interests masquerading as a contest of principles. The conduct of public affairs for private advantage."[1] So goes the pithy, if cynical, definition of politics given by Ambrose Bierce in *The Devil's Dictionary*.[2] Bierce's definition expresses the commonplace observation that political parties exist to advance their own interests which may sometimes be adverse to the interests of others. So long as the means remain lawful, political parties may enlist support for their programs in any manner they consider advantageous.[3] Political patronage, that is, the bartering of votes for jobs and other favors, has traditionally been one method that political parties have used to advance their own interests.[4] However, a political party's freedom to advance its interests through patronage is not absolute. For example, government actors, who are often political party loyalists, generally may not hire or fire individuals based on a person's political affiliations.[5] This restriction is based upon an individual's First Amendment freedom of political association and balances that freedom against a

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1. AMBROSE GWINETT BIERCE, DEVIL'S DICTIONARY 156 (1911).

2. *Id.*

3. Cynthia Grant Bowman, *'We Don't Want Anybody Sent': The Death of Patronage Hiring in Chicago*, 86 NW. U. L. REV. 57, 60 (1991). The arrangement is also known as the "spoils system" from the quip (by Nineteenth Century New York Governor Marcy), that "[t]o the victor belongs the spoils of the enemy." *Id.* at 60 n.18 (citing M. TOLCHIN & S. TOLCHIN, TO THE VICTOR: POLITICAL PATRONAGE FROM CLUBHOUSE TO THE WHITE HOUSE 319 (1971)).

4. *See id.* at 61. Finley Peter Dunne's fictitious Chicago bartender, Mr. Dooley, makes the same point more colorfully in his description of an equally fictitious Chicago aldermanic candidate, "Flannigan."

> [T]his here Flannigan had put a man on th' day watch, tol' him to speak gently to any raygistered voter that wint to sleep behind th' sthove, an' was out that night visitin' his frinds. Who was it judged th' cake walk? Flannigan. Who was it carrid th' pall? Flannigan. Who was it sthud up at th' christening? Flannigan. Whose ca-ards did th' grievin' widow, th' blushin' bridegroom, or th' happy father find in th' hack? Flannigan's. Ye bet ye'er life. *Ye see Flannigan wasn't out f'r th' good iv th' community. Flannigan was out f'r Flannigan an' th' stuff.*

FINLEY PETER DUNNE, MR. DOOLEY IN PEACE AND WAR 114-15 (NEW YORK, 1898) (emphasis added). It should come as no surprise that "Flannigan" won that fictitious election. *Id.* at 116.

5. Cynthia Grant Bowman, *The Law of Patronage at a Crossroads*, 12 J.L. & POL. 341, 341-42 (1996).

political party's interest in preferring members of its own party for government employment.[6]

Tarpley v. Keistler[7] considers the closely related issue of whether a private individual, who is also the officer of a local political party organization, may recommend the hiring of a party loyalist to a government actor of the same party.[8] The *Tarpley* decision frames this issue in terms of balancing an individual's freedom of political association against another individual's right of petition.[9] As is often required in First Amendment jurisprudence, the *Tarpley* decision weighs competing interests.[10] *Tarpley* holds that a private individual employed by a political party organization may directly advocate the hiring of party loyalists to government positions as an exercise of the right of petition.[11] To achieve this result, the *Tarpley* decision applies the *Noerr-Pennington* doctrine to a section 1983[12] action.[13] The decision holds that by protecting the right of petition as a component part of associa-

6. *Id.* at 354. This is extensively developed in poitical speech cases.

7. 188 F.3d 788 (7th Cir. 1999).

8. *Id.* at 789-91. Tarpley was alleging a violation of his First Amendment right to freedom of political association pursuant to 42 U.S.C. § 2983. *Id.* at 790.

9. *Id.* at 795.

10. The balance referred to corresponds to Professor Laurence Tribe's "track two" analysis. If a government regulation is aimed at the non-communicative impact of the act, the courts will balance freedom of expression against the government's regulatory interests on a case by case basis. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 792-93 (2d ed. 1988). As Professor Tribe notes, "[i]t is impossible to escape the task of weighing the competing considerations. One example of this problem is often seen in the 'overlap' between the free exercise of the religion clause and the establishment clause." *Id.* at 1156-57. Another example occurs in balancing the freedom of speech against what are generally termed "time, place, and manner" restrictions. This goes to the distinction between speech and conduct, which Professor Tribe finds less helpful because "[a]ll communication except perhaps that of the extrasensory variety involves conduct." *Id.* at 827. Professor Tribe traces the origin of the concept to Justice Douglas' concurring opinion in *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 775-77 (1942). *Id.* at 826 n.4. The concept gained a more complete expression in *Teamsters Union v. Vogt Inc.*, 354 U.S. 284 (1957). There Justice Frankfurter found that picketing, which was the issue of the case, was "speech plus" and that the state could regulate the "plus." TRIBE, at 826 (discussing *Vogt*). In *Cox v. Louisiana*, Justice Goldberg adumbrated what Professor Tribe describes as the "fullest statement" of the "speech plus" problem. 379 U.S. 559, 564-66 (1965). In that decision the Court held that demonstrators peacefully gathering outside the Baton Rouge, Louisiana jail to protest segregation and the arrest of students for picketing stores with segregated lunch counters was "speech plus" and thus entitled to less protection than "pure speech." *Id.* at 568-75. (discussing *Louisiana v. Cox*, 379 U.S. 559 (1965)). However, "[e]xpression and conduct, message and medium, are thus inextricably tied together in all communicative behavior; expressive behavior is '100% action and 100% expression.'" TRIBE, at 827 (citing John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495-96 (1975)). Professor Tribe's analysis also has implications for the right of petition, as we shall see. *See infra* notes 365-78 and accompanying text.

11. *See supra* note 7, at 795-96.

12. 42 U.S.C. § 1983 (1994). Section 1983, which is a part of the Civil Rights Act of 1871, allows petitioners a cause of action for conspiracies intended to deprive them of their civil rights.

tional rights in general, the right of political association is more securely preserved.[14] The significance of *Tarpley v. Keistler* lies not only in its extension of the *Noerr-Pennington* doctrine to section 1983 actions and to one particular form of political patronage, but also in its recognition of the unique value of the right of petition.[15]

Part I of this Note will consider the background of the *Tarpley* decision in the following order.[16] First, a general review of the history of political patronage in Illinois will be followed by a discussion of a line of cases restricting the authority of the government to hire or fire employees on the basis of their political affiliations.[17] Second, a brief review of the incorporation of the right of petition into the Bill of Rights and discussion of several Nineteenth and Twentieth Century cases that have interpreted the right of petition.[18] Finally, an analysis of the *Noerr-Pennington* doctrine, together with a description of the cases that have extended the doctrine beyond the context of antitrust law where it originated.[19] Part II will review the subject opinion in depth[20] and Part III will analyze the *Tarpley* decision's recognition that the right of petition strengthens the other enumerated First Amendment rights of speech, press, and assembly by safeguarding the right to seek action from that part of the government most competent to provide redress.[21] Part IV will consider the potential impact of

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Id. A state actor for purposes of section 1983 need not be an employee of the state. *See also infra* notes 285-89 and accompanying text.

13. 188 F.3d at 791. State action is not limited to the conduct of state officials; the conduct of private parties can, under certain circumstances, constitute state action.

14. *See supra* note 7, at 794-95.

> In every free and deliberating society there must, from the nature of man, be opposite parties and violent dissentions and discords; and one of these must prevail over the other for a longer or shorter time. Perhaps this party division is necessary to induce each to watch and relate to the people the proceedings of the other.

DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 116-17 (1994). (Letter from Thomas Jefferson to John Taylor, June 4, 1798).

15. The First Amendment does not enumerate a specific "freedom of association," as it does speech, press, petition, or assembly. *See* TRIBE, *supra* note 10, at 702. The Supreme Court has recognized that implicit in the First Amendment (and in the liberties secured by the Fourteenth Amendment) a right of association to pursue goals that the First Amendment protects independently; political advocacy is one such example. *Id.* at 703. Thus, the issue in *Tarpley* focuses on how to balance the enumerated right of petition to pursue political association against the freedom of association to join (and not be penalized for joining) a political party.

16. *See infra* notes 23-267 and accompanying text.

17. *See infra* notes 24-102 and accompanying text.

18. *See infra* notes 102-161 and accompanying text.

19. *See infra* notes 162-265 and accompanying text.

20. *See infra* notes 268-325 and accompanying text.

21. *See infra* notes 326-402 and accompanying text.

Tarpley.[22] Finally, this Note will conclude that *Tarpley* appropriately advances and protects the right of petition.

II. BACKGROUND

A. Political Patronage in Illinois

Illinois has a rich history of political patronage, in large measure due to the contributions of the City of Chicago.[23] Consequently, many of the landmark cases defining the scope of political patronage have originated in Illinois.[24] The benefits of political patronage in Chicago and elsewhere are debatable. Justice Scalia, for example, in his dissenting opinion in *Rutan v. Republican Party of Illinois*,[25] argued that political patronage is not only constitutional, but an acceptable basis for political hiring.[26] Although disclaiming an endorsement of the practice, Justice Scalia observed that a legislature could reasonably determine that the benefits of patronage hiring outweigh its detrimental effects.[27] He noted, for example, that a legislature could conclude that patronage hiring strengthens party discipline, enhances party effectiveness, promotes a two-party system, and provides minor-

22. *See infra* notes 399-402 and accompanying text.

23. *See, e.g.*, LEN O'CONNOR, CLOUT: MAYOR DALEY AND HIS CITY (1975) (describing how the "machine" evolved in Chicago in the first three-quarters of the Twentieth Century); M. RAKOVE, WE DON'T WANT NOBODY NOBODY SENT: AN ORAL HISTORY OF THE DALEY YEARS (1979) (describing, in the often colorful words of important and not-so-important party workers, how the "machine" worked); MIKE ROYKO, BOSS: RICHARD J. DALEY OF CHICAGO (1971) (describing Mayor Daley's rise to power and his creation of a political organization). *See also* Bowman, *supra* note 3, at 62-65. Of course, political patronage in Chicago did not begin with Richard J. Daley. Mayor Carter Harrison operated a successful patronage machine in the late Nineteenth Century. DONALD L. MILLER, CITY OF THE CENTURY: THE EPIC OF CHICAGO AND THE MAKING OF AMERICA 434 (1996). Once again, Finley Peter Dunne's Mr. Dooley put it more colorfully. "Charter Haitch? What wud a man that's been mayor iv Chicago do with an infeeryor job like th' prisdincy?" FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 96 (1906).

24. *See, e.g.*, Rutan v. Republican Party of Illinois, 497 U.S. 62, 79 (1990) (extending the holding of Elrod to include promotions, transfers and hiring decisions based on political patronage); Elrod v. Burns, 427 U.S. 347, 372 (1976) (holding patronage dismissals severly restrict political belief and association); Vickery v. Jones, 100 F.3d 1334 (7th Cir. 1996); Tarpley v. Jeffers, 96 F.3d 921 (7th Cir. 1996) (holding that state officials had qualified immunity in hiring temporary employees on political patronage grounds); Shakman v. Democratic Party of Cook County, 569 F. Supp. 177 (N.D. Ill. 1983) (holding eliminated political considerations in hiring of governmental employees). Of course, Illinois lacks a monopoly on political patronage. New York and Louisiana are two other jurisdictions in which patronage is common. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 140-44 (1983) (cause of action originated in New Orleans); Branti v. Finkel, 445 U.S. 507, 508 (1980) (cause of action originated in New York).

25. 497 U.S. 62, 92 (1990) (Scalia, J., dissenting).

26. *Id.* at 97. (stating that long tradition and no basis for holding patronage–based dismissals, violates the First Amendment).

27. *Id.* at 104.

ity groups with political access.[28] Other commentators have disputed the validity of the political patronage benefits recited by Justice Scalia and have in fact argued the opposite.[29] Whatever the merits of patronage hiring, the practice is largely disfavored in law, even though it continues to flourish in Illinois and elsewhere.[30]

An examination of modern political patronage cases begins with *Elrod v. Burns*.[31] In *Elrod*, the petitioners were non-civil service employees of the Illinois Cook County Sheriff's Office, and members of the Republican Party.[32] The petitioners alleged that they were dismissed, or threatened with dismissal, solely because they belonged to the Republican Party.[33] In December 1970, Sheriff Elrod, a Democrat, assumed office from his Republican predecessor and fired, or threatened to fire, non-civil service Republican employees who refused to change parties.[34] It had become a long-standing practice of the Cook County Sheriff to replace non-civil service employees with members of his own political party.[35]

The petitioners argued that their discharge violated the First and Fourteenth Amendments of the United States Constitution, and accordingly sought relief under sections 1983, 1985, 1986, and 1988 of Title 42 of the United States Code.[36] Writing for a plurality of the Court, Justice Brennan found that patronage hiring imposed restraints on the freedoms of belief and association, as well as the "free-functioning of the electoral process."[37] Justice Brennan acknowledged that preservation of the democratic process could justify limits on First Amendment rights.[38] However, he concluded that patronage dismissals as a means of preserving the democratic process, were not the

28. *Id.* at 104-10. Justice Scalia relied on Justice Powell's dissenting opinions in *Branti* and *Elrod*. *See id.* at 105.

29. *See* Bowman *supra* note 3, at 111-15.

30. *See* Bowman *supra* note 5, at 358-61. Patronage hiring need not be based on political party affiliation. The *Chicago Tribune* recently reported that John Stroger, President of the Cook County Board, had appointed or "recommended" the hiring of many members of his extended family for Cook County jobs. Robert Becker, *Stroger the One to See About a Job*, CHI. TRIB., Oct. 3, 1999, *available in* 1999 WL 2918346.

31. 427 U.S. 347 (1976).

32. *Id.* at 350.

33. *Id.* at 351.

34. *Id.* at 350-51.

35. *Id.*

36. *Id.* at 350. Section 1983 only offers a cause of action for a deprivation of a petitioner's civil rights in violation of the Constitution or other applicable federal law. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 615-19 (1979). The Civil Rights Act of 1871 is also known as the "Ku Klux Klan Act." *Id.* at 611 n.25.

37. 427 U.S. at 356.

38. *Id.* at 368.

least restrictive means available to promote that goal.[39] Justice Brennan noted, for example, that patronage dismissals could impair the democratic process by entrenching a single party.[40] Accordingly, the Court held patronage dismissals were unconstitutional, except when they involved the dismissals of persons in "policy making" positions.[41]

Four years later the Court dealt with the policy-making exception in a case from New York, *Branti v. Finkel*.[42] The respondents in *Branti* were two assistant public defenders employed by Rockland County, New York.[43] The respondents learned that they were going to be discharged by the Public Defender solely because they were members of the Republican Party.[44] The respondents obtained a temporary restraining order from the United States District Court for the Southern District of New York enjoining the Public Defender from terminating their employment on the basis of their party affiliation.[45] The district court held that the respondents could not be discharged solely on the basis of their political party affiliation unless they occupied policy-making positions.[46] In particular, the district court found the petitioners did not occupy a confidential position in relation to the policy-making process.[47] The United States Court of Appeals for the Second Circuit affirmed.[48]

The Supreme Court affirmed the court of appeal's decision and accepted the reasoning of the district court that confidentiality and policy-making must involve partisan political objectives.[49] In the case of an assistant public defender, the Court found that the policy-making and confidentiality alleged to justify the dismissals related only to the needs of individual clients, not to the larger issues of partisan politics.[50] The upshot of the decision in *Elrod* and *Branti* was the prohibition of political patronage based discharges, unless the employee occupied a position requiring confidentiality and policy-making re-

39. *Id.* at 369.

40. *Id.* Patronage can result in the entrenchment of one or a few parties to the exclusion of others.

41. *Id.* at 372. Policies which the electorate has sanctioned are effectively implemented with this decision. *Id.*

42. 445 U.S. at 508 (1980).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 509-11.

47. *Id.* at 511. Thus, the court found the only confidential aspect of their work was that related to the work product of their attorney-client relationships. *Id.*

48. 445 U.S. at 509.

49. *Id.* at 518-20.

50. *Id.* at 519.

lated to partisan political objectives.[51] The two decisions served to restrict the ability of government employers to discharge rank and file employees on the basis of an employee's political affiliation.

In *Shakman v. Democratic Organization of Cook County*,[52] the Northern District of Illinois held that hiring on the basis of political party affiliation was illegal.[53] In 1969, the plaintiffs, individually and on behalf of independent candidates, voters, and taxpayers in Cook County, sued in district court alleging that various defendants, including the City of Chicago, violated their constitutional rights by conditioning employment upon political party affiliation.[54] The district court dismissed the complaint, but the United States Court of Appeals for the Seventh Circuit reversed the dismissal and remanded.[55] The United States Supreme Court denied certiorari and settlement negotiations began.[56] On May 5, 1972, the district court approved the settlement and entered a consent decree applying to those employees already hired.[57] As part of that decree, the court retained jurisdiction for the parties to continue litigating the issue of whether political affiliation may be considered in hiring employees.[58]

In 1979, the court granted the plaintiffs' motion for partial summary judgment finding that the defendants had illegally hired employees for government positions on the basis of political party affiliations.[59] In 1983, the court entered judgment in favor of the plaintiffs and provided relief as determined by the 1979 order. The judgment generally followed the policy-making exception of *Branti*,[60] and provided for certain categories of exempt employees, such as department heads.[61]

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51. *See supra* note 5, at 344, 344 n.21.

52. 569 F. Supp. 177 (N.D. Ill. 1983).

53. *Id.* at 178. Governmental employees were to be free of all coercion and discrimination based on political considerations.

54. *Id.* at 204-05 (discussing *Shakman*, 310 F. Supp. 1398 (N.D. Ill. 1969)).

55. *Id.* at 178 (discussing *Shakman*, 435 F.2d 267 (7th Cir. 1970)).

56. *Id.*

57. *Id.*

58. 569 F. Supp. at 205.

59. *Id.* at 178 (discussing Shakman v. Democratic Org. of Cook County, 481 F. Supp. 1315 (N.D. Ill. 1979)). The *Shakman* decision took fourteen years to be resolved because the proceedings were split into what amounted to three phases. First, the negotiations that led to the consent decree in 1972 involved employees already hired. *Id.* Between 1972 and 1979, the issue of whether the plaintiffs were impermissibly denied employment on the basis of political affiliation continued to be litigated. *Id.* After partial summary judgment was entered for the plaintiffs in 1979, the court held multiple hearings and reviewed briefs to determine the plaintiffs' remedy. *Id.* The remedy was entered with the 1983 judgment. *Id.* at 205-06.

60. 445 U.S. at 508.

61. *Id.* at 206.

In *Rutan v. Republican Party of Illinois*,[62] the United States Supreme Court upheld the general principle expressed in the *Shakman* decisions; political patronage is an impermissible basis for hiring government employees, although certain policy-making positions may be exempt.[63] The issue in *Rutan* was an executive order promulgated by Governor James Thompson of Illinois on November 12, 1980, in which he imposed a hiring freeze for every agency under his authority.[64] The order affected sixty thousand state positions, of which approximately five thousand became vacant each year through resignation, retirement, or death.[65] The order further stated, "no exceptions" would be allowed without the governor's express permission.[66] However, the plaintiffs in *Rutan* alleged Governor Thompson's express permission was granted routinely through the Governor's Office of Personnel.[67] The various agencies would screen applicants under the Illinois civil service system, make their choices, and then submit them to the Office of Personnel to be approved or denied.[68]

Rutan and the other petitioners alleged that the practice of routing hiring decisions through the Office of Personnel camouflaged a political patronage system that restricted state employment to those affiliated with the Republican Party.[69] The petitioners alleged that the Office of Personnel specifically considered whether the applicant had voted in past Republican primaries, whether the applicant had provided financial support to Republican Party candidates or promised to work for the party, and whether the applicant had the support of Republican Party officials at state or local levels.[70]

The United States Supreme Court held that *Elrod* and *Branti* applied to the facts of *Rutan* regarding those petitioners who were denied promotion or rehiring following layoffs.[71] Rutan alleged that she

62. 497 U.S. at 62.

63. *Id.* at 72. The 1979 *Shakman* decision held that the defendants had wrongly based hiring decisions on impermissible political considerations. *See* United States v. Holley, 481 F. Supp. 61 (S.D. Fla. 1979). The 1983 *Shakman* decision enjoined the defendants from conditioning the hiring of all but some exempt categories of prospective employees on political grounds. *See Shakman*, 569 F. Supp. at 179, 191.

64. 497 U.S. at 64.

65. *Id.* at 60. Every agency, bureau board, or commission subject to the governor's control fell under the scope of the executive order. *Id.* at 65.

66. *Id.* at 65.

67. *Id.* at 66. The agency was expressly created for this purpose. *Id.*

68. *Id.* Some employment decisions have required approval for new hires, promotions, transfers, and recalls after layoffs.

69. *Id.*

70. 497 U.S. at 66.

71. *Id.* at 74-79. The same First Amendment concerns in those decisions were implicated here.

had been denied promotions to supervisory positions for which she was qualified because of her support of the Democratic Party.[72] Other plaintiffs, who either were, or had been, State of Illinois employees, alleged that they had not been recalled after layoffs because they voted in Democratic primaries, or lacked the support of Republican party workers.[73] The Court noted that the government's interest in maintaining effective employees could be met by dismissal or demotion for deficient work, while the government's interest in hiring employees who would loyally implement its policies could be secured by selecting certain high-level employees on the basis of their political affiliation.[74] Thus, the Court held that promotions, transfers, and recalls after layoffs, based on political affiliation, impermissibly violated the First Amendment rights of government employees.[75] "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate."[76] The Court also extended the principles of *Elrod* and *Branti* to hiring decisions, holding that the government's rejection of an applicant on the basis of his political party affiliation restricted the applicant's exercise of his First Amendment rights.[77]

Rutan did not mark the end of political patronage litigation in Illinois. In 1996, plaintiff Gary Vickery alleged that state officials in Illinois, and certain members of the Illinois Republican Party, continued to operate a political patronage system in violation of the Constitution.[78] Specifically, Vickery alleged that certain Illinois state officials, as well as members of the Illinois Republican Party, supported financial and political backers of the Illinois Republican Party for employment as highway maintainers.[79] After *Rutan* was handed down by the Supreme Court, Governor James Thompson and his successor Governor Jim Edgar ordered that hiring, or other personnel decisions should not be made on the basis of an applicant's political party affili-

72. *Id.* at 67.

73. *Id.*

74. *Id.* at 69-70.

75. *Id.* at 75-76.

76. 497 U.S. at 76.

77. *Id.* at 74-75.

78. Vickery v. Jones, 100 F.3d 1334, 1334-36 (7th Cir. 1996). According to the opinion, Vickery alleged a violation of sections 1983 and 1988 under Title 42. *Id.* Section 1983 provides a cause of action for a deprivation of a petitioner's civil rights in violation of other federal laws. *See* Chapman 441 U.S. at 616.

79. *Id.* at 1335.

ation.[80] However, Governor Edgar determined that temporary employees would be treated as exempt from *Rutan*, thus allowing political affiliation to be considered in their hiring.[81] In fact, political party affiliation and support were among the criteria used in filling temporary positions.[82] The Illinois Department of Transportation hired the plaintiff, Gary Vickery, as a temporary highway maintainer on the basis of his brother's recommendation.[83] His brother, Randy Vickery, was the chairman of the Gallatin County Republican Central Committee at the time.[84] Gary Vickery performed his duties satisfactorily, but when his six-month contract expired, the position went to another applicant.[85] Meanwhile, the plaintiff's brother, Randy, had been replaced as the chairman of the Gallatin County Republican Central Committee.[86] The United States Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the plaintiff's damages suit on the ground that the unconstitutionality of political patronage based personnel decisions regarding temporary employees had not been established at the time the incidents at issue occurred.[87] Therefore, official immunity barred a damages claim against government officials for the violation of the law.[88] Furthermore, the court held that qualified immunity protected the state officials from an award of damages, and the plaintiff had failed to show state action regarding the party defendants.[89]

Prior to the decision in *Vickery*, but after the incidents precipitating that case, the United States Supreme Court decided *O'Hare Truck Service, Inc. v. City of Northlake*.[90] The respondent, the City of Northlake, coordinated a towing service through its police department,

80. *Id.* at 1336-37. However, Governor Edgar determined that temporary employees would be treated as exempt from the holding in *Rutan*.

81. *Id.*

82. *Id.* at 1337. The defendants admitted that this was true in awarding temporary highway maintenance positions in Illinois Department of Transportation. *Id.*

83. *Id.*

84. 100 F.3d at 1337.

85. *Id.* The position was not advertised or posted in any way. *Id.*

86. *Id.*

87. *Id.* at 1346-47. No evidence of deliberate deception by the plaintiffs was offered. *Id.* at 1340.

88. *Id.* at 1343. Regardless of subjective motivation, this immunity still applies. *Id.*

89. *Id.* at 1340. *See* Owen v. City of Independence, Mo., 445 U.S. 622, 656 (1980) (holding that the liability for Constitutional violations is quite properly the concern of its elected or appointed officals). Municipalities and states have no immunity from damages for violations of the United States Constitution caused by their employees' actions. 445 U.S. at 655-60. Section 1983 creates a cause of action that local governments may not avoid. In contrast, municipal and state employees, who act in good faith, are protected from personal liability by qualified immunity. *Id.* at 657.

90. 518 U.S. 712 (1996).

which maintained a rotating list of available towing services.[91] Whenever a request for a tow was made to the police department, the dispatcher would call the towing service next on the list.[92] O'Hare Truck Service had been on the rotating list for almost thirty years.[93] Prior to the events at issue, the City of Northlake had only removed towing services from the list for cause.[94]

In 1989, the new mayor of Northlake, Reid Paxson, affirmed that O'Hare would only be removed from the list for deficient service.[95] Four years later, during Paxson's reelection campaign, John Gratzianna, the owner of O'Hare, refused to make a campaign contribution to Paxson while openly supporting Paxson's opponent.[96] After Paxson was reelected, O'Hare was removed from the rotating list.[97] O'Hare sued under 42 U.S.C. §1983 alleging an infringement of its First Amendment rights.[98]

The United States Supreme Court extended the principles of *Elrod* and *Branti* to decisions regarding independent contractors, holding that the government "may not coerce support . . . unless it has some motive beyond dislike of the individual's political association."[99] The Court found unpersuasive the respondents' argument that since O'Hare could have been terminated at any time for any reason, including punishment for political opposition, no justification was required for the dismissal.[100] Although government officials can terminate at-will relationships without cause, "it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views . . . ."[101]

The line of decisions from *Elrod* through *O'Hare Trucking* established that the government may not base employment decisions on political party affiliations, with the limited exception for those employees in policy-making positions. This restriction applied to both government and private actors, whenever the state action requirement could be met. Left unresolved, however, was the problem of how to

91. *Id.* at 715. This has been the practice for at least 30 years. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 712.

95. *Id.* at 715.

96. 518 U.S. at 715. Gratzianna displayed the opponent's campaign posters at O'Hare's place of business. *Id.*

97. *Id.* at 715-16.

98. *Id.* An action was also brought under Revised Statute Section 1979. *Id.*

99. *Id.* at 720-26. Coercion was present just as it was in *Elrod* and *Branti*. *Id.*

100. *Id.* at 725-26. Governmental entities can terminate at-will relationships, but cannot impose conditions that impute political patronage. *Id.*

101. *Id.* at 725-26.

reconcile the associational rights of private individuals, when the assertion of those rights was adverse to one of the enumerated First Amendment rights of other private individuals, and evidence of state action was inconclusive. This is the problem adddressed in *Tarpley v. Keistler.*

B. The Right of Petition

The particular enumerated right at issue in *Tarpley v. Keistler* is the right of petition. Therefore, an examination of that right and its interpretation in case law prior to the development of the *Noerr-Pennington* doctrine is necessary to understand what distinguishes the right of petition from the other enumerated rights of speech, press, and assembly.

1. Origins of the Right of Petition

An analysis of the right of petition must begin with an examination of the petition clause itself. The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[102] In the Congressional debate on what would become the First Amendment, James Madison clearly stated that the purpose of the right of petition was to enable citizens to "communicate their will" through direct petitions to the

102. U.S. CONST. amend. I. The historical evolution of the right of petition in Anglo-American jurisprudence from its origins in medieval England to its incorporation in the First Amendment to the Constitution of the United States is beyond the scope of this Note. Nevertheless, a brief overview of the evolution of the right of petition may be useful.

Although the earliest of example of a petition in Anglo-American legal history is the English leaders' petition to Aethelred the Unready in 1013, the Magna Carta of 1215 is generally believed to have secured the right of petition in English law. *See* Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1154-55 (1986). The Magna Carta was King John's response to his barons' petition for redress of various grievances. *Id.* at 1155. A century later, the right had been expanded so that noblemen, sometimes individually and sometimes collectively, commonly petitioned the King for favors as well as redress of grievances. *Id.* at 1156. In that period petitions provided the mechanism by which new laws were initiated. *Id.* at 1155-56. The Seventeenth Century, a period of constitutional crisis, internal unrest, and finally civil war, and petitioning grew in popularity among commoners as a means of protesting, among other things, taxes, dispersal of the army, and state religious institutions. *Id.* at 1156-62. However, the right was not protected. One could be imprisoned for petitioning if the petition was presented in a disorderly manner or if the petition was intended to be "seditious." *Id.* at 1158-59. Not until the Eighteenth Century did the right of petition come to enjoy a protected status in England. *Id.* at 1166-67. Protection of the right of petition was not the case in the American colonies until the time of the American Revolution. *Id.* at 1173. Pre-union colonial constitutions affirmed the right and eventually it became part of the First Amendment. *Id.*

legislature or officials of the government.[103] An examination of the debate on the language of the amendment indicates that Madison and others intended the right of petition, as well as each of the other enumerated rights, to be separate and distinct rights.[104]

The original text of the proposed amendment stated that "[t]he freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed."[105] The word "petition" was not used in the proposed amendment, but rather the word "apply." Congressman Thomas Tucker of South Carolina moved to add "instruct their representatives" to the phrase "apply to the Government for a redress of grievances."[106] The Federalists argued that such an instruction[107] would bind the legislature to the "popular opinions of the moment."[108] Representative Roger Sherman, a Federalist, replied that the wiser practice was to receive the counsel of the people indirectly through their speech and press, or when they assembled and directly presented grievances through petitions.[109] The right of petition became one of several mechanisms by which citizens could inform the government of their concerns, thereby securing the greatest degree of direct access a citizen had to his government.

Representative Theodore Sedgwick of Massachusetts moved to delete the words "assemble and," and argued that the freedom of speech embraced the freedom of assembly.[110] "If people freely converse together, they must assemble for that purpose; it is a self-evident

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103. 1 ABRIDGEMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1856, at 141 (New York, D. Appleton & Co., 1857) (hereinafter "ABRIDGEMENT OF THE DEBATES"). "[T]he people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may *communicate their will*." *Id.* at 141-42 (emphasis added).

104. *See* BERNARD SCHWARTZ, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1051-52 (1971); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2207-12 (1998).

105. *See* Smith, *supra* note 102, at 1175 (emphasis added).

106. *See* ABRIDGEMENT OF THE DEBATES, *supra* note 103, at 188; Mark, *supra* note 104, at 2209.

107. Instruction referred to the process by which constituents would compose a list of directions to send to their representatives directing or "instructing" them how to vote on particular issues. It is a form of referendum. The practice was particularly common in colonial New England. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 189-90 (1969).

108. *See* ABRIDGEMENT OF THE DEBATES, *supra* note 103, at 189.

109. *Id.* at 189-90.

110. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 630 (1999).

unalienable right which the people possess . . . ."[111] Neither Congressman Sedgwick, nor any other participant in the debate, argued that assembly included or restricted the right of petition.[112] Although that portion of the debate centered around an explicit right of assembly, in defeating Congressman Sedgwick's motion, opponents countered that each of the enumerated rights was a separate right inherent in the people and therefore should be accorded specific protection against government infringement.[113]

As those early congressional debates indicated, the rights of speech, press, assembly, and petition were enumerated because they were intended to be separate rights.[114] In particular, the debates suggested that the right of petition was intended, from the beginning of the Republic, to be a separate right providing the means by which a citizen could directly inform the government, or some official within the government, of a matter of concern to the citizen.[115] Congressional debates on the First Amendment never explicitly stated what was unique or special about the right of petition that justified its enumeration. Logically, the Framers must have believed that the right of petition was distinct to some degree from the rights of speech, press, and assembly. If the right of petition was not distinct, the Framers would not have bothered to enumerate it separately and defend that position in debate.

The right of petition is not surplusage. As Madison stated, the right of petition allows the people to "communicate their will" to the government.[116] The key to understanding the right of petition lies in appreciating how the right of petition strengthens the freedoms of speech, press, and assembly in enabling citizens to communicate their will to the government.

2. *Early Cases*

Perhaps the earliest case construing the First Amendment right of petition is *Harris v. Huntington*.[117] In *Harris*, the defendant sent a letter to the Vermont Legislature impugning the qualifications and

111. *Id.*

112. *Id.* at 631. Opponents of Representative Sedgwick's motion realized that assembly was often essential to collective petitioning. *See, e.g.*, Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L. Q. 13, 41 (1993) (discussing the evolution of the right of petition).

113. Andrews, *supra* note 110 at 631.

114. *Id.* at 631-2.

115. *Id.* at 630.

116. *See supra* note 103, at 141.

117. 2 Tyl. 129 (Vt. 1802).

character of the plaintiff to hold the office of Justice of the Peace.[118] The plaintiff sued alleging libel, but the court held that the issue of libel was irrelevant because the letter was protected as a petition directed to the branch of the Vermont Legislature charged with electing Justices of the Peace.[119] "The first exception [to the lower court's decision] involves a question of greater magnitude, and more interesting to the people of *Vermont* [sic] than any which has been hitherto agitated in this Court, to wit, whether it is actionable in the citizens to represent their grievances by petition to the General Assembly."[120] The court held the letter was not actionable because "[a]n absolute and unqualified indemnity from all responsibility in the petitioner is indispensable . . . for it would be an absurd mockery in a government to hold out this privilege to its subjects, and then punish them for the use of it."[121]

Massachusetts departed from *Harris* in *Bodwell v. Osgood*,[122] on the issue of whether libel in a petition to the government was *absolutely* protected. "[A] false complaint, made with express malice, or without probable cause, to a body *having competent authority to redress the grievance complained of*, may be the subject of an action for libel."[123] The United States Supreme Court relied on *Bodwell* in *White v. Nicholls*.[124] In *White*, the Court held that libel in a petition was not protected if there was "express malice," but conceded that if the petitioner had proceeded with "honest intentions," his actions would be entitled to protection.[125] The decisions in *Harris*, *Bodwell*, and *White* focused primarily on the contents of the respective petitions and whether they could be protected if libelous. In addition, each decision acknowledged that the right of petition exists to permit petitioners' direct access to "a body having [the] competent authority to redress the grievance."[126]

The United States Supreme Court gave further expression to the right of petition a generation later in *United States v. Cruikshank*.[127] In *Cruikshank*, a group of former slaves charged the defendants with conspiring to prevent them from exercising their right to assemble

118. *Id.*
119. *Id.* at 146.
120. *Id.* at 135.
121. *Id.* at 139-40.
122. 3 Pick. 379 (Mass. 1824).
123. *Id.* at 384 (emphasis added).
124. 44 U.S. (3 How.) 266 (1845).
125. *Id.* at 290 (citing *Bodwell*, 3 Pick. at 384-85).
126. 3 Pick. at 379.
127. 92 U.S. 542 (1875).

peaceably.[128] The Court held that "[t]he right of the people peaceably to assemble for the *purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government*, is an attribute of national citizenship . . . ."[129] The United States Government could protect such an assembly, the Court continued, because an assembly for the purpose of petitioning the government for redress of grievances invoked a constitutionally protected right.[130] An assembly for any other generally lawful purpose was not so protected because a specific constitutional right was not implicated.[131] The right of petitioning, the Court held, merited special protection because it was the means by which the petitioner had access to his government.[132]

During the latter part of the Nineteenth Century, the right of petition began to evolve beyond the form in which it had existed in the early years of the Republic. Along with the evolution of the right of petition, its distinctive value from the other enumerated First Amendment rights began to emerge more clearly. Not only did the right of petition secure a citizen's right of access to his government, it also allowed him to choose freely the subject matter of his petition,[133] and the agency or individual to whom he would direct that petition.[134] Of course, in one sense the right of petition remained a component of a broader right to freedom of expression, which included speech, press, and assembly. Therefore, choosing the subject matter of a petition or

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128. *Id.* at 551. The complaint did not specifically mention the right of petition the government for redress of grievances. In failing to so specify, the court held the complaint defective in presenting a cause of action, the remedy to which could not be supplied by the federal government. *Id.* at 553.

129. *Id.* at 552 (emphasis added).

130. *Id.* at 552-53.

131. *Id.* at 553. The incident at issue in *Cruikshank* occurred in 1872 in Colfax, Louisiana. Contending political factions engaged in a battle, which has been described as "the bloodiest single act of carnage in all of Reconstruction." RANDALL KENNEDY, RACE, CRIME, AND THE LAW 50 (1997) (citing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 530 (1988)).

> The faction opposing Reconstruction killed about 280 African-Americans, many of whom were unarmed. *Id.* The federal government indicted 97 individuals under the Enforcement Act of 1870, but only managed to bring nine to trial and to convict three. *Id.* The United States Supreme Court overturned the three convictions on the grounds that the prosecutors failed to charge the defendants with crimes punishable by the federal government. *Id.* The Court held that the prosecution failed to make explicit charges that the defendants attacked the victims because of their race. *Id.* Absent an explicit charge of racial motive, the actions of the defendants were not crimes under federal law. *Id.*

132. 92 U.S. at 552.

133. *See Cruikshank*, *supra* note 127 at 542.

134. *See Bodwell*, *supra* note 122.

the government agency to receive it could be interpreted simply as an exercise of the freedom of expression. However, the right of petition was also slowly beginning to immunize certain forms of expression, which might otherwise be actionable, as long as those expressions were presented as requests for governmental action. In contrast to the Seventeenth and Eighteenth Centuries,[135] the Nineteenth Century expanded the definition of what constituted a petition as well as the classes of expression meriting immunity.[136]

3. *Twentieth Century Cases*

Twentieth Century petition cases are few, but nevertheless instructive because the cases continued the expansion of both the definition of petition and the forms of expression meriting immunity as petitions. For example, in *DeJonge v. Oregon,*[137] the United States Supreme Court first applied the term "cognate rights" to describe the enumerated First Amendment rights of speech, press, assembly, and petition.[138] Citing *Cruikshank*, the Court held that peaceful assembly for lawful public discussion could not be made a crime.[139] The petitioner DeJonge was free to participate in a public meeting held under the auspices of the Communist Party, so long as the purpose of the meeting itself was lawful.[140] Similarly, in *Thomas v. Collins,*[141] the Court specifically identified the rights of petition and assembly as "cognate rights" in striking down a Texas statute that prohibited individuals from soliciting union membership without first obtaining a union organizer's card.[142] "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured,

135. Mark, *supra* note 104, at 2170-74. "A [petition] was a communication which, to be protected, had to take a certain form and embody certain components." *Id.* at 2171. "By the seventeenth century . . . [a] petition was a communication that, 1) had to be addressed to an authority such as the King, 2) had to state a grievance, and, 3) had to pray for relief." *Id.* at 2173. In the early years of the Republic, petitions composed in a "certain form" were frequently directed to Congress and Congress attempted to pass on them. *Id.* at 2212. As the debate over slavery intensified, the volume of petitions grew until Congress imposed a "gag rule" on petitions concerning slavery or its abolition. *Id.* at 2216-17. Although Congress eventually repealed the "gag rule," the period when the rule was in effect is thought by some to mark the decline of formal petitions and consequently the right of petition itself. *Id.* at 2215-28.

136. *See supra* notes 117-35 and accompanying text. As Professor Mark noted, with a change in political culture in the Nineteenth Century, distinguishing petitions from political speech became more difficult to do. Mark, *supra* note 104, at 2228. In part, this process was a concomitant to "the independent expansion of the protection of speech and press." *Id.* at n.358.

137. 299 U.S. 353 (1937).

138. *Id.* at 364.

139. *Id.* at 364-65.

140. *Id.* at 365-66.

141. 323 U.S. 516 (1945).

142. *Id.* at 518, 530.

and with it the right of assembly, are not solely religious or political ones . . . . [F]ree speech and a free press are not confined to any field of human interest."[143]

In *Gibson v. Florida Legislative Investigation Committee,*[144] a committee of the Florida Legislature investigated the National Association for the Advancement of Colored People (NAACP) because of suspected Communist affiliations.[145] The committee ordered the petitioner, Gibson, to produce the membership list of the Florida NAACP.[146] Gibson refused to produce the list arguing that to do so would compromise the associational rights of NAACP members, and potential NAACP members under the First and Fourteenth Amendments.[147] A Florida state court adjudged Gibson in contempt, and sentenced him to six months in prison and a $1,200 fine.[148] The United States Supreme Court reversed the judgment holding that compulsory process must be carefully restricted when, absent any evidence of illegal or subversive activity, it threatens to impinge upon First Amendment freedoms.[149]

Of relevance to this Note is Justice Douglas' concurring opinion in *Gibson*, which examined associational rights and the right of assembly.[150] Justice Douglas noted that "[j]oining a group is often as vital to freedom of expression as utterance itself. Joining a political party may be as critical to expression of one's views as hiring reporters is to the establishment of a free press."[151] Justice Douglas recognized that neither political party affiliations, nor other kinds of affiliations occur in a vacuum. Membership in a political party, or in any of free society's "innumerable institutions," is where "views and opinions are expressed, opinions mobilized, and social, economic, religious, educational, and political programs are formulated."[152] "A coming together is often necessary for communication–for those who listen as well as for those who speak."[153] During the second half of the Twentieth Century, the United States Supreme Court had expanded the definition of petition beyond the classical forms of the Seventeenth, Eighteenth, and early Nineteenth Centuries, to include a wide range

143. *Id.* at 531.
144. 372 U.S. 539 (1963).
145. *Id.* at 540-41.
146. *Id.*
147. *Id.* at 542-43.
148. *Id.* at 543.
149. *Id.* at 558.
150. *Id.* at 562-65 (Douglas, J., concurring).
151. 372 U.S. at 565 (Douglas, J., concurring).
152. *Id.* at 563.
153. *Id.* at 564.

of concerns, which did not have to be especially momentous to merit protection.[154] The Court also began to accept that the right of petition did not have to be restricted to traditional oral or written expressions, but could be implicated, for example, by membership in a group.[155]

Although the Supreme Court expanded the scope and definition of the right of petition during the Twentieth Century, it stopped short of granting blanket immunity to any act that could be characterized as a petition in *McDonald v. Smith*.[156] The Court declined to elevate the petition clause to "special First Amendment status."[157] In *McDonald*, the petitioner wrote two allegedly defamatory letters to President Ronald Reagan and other members of the government claiming that the respondent, under consideration at that time for the position of United States Attorney, engaged in fraud, extortion, and civil rights violations.[158] The United States District Court for the Middle District of North Carolina denied the petitioner's motion for a judgment on the pleadings holding that the petition clause did not confer absolute immunity from liability for libel.[159] Both the United States Court of Appeals for the Fourth Circuit and the United States Supreme Court, following *White*[160]and *Bodwell*,[161] affirmed the decision.[162]

C. *The Noerr-Pennington Doctrine*

The *Noerr-Pennington* doctrine evolved from two cases decided by the United States Supreme Court in the early 1960s, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[163] and *United Mine Workers of America v. Pennington.*[164] In *Noerr Motor Freight,* a group of forty-one Pennsylvania truck operators and their trade association, the Pennsylvania Motor Truck Association, alleged that the defendants, twenty-four eastern railroads, conspired to restrain trade and

154. *See supra* notes 142-44.

155. *See supra* notes 150-53. Justice Douglas would make this point more forcefully in his dissenting opinion in *Adderley v. Florida*, 385 U.S. 39, 49-50 (1966) (Douglas, J., dissenting).

156. 472 U.S. 479 (1985).

157. *Id.* at 485.

158. *Id.* at 480-81.

159. *Id.* at 482.

160. *See generally Bodwell*, 3 Pick. 379 (Mass. 1824) and *White*, 44 U.S. (3 How.) 266 (1845).

161. 472 U.S. at 482.

162. 472 U.S. at 484. Professor Mark concluded that the letters really were not petitions because they lacked "'petitionary parts.'" *See* Mark, *supra* note 103, at 2228 n.358. Of course the letters would not fit the definition of a "classic" petition. *See supra* note 136 and accompanying text (providing a definition of the "classic" petition). One point of *Tarpley*, as well as that of Justice Douglas' dissent in *Adderly*, was that what constitutes a valid petition has changed over 300 years and continues to change. *See infra* notes 390-98 and accompanying text.

163. 365 U.S. 127 (1961).

164. 381 U.S. 657 (1965).

monopolize long-distance freight hauling in violation of the Sherman Act.[165] Specifically, the plaintiffs alleged a conspiracy involving the retention of co-defendants Carl Byoir & Associates, a public relations firm, to develop a publicity campaign to encourage the adoption of laws detrimental to the trucking industry.[166] The plaintiffs alleged that as a result of the campaign, the defendants had persuaded the Governor of Pennsylvania to veto the "Fair Truck Bill, which would have permitted truckers to carry heavier loads over the Pennsylvania roads."[167]

The defendants countered that their publicity campaign was undertaken to inform the public and the state legislature about the extensive damage done to state roads by overloaded trucks, the driving hazards posed by such trucks, the deliberate violations of the laws regarding weight limitations by trucks, and the failure of the trucking firms to pay their fair share in taxes for road maintenance.[168] Subsequently, the defendants filed a counter-claim alleging that the plaintiffs had violated the Sherman Act by conspiring to monopolize the long-distance freight hauling business in much the same way as the railroads allegedly had done.[169]

The district court found that the railroads' publicity campaign, to the extent that it was directed at the legislature and law-enforcement authorities, was malicious, fraudulent, and intended to injure the truckers' business interests by destroying the goodwill they enjoyed among the public and their customers.[170] In holding for the truckers, the district court found that the railroad industry employed a third party, Carl Byoir & Associates, to conduct a malicious publicity campaign intended to eliminate the trucking industry as a competitor to the railroads.[171] Moreover, the court noted that destroying the goodwill of the trucking industry would damage the truckers in a way unrelated to the passage of the "Fair Truck Bill."[172] The district court

165. 365 U.S. at 128-31.

166. *Id.*

167. *Id.*

168. *Id.* at 131-32.

169. *Id.*

170. *Id.* at 132-35.

171. 365 U.S. at 132-35.

172. *Id.* The district court applied Justice Story's definition of good will:

> [G]ood will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill, or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

believed the railroads could have opposed the bill in a manner not intended to discredit the truckers.[173] The United States Court of Appeals for the Third Circuit affirmed.[174]

The petitioners filed for certiorari on the limited question of whether the lower courts erred in holding that they had violated the Sherman Act.[175] The United States Supreme Court granted certiorari and reversed on the ground that the case involved a new application of the Sherman Act that threatened to impose severe restrictions on the rights of an individual to advocate for, or against, the passage of legislation.[176] The Court held that the Sherman Act did not prohibit two or more persons from associating together to persuade the legislature or executive to support a bill that would produce a restraint of trade or a monopoly.[177]

> To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.[178]

The Court also held that such an application of the Sherman Act would affect the First Amendment, in particular, the right of petition.[179] "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[180] Thus, the Court concluded that the Sherman Act did not apply to activities soliciting government action regarding the passage and enforcement of laws.[181]

The Court further concluded that the motivation of the defendants in seeking passage and enforcement of the laws was irrelevant, even though the railroads intended to destroy long-distance truckers as competitors.[182]

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of

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Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 155 F. Supp. 768, 810 (E.D. Pa. 1957).

173. 155 F. Supp. at 823. *See also id.* at 779-801 *passim* (discussing the railroads publicity campaign of "vilification" in detail).

174. 365 U.S. at 135.

175. *Id.*

176. *Id.* at 135-37, 144-45.

177. *Id.*

178. *Id.* at 137.

179. *Id.* at 138.

180. 365 U.S. at 138.

181. *Id.*

182. *Id.* at 138-40.

> laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors . . . . A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right of petition in the very instances in which that right may be of most importance to them.[183]

Although the Court held that motive was irrelevant in assessing the constitutionality of actions intended to influence the government to take action favorable to one's interests, the Court conceded that situations could exist when the application of the Sherman Act was appropriate.[184] The Court held that "shams," such as the attempt to interfere with a competitor's business through spurious publicity campaigns ostensibly directed at the government, would not be protected.[185]

In *United Mine Workers of America v. Pennington*,[186] the United Mine Workers (UMW) sued Pennington and the Phillips Brothers Coal Company to recover $55,000 in royalty payments allegedly due under the National Bituminous Coal Wage Agreement of 1950 (Agreement).[187] The defendants filed a cross-claim alleging that the UMW had violated the Sherman Act.[188] The defendants' claim focused on the injury to the smaller coal companies from having been forced out of the industry because of the Agreement and various other understandings between the UMW and large operators.[189] The Agreement, an arrangement between the UMW and the large operators, sought to curtail overproduction of coal by eliminating the smaller companies through a combination of rapid mechanization and increased wages.[190]

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183. *Id.*

184. *Id.* at 144.

185. *Id.*

186. 381 U.S. 657 (1965).

187. *Id.* at 659. The National Bituminous Coal Wage Agreement of 1950 was a wage agreement executed in 1950 between the UMW and smaller coal companies, among them Phillips Brothers Coal Company, and later amended in 1952. *Id.*

188. *Id.*

189. *Id.* at 659-60.

190. *Id.* The smaller coal companies could not afford to mechanize as rapidly as the larger coal companies, but because they would still have to pay the higher wages, they would be forced out of business by the increased operating costs. United Mine Workers of America v. Pennington, 381 U.S. at 659-60. Larger coal companies, on the other hand, could offset what they would pay in higher wages by lay-offs as mechanization made many employees redundant. *Id.*

The larger coal companies and the UMW jointly petitioned the Secretary of Labor to establish a minimum wage for employees of contractors who sold coal to the Tennessee Valley Authority (TVA).[191] The minimum wage was intended to make it difficult for the smaller coal companies to compete in the TVA term contract market.[192] The Secretary agreed to the proposed minimum wage, which was much higher than the minimum wage in other industries.[193] Subsequently, both union and company representatives urged the TVA to limit its spot-market purchases from the smaller companies because the spot-market was exempt from the minimum wage requirements of the Walsh-Healey Act.[194] Several of the larger companies undertook "a destructive and collusive price-cutting campaign in the TVA spot market for coal" to further restrict the availability of coal markets to the smaller companies.[195]

The trial court found for Phillips Coal Company, one of the smaller operators, and the United States Court of Appeals for the Third Circuit affirmed.[196] Applying the *Noerr* principle, the Supreme Court reversed and emphasized that although the motive of the UMW was anti-competitive, its actions were protected.[197] "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act."[198]

The *Pennington* Court did not elaborate on the "sham" exception mentioned in the *Noerr* decision. That task was left to the Court in *California Motor Transport Co. v. Trucking Unlimited.*[199] The parties in that case were competitors in the trucking business in California.[200] Trucking Unlimited alleged that the petitioners, California Motor Transport, conspired to restrain trade in violation of the Sherman Act by engaging in a concerted action to prevent the respondents from acquiring operating rights.[201] The complaint alleged that the aim of

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Companies further agreed not to lease coal lands to non-union operators or to buy or sell non-union coal. *Id.*

191. *Id.* at 660-61.
192. *Id.*
193. *Id.*
194. *Id.*
195. 381 U.S. at 661.
196. *Id.*
197. *Id.* at 669-72.
198. *Id.* at 670.
199. 404 U.S. 508 (1972).
200. *Id.* at 509.
201. *Id.*

the conspiracy was to put the respondents out of business by harassment, and denying them "free and unlimited access" to various state agencies charged with granting operating rights from the state.[202] The district court dismissed the complaint for failure to state a cause of action, however, the United States Court of Appeals for the Ninth Circuit reversed.[203]

The United States Supreme Court affirmed the circuit court's reversal, holding that a combination of businessmen working to deny their competitors meaningful access to the same agencies that they were themselves petitioning, would satisfy the "sham" exception of *Noerr-Pennington*, and accordingly would not be protected.[204] The Court remanded the case to the trial court to consider those allegations.[205] The "sham" exception, defined in *California Motor Transport*, amounted to anti-competitive activity intended to deny one's competitors meaningful access to the same agencies and courts upon which the petitioner himself relied in pursuing his own anti-competitive aims.[206] In other words, one may use the legislature, executive, or judiciary to pursue anti-competitive ends, but may not at the same time deny competitors access to those same institutions to pursue anti-competitive aims of their own.

1. Extension of Noerr-Pennington Immunity Beyond Anti-Trust Claims

Although the United States Supreme Court has never considered the *Noerr-Pennington* doctrine outside of antitrust jurisprudence, the doctrine has been extended into other areas of law.[207] For example, *Noerr-Pennington* immunity has been applied to bar tort liability,[208] civil rights actions,[209] libel claims,[210] SLAPP suits,[211] and suits for ma-

202. *Id.*

203. *Id.*

204. *Id.* at 515-16.

205. 404 U.S. at 515.

206. *Id.* at 511-12.

207. *See* Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243, 1256-65 (1984). Zauzmer argued that the doctrine should only apply to antitrust actions because further extension risks elevating the right of petition over other constitutional freedoms to the extent that it becomes an absolute right. *Id.* at 1256-65 *passim*.

208. *Id.* (citing *Sierra Club v. Butz*, 349 F. Supp. 934, 939 (N.D. Cal. 1972)).

209. *Id.* (citing *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803, 807 (S.D.N.Y. 1979)).

210. *Id.* (citing *Webb v. Fury*, 282 S.E.2d 28, 36-37 (W. Va. 1981)).

211. Westfield Partners, Ltd. v. Hogan, 740 F. Supp. 523, 524-27 (N.D. Ill. 1990). SLAPP suits (Strategic Lawsuits Against Public Participation) are retaliatory lawsuits often filed by real estate developers against purchasers who complain publicly about problems such as plumbing or sewer installation. *See* Art Golab, *Developers SLAPP Homeowners; Lawsuits Aim to be a Pain*

licious prosecution.[212] Courts have also extended *Noerr-Pennington* immunity to bar section 1983 actions.[213] Cases applying the *Noerr-Pennington* doctrine to bar section 1983 actions have fallen into roughly two categories: zoning actions, and employment-related actions.[214]

a. The Zoning Cases

The zoning cases rest on the courts' holdings that private individuals have the right, under the First Amendment right of petition, to communicate concerns to their representatives. Two of the earlier zoning cases prefigured the extension of the *Noerr-Pennington* doctrine to section 1983 actions. In *Aknin v. Phillips*,[215] the defendants complained to officials of the Village of Mamaroneck, New York, that the plaintiffs' discotheque, which operated into the early hours of the morning, was creating a disturbance in the defendants' residential neighborhood.[216] The purpose of the defendants' complaint was to effect a re-zoning of the area, which would prohibit operation of the discotheque.[217] The plaintiffs sued alleging that the defendants conspired to close the discotheque, and deprive the plaintiffs of their constitutional rights.[218] The court held that the First Amendment

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in the Wallet, CHI. SUN-TIMES, Apr. 5, 2000, at 3. The developer's purpose behind the suits is to retaliate for perceived slander or to scotch opposition to proposals. *Id.* Increasingly, businesses are filing SLAPP suits against other businesses. Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 72-73 (1996).

212. *See* Zauzmer, *supra* note 207, at 1258 (citing City of Long Beach v. Bozek, 645 P.2d 137, 139-40 (Cal. 1982)).

213. 42 U.S.C. § 1983, provides that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

See, e.g., Eaton v. Newport Bd. of Educ., 975 F.2d 292 (6th Cir. 1992); Video Int'l. Prod., Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075 (5th Cir. 1988); Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985); Evers v. County of Custer, 745 F.2d 1196 (9th Cir. 1984); Gorman Towers v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980); Nickum v. Village of Saybrook, 972 F. Supp. 1160 (C.D. Ill. 1997); Sawmill Products, Inc. v. Town of Cicero, 477 F. Supp. 636 (N.D. Ill. 1979); Aknin v. Phillips, 404 F. Supp. 1150 (S.D.N.Y. 1975). The United States Court of Appeals for the Fourth Circuit declined to extend *Noerr-Pennington* immunity to section 1983 actions in *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

214. The zoning cases are: *Aknin, Sawmill Products, Gorman Towers, Evers*, and *Video International Products*. The employment cases are: *Stachura, Eaton*, and *Nickum*.

215. 404 F. Supp. 1150 (S.D.N.Y. 1975).

216. *Id.* at 1151-52.

217. *Id.* at 1152.

218. *Id.*

protected the defendants' right to petition village officials to close the discotheque.[219]

> They [defendants] are entitled to speak, and even to speak sharply, to their elected representatives concerning these goals [closing the discotheque] . . . . To permit maintenance of this type of civil rights lawsuit against a private individual would under the circumstances . . . have an unfortunate and unjust chilling effect upon the exercise by members of the public of their First Amendment right to complain about a public nuisance.[220]

Similarly, in *Sawmill Products v. Town of Cicero*,[221] a sawmill company sued the town of Cicero, Illinois, and two private individuals alleging a conspiracy to deprive the company and its owners of their constitutional rights by seeking to have the sawmill's license revoked.[222] The Northern District of Illinois dismissed the complaint against the private defendants holding that keeping them in the case would "chill the exercise of their First Amendment right of petition."[223] Neither of the two preceding cases specifically cited or discussed the *Noerr-Pennington* doctrine.

In *Gorman Towers v. Bogoslavsky*,[224] the court applied the same reasoning as *Aknin* and *Sawmill Products* to the First Amendment concerns. However, *Gorman Towers* became the first case where the *Noerr-Pennington* doctrine was specifically cited and applied to bar section 1983 actions. The United States Court of Appeals for the Eighth Circuit held that "private citizens and their lawyer were absolutely privileged by the First Amendment to petition for the zoning amendment that caused plaintiffs' damages."[225] The court relied specifically upon the *Noerr-Pennington* doctrine in its holding[226] and cited cases in which other courts had held "individual defendants constitutionally immune from liability for exercising their right to petition," even if some of the opinions did not cite the *Noerr-Pennington* doctrine.[227] In addition, *Gorman Towers* considered the "sham" exception to *Noerr-Pennington*.[228] "Noerr and its progeny indicate that liability can be imposed under section 1983 for activity ostensibly de-

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219. *Id.* at 1153.

220. *Id.*

221. 477 F. Supp. 636 (N.D. Ill. 1979).

222. *Id.* at 638.

223. *Id.* at 642.

224. 626 F.2d 607 (8th Cir. 1980).

225. *Id.* at 614.

226. *Id.*

227. *Id.* at 615. As noted, neither *Aknin* nor *Sawmill Products* discussed *Noerr-Pennington*, but Judge Stephenson cited each in *Gorman Towers*. *See id.*

228. *Id.*

signed to influence public policy only if the real purpose of the policy is not to induce governmental action but to injure the plaintiff directly."[229] Finding that the defendants did not employ bribes or prevent the plaintiffs from countering the defendants' lobbying efforts with lobbying of their own, the court held there was no sham.[230] "We are loathe [sic] to interpret section 1983 to proscribe what we thus understand to be traditional political activity [lobbying]."[231]

In *Evers v. County of Custer*,[232] the Ninth Circuit followed *Gorman Towers* in applying the *Noerr-Pennington* doctrine. The court used the doctrine to bar a property owner's section 1983 action against neighboring property owners who urged the county to reopen what the plaintiff contended was a private road through her property. The defendants, as neighboring property owners, argued that the road should be public.[233] The petitioner claimed that the actions of the defendant and the Custer County Commissioners interfered with her property interest in the road, thereby violating her First Amendment rights.[234]

A more extensive analysis of *Noerr-Pennington* immunity and the "sham" exception is evident in *Video Products International, Inc. v. Warner-Amex Cable Communications, Inc.*[235] Warner-Amex Cable Communications, Inc. (WAX) petitioned the city of Dallas, Texas, for actions on zoning ordinances that would have put Video International Products, Inc. (VIP), a rival cable company, out of business.[236] VIP sued WAX alleging a conspiracy with the city of Dallas to drive VIP out of business in violation both of antitrust law and the First Amendment right to freedom of speech.[237] The court held that the *Noerr-Pennington* doctrine protected WAX.[238] "The point of the *Noerr-Pennington* doctrine," Judge Jolly wrote, "is to protect private parties when they petition the government for laws or interpretations of its existing laws even though those private parties are pursuing their goals with anticompetitive intent."[239] In affirming the district court's reasoning, Judge Jolly held that WAX's First Amendment petitioning of the city of Dallas was protected under the *Noerr-Pennington* doc-

229. 626 F.2d at 615.
230. *Id.*
231. *Id.*
232. 745 F.2d 1196 (9th Cir. 1984).
233. *Id.* at 1200-01.
234. *Id.* at 1199.
235. 858 F.2d 1075 (5th Cir. 1988).
236. *Id.* at 1077.
237. *Id.* at 1077, 1081.
238. *Id.* at 1082-84.
239. *Id.* at 1083.

trine.[240] The appellate court extended *Noerr-Pennington* immunity to section 1983 actions, primarily on the basis of First Amendment concerns rather than antitrust issues.

Judge Jolly also elaborated upon an issue that would have significance in *Tarpley*, the co-conspirator exception to *Noerr-Pennington*.[241] Under the co-conspirator exception, an illegal conspiracy between private individuals and state actors deprives the private defendants of *Noerr-Pennington* immunity, even if there is no "sham" petition.[242] There must be a "corrupt conspiracy," involving bribery or some other selfish or corrupt motive on the part of the state actor, to trigger the exception.[243]

> We think that if *Noerr-Pennington* is to have its intended effect at all, an analysis of whether the petitioner is a co-conspirator under section 1983 must parallel the co-conspirator exception with *Noerr-Pennington* . . . . Otherwise, first amendment petitioning could be challenged in the section 1983 context as a denial of equal protection, a taking of property without just compensation, a first amendment violation, or other constitutional claim, thus vitiating *Noerr-Pennington* protection.[244]

According to the court, any behavior by a private individual that is protected under the *Noerr-Pennington* doctrine is also protected from section 1983 liability.[245]

b. The Employment Cases

A smaller cluster of cases deal generally with employment actions. For example, in *Stachura v. Truszowski*,[246] the plaintiff sued alleging that the defendant, a private individual, had conspired with the school board to remove the plaintiff from his job as a schoolteacher in violation of his First Amendment right of free speech, and his Fifth and Fourteenth Amendment guarantees of due process.[247] The school board had fired the plaintiff on the basis of complaints by Ms. Truszowski and others, that the plaintiff had inappropriately taught human reproduction to his life science class.[248] Mr. Stachura asserted a property interest in his employment as a schoolteacher, the deprivation of

240. *Id.* at 1084. The district court decision was reversed and remanded only on the issue of damages. 858 F.2d at 1088.
241. *Id.* at 1083.
242. *Id.*
243. *Id.*
244. *Id.* at 1084.
245. *Id.*
246. 763 F.2d at 211 (6th Cir. 1985).
247. *Id.* at 212-13.
248. *Id.* at 213.

which, without due process, amounted to violations of the Fifth and Fourteenth Amendments.[249] The court acknowledged that the defendant's role in bringing about the plaintiff's dismissal was "pivotal," but held that the defendant's actions were protected because her protests were directed to the public body responsible for the school system.[250] "While Ms. Truszowski's role in these events is not a pretty one . . . it was a petition addressed to the proper authority and as a consequence, her actions were immunized from this suit by her First Amendment rights."[251]

In a similar fact pattern, the United States Court of Appeals for the Sixth Circuit, in *Eaton v. Newport Board of Education*,[252] followed *Stachura* in applying *Noerr-Pennington* immunity to dismiss a suit against an individual who lobbied for the removal of a school principal.[253] The court noted that a "citizen's right to petition is not limited to goals that are deemed worthy, and the citizen's right to speak freely is not limited to fair comments."[254]

In *Nickum v. Village of Saybrook*,[255] the district court for the Central District of Illinois held that private defendants' actions in seeking removal of the plaintiff, the police chief of the village, could be immunized under *Noerr-Pennington*.[256] The plaintiff alleged that a conspiracy between the private defendants and Village Board of Saybrook deprived her of a property interest in her employment without due process, and in violation of the Fifth and Fourteenth Amendments.[257] The court found that the defendants were well within their rights to seek dismissal of the police chief.[258] The defendants' motives in seeking the police chief's dismissal, the court continued, were irrelevant under *Noerr-Pennington*, so long as their means were legitimate.[259] "The *Noerr-Pennington* doctrine provides that the right to legitimately petition the government through a legislature, the judiciary, or an administrative agency is fundamental to the concept of representative

249. *Id.*

250. *Id.*

251. *Id.* The court cited but did not discuss the *Noerr-Pennington* doctrine. *See* 763 F.2d at 213.

252. 975 F.2d 292 (6th Cir. 1992).

253. *Id.* at 298-99.

254. *Id.* at 298.

255. 972 F. Supp. 1160 (C.D. Ill. 1997).

256. *Id.* at 1172. Provided, however, that defendants' actions did not fall within the co-conspirator exception. *Id.*

257. *Id.* at 1166.

258. *Id.*

259. 972 F. Supp. at 1171-72.

democracy. As such it is constitutionally protected speech, no matter what its motivation."[260]

2. *The Significance of the Noerr-Pennington Doctrine for the Right of Petition*

The evolution of the *Noerr-Pennington* doctrine beyond antitrust emphasizes the value of the right of petition in immunizing certain forms of expression that might otherwise be actionable. For example, in *Adkin v. Phillips*,[261] the complaints of Mr. Phillips, Mrs. Sidemann, and the other defendants were protected because they were directed to the village officials responsible for zoning, and therefore amounted to petitions.[262] Likewise, the complaints of Truszowski and the Newport Board of Education in *Stachura* and *Eaton*, were protected because the complaints were directed to the school boards responsible for overseeing the administration of the schools.[263] None of the complaints were presented in the "classic" form of a petition.[264] However, each complaint was classified as a petition because it sought government action on matters that the government could properly act and provide relief.

Additionally, the evolution of the *Noerr-Pennington* doctrine reaffirms the idea that petitions need not flow from sublime motives or the great issues of the state. Self-interest, even to the detriment of another's interest, is a legitimate motive so long as the means used are themselves legitimate.[265] Illegitimate means are those that deprive a rival access to the process that the petitioner is using to advance his own interests,[266] or those means which are illegal, such as bribery.[267] *Tarpley v. Keistler* is the result of this evolution.

III. THE SUBJECT OPINION

A. *The Facts of the Case*

In response to the *Rutan* decision in 1990, Governor James Thompson ordered all state agencies and offices under his authority, to base all personnel decisions on merit.[268] Governor Thompson's successor,

260. *Id.* at 1171 (internal citations omitted).
261. 404 F. Supp. at 1152.
262. *Id.*
263. Stachura v. Truszkowski, 763 F.2d at 213; Eaton v. Newport Bd. of Educ., 975 F.2d at 298.
264. *See supra* note 135 (discussing the classic form of a petition).
265. 763 F.2d at 213.
266. 858 F.2d at 1083.
267. 404 F. Supp. at 1150-52.
268. 188 F.3d at 789-90. *See also supra* notes 62-77.

Governor Jim Edgar, determined that *Rutan* did not apply to temporary positions.[269] Consequently, Governor Edgar's administration filled temporary positions with Republican Party loyalists.[270] Edgar Administration officials also held meetings at which they informed Republican Party loyalists that "political affiliation could be considered in filling vacancies for temporary positions."[271] The defendant, Frank Keistler, was the long-time chairman of the Union County Republican Central Committee, and attended many of the meetings with administration officials.[272] Administration officials gave Keistler and other party workers "lists of contacts in various state agencies to whom they could submit recommendations to fill vacant temporary positions."[273]

The state operated Choate Mental Health Center in Union County sought to fill two permanent vacancies in its power plant facility.[274] "The Department of Mental Health, which managed Choate, authorized Choate to fill the vacancies on a temporary basis only."[275] When Keistler learned of the vacancies he called Natalie Bales, a personnel officer in the Department of Mental Health, to recommend Harold Blessing, a Republican precinct worker, for one of the positions.[276] Keistler also called Janice Cellini in Governor Edgar's Office of Personnel to discuss Blessing's interest in the job.[277]

"Following the normal procedures for filling vacancies, Bales called her contact in the Governor's Personnel Office (not Cellini) . . . and was given Blessing's name."[278] Bales then submitted Blessing's name to Alice Kerns, the personnel officer at Choate.[279] Four days later, Blessing began work at Choate.[280] Blessing was never interviewed and the vacancy was never posted.[281] Later in 1992, the Department of Mental Health made the position permanent, but once again the position was never advertised to the public.[282] Blessing, Tarpley, and

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269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. 188 F.3d at 790.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. 188 F.3d at 790.
280. *Id.*
281. *Id.*
282. *Id.*

eight others interviewed for the permanent position.[283] The job went to Blessing, in part because he had gained valuable experience during his time as a temporary employee in the same job.[284]

B. *Procedural History*

Tarpley sued under 42 U.S.C. §1983 alleging infringement of his First Amendment right of freedom of political association.[285] Tarpley contended that Blessing was awarded the temporary, and consequently the permanent position, because Blessing was a Republican Party precinct worker.[286] Tarpley proposed that the Edgar administration used temporary vacancies as a means of circumventing *Rutan* to preserve a political patronage system.[287] Thus, party loyalists would be rewarded with temporary positions, which the administration would then convert to permanent positions.[288] As a result, the loyalists would have a decided advantage over other applicants for the permanent slots because of their experience as temporary employees in the same positions.[289]

The suit named both state officials and private individuals, such as Keistler, who were Republican Party functionaries.[290] The district court for the Northern District of Illinois granted summary judgment in favor of all defendants with respect to the hiring decisions for permanent positions.[291] The United States Court of Appeals for the Seventh Circuit affirmed this part of the district court's decision.[292] The Seventh Circuit also held that the state defendants were protected by qualified immunity for the claims relating to the hiring of temporary employees.[293] Nonetheless, the Seventh Circuit reversed the district

283. *Id.*

284. *Id.* The interviews consisted of eighteen questions to which responses were scored separately by two interviewers on a scale of one to ten. *See* Tarpley v. Jeffers, 96 F.3d 921, 925 (7th Cir. 1996) (describing the test). Blessing's advantage from previous experience in the job may not have been the only reason he received a higher score than Tarpley. *Id.* at 926. On some questions at least, the score appeared skewed in favor of Blessing. For example, to the question "[c]an you handle having more than one boss?" Tarpley responded "yes" and received 3.5 points. Blessing responded "no problem" and received 7.5 points. *Id.*

285. 188 F.3d at 790.

286. *Id.*

287. Tarpley v. Jeffers, 96 F.3d 921, 923 (7th Cir. 1996).

288. *Id.*

289. *Id.*

290. 188 F.3d at 790.

291. *Id.*

292. *Id.*

293. *Id.*

court's grant of summary judgment in favor of the private Republican Party defendants regarding the temporary hiring claims.[294]

On remand, Keistler moved for summary judgment, arguing that he lacked the authority to make state hiring decisions, did not engage in a conspiracy to gain such authority, and therefore, never acted under the color of state law.[295] The district court granted Keistler's motion for summary judgment, finding that Tarpley offered no admissible evidence that Keistler and the other party defendants did anything more than advocate the hiring of Blessing.[296] Once again Tarpley appealed.[297]

C. *Judge Cudahy's Opinion*

Judge Cudahy's majority opinion first addressed the issue of whether Keistler's conduct in recommending Blessing constituted state action.[298] Under certain circumstances the conduct of private individuals, such as Keistler, could constitute state action.[299] However, the answer in each case is "situation specific and fact driven."[300] Keistler argued that since he lacked the authority to hire anyone, his recommendation of Blessing could not constitute state action.[301] Keistler's argument relied heavily on the opinion in *Vickery*, where the Seventh Circuit held that because the defendant lacked actual hiring authority his recommendations of individuals for temporary highway maintainer positions could not constitute state action.[302] Judge Cudahy held that Keistler's argument was incorrect to the extent that it interpreted *Vickery* to hold that without actual hiring authority a

294. *Id.*

295. *Id.* at 790-91.

296. 188 F.3d at 791.

297. *Id.*

298. *Id.* Section 1983 requires that a plaintiff show a defendant acted under color of state law when a section 1983 action is based on a violation of the First Amendment as applied to states through the Fourteenth Amendment. *Id.*

299. *Id. See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (holding that the actions of a restaurant worker in concert with a local police officer to deny service to a white schoolteacher constituted state action). In *Dennis v. Sparks*, the Court held that bribery of a state judge was a "corrupt conspiracy," which constituted state action on the part of the private individual making the bribe. 449 U.S. 24, 28 (1980). The Court held that a state university's compliance with National Collegiate Athletic Association (NCAA) regulations did not constitute state action because the university retained the authority to ignore the regulations and to withdraw from the NCAA. N.C.A.A. v. Tarkanian, 488 U.S. 179, 193-96 (1988). One obvious distinction between *Tarkanian*, and *Adickes* and *Dennis*, is that in *Tarkanian* the private actor's actions were lawful. *Id.*

300. 188 F.3d at 793.

301. *Id.* at 793-94

302. *Id.* at 792-93

private political party, or its functionary, could not be liable in a section 1983 action.[303] Keistler's argument made hiring authority the single determinative factor. Such a proposition, however, contradicted the United States Supreme Court's position that state action cases must be decided on a case by case basis.[304]

Tarpley further argued that possession of ultimate hiring authority was not dispositive of state action, particularly when the state actor lacked the freedom to act contrary to the wishes of the private party official.[305] Judge Cudahy noted that Tarpley did produce some evidence suggesting a conspiracy.[306] For example, Keistler attended meetings with state officials and conferred with the Governor's personnel office about Blessing's interest in the job.[307] In turn, the Governor's office forwarded only Blessing's name to Choate.[308] A jury could believe, Judge Cudahy conceded, that the state "simply rubberstamped [Keistler's] picks," thus, transforming his recommendation of Blessing into state action for purposes of section 1983.[309]

However, the opinion declined to reach the issue of whether Keistler's recommendation of Blessing constituted state action or a conspiracy because the opinion held that Keistler's actions were protected by the *Noerr-Pennington* doctrine.[310] What Tarpley characterizes as a conspiracy is more accurately and more commonly known as political advocacy, another protected form of free expression.[311] Judge Cudahy described Keistler's recommendation of Blessing as "a paradigmatic First Amendment right," because suggesting "whom to hire is a traditional form of political activity."[312]

Keistler's motives were irrelevant, Judge Cudahy continued, because under the *Noerr-Pennington* doctrine a petitioner's motives may be selfish or unworthy.[313] In a sense, Keistler's actions were intended to exclude Tarpley from the position at Choate, but only because Keistler wanted to fill the position with a Republican.[314] Keistler did not target Tarpley individually, and more importantly, nothing

303. *Id.* at 793

304. *Id.* "Each [state action] case is different, and each case must be considered on its own merits." 188 F.3d at 793.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. 188 F.3d at 793.

310. *Id.* at 794-95.

311. *Id.* at 795-97.

312. *Id.* at 795.

313. *Id.*

314. 188 F.3d at 795-96.

Keistler did prevented Democrats from recommending that their party loyalists be hired.[315] "Advocacy is inherently partisan, and the First Amendment guarantees freedom of such partisanship, at least in the form of political speech."[316] As Judge Cudahy concluded:

> Section 1983 claims, as much as the antitrust laws, are not appropriate vehicles for proscribing political activity such as attempts to persuade public officials. Other contexts may dictate different results, and First Amendment protections would not necessarily extend to cases where the attempt itself (rather than the intended result) created the alleged harm. In addition, where political speech is not at stake, First Amendment protection of conspiratorial speech might be very limited. We believe that these important distinctions "sufficiently guard those constitutional rights that section 1983 serves to protect."[317]

D. Judge Ripple's Dissent

Judge Ripple's brief dissent focused upon two points. First, Judge Ripple noted that Judge Cudahy's opinion conceded that a jury could find that a conspiracy existed between Keistler and the state sufficient to satisfy the state action requirement.[318] Therefore, because the issue before the panel was a motion for summary judgment and the jury could find a conspiracy, Judge Ripple argued that the district court's grant of summary judgment should be overturned and the case remanded.[319] Secondly, Judge Ripple argued that balancing Keistler's First Amendment rights over Tarpley's First Amendment rights was inappropriate because of the evidence of a conspiracy, and because favoring Keistler's rights implicitly denigrated Tarpley's freedom of association.[320]

Judge Cudahy countered that "Tarpley's evidence of conspiracy amounts to Keistler exercising his constitutional rights at the urging of state officials."[321] Nothing, Judge Cudahy observed, required that Keistler's methods be old-fashioned. As a result, no significant distinction existed between the written means of communication acceptable to Judge Ripple, and the modern telephone Keistler preferred.[322] With respect to the denigration of the freedom of association, Judge Cudahy noted that the right of political association occurs in context

315. *Id.* at 795-97.
316. *Id.* at 795.
317. *Id.* at 796 (internal citations omitted).
318. *Id.* at 797.
319. 188 F.3d at 797.
320. *Id.* at 797-98.
321. *Id.* at 796 n.8.
322. *Id.*

and "those who enter the political fray, have grander, even if selfish, aspirations: they want to speak, assemble, petition or publish *in support of something*."[323] "[T]he right of political association comprises (and is derivative of) the textual First Amendment rights–speech, assembly, petition and press–only by protecting the scope of the component parts (here, petition and speech) can we protect the amalgam."[324]

IV. ANALYSIS

The significance of *Tarpley* lies beyond the decision's extension of *Noerr-Pennington* immunity to section 1983 actions, particularly in the form of political patronage. The larger significance of *Tarpley* lies in its recognition of the value of the right of petition. Specifically, *Tarpley* recognizes that the right of petition is unique and distinct in some ways from the "cognate rights"[325] of speech, press, and assembly. *Tarpley* properly recognizes that the distinctions between the rights of petition, speech, press, and assembly, may sometimes warrant an analysis focusing specifically upon protecting the right of petition.

A. The Noerr-Pennington Doctrine Flows from the First Amendment Right of Petition

Some commentators question whether the *Noerr-Pennington* doctrine flows from the First Amendment, a construction of the Sherman Act, or a combination of the two.[326] However, Judge Cudahy's opinion views the *Noerr-Pennington* doctrine as the offspring of the First Amendment.[327] "*Noerr-Pennington* immunity recognizes both the reach of the First Amendment right to petition and the limited ability

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323. *Id.* at 796 n.6.

324. *Id.*

325. Justice Rutledge used the term in *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *supra* notes 141-43 and accompanying text.

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

Id. at 530 (internal citations omitted). Justice Rutledge did note that the rights were not "identical." *Id.* Subsequent decisions have perhaps lost sight of Justice Rutledge's observation. *See* McDonald v. Smith, 472 U.S. 479, 485 (1985); *supra* notes 156-62. "These First Amendment rights are *inseparable* and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." *Id.* (emphasis added and internal citations omitted). "The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." *Id.* at 482.

326. ABA ANTITRUST SECTION, MONOGRAPH NO. 19, *The Noerr-Pennington Doctrine*, 34 (1993).

327. 188 F.3d at 795.

of Congress to fetter that right."[328] The question is important because if the *Noerr-Pennington* doctrine is based primarily on First Amendment principles, then courts must look to case law interpreting the First Amendment and the right of petition when applying the doctrine.[329] If the doctrine is based primarily on the Sherman Act, then courts must look to the body of antitrust law.[330] Obviously, if the *Noerr-Pennington* doctrine is based on a construction of the Sherman Act, then its extension beyond antitrust law becomes more difficult to justify.

The United States Supreme Court has never explicitly stated the basis for the *Noerr-Pennington* doctrine.[331] In *Noerr*, however, the Court clearly indicated that constitutional concerns were at least one significant basis for its holding.[332] "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[333] One commentator has suggested that the Court's repeated references to "immunity" in the more recent case of *Allied Tube & Conduit Corporation v. Indian Head, Inc.*,[334] which "implies that the doctrine's constitutional roots are preeminent."[335]

The lower courts that have extended *Noerr-Pennington* immunity beyond antitrust have consistently articulated a constitutional rationale for such a holding.[336] For example, in *Gorman Towers, Inc. v. Bogoslavsky*, the court reasoned that the United States Supreme Court in *Noerr* "relied in large part on the desirability of avoiding the 'important constitutional questions' that would arise if it imputed to Congress an intent to regulate activity covered by the First Amendment's guarantee of the right to petition the government for redress of grievances."[337] Thus, the *Gorman Towers* court used "deference to the right to petition" to support its extension of *Noerr-Pennington* immunity to section 1983 cases.[338]

The position that constitutional law provides the foundation for the *Noerr-Pennington* doctrine receives its fullest support in recognizing

328. *Id.*
329. *See supra* note 327, at 35.
330. *Id.*
331. *Id.* at 34-38.
332. 365 U.S. 127 at 138.
333. *Id.*
334. 486 U.S. 492 (1988).
335. *See supra* note 327, at 35 n.207 (citing Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANTITRUST L.J. 327, 346 (1988)).
336. *See supra* notes 207-67 and accompanying text.
337. 626 F.2d at 607.
338. *Id.*

that the application of the same reasoning employed in the *Noerr* and *Pennington* cases can protect the right of petition without specifically invoking either case. In *Aknin* and *Sawmill Towers*, for example, the right of petition immunized the defendants' conduct in the face of section 1983 actions, but the court in each of those cases made no mention of the *Noerr-Pennington* doctrine.[339] It would appear that the *Noerr-Pennington* doctrine is a shorthand representation of the principle expressed in *Tarpley*, and other cases, that "parties may petition the government for official action favorable to their interests without fear of suit, even if the result of the petition, if granted, might harm the interests of others."[340] The Constitution, specifically the First Amendment right of petition, drives the result in *Noerr* and its progeny. It is "deference to the right to petition,"[341] not the talismanic quality of the term "*Noerr-Pennington*," that is the unifying principle of the *Noerr* line of cases. Again, *Tarpley* is fully in accord. "This so-called *Noerr-Pennington* immunity recognizes both the reach of the First Amendment right to petition and the limited ability of Congress to fetter that right."[342]

Tarpley follows the basic principle that *Noerr-Pennington* immunity represents that expression—which otherwise may be impermissible and actionable—can be protected in certain circumstances if it is made in the form of a petition. Similar to how the defendants' actions in *Noerr* and *Pennington* might have amounted to impermissible violations of the antitrust laws had those actions not been in the form of petitions, Keistler's actions may have constituted an impermissible restriction of Tarpley's freedom of political association. The question remains whether the right of petition embraces political patronage recommendations, such as the one made by Keistler.

B. The Right of Petition Embraces Political Patronage Recommendations

Alexis de Tocqueville, writing in the first half of the Nineteenth Century, stated that political "[p]arties are a necessary evil in free

339. *See supra* notes 215-23 (discussing *Aknin v. Phillips* and *Sawmill Prod., Inc. v. Town of Cicero*).

340. 188 F.3d at 794. Although the position that the First Amendment foundations of the *Noerr-Pennington* doctrine can be supported without reference to the *Noerr* and *Pennington* cases themselves it might make the *Noerr-Pennington* doctrine a somewhat misplaced analogy for First Amendment petition rights, but a review of the cases and their progeny is still useful. Many of the cases that extend protection to petitions cite and discuss the *Noerr-Pennington* doctrine as justification for their holdings. *See supra* notes 163-267 and accompanying text.

341. 626 F.2d at 614.

342. 188 F.3d at 794.

governments . . . ."[343] Inevitably, Tocqueville continued, political parties and politicians will seek to advance their own interests.

> A political aspirant in the United States begins by discriminating his own interest, and by calculating upon those interests which may be collected around and amalgamated with it; he then contrives to discover some doctrine or some principle which may suit the purposes of this new association, and which he adopts in order to bring forward his party and to secure his popularity . . . .[344]

Not only are political parties a "necessary evil," and their pursuit of self-interest inevitable, "the right of political association is integral to republican government."[345] Group association enhances the advocacy of both private and public matters, particularly those that are controversial. Thus, the United States Supreme Court has recognized a constitutional right of political association.[346]

As *Tarpley* illustrates, the right of association does not occur in a vacuum, nor is it an end in itself.[347] "People who associate, especially those who enter the political fray, have grander, even if selfish, aspirations: they want to speak, assemble, petition or publish *in support of something*."[348] An individual such as Tarpley does not join the Democratic Party just to carry a membership card or otherwise proclaim his affiliation, but rather to support something.[349] Justice Douglas made a similar argument in his concurring opinion in *Gibson v. Florida Legislative Investigative Committee*,[350] "[j]oining a group is often as vital to freedom of expression as utterance itself."[351]

Of course, Tarpley has associational rights, including the right to belong to a political party of his own choosing and not be penalized by the government for that choice. Tarpley's choice of party in effect cost

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343. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 173-74 (1889). Tocqueville also lamented the dearth of "great" political parties.

> The political parties which I style great are those which cling to principles more than to their consequences; to general, and not to especial cases; to ideas, and not to men. These parties are usually distinguished by a nobler character, by more generous passions, more genuine convictions, and a more bold and open conduct than the others. In them private interest, which always plays the chief part in political passions, is more studiously veiled under the pretext of public good; and it may even be sometimes concealed from the eyes of the very persons whom it excites and impels.

Id. at 174. He continued "America has already lost the great parties which once divided the nation . . . ." *Id.*

344. *Id.* at 177.

345. 188 F.3d at 796 n.6.

346. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 15 (1976)).

347. *Id.*

348. *Id.*

349. *Id.*

350. 372 U.S. at 565 (Douglas, J., concurring). *See supra* notes 145-155.

351. *Id.*

him his job because his was the losing party. This was a restriction on his freedom of belief and association. The consequences to Tarpley were much the same as those described by Justice Brennan in *Elrod v. Burns*.[352]

> An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job [or being denied employment as was the case with Tarpley]. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his own party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished.[353]

Unquestionably, "[t]hese are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment."[354] However, Tarpley's right of association was not circumscribed simply because his party lost the election. Tarpley's right of association was circumscribed in large measure because it collided with another private individual's own First Amendment rights, in particular, that individual's right of petition.[355] When a private individual, who is also an employee of a non-governmental political party organization, recommends the hiring of an individual of the same party for a government position, he is asking the government for action favorable to his interests. Therefore, he is exercising his right of petition.[356] In one sense the party worker's actions may appear ignoble. Political patronage usually carries the stigma of corruption,[357] a problem which Judge Cudahy's opinion acknowledged by characterizing Keistler as an "old-timer," whose actions were "suspicious."[358] Yet, in a two-party sys-

352. 427 U.S. at 355.

353. *Id.* at 355-56 (internal citations omitted).

354. 497 U.S. at 74.

355. 188 F.3d at 796 n.6. Judge Cudahy points out that "Tarpley's right to associate is not circumscribed because his is the losing party; party choice has nothing to do with it." *Id.* Obviously, being on the losing side does have something to do with it because if Tarpley had been a Republican he might have received the job. The more significant issue is how to settle the assertion of mutually exclusive First Amendment claims by private parties. *Id.*

356. *Id.* at 795.

357. *See generally* Bowman, *supra* note 3 (discussing how patronage works).

358. 188 F.3d at 795, 796 n.8.

tem, politics is often untidy and venal.[359] Keistler's actions in recommending Blessing were an exercise of a "paradigmatic First Amendment right," not only because "[m]aking suggestions about whom to hire is a traditional form of political activity,"[360] but because getting jobs for party loyalists helps propagate a two-party system. A two party system, in the opinion of commentators such as Thomas Jefferson and Alexis de Tocqueville, is necessary for a free society.[361] Keistler's actions were as anticompetitive as the actions of the defendants in the *Noerr* and *Pennington* cases, however, this was irrelevant. An individual's motives may be selfish or partisan because "[a]dvocacy is inherently partisan, and the First Amendment guarantees freedom of such partisanship, at least in the form of political speech."[362] Without partisanship there can be no political parties, and without political parties, if Jefferson and Tocqueville are to be believed, there can be no free society.[363]

The *Tarpley* decision protects the right of political association by subordinating it to the right of petition.[364] As Judge Cudahy noted, "the right of political association comprises (and is derivative of) the textual First Amendment rights–speech, assembly, petition and press–only by protecting the scope of the component parts (here, petition and speech) can we protect the amalgam."[365] A section 1983 action, the decision continued, is an improper means for restricting a traditional political activity such as the attempt to persuade public officials.[366] "[F]ar from belittling the right to political association, "the court believed it was enhancing its vibrancy."[367] Keistler's First Amendment right of petition trumps Tarpley's associational rights. No balancing was done. Vindicating Keistler's right of petition at the expense of Tarpley's associational rights ultimately protects the associational rights of all, including Tarpley. "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[368] Thus, protecting

359. *See supra* notes 14, 23, 344-45.

360. 188 F.3d at 795.

361. *See supra* notes 14, 344-45.

362. 188 F.3d at 795.

363. *See supra* notes 14, 344-45. Of course, the necessity of political parties and their value in a free society is debatable, with Jefferson and Tocqueville perhaps representing one extreme of opinion. The Federalists believed differently. *See, e.g.*, THE FEDERALIST NOS. 9, 10 (Alexander Hamilton) (discussing the problems of faction and the proposed Constitution as the remedy).

364. 188 F.3d at 795.

365. *Id.* at 796 n.6.

366. *Id.* at 796.

367. *Id.* at 796 n.6.

368. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 15 (1976)).

Keistler's right of petition today benefits Tarpley's chances of one day gaining the recommendation of a non-governmental Democratic Party officer for another government job when his party is again on the winning side.[369]

Keistler and other similarly situated individuals, who are private political party officers, have an affirmative First Amendment right of petitioning the government in a form of political advocacy to seek action favorable to their interests. In contrast, Tarpley and other similarly situated individuals have no comparable affirmative constitutional right to government jobs.[370] Ordinarily, the government has no affirmative duty to protect an individual from harm caused to him by another private individual,[371] unless the other individual's actions can, in some way, be attributed to the state.[372] Admittedly, Tarpley did have a right not to be denied the government job at Choate Mental Health Center because of his political affiliation. However, Keistler, a private individual, can only be held accountable if his actions cannot properly be characterized as a petition. Keistler's recommendation of a party loyalist for a government job did not amount to a constitutionally impermissible denial of Tarpley's associational rights because the recommendation was a petition in the form of political advocacy.[373] Judge Cudahy's decision could omit the "difficult determination" of state action because the political advocacy practiced by Keistler did not amount to an impermissible act, even though Tarpley sought to mischaracterize Keistler's actions as a conspiracy.[374] Tarpley's harm was merely collateral to Keistler's intended result of advocating Republican loyalists for the position.[375] Judge Cudahy acknowledged that if Keistler, in conjunction with the state, attempted to harm Tarp-

369. Patronage obviously can entrench one party thereby weakening the two-party system, as Tammany Hall in Nineteenth Century New York City and the supremacy of the Democratic Party in Chicago since 1931, demonstrate. *See* Bowman *supra* note 3, at 85. Nevertheless, private political partisans must be "free to advocate" if the right of political association is to have any meaning. 188 F.3d at 796 n.6.

370. One is reminded a little of Justice Holmes' observation that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of City of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

371. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 477 (4th ed. 1991).

372. *Id.* at 477.

373. 188 F.3d at 795.

374. *Id.* As Professors Nowak and Rotunda note "a ruling on the presence of state action is a decision on the merits of the underlying constitutional claim . . . . The [fourteenth] amendment does not require the judiciary to determine whether a state has 'acted,' but whether a state has 'deprived' someone of a guaranteed right." *See* NOWAK AND ROTUNDA *supra* note 372, at 484. By declining to reach the determination of state action the decision signals that there has not been a state deprivation of a constitutional right.

375. 188 F.3d at 795.

ley personally by recommending someone else for the Choate job, then First Amendment protections might not have applied.[376] Such actions would have amounted to an impermissible conspiracy, not simple political advocacy. In the absence of a conspiracy directed at an individual, Keistler's right to petition the government to hire a party loyalist is more valuable than Tarpley's right to be considered for a government job, regardless of his party affiliation, because "[p]olitical association would be an empty right indeed if partisans were not free to advocate."[377]

C. *The Right of Petition is Unique and Distinct from Other Enumerated Rights*

As we have seen, a line of Nineteenth and Twentieth Century petition cases culminating in the *Noerr* and *Pennington* cases, and their progeny, establish that the right of petition protects a citizen's right of access to his government, and as a result, immunizes expression which might otherwise be actionable.[378] The *McDonald* decision, while limiting the right of petition, holds that the right "is an assurance of a particular freedom of expression."[379] Implicit in this statement is an understanding that the right of petition is distinct from the rights of speech, press, and assembly. However, later opinions acknowledging the point established by *McDonald* lose sight of what is distinct about the right of petition.[380] For example, in *San Filippo v. Bongiovanni*, the United States Court of Appeals for the Third Circuit stated that "*McDonald* is a case in which the petition clause protects no value that is not protected by the speech clause."[381] The Third Circuit found it "difficult to distinguish in any meaningful way between words contained in a letter to the President and words contained in, for example, an advertisement appearing in the *New York Times*."[382] Yet, a meaningful distinction may exist when expression is immunized because a private individual or group presents its expression in the form of a petition, that is, a request to the government for action favorable to its interests. Moreover, the right of petition also protects the indi-

376. *Id.* at 796. "Other contexts may dictate different results, and First Amendment protections would not necessarily extend to cases where the attempt itself (rather than the intended result) created the alleged harm." *Id.* The determination of state action depends on the facts of each case. *Id. See supra* note 372, at 483.

377. *Id.* at 796 n.6.

378. *See supra* notes 117-267 and accompanying text.

379. 472 U.S. at 482.

380. *San Filippo v. Bongiovanni*, 30 F.3d 424, 442-43 (3rd Cir. 1994).

381. *Id.* at 439.

382. *Id.*

vidual petitioner's freedom to choose not only the content of his petition and its recipient, but also the means of expressing his petition.[383] It is for the petitioner to decide how his petition can most effectively be brought to the attention of its intended recipient.[384] The petitioner may choose unwisely, but the decision is his to make. The petitioner "is not limited to writing a letter or sending a telegram to a congressman; [the right of petition] is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor."[385] A petitioner's methods of petitioning need not be "conventional" because

> [c]onventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials.[386]

In short, "the Petition Clause embraces a much broader range of communications addressed to the executive, the legislature, courts and administrative agencies."[387] The petitioning method chosen may be seen simply as another example of freedom of expression in general, and therefore subject to many of the same restrictions on time, place, and manner as non-petitionary expression. The recognition that "unconventional" communications may qualify as petitions has helped add in the expansion of immunized expression that has potential to be immunized.

Tarpley v. Keistler recognizes that the right of petition embraces a variety of topics and may be expressed through different means or in different forms. The decision stands for the proposition that a petition expressed through non-traditional means is not rendered impermissi-

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383. *See* ABRIDGEMENT OF THE DEBATES, *supra* note 104, at 141. *See also supra* notes 102-266 and accompanying text.

384. Judicial petitions are another form of petitioning. *See* Andrews, *supra* note 110, at 633. If an individual, returning from a political rally in which he exercised his freedoms of speech, press, and assembly found a parking ticket on the windshield and chose to contest the ticket, he would be asserting another form of his right of petition. He would be directly targeting that agency within the government he believes best able to provide relief, but his petition would not involve freedom of assembly, press, or except by the most attenuated construction speech. Of course the assertion of the enumerated rights in any combination or form is no guarantee of success. One can wonder whether a municipal authority charged with enforcement of parking violations is likely to be moved by an exercise of the right of petition.

385. 385 U.S. 39, 49-50 (Douglas, J., dissenting).

386. *Id.*

387. 472 U.S. 479, 488 n.2.

ble simply because it is expressed through non-traditional means.[388] In *Tarpley*, as we have seen, a private individual employed as an officer of a county political party organization recommended the hiring of a party loyalist to a state government personnel officer in a telephone conversation.[389] The decision noted that the defendant's actions might be protected by the free speech clause of the First Amendment,[390] but went on to hold that the act of recommending was an example of the right of petition because Keistler was asking the government for action favorable to his interests.[391] Keistler chose the means through which to submit his petition, the telephone, and the individual to whom to submit his petition, Natalie Bales.[392]

The dissent concluded that had Keistler written a letter to Ms. Bales, or organized a "massive letter writing campaign among his fellow party members," his actions would have been protected under the First Amendment.[393] This is not necessarily true. Judge Ripple's dissent confused the means and form of a petition with evidence of an impermissible conspiracy. Under the dissent's analysis, traditional methods of petitioning, such as letters, presumably would not qualify as evidence of an impermissible conspiracy. However, the dissent failed to appreciate that one value of the right of petition lies precisely in the discretion it gives a petitioner to choose both the means and the recipient of his petition. As the majority observed, "[s]imply because Keistler was 'engaged in an old-time political activity' does not require that his methods of advocacy be similarly old-fashioned."[394] Therefore, the dispositive issue in *Tarpley* was not the form or means of the petition, as the dissent suggests, but rather Keistler's actions. Assuming, in conjunction with the state, Keistler was somehow "out to get" Tarpley personally by depriving him of the Choate job, Keistler's actions could be characterized as a conspiracy and made actionable.[395] However, if this were the case, it would not make any difference whether Keistler sent one letter, many letters, or spoke on a telephone. On the other hand, if Tarpley's loss of the Choate job was merely collateral to Keistler's general efforts to advance the interests of his party, then there was no impermissible conspiracy, but

388. 188 F.3d at 797 n.8.

389. *Id.* at 790.

390. *Id.* at 794.

391. *Id.*

392. *Id.* at 790.

393. *Id.* at 797 (Ripple, J., dissenting).

394. 188 F.3d at 796 n.8 (internal citations omitted).

395. *Id.*

rather political advocacy.[396] Again, Keistler's choice of means or form would have not have transformed permissible political advocacy into impermissible conspiracy.

V. IMPACT

In handing down its decision in *Tarpley,* the Seventh Circuit joined the other Circuits that have expressly extended *Noerr-Pennington* immunity to bar section 1983 actions. At the close of his dissent, Judge Ripple lamented that the decision in *Tarpley* will "haunt the jurisprudence of this circuit."[397] Although it is too early to assess the influence of *Tarpley* on the jurisprudence of the Seventh Circuit, Judge Ripple's fears should prove unfounded. *Tarpley v. Keistler*, as many First Amendment cases before it, does demand a choice between the competing First Amendment rights of two individuals.[398] Judge Cudahy's opinion declined to "vindicate [Tarpley's] First Amendment rights at the expense of Keistler's . . ." because "[s]ection 1983 claims . . . are not appropriate vehicles for proscribing traditional political activity such as attempts to persuade public officials."[399] It is unlikely that *Tarpley* will lead to an increased application of the *Noerr-Pennington* doctrine to defeat meritorious section 1983 claims. The opinion acknowledges that when political advocacy is not involved, or there is an attempt to personally harm a particular individual, then the outcome could be different.[400] In addition, *Tarpley* should not loosen the restrictions against political patronage hiring established by the

396. *Id.* at 795. The dissent equates the majority's acknowledgement that there was some evidence from which a jury could have concluded a conspiracy existed to indicate that there was a material issue of fact and therefore, that summary judgment should have been denied. *Id.* at 797 (Ripple, J., dissenting). Arguably, the dissent takes this acknowledgment out of context. In the paragraph following the acknowledgement that there was some evidence of a conspiracy, the opinion makes the point that what Tarpley mischaracterized as a conspiracy was political advocacy. *Id.* at 795. The evidence recited in the preceding acknowledgement paragraph was therefore evidence of political advocacy, not conspiracy, and therefore did not create state action. *Id.* The point is a fine one, but if the court believes there is no "genuine issue as to any material fact" then the moving party is entitled to summary judgment. FED. R. CIV. P. 56(c). Apparently, neither the district court nor a majority of the appellate panel believed there was an issue of material fact regarding Tarpley's mischaracterization of political advocacy as conspiracy. 188 F.3d at 791 (citing appellant's position).

397. *Id.* at 798.

398. 188 F.3d at 796 n.7.

399. *Id.* at 796.

400. *Id.* Here, the alleged harm to Tarpley occurred indirectly because the job at the Choate Mental Health Center went to another individual. *Id.* at 795. Keistler's "intended result" was to recommend a Republican party loyalist for the job in the expectation that his recommendation would be accepted. *Id.* Of course, the job might have gone to another Republican loyalist on the basis of another party officer's recommendation if another Republican been nominated. However, had Keistler deliberately targeted Tarpley for exclusion from the job and recom-

line of cases from *Elrod* through *Rutan* because those cases dealt with defendants who were government employees, not private individuals.[401] In each of those cases, the state action requirement was already met, therefore, questions of whether political advocacy amounted to impermissible conspiracies between state and private actors did not have to be considered.

VI. CONCLUSION

Although *Tarpley v. Keistler* extended *Noerr-Pennington* immunity to section 1983 actions, the larger significance of the decision lies in its recognition of the value in the right of petition and in its understanding of what distinguishes the right of petition from the other enumerated rights of speech, press, and assembly. The freedom of speech, press, and assembly will often embrace the right of petition. In such a situation, the analysis should take direction from any principles of constitutional law applicable to freedom of expression. From time to time, as in the *Noerr-Pennington* line of cases and in *Tarpley*, the right of petition itself, that is, the right of an individual to request action from the branch of the government he believes best able to help him and to make his request in a form he believes most effective, is challenged apart from the other enumerated rights. In such a situation, courts should recognize, as the majority opinion in *Tarpley* did, that the right of petition merits a separate analysis. Not only must the content of the petition be carefully examined, but also the form in which the petition is made and the means by which it is presented. If a communication can be properly characterized as a petition, it may merit some measure of protection even though its content might otherwise be actionable. The content of the communication should not be the only consideration because unconventional or less traditional methods of petitioning may obscure what is a legitimate request for government action. Unconventional or less traditional methods of petitioning are sometimes necessary.[402] The form and means of a petition may prove just as decisive as the petition's content in achieving its intended result. Judge Cudahy's opinion understands that sometimes the means or form of the petition is a part of the message.[403] In ex-

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mended Blessing specifically to thwart Tarpley, then his attempt would have created the harm and would not be protected. *Id.* at 797 n.8.

401. *See supra* 385.

402. *See supra* notes 31-77 and accompanying text.

403. "In a culture like ours, long accustomed to splitting and dividing all things as a means of control, it is sometimes a bit of a shock to be reminded that, in operational and practical fact, *the medium is the message.*" MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN, 7 (1964) (emphasis added).

tending *Noerr-Pennington* immunity to a form of political advocacy in the context of a section 1983 claim, *Tarpley v. Keistler* appropriately protects the First Amendment right of petition.

James Filkins