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**INTRODUCTION**

The first amendment to the United States Constitution unequivocally establishes an individual's right to petition the government for redress of grievances. Judicial deference to the primacy and

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1. U.S. Const. amend. I provides in pertinent part: “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”

The right to petition the government for redress of grievances was included in the civil and political liberties guaranteed by the signing of the Magna Carta in 1215. The right to petition the House of Commons, as an extension of the Magna Carta provision, served as a model in the framing of the right in the American Bill of Rights. See 1 C. STEPHENSON & F. MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 125 (2d ed. 1972).

In 1876 the right to petition received its first major interpretation by the United States Supreme Court in United States v. Cruikshank, 92 U.S. 542 (1876). The Court limited the scope of the right to grievances caused by the national government. Id. at 552. The Court recognized, however, that the “very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.” Id. The right to petition was eventually applied to the states through the fourteenth amendment in Hague v. C.I.O., 307 U.S. 496 (1939).

The right to petition has been described recently as “among the most precious of the liberties safeguarded by the Bill of Rights.” United Mine Workers of America v. Illinois State Bar Ass’n, 389 U.S. 217, 222 (1967). In addition, the right is viewed as possessing “a sanctity and a sanction not permitting dubious intrusions.” Thomas v. Collins, 323 U.S. 516, 530 (1945). See also Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1342-43 (7th Cir. 1977).

Not only are redress of religious and political grievances assured under the right, but also grievances stemming from business or economic activities. Compare Thomas v. Collins, 323 U.S. 516, 531-32 (1945) (state statute cannot require labor union organizers to register with a state official before urging workers to join a union) with California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); and Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1962) (business interests may combine and lobby to influence the legislative, executive, or judicial branches of government without violating the antitrust laws).

Finally, the right to petition for redress of grievances has been applied in the criminal law area as a defense to actions brought for violation of various assembly laws. See, e.g., DeJonge v. Oregon, 299 U.S. 353 (1937) (setting aside a conviction pursuant to the Oregon criminal syndicalism act for assisting in the conduct of a meeting called under the auspices of the Communist Party).

For a general discussion of the right to petition and its historical development, see NOWAK, ROTUNDA & YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, 828-31 (1978); Annot., 30 L.Ed.2d 914 (1973).
import of this right\(^2\) is especially apparent in a court-created exception to the antitrust laws\(^3\) which recognizes the necessity to

2. Despite the respect accorded the right to petition as an enumerated right in the first amendment, the ability to seek redress of grievances is not without limitation. As a general rule, the right to petition may not be used as a shield to violate valid statutes. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); NOWAK, ROTUNDA & YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, 830 (1978). Similarly, the right may not be used to achieve a "substantive evil." NAACP v. Button, 371 U.S. 415, 444 (1963). Thus, in an antitrust context, a conspiracy to bar competitors from meaningful access to administrative agencies or the courts was denied protection under the right to petition. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

3. In City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the Supreme Court acknowledged its long-standing reluctance to carve judicial exceptions from the broad coverage of the antitrust laws. Two policies, however, have been previously held by the Court to be "sufficiently weighty to override the presumption against implied exclusions." Id. at 399. Parker v. Brown, 317 U.S. 341 (1943), identified the first such exclusion. In Parker, the Court recognized that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Id. at 351. Because of this firm commitment to a non-federalist position, the Court held that a marketing program adopted by the state of California to regulate the handling, disposition, and pricing of raisins produced in California was not within the intended scope of the antitrust laws. Id. at 350-52. The "state action" exception, based on Parker, immunizes restraints of trade resulting from valid state governmental action. See Rogers, The State Action Antitrust Immunity, 49 U. Colo. L. Rev. 147 (1978); Note, Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates, 77 Colum. L. Rev. 898 (1977). The Parker doctrine was recently reaffirmed in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

The doctrine enunciated in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), is the second judicially-created exception to the antitrust laws. It is this exception which will serve as the focus of this article.

Despite the fact that City of Lafayette acknowledges only two judicially-created exceptions to the antitrust laws, the Supreme Court has at times granted antitrust immunity to professional baseball and learned professions. See, e.g., 16 F. Business Organizations, Von Kalinowski, Antitrust Laws and Trade Regulation § 50 (baseball) and § 49 (learned professions) (7th ed. 1980).

Of course, numerous statutory exceptions to the antitrust laws exist. Statutory accommodation has been achieved in such diverse areas as agriculture, banking, shipping, and labor. For a comprehensive discussion of statutory exceptions, see 16F Business Organizations, Von Kalinowski, Antitrust Laws and Trade Regulation §§ 44.04, 45.01-19 (7th ed. 1980); Annot., 45 L.Ed.2d 841 (1976). For a concise summary of exceptions contained in the antitrust laws and in specific trade regulation statutes, see 16F Business Organizations, Von Kalinowski, Antitrust Laws and Trade Regulation § 44.02(3)(d) (7th ed. 1980). See generally Pogue, The Rationale Of Exceptions From Antitrust, 19 A.B.A. Antitrust Section 313 (1961).

Legislation passed during the Carter administration increased the potential for antitrust liability in three areas of the transportation industry formerly receiving antitrust exemptions. Congress initiated its movement toward substantial deregulation of the transportation industry with the passage of the Air Transportation Regulatory Reform Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978). This Act served as the prototype for the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980). Four months after the enactment of the
democratic processes of permitting petitioning activities despite their direct anticompetitive effect. Since its formal recognition two decades ago, this antitrust exception, called the Noerr-Pennington doctrine after the two United States Supreme Court decisions from which it arose, has evolved into a potent defense frequently utilized by parties facing antitrust attack.

Both an appreciation of the communicative element in attempts to persuade the government, and a fundamental belief in the unfettered expression of ideas have influenced the courts in formulating the scope of conduct classified as petitioning activity under the Noerr-Pennington doctrine. Courts have readily disregarded any anticompetitive intent present in attempts to influence legislative policy-making, even when the apparent purpose for actively supporting the enactment or enforcement of a law was to eliminate competition. Nevertheless, courts have consistently honored the

Motor Carrier Act, Congress passed and President Carter approved the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). These three new laws significantly emancipate the airline, trucking, and railroad industries from the supervisory control of their respective federal regulatory agencies, and remove from antitrust immunity most areas of the carriers' commercial activity.

4. The Supreme Court in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), was guided by the dual observation that "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives," id. at 137, and that the denial of the freedom to freely inform the government of individual grievances "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." Id. See text accompanying notes 40 through 46 infra.


6. The Noerr-Pennington doctrine is most frequently used as the basis for a motion to dismiss. See note 92 infra.

7. Conduct recognized by the Supreme Court as petitioning activity ranges from lobbying and letter writing to picketing and sit-ins. See note 103 infra and accompanying text.

8. E.g., "In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril." Gilbert v. Minnesota, 254 U.S. 325, 338 (1920); "The public criticism of governmental policy and those responsible for government operations is at the very core of the constitutionally protected free speech area." Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1342 (7th Cir. 1977). Accord New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (factual context of case considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270). See also Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

strict sanctions of the Sherman Act against conspiracies in restraint of trade\textsuperscript{10} or concerted refusals to deal by separating and protecting the petitioning activity from the broader scheme that is violative of the antitrust laws.\textsuperscript{11}

Recent interpretations of the \textit{Noerr-Pennington} doctrine have distorted the perimeters of this antitrust exception.\textsuperscript{12} In some cases the doctrine has been extended to immunize types of conduct beyond those originally intended to be encompassed by the exception.\textsuperscript{13} Moreover, the scope of conduct permitted as petitioning activity under the doctrine too often has been controlled by the threshold characterization of a party as either a commercial\textsuperscript{14} or a non-commercial\textsuperscript{15} entity. Based on this facile distinction,\textsuperscript{16} courts have indicated that less economically expressive activity is tolerated for commercial groups than for their non-commercial counterparts.

The purpose of this article is to examine the extent to which the \textit{Noerr-Pennington} doctrine was intended to be used to immunize conduct creating adverse or disruptive economic effects. First, the \textit{Noerr-Pennington} doctrine will be traced from its inception to its current status as a defense for certain anticompetitive conduct. Next, the types of conduct which can be classified as petitioning

\begin{footnotes}
\item 10. 15 U.S.C. § 1 (1976) provides in pertinent part: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .” See cases cited at note 113 infra.
\item 11. See, \textit{e.g.}, United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (1965) (“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 part of a broader scheme itself violative of the Sherman Act.”).
\item 12. See text accompanying notes 122 through 186 infra.
\item 13. See notes 102 through 105 infra and accompanying text.
\item 14. A commercial entity is related to or is connected with trade or commerce. Attempts by commercial associations to influence public policy are often, but not always, motivated by desire for greater profits. See E. KINTNER, \textsc{Federal Antitrust Law} § 17.05 (1980).
\item 16. The commercial-noncommercial distinction has even been used to characterize the functions of the governmental body to which petitions or influence are directed. See note 90 infra.
\end{footnotes}
activity will be explored through a discussion of recent applications of the Noerr-Pennington doctrine. Three recent treatments\(^\text{17}\) of the doctrine will be examined in order to assess the need to create a distinction between politically expressive conduct and economic activity forbidden by the Sherman Act.\(^\text{18}\) Finally, the article will propose factors to be considered in re-establishing the careful equilibrium originally created by the Supreme Court to reconcile the freedom of expression with the freedom to compete.

**DEVELOPMENT OF THE NOERR-PENNINGTON DOCTRINE**


Of the three United States Supreme Court decisions which serve as the basis for the Noerr-Pennington doctrine,\(^\text{19}\) *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*\(^\text{20}\) is the cornerstone of the doctrine. *Noerr* established that the Sherman Act\(^\text{21}\) does not apply to activities which solicit governmental action with respect to passage or enforcement of laws.\(^\text{22}\)

**The Factual Context**

Intense competition between the railroad and trucking industries for the income generated by long-distance hauling of heavy freight culminated in marketplace attacks by each group against the other in the period following World War II.\(^\text{23}\) The railroads'...


\(^{18}\) The need for a line to be drawn "with a dividing point between political expression and economic activity forbidden by the Sherman Act" was suggested by Assistant Attorney General Walter Theiss, Office of the Attorney General, State of Missouri, when commenting upon the then-recent decision by the Eighth Circuit in Missouri v. NOW, 620 F.2d 1301 (8th Cir.), *cert. denied*, 101 S. Ct. 122 (1980), in which Missouri's antitrust claims were denied. Slonim, *ERA Boycott Ruled Outside Sherman Act*, 66 A.B.A.J. 546 (1980).


\(^{22}\) 365 U.S. at 138.

\(^{23}\) *Id.* at 128. For a detailed review of the events leading up to the 1961 decision by the Supreme Court in *Noerr*, see Walden, More About Noerr—Lobbying, Antitrust and the Right to Petition, 14 U.C.L.A. L. Rev. 1211, 1214-20 (1967). Dean Walden notes that in the post-World War II period, approximately 300,000 trucks engaged in the long-haul transportation business with ownership divided among some 20,000 companies. See also The Gentle
offensive against their chief competitor was in the form of a sophisticated advertising campaign.\textsuperscript{24} Through lobbying and public persuasion, the campaign was designed to foster the adoption and retention of laws restricting the ability of the trucking business to transport heavy freight, to create distaste for the truckers among the general public, and to damage relationships between trucking lines and their customers.\textsuperscript{25} To achieve these ends, the railroads successfully stimulated grass roots opposition to the trucking industry.

In response to increased public hostility toward truckers, several states enacted laws detrimental to the trucking industry.\textsuperscript{26} Numerous truck operators and their trade association\textsuperscript{27} reacted by charging that the railroads responsible for the publicity campaign had violated section 1\textsuperscript{28} and section 2\textsuperscript{29} of the Sherman Act. The truckers' complaint alleged that the defendant railroads'\textsuperscript{30} sole motivation in attempting to influence legislation was to destroy the truckers as competitors in the long-distance freight business.\textsuperscript{31}
methods employed by the railroads were described as "vicious, corrupt, and fraudulent." In particular, the truckers sought treble damages for the loss of business resulting from the veto of a pro-trucking bill by the governor of Pennsylvania, and an injunction to restrain the railroads from future use of certain publicity techniques.

The railroads denied that any anticompetitive purpose motivated their anti-trucking advertising efforts. In their answer, the railroads emphasized that the publicity campaign was conducted solely to inform legislatures and the public of facts about the trucking industry. Such conduct, they insisted, was protected by the first amendment under the rights of assembly and petition, and therefore was not within the scope of the antitrust laws.

32. Id.
33. Section 4 of the Clayton Act, 15 U.S.C. §§ 12-27 (1976), provides:
   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover treble the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
34. Perhaps the most dramatic example of successful lobbying by the railroads, through the public relations firm of Carl Byoir & Associates, Inc., occurred when the governor of Pennsylvania vetoed the "Fair Truck Bill" in 1951, six minutes before the bill would have become law without his signature. If passed, the bill would have raised the weight limit for trucks travelling in Pennsylvania from 45,000 pounds to 60,000 pounds. Walden, More About Noerr—Lobbying, Antitrust and the Right to Petition, 14 U.C.L.A. L. Rev. 1211, 1217-18 (1967).
35. It is important to note that the truckers, in seeking an injunction against specific aspects of the railroads' methods of publicity, were not attempting to curtail the railroads' right to disseminate information about competitors or their right to effect the passage of legislation. Instead, the truckers sought to restrain the railroads' use of the "third-party" technique, which gave material prepared by the railroads the appearance of being the spontaneously expressed view of independent persons and civil groups. In essence, under the third party technique, the true source of the material is never revealed. The truckers objected to the future release of disparaging information about them without disclosure of railroad participation, to attempts to exert influence on the governor of Pennsylvania through "front organizations," and to the payment of private and public organizations to propagate the arguments of the railroads. 365 U.S. at 130-31.
36. Id. at 131-32. The railroads subsequently filed a counterclaim against the truckers, charging parallel violations of the Sherman Act for reasons similar to those cited by the truckers: use of a malicious publicity campaign directed toward a competitor, creation of a hostile public atmosphere, and interference with business relationships. Id. at 132. The district court ultimately dismissed the counterclaim. 155 F. Supp. 768 (E.D. Pa. 1957).
37. Since the initiation of litigation in 1953, the railroads argued consistently that the complained of activities did not fall within the scope of the antitrust laws. Rather, the activities were within the protection of the first amendment through the freedom of speech and
district court was unpersuaded by this argument and held that the railroads’ publicity campaign constituted an illegal conspiracy in restraint of trade. The Third Circuit affirmed.

The Supreme Court Opinion

In a unanimous decision, the Supreme Court reversed and held that the Sherman Act did not apply to those activities of the railroads which merely solicited governmental action with respect to the passage or enforcement of laws. Two reasons supported this holding. First, a contrary result "would impute to the Sherman Act the rights of assembly and petition. See, e.g., Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 113 F. Supp. 737, 742 (E.D. Pa. 1953). Whenever it was raised, the district court uniformly dismissed the argument as being inapplicable in view of the methods employed by the railroads to effect specific legislation.

38. 155 F. Supp. 768 (E.D. Pa. 1957). The court was careful to note, however, its awareness of the constitutional overtones of its decision. Id. at 826. Had the railroads merely attempted to influence the passage or enforcement of laws, no Sherman Act violation would have been found. Instead, the decision was prompted by lobbying and publicity techniques which the court believed went beyond the realm of constitutionally protected conduct. In particular, the court was disturbed by the perceived maliciousness and fraudulence of the anti-truck campaign, and by the railroads’ active desire to destroy the trucking industry's public and commercial goodwill. Thus, the district court concluded that the railroads’ conduct, "although attempted to be shrouded with a legislative cloak, ultimately narrow(ed) down" to conduct proscribed by the Sherman Act. Id. at 828-29.

39. 273 F.2d 218 (3d Cir. 1959) (Biggs, C.J., dissenting). The Third Circuit's opinion largely echoed the conclusions of the district court. In a dissenting opinion, Chief Judge Biggs adopted the railroads' constitutional argument. 273 F.2d at 227-29.


Carrying the Parker construction of the Sherman Act one step further, the Court reasoned that if the restraint on trade caused by the law itself is valid, then attempts to have that law enacted are also valid. Thus, the Sherman Act cannot prohibit two or more persons from associating together to persuade the legislature or the executive to pass the law that produces the economic restraint. Besides, the Court observed, such combinations of individuals, working jointly to achieve legislative change, are essentially dissimilar to those combinations traditionally condemned by § 1 of the Sherman Act. 365 U.S. at 135-36.
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."\(^{42}\) Second, to forbid associational activity directed toward influencing legislation would be of questionable constitutionality, especially in view of the first amendment right to petition the government.\(^{43}\)

Based on this reasoning, the overriding need to protect petitioning activity from antitrust attack transcended the factors raised by the truckers in their complaint. The Supreme Court concluded that the railroads' desire to destroy the truckers as competitors did not transform their attempts to influence legislation into violations of the antitrust laws.\(^{44}\) In addition, the direct injury to reputation and the subsequent loss of business which the truckers sustained as a result of the railroads' campaign were classified by the Court as incidental effects of a legitimate attempt to procure governmental action.\(^{45}\) Further, the fact that the railroads pursued legislation on matters in which they were financially interested did not diminish their protection under the newly-created antitrust immunity. It was recognized that a contrary conclusion would "deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them."\(^{46}\)

Thus, the Supreme Court in *Noerr* recognized a statutorily and constitutionally based exception to the antitrust laws. The Court established that petitioning activity is not tarnished by an anticompetitive purpose or an anticompetitive effect. With this foun-
dation in place, the Court added further contours to the exception in two later cases where it was applied to varying factual situations.

United Mine Workers of America v. Pennington

United Mine Workers of America v. Pennington\(^7\) extended the coverage of the *Noerr* antitrust immunity by holding that joint efforts to influence public officials are not illegal even when part of a broader scheme itself violative of the Sherman Act.\(^8\) In addition, *Pennington* implicitly expanded the type of conduct recognized as petitioning activity under the *Noerr* doctrine from lobbying to more subtle means of influence.\(^9\)

In *Pennington*, the United Mine Workers entered into agreements with large mine operators to eliminate small, less efficient coal producers.\(^10\) The agreements guaranteed the union higher wages while assuring the large companies of eventual control over the market.\(^11\) The means utilized to effectuate the agreements combined refusals to buy coal from or rent land to the small companies with attempts to modify existing legislation. The parties to the agreement succeeded in persuading the Secretary of Labor to establish a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority\(^12\) under the Walsh-Healy Act.\(^13\) The wage was designed to be high enough so as to make it difficult for small companies to compete in the TVA term contract market.\(^14\) Additionally, the TVA was urged by the union and the company representatives to halt specific purchases exempt from the

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48. 381 U.S. at 670.
49. *Id.* at 659-61.
50. *Id.* at 660.
51. *Id.*
52. 381 U.S. at 660.
54. *Id.* The minimum wage was also much higher than that in other industries. See Note, *Application Of The Sherman Act To Attempts To Influence Government Action*, 81 HARV. L. REV. 847 (1968).
minimum wage standards. The small companies thus were dealt a double blow: the private agreement between the union and large companies closed the market for the sale of non-union coal, and the "public" amendments to the Walsh-Healy Act enacted a wage level which they could not afford to pay.

On review of a judgment against the union, the Supreme Court reiterated the position taken in Noerr that the first amendment shields from Sherman Act liability concerted efforts to influence public officials, regardless of intent or purpose. But the Noerr doctrine, according to the Pennington Court, also would protect conduct accompanied by a purpose to further an illegal conspiracy. The Court separated the defendant union's approaches to the Secretary of Labor from its admittedly illegal conspiracy with the large coal producers, thereby protecting the petitioning activity against the sanctions of the Sherman Act as applied to this clear restraint of trade.

Unlike Noerr, the petitioning activity in Pennington was not di-

55. 381 U.S. at 660-61. "At a later time, at a meeting attended by both union and company representatives, the TVA was urged to curtail its spot market purchases, a substantial portion of which were exempt from the Walsh-Healy order." Id.

56. The suit was actually initiated by the trustee of the United Mine Workers of America Welfare and Retirement Fund against a small coal company, Phillips Brothers Coal Company, for royalty payments allegedly due under the trust provisions of the National Bituminous Coal Wage Agreement of 1950. Phillips filed an answer and cross-claim against United Mine Workers of America (UMW) alleging that the trustees, UMW, and specific large coal operators had conspired to restrain and to monopolize commerce in violation of the Sherman Act.

After a five-week trial, a verdict was returned in favor of Phillips and against the trustees and the union. The trial court set aside the verdict against the trustees but overruled the union's motion for judgment notwithstanding the verdict or in the alternative for a new trial. The Sixth Circuit Court of Appeals affirmed. 325 F.2d 804 (6th Cir. 1963).

57. 381 U.S. at 670.

58. Id. But see American Tobacco Co. v. United States, 328 U.S. 781 (1946), which states in pertinent part:

It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.


59. The Pennington Court reversed and remanded for further proceedings. The Noerr doctrine was actually only a small portion of the general issue of whether UMW had violated its exemption from the antitrust laws as a labor union under § 20 of the Clayton Act, 15 U.S.C. §§ 12-27 (1976) and § 4 of the Norris-La Guardia Act, 29 U.S.C. § 101 et seq. (1976). The Supreme Court determined that, if proved, the agreement between UMW and the large operators was not exempt. 381 U.S. at 669.
rected to a legislative body, but rather to an executive department (the Department of Labor) and to an administrative agency (the TVA). Moreover, the type of conduct classified as petitioning activity in *Pennington* was not limited to lobbying, but also included seeking statutory change through defined rules of administrative procedure. These aspects of *Pennington*, then, extended the range of forums to which the *Noerr* doctrine could apply, and expanded the scope of activity protected as attempts to influence the passage or enforcement of laws.

**California Motor Transport Co. v. Trucking Unlimited**

The final case in the *Noerr-Pennington* trilogy, *California Motor Transport Co. v. Trucking Unlimited*, involved alleged concerted efforts by a highway carrier to resist and defeat licensing applications of a competitor attempting to acquire operating rights in California. In an opinion written by Justice Douglas, the Supreme Court drew a critical distinction between concerted efforts which are genuine attempts to influence public officials, and concerted efforts which are nothing more than an abuse of the right to petition governmental processes.

*California Motor Transport* modified the *Noerr* and *Pennington* antitrust exception in three significant ways. First, the Court extended the applicability of *Noerr* and *Pennington* to include all departments of the government, including the courts. Second, in

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61. 404 U.S. at 509.


63. 404 U.S. at 510. Although *California Motor Transport* extended the *Noerr-Pennington* immunity to adjudicatory and agency forums, the majority opinion distinguished
the process of summarizing Noerr, the Court implicitly established the first amendment right to petition as the exclusive origin of the antitrust exception. Finally, the Court held that because respondent highway carriers had not sought to influence public officials but instead had sought to bar their competitors from meaningful access to adjudicatory tribunals, the Noerr-Pennington

between unethical practices in the legislative realm and unethical conduct in adjudicatory and agency proceedings. Misrepresentations tolerated in the political (legislative) arena are not immunized when used in adjudicatory and agency processes. Id. at 513. Justice Stewart, in his concurring opinion which was joined by Justice Brennan, felt that this aspect of the majority opinion trampled upon important first amendment values. According to Justice Stewart, no difference in approach should be maintained between attempts to influence legislative and executive bodies, and attempts to influence administrative and judicial bodies. Id. at 516-17.

Examples of the types of conduct not immunized in the adjudicatory process include perjury by witnesses, use of a patent obtained by fraud to exclude a competitor from the market, conspiracy with a licensing authority to eliminate a competitor, and bribery of a public purchasing agent. See Walker Process Equip. Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 175-77 (1965) (patents); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962) (licensing); Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 862 (9th Cir. 1965) (bribery). See generally WIXT Television, Inc. v. Meredith Corp., 506 F. Supp. 1003, 1030-33 (N.D.N.Y. 1980). See generally Robinson, Reconciling Antitrust And The First Amendment, 48 ANTITRUST L.J. 1335, 1343-44 (1980). Robinson notes that since California Motor Transport, the lower courts have held the Noerr-Pennington defense inapplicable where a defendant is alleged to have engaged in misconduct in an adjudicatory setting, such as the submission of knowingly false data or misrepresentation.

In Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168 (D. Del. 1979), the court observed that specific identification of the governmental agency is particularly significant in the Noerr-Pennington area because the scope of the defense widens with the discretion of the forum. Id. at 173 n. 6. For earlier cases involving misrepresentations in an agency context, see Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972) (misrepresentations by defendant before FDA regarding defendant's drug product which allegedly injured plaintiff held not protected by Noerr); Woods Exploration & Producing Co. v. Aluminium Co. of America, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972) (submission of false natural gas production forecasts by defendants to state regulatory commission as part of attempt to persuade the commission to take certain action disadvantageous to defendants' competitors held beyond the scope of Noerr immunity). Although the Fifth Circuit decision in Woods appeared before the Supreme Court decision in California Motor Transport, the Supreme Court denied certiorari in Woods after the Court's California Motor Transport decision. 404 U.S. 1047 (1972).

64. 404 U.S. at 510-11. In giving primacy to the first amendment basis of the Noerr-Pennington doctrine, the Supreme Court concluded that:

[It] would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

Id. The antitrust exception was previously formulated in Noerr from the dual bases of statutory construction and constitutional freedoms. See notes 41 through 43 supra and accompanying text.
immunity from the Sherman Act would not apply.\textsuperscript{65} Respondents' involvement in the adjudicatory process had been a mere "sham" to cover what was nothing more than an attempt to interfere directly with the business relationships of a competitor.\textsuperscript{66} Thus, by giving substance to the "sham" exception to antitrust immunity, \textit{California Motor Transport} contributed a strong but limited counterargument to the \textit{Noerr-Pennington} defense.\textsuperscript{67}


\textsuperscript{66} Dicta in \textit{Noerr} foreshadowed the creation of the sham exception. Although noting that the railroads' efforts to influence legislation were indisputably genuine, the Supreme Court observed that there could be times when a publicity campaign only seeks to destroy a competitor. When a direct attempt to interfere with business relationships is detected, application of the Sherman Act may be justified. \textit{Eastern R.R. Presidents Conference v. Noerr Motor Freight}, 365 U.S. 127, 144 (1961).

\textsuperscript{67} Later lower court cases have articulated varying requirements for qualifying under the sham exception. \textit{See, e.g.,} Virginia Academy of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476, 482 n.9 (4th Cir. 1980) (sham exception, which indicated direct attempt to interfere with competitor's business, applies only when right to petition is actually exercised); City of Mishawaka v. American Elec. Power Co., 616 F.2d 976, 982-83 (7th Cir. 1980), \textit{cert. denied}, 101 S.Ct. 892 (1981) (maneuvering of utility to deny access of municipality to federal commission cannot acquire antitrust immunity by seeking refuge under umbrella of political expression); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 594 (7th Cir. 1977), vacated, 435 U.S. 992 (1978), \textit{judgment reinstated}, 583 F.2d 378 (7th Cir. 1978), \textit{cert. denied}, 439 U.S. 1090 (1979) (economically unrealistic nature of concession proposal might support inference that proposal was mere sham); Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1082 (9th Cir. 1976), \textit{cert. denied}, 430 U.S. 940 (1977) (sham exception should be read narrowly in order to protect the first amendment right of access to administrative proceedings); Reaemco, Inc. v. Allegheny Airlines, 496 F. Supp. 546, 557 (S.D.N.Y. 1980) (three principal criteria for determining whether allegedly illegal conduct is immune from antitrust regulation or comes within the sham exception are: (1) the impact of regulation on first amendment values; (2) the nature of the challenged conduct; and (3) the frequency of repetition of the challenged conduct); First Nat'l Bank v. Marquette Nat'l Bank, 482 F. Supp. 514, 518 (D. Minn. 1979), \textit{aff'd}, 636 F.2d 195 (8th Cir. 1980) (purpose or intent to deprive competitors of meaningful access to agencies or courts is factor to be considered in determining applicability of sham exception); Huron Valley Hospital, Inc. v. City of Pontiac, 466 F. Supp. 1301, 1312-15 (E.D. Mich. 1979) ("sham" exception to \textit{Noerr-Pennington} rule applies to the use of administrative or judicial processes where the purpose to suppress competition by depriving competition of meaningful access to agencies and courts is evidenced by repetitive lawsuits bearing the hallmark of insubstantial claims); MCI Communications Corp. v. AT&T, 462 F. Supp. 1072, 1102-04.
The Noerr-Pennington Doctrine Defined

The Supreme Court's decisions in Noerr, Pennington, and (N.D. Ill. 1978), aff'd, 578 F.2d 1372 (7th Cir.), cert. denied, 439 U.S. 983 (1978) (Noerr-Pennington doctrine does not protect direct injury to relations with customers and financial community caused by publicity campaign; Noerr-Pennington only protects indirect injury to relations with public resulting from governmental action); Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F. Supp. 1124, 1131 (N.D.N.Y. 1977), aff'd, 594 F.2d 594 (7th Cir.), Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F. Supp. 1124, 1131 (N.D.N.Y. 1977), aff'd, 594 F.2d 594 (7th Cir.), cert. denied, 439 U.S. 983 (1978) (Noerr-Pennington does not protect direct injury to relations with customers and financial community caused by publicity campaign; Noerr-Pennington only protects indirect injury to relations with public resulting from governmental action); Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F. Supp. 1124, 1131 (N.D.N.Y. 1977), aff'd, 594 F.2d 594 (7th Cir.), cert. denied, 439 U.S. 983 (1978) (corruption of administrative or judicial processes removes shield of antitrust immunity provided by Noerr-Pennington doctrine); Associated Radio Serv., Co. v. Page Airways, Inc., 414 F. Supp. 1088, 1096 (N.D. Tex. 1976), aff'd, 624 F.2d 1342 (5th Cir. 1980) (in order to preclude antitrust immunity based upon concerted efforts to induce governmental action, plaintiff need only show that the defendant instituted litigation with the purpose of achieving a collateral and unlawful objective to that appearing on the face of the suit and that he committed specific acts, other than those acts incidental to the normal use of the courts, directed at obtaining that objective).

The following ambiguous language in California Motor Transport has created a dispute among the lower courts to whether a single suit filed by a competitor can invoke the sham exception, or conversely, whether a pattern of repetitive suits is required:

Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed, but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. 404 U.S. at 513.


Further, several courts contend that litigants claiming sham behavior must state the basis for the allegation in more than conclusory terms. Under this approach, the complaint must provide some basis for believing that what appears to be a legitimate exercise of the right to petition is in reality something else. The heightened pleading rule requires "fact" as opposed to "notice" pleading where a plaintiff seeks to avoid the impact of Noerr-Pennington by relying on the sham exception. The rule is motivated by the concern that without such a requirement, the right to petition would be chilled by the fear of having to defend harassing and expensive litigation.

The Ninth Circuit initiated this approach in Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976) (Browning, J., dissenting), cert. denied, 430 U.S. 940 (1977). The court dismissed, because of
the lack of factual specificity in pleading, a complaint alleging that the defendants’ actions in petitioning the San Francisco zoning board were a sham and therefore unprotected by Noerr-Pennington. See Robinson, Reconciling Antitrust And The First Amendment, 48 ANTITRUST L.J. 1335, 1348 n.62 (1980). Robinson points out that although the Franchise Realty court stated it was not adopting a rule requiring fact as opposed to notice pleading for antitrust cases generally, it declared that “where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected the the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.” 542 F.2d at 1082-83.


Strong opposition to the heightened pleading requirement is voiced in the Franchise Realty opinion itself and in subsequent lower court opinions. In his Franchise Realty dissent, Judge Browning emphasizes that the majority created an unwarranted exception to the standard for pleading laid down in the Federal Rules of Civil Procedure. 542 F.2d at 1087. According to Judge Browning, none of the cases cited by the majority in support of the new pleading rule suggest that the problem of protecting first amendment rights from the chilling effects of harassing litigation should be solved by the creation of a judicial exception to the federal practice of notice pleading. Id. at 1090. Accord Sage Int'l Ltd. v. Cadillac Gage Co., 507 F. Supp. 939, 943-44 (E.D. Mich. 1981); MCI Communications Corp. v. AT&T 462 F. Supp. 1072, 1102 (N.D. Ill. 1978), aff'd, 594 F.2d 594 (7th Cir. 1979).


69. 381 U.S. 657 (1965).
70. 404 U.S. 508 (1972).
71. The original intent of Congress in enacting the Sherman Act was to suppress and penalize restraints on commercial competition in the marketing of goods and services. Apex Hosiery Co. v. Leader, 310 U.S. 469, 493-95 (1940). See also Council for Employment and Economic Energy Use v. WHDH Corp., 580 F.2d 9, 12 (1st Cir. 1978), cert. denied, 440 U.S. 945 (1979). According to the Apex Court, the purpose of the antitrust laws was to prevent restraints in business and commerce which tended to “restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.” 310 U.S. at 493. For a general discussion of the economic background of the antitrust laws, see E. KINTNER, FEDERAL ANTITRUST LAW §§ 1.1-1.16 (1980).
72. The difficulty in achieving the reconciliation between antitrust laws and constitutional freedoms is discussed in Comment, Combination To Seek Legislation and Law Enforcement for Anticompetitive Purpose Not a Violation of Sherman Act, 1961 U. ILL. L.F. 326. The student commentator contrasts the Sherman Act’s limitation of rights with the “virtually unaboligable” right to petition. Id. at 326 n.6.
proscriptions of the Sherman Act. Fundamentally, the Noerr-Pennington doctrine means that the Sherman Act does not apply to those activities of associations which are specifically designed to procure favorable governmental action, even when the underlying motivation and the subsequent effect of the activities is anticompetitive. It is the petitioning element in the doctrine that distinguishes attempts to eliminate competition through private action from attempts to eliminate competition through legislation. While direct attempts to destroy a competitor, not channeled through the petitioning medium, create situations where the Sherman Act traditionally has applied, direct injury to a competitor resulting from attempts to influence governmental action is considered an incidental effect of constitutionally sanctioned conduct. The Protective realm of the Noerr-Pennington doctrine, however, is not unlimited. The further removed the activity is from soliciting the passage or enforcement of laws, the stronger the reasons

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73. The merging of Noerr, Pennington, and California Motor Transport into the Noerr-Pennington doctrine is marred by certain ambiguities in reasoning in each of the opinions. One commentator believes that the principle weakness of the Noerr-Pennington line of cases is the failure by the Supreme Court to articulate unambiguously in each case the basis for exempting certain lobbying from the reach of the antitrust laws. Whereas Noerr suggests that the exception is based on construction of the Sherman Act, California Motor Transport indicates that the exception is predicated upon the first amendment. Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Chi. L. Rev. 80, 94 (1977). "The resolution of this ambiguity is crucial, for if all lobbying activities are exempt from the Sherman Act, conduct that is unprotected by the first amendment might nevertheless be immune from the antitrust laws." Id. Fischel individually analyzes and criticizes the three Supreme Court decisions forming the basis of the Noerr-Pennington doctrine.


become for applying the Sherman Act and denying the protection of the Noerr-Pennington doctrine. 77

Under the doctrine, therefore, antitrust immunity extends only to those actors involved in "political activity." "Political" denotes attempts to influence government action. The term was not used by the Noerr Court to characterize the legislation which is the object of petitioning activity. 78 Financial or commercial legislation thus should receive the same scope of protection under the Noerr-Pennington doctrine as would social or noneconomically-oriented legislation. 79 Moreover, the goals which participants wish to achieve through their solicitation attempts do not add to or subtract from the amount of protection accorded to the activity. 80

The respect granted to the right to petition in an antitrust context is further illustrated by Pennington's holding that any portion of conspiracies in restraint of trade which involves genuine attempts to influence the passage of legislation may be excised from the broader illegal scheme. 81 The petitioning element, then, cannot

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78. 365 U.S. at 137.

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. 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 (footnote omitted).

Id.

79. In Noerr, for example, the conference of railroads wished indirectly to increase profits by directly influencing anti-truck legislation. The advertising campaign was undertaken solely to advance the economic self-interest of the railroads. Yet Noerr clearly acknowledged that it was neither unusual nor less legal to seek action on the passage of laws with the hope of gaining a personal or a competitive advantage. 365 U.S. at 139.

80. Id. at 139-40. See also City of Mishawaka v. American Elec. Power Co., 616 F.2d 976, 981 (7th Cir. 1980), cert. denied, 101 S. Ct. 892 (1981) (Noerr-Pennington doctrine shields from the Sherman Act a concerted effort to influence public officials, regardless of intent or purpose); Miracle Mile Assoc. v. City of Rochester, 617 F.2d 18, 20-21 (2d Cir. 1980) (mere solicitation of governmental action through legislative processes, even though the sole purpose is to restrain competition, is an activity which is fully protected by the first amendment and is immune from Sherman Act liability); Association of W. Ry. v. Riss & Co., 299 F.2d 133, 135 (D.C. Cir.), cert. denied, 370 U.S. 916 (1962) (joint solicitation of government action for passage of laws does not violate the Sherman Act even if its purpose is to destroy competition).

be tainted even when intertwined with unlawful activity. The petitioning element can be abused, however, when used to bar the access of competitors to adjudicatory tribunals and courts. California Motor Transport refused to extend the coverage of the Noerr-Pennington doctrine to covert attempts to interfere directly in the business relationships of a competitor through the masquerade of petitioning activity.

Finally, in the process of differentiating between "sham" and bona fide petitioning efforts, California Motor Transport shifted the dual statutory-constitutional basis of the Noerr-Pennington doctrine to a solely constitutional foundation. The result of this shift was a signal to lower courts that the broad range of conduct associated with other first amendment rights could be used to interpret the scope of petitioning activity protected by the doctrine from Sherman Act violations.

APPLICATION OF THE NOERR-PENNINGTON DOCTRINE

Past Patterns

Application of the Noerr-Pennington doctrine by lower courts


84. 404 U.S. at 510-11.

85. U.S. Const. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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." See note 64 supra.

Once the basis of the Noerr-Pennington doctrine was placed solely on the first amendment, questions arose as to the applicability of traditional forms of protest, such as picketing and consumer boycotts, to conduct regulated under the Sherman Act. See generally Note, NOW or Never: Is There Antitrust Liability for Noncommercial Boycotts?, 80 Colum. L. Rev. 1317 (1980); Note, Political Boycott Activity and the First Amendment, 91 Harv. L. Rev. 659 (1978); Comment, Political, Social, And Economic Boycotts By Consumers: Do they Violate The Sherman Act?, 17 Hous. L. Rev. 775 (1980); Note, Protest Boycotts Under the Sherman Act, 128 U. Pa. L. Rev. 1131 (1980).


87. For discussions about the Noerr-Pennington doctrine as it has matured through application and interpretation, see Costilo, Antitrust's Newest Quagmire: The Noerr-
has been confined largely to customary modes of petitioning activity such as lobbying, approaches to public officials, and administrative proposals and appearances. Indeed, courts often assume that the type of conduct in dispute constitutes petitioning activity and focus instead on the genuineness of the conduct under the sham exception.

The Noerr-Pennington doctrine has been considered most frequently by lower courts in a commercial context when business
entities with united interests form combinations for the purpose of influencing legislation or administrative decisions favorable to themselves. A fairly typical pattern has developed when such combinations are challenged. The courts ultimately must determine whether the combinations constitute illegal conspiracies in restraint of trade or legal associations of entities merely seeking legislative change. The judicial process usually is initiated by the victim of the concerted activity. The defendant individuals or associations invoke the Noerr-Pennington doctrine as a defense to the accusations of anticompetitive activity and move to dismiss the plaintiff's complaint. In ruling upon the motion to dismiss,
courts first resolve whether or not the defendants have made a genuine attempt to influence the passage or enforcement of laws through their actions. If a genuine effort is found, and no attendant illegal activity is involved, then based on the Noerr-Pennington exception to the antitrust laws, the motion will be granted. If, however, the defendants’ conduct is determined to be merely a sham to cover a direct attempt to destroy a competitor, or if the conduct appears to be merely a portion of a larger scheme itself violative of the Sherman Act, the motion will be denied. Should the alleged Sherman Act violations later be proved, then any protected petitioning activity is separated from the illegal conduct when assessing monetary damages against the defendants.

This method is consistent with the precepts enunciated in Noerr, Pennington, and California Motor Transport. As long as

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93. See, e.g., Virginia Academy of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476 (4th Cir. 1980); Feminist Women’s Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), cert. denied, 424 U.S. 924 (1979); Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975).

94. See, e.g., Mark Aero, Inc. v. TWA, 580 F.2d 288 (8th Cir. 1978); Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975); Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696 (D. Colo. 1975).

95. California Motor Transport indicates that misrepresentations and unethic conduct in the petitioning process will be treated differently in the legislative, administrative, and judicial contexts. “Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.” 404 U.S. at 513. In foreshadowing the sham exception, the Noerr Court articulated it in terms of direct attempts to harm a competitor. 365 U.S. at 144. Noerr arose in a legislative context. In contrast, California Motor Transport discussed the sham exception in terms of barring access to governmental forums and filing repetitive lawsuits. The case arose in an agency and court context. The majority opinion in California Motor Transport reconciled these descriptive differences by citing Congress’ traditional caution in legislating with respect to problems relating to the conduct of political activities, and comparing the congressional caution to the familiar imposition of sanctions against unethical conduct in an adjudicatory setting. 404 U.S. at 512.

96. See note 68 supra.


98. See Federal Prescription Serv. v. American Pharmaceutical Ass’n, 484 F. Supp. 1195 (D.D.C. 1980), in which a district court held that defendant National Society of Pharmacists committed a per se violation of § 1 of the Sherman Act when it carried out a policy of indiscriminate opposition to mail order pharmacies. Those efforts of the association, however, which constituted attempts to influence legislation were protected by the Noerr-Pennington doctrine. The court ultimately rejected as a claim for damages legal expenses incurred by the plaintiff in response to lobbying activities or litigation found to be protected under Noerr-Pennington. The court did award the plaintiff treble damages for lost profits attributable to the conspiracy. Id. at 1209-13.

99. See notes 68 through 86 supra and accompanying text.
the desire to destroy a competitor is pursued through bona fide attempts to achieve legislative change, the conduct will be classified as petitioning activity.\textsuperscript{100} When, however, the destructive impulse is directed more toward the marketplace than toward the government, the need to maintain a free enterprise economy outweighs any communicative element in the petitioning activity.\textsuperscript{101} Thus, the line between exemption from and violation of the Sherman Act is dependent upon the petitioning element in the conduct causing anticompetitive effects.

\textbf{Recent Trends}

In recent cases,\textsuperscript{102} defendants charged with antitrust violations have attempted to extend the \textit{Noerr-Pennington} doctrine to immunize conduct beyond what previously has been considered customary petitioning activity.\textsuperscript{103} Defendants invoking the doctrine, moreover, are no longer exclusively commercial entities. Noncommercial organizations have borrowed and adapted the doctrine for their own use as an antitrust defense.\textsuperscript{104} The new growth in the doctrine as a defense, however, ignores the original limitations on the doctrine imposed by the Supreme Court.\textsuperscript{105}

This expansion of the \textit{Noerr-Pennington} doctrine was triggered

\begin{footnotesize}
\begin{enumerate}
\item Legislative change in this context also encompasses the decisions of administrative agencies and courts.
\item \textit{Associations of businesses typically utilize common forms of persuasive conduct, such as advertising, lobbying, and letter writing, to communicate their grievances to the government. In addition, Pennington and California Motor Transport implicitly recognized the institution of administrative or judicial proceedings as petitioning activity. The common element in these acknowledged forms of petitioning conduct is that society has an interest in protecting each as a part of the political and democratic processes. Conduct in which the social interest is diminished will be less likely to be classified as within the Noerr-Pennington immunity. See L. Sullivan, Handbook of the Law of Antitrust § 238(d) (1977).}
\item \textit{See, e.g., Missouri v. NOW}, 620 F.2d 1301 (8th Cir.), \textit{cert. denied}, 101 S. Ct. 122 (1980); \textit{NAACP v. Claiborne Hardware Co.}, No. 51,488 (Miss. S. Ct. Dec. 10, 1980) (Boycott of retail merchants in a Mississippi community by the NAACP held not violative of Mississippi antitrust law because, based on Noerr-Pennington doctrine, boycotts to achieve political ends are not a violation under the Sherman Act, after which the state law was patterned). \textit{See notes 68 through 86 supra and accompanying text.}
\end{enumerate}
\end{footnotesize}
by the language in *California Motor Transport Co. v. Trucking Unlimited* which identified constitutional reasons as the sole basis of the antitrust exception. The courts began to expand the scope of conduct classifiable as petitioning activity beyond simple lobbying to include the full spectrum of cognate first amendment rights. Further, the prominence accorded to the first amendment after *California Motor Transport* prompted courts to give greater consideration to the expressive content of certain forms of conduct.

The treatment of boycotts is illustrative of this shift in perspective. The Supreme Court in *Noerr* cited boycotts as combinations normally held violative of the Sherman Act. The *Noerr* Court, however, was referring to the classic economic boycott, i.e., a concerted action to destroy a competitor through refusals to deal or denial of access to the marketplace. In most instances, these boycotts were considered to be illegal *per se*, although a more

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107. *Id.* at 510-11.
108. In addition to protecting the right to petition, the first amendment also guarantees the freedoms of speech, religion, and assembly. The freedom of association is considered implicit in the amendment, although it is not included as an enumerated right. See note 43 *supra*.
111. *Id.* at 136.
112. Boycotts occur most frequently in a commercial context. Indeed, as the student author in Note, *NOW or Never: Is There Antitrust Liability for Noncommercial Boycotts?*, 80 Colum. L. Rev. 1317 (1980), observed, all group boycotts considered by the Supreme Court have been conducted by business firms or associations of such firms. *Id.* at 1317. Classic group boycotts are defined as concerted refusals to deal with a third party with the aim of excluding the party from a particular market or coercing the party to agree to certain terms as a condition of participation in the market. *Id.* Group boycotts in a commercial context are to be distinguished from boycotts used by social or political groups as a means of protest. See, e.g., Henry v. First Nat'l Bank, 595 F.2d 291 (5th Cir.1979), *cert. denied*, 100 S. Ct. 1020 (1980) (civil rights boycott of white merchants). See generally L. Sullivan, *HANDBOOK OF THE LAW OF ANTITRUST* §§ 83-92 (1977); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. Pa. L. Rev. 847 (1955); Note, *Protest Boycotts Under The Sherman Act*, 128 U. Pa. L. Rev. 1131 (1980).
113. The *per se* doctrine labels as illegal any practice to which it applies, regardless of the reasons for the practice and without extended inquiry as to its effects. L. Sullivan, *HANDBOOK OF THE LAW OF ANTITRUST* § 59 (1977). The Supreme Court has consistently treated group boycotts as *per se* violations of the Sherman Act because these boycotts typically involve direct attempts to eliminate a competitor. See, e.g., United States v. General Motors Corp., 384 U.S. 127 (1966); Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion
flexible "rule of reason" test\textsuperscript{114} has been applied by the lower courts to temper the severity of the \textit{per se} approach.

Recently, the preconception that all boycotts are inherently anticompetitive has been challenged by commercial entities who utilize refusals to deal not to destroy competitors but to symbolize grievances.\textsuperscript{115} Although the boycott label is still applied to this conduct, these refusals to deal are boycotts of a different genre than those

Originators Guild of America v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914).


\textsuperscript{114} Courts have applied a "rule of reason" test as the prevailing standard of analysis when the \textit{per se} doctrine is inappropriate. In the boycott context, the rule of reason is most often invoked when the indirect effect of a certain course of conduct is to inhibit trade. Under the rule of reason analysis, courts balance the procompetitive effect of the conduct against any anticompetitive effect. Depending on the outcome of this balancing process, the conduct is determined to be either reasonable or unreasonable. Only the latter finding will prompt the sanctions of the antitrust laws. \textit{See, e.g.}, Silver v. New York Stock Exch., 373 U.S. 341 (1963); Associated Press v. United States, 326 U.S. 1 (1945).

Under the rule of reason, the trier of fact must consider:

the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.


\textsuperscript{115} Using concerted refusals to deal as a means of expressing grievances to public officials provides a new angle to both the \textit{per se} and rule of reason approaches to anticompetitive behavior. Application of the \textit{per se} rule to this type of conduct, which would prevent consideration of the expressive component of the conduct, would impermissibly chill an association's constitutional right to voice disagreement with governmental policy. On the other hand, under the rule of reason, the communicative purpose of the chosen conduct is not determinative but can only be considered as evidence of the restraint's probable impact on competition. The expressive element will, however, give greater weight to other rule of reason criteria such as the facts peculiar to the association, the history of the restraint, and the reasons why the restraint was imposed. Increased emphasis of these factors will serve as a strong counterweight to any anticompetitive effects.
considered in the past. When boycotts are used more for their communicative value than for their anticompetitive effect, courts are forced to be more sensitive to the implication of first amendment freedoms of expression and petition, and are unable to rely as heavily upon the previous method of boycott analysis.

Judicial respect for the communicative element in boycotts has been exhibited by a few courts when faced with non-commercial organizations charged with antitrust violations. Because boycotts organized by consumers or political groups are viewed as intimately bound up with political speech and not tied to narrow economic interests, courts have indicated that more economically disruptive conduct is to be tolerated for non-commercial groups than for their commercial counterparts. This approach, however, is the result of erroneously according undue weight to either the protections of expressive conduct under the first amendment or to the restrictions on anticompetitive behavior imposed by the Sherman Act.

The application of the Noerr-Pennington doctrine to non-traditional forms of petitioning activity and the use of the doctrine by non-commercial organizations indicates that a reassessment of the doctrine is necessary. In particular, there is a need to modify the approach taken by courts in determining the appropriateness of

116. Application of the boycott label to actions which do not seek to destroy or injure a competitor is dangerous. See Handler, Recent Developments in Antitrust Law: 1958-59, 59 Colum. L. Rev. 843 (1959). Professor Handler remarks that the term boycott "connotes something sinister. It is not a neutral term. It is an opprobrious epithet." Id. at 864. Appropriate classification of conduct creating anticompetitive effects, then, is crucial because of the sympathetic or hostile reactions triggered by the use of the word. It is especially interesting to compare, for example, the classifications of a three-day closure of New England gas stations as a "boycott" by the courts considering the shut-down, see, e.g., Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 499 F. Supp. 553 (D. Del. 1980), with the classification of the same closure as a "strike" by the press covering the story. See, e.g., Sultzberger, Strike of Service Stations Is Averted As U.S. Agrees to Review Demands, N.Y. Times, June 28, 1979, § 2, at 10, col. 5; Striking Gas Stations Reach Pact, N.Y. Times, § 2, at 2, col. 4.


120. See notes 184 through 186 infra and accompanying text.
the antitrust exception to the particular conduct in question. Courts should not assume that the methods used to express grievances to the government are protected forms of petitioning activity. Analysis of the type of conduct claimed to be a valid exercise of the right to petition should supplant analysis of the genuineness of the activity as the threshold consideration. The heightened complexities in applying the Noerr-Pennington doctrine, as illustrated in three recent cases, make the original reconciliation between the Sherman Act and the first amendment less correlative.

Unequal Application of the Noerr-Pennington Doctrine

Crown Central Petroleum Corporation v. Waldman and Osborn v. Pennsylvania-Delaware Service Station Dealers Association evidence the analytical disarray which results when courts must apply the Noerr-Pennington doctrine to non-customary forms of petitioning activity. The cases arose out of the same factual situation, but the district courts differed in the weight given to the cases’ antitrust and constitutional dimensions. Although defendants in both Crown Central and Osborn claimed immunity under the Noerr-Pennington doctrine, only one of the courts upheld the disputed conduct as protected petitioning activity.

In 1979, members the Pennsylvania-Delaware Independent Service Station Dealers Association closed their gas stations for a three-day period to protest United States Department of Energy gasoline pricing policies. This event prompted the filing of suits

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121. See notes 87 through 89 supra and accompanying text.
122. 486 F. Supp. 759 (M.D. Pa.), rev’d on other grounds, 634 F.2d 127 (3d Cir. 1980).
126. For a discussion of the Pennsylvania-Delaware Independent Service Station Dealers Association’s activities during the gasoline shortage of 1979, see N.Y. Times, June 28, 1979, § 2, at 10, col. 5; N.Y. Times, July 11, 1979, § 2, at 5, col. 1; N.Y. Times, July 16, 1979, § 2, at 2, col. 4; N.Y. Times, July 29, 1979, § 23, at 13, col. 1. The service station dealers’ actions were successful. In late July 1979, the Department of Energy increased the minimum retail price of gasoline, which ensured greater profits for the dealers. See 10 C.F.R. § 212.93; 44 Fed. Reg. 42541-45 (1979).
127. Some service station dealers also closed their stations on a series of seven consecutive Sundays in the spring and summer of 1979. The Sunday closures were for the same expressive purpose as the more dramatic three-day closure. Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759, 761 (M.D. Pa.), rev’d on other grounds, 634 F.2d 127 (3d Cir. 1980).
128. Id. at 766.
in two different states, each suit alleging that the closure constituted an illegal conspiracy in restraint of trade in violation of the antitrust laws.

Crown Central Petroleum Corporation v. Waldman

In reaction to the three-day gas station closure, Crown Central Petroleum Corporation sought an injunction in district court against Waldman, its retailer, to prevent his further participation in the alleged conspiracy. Waldman filed a motion to dismiss this portion of Crown Central’s complaint, claiming that the clo-

129. Crown Central’s complaint consisted of three counts. In Count I, Crown Central sought a declaratory judgment that in terminating its franchise relationship with Waldman it had complied with the terms of both the Branded Service Station Lease and Dealer Agreement and the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 et seq. (1978), and that Crown Central was entitled to possession of the station. 486 F. Supp. at 761. Count II sought a permanent injunction under the federal antitrust laws, specifically § 16 of the Clayton Act, 15 U.S.C. §§ 12-27 (1976). The Crown Central complaint prayed for an injunction against Waldman’s further participation in any conspiracy in restraint of trade. In addition, Crown Central requested damages for potentially irreparable injury to its trademark caused by Waldman’s participation as an active member in the dealers association. 486 F. Supp. at 761-62. Finally, Count III sought Waldman’s eviction from the station under Pennsylvania law. Waldman’s lease with Crown Central had expired June 18, 1976 and was not renewed because a new Pennsylvania statute, 73 P.S. §§ 202-1 et seq. (1975), would have prevented Crown Central from enforcing parts of the lease agreement that it believed were essential to its marketing philosophy. 486 F. Supp. at 762. The district court stayed all consideration of Count III pending the final outcome of an identical eviction action in state court. Id.

130. Waldman filed a motion to dismiss or to strike portions of Crown Central’s complaint under Fed. R. Civ. P. 12(b)(6) and 12(f). The motion was directed only to Counts II and III of the complaint. 486 F. Supp. at 761. The district court entered judgment in favor of Waldman in Count II because his participation in the concerted action of the independent dealers in closing their stations was exempted from the antitrust laws as an exercise of his first amendment right to petition the government under the Noerr-Pennington doctrine. Id. at 769.

In ruling upon Waldman’s motion to dismiss, the district court considered matters outside the pleadings. The court was then bound to treat the motion as one for summary judgment under Fed. R. Civ. P. 56. Because the only outside evidence which the court reviewed was the testimony of Waldman elicited and relied upon by Crown Central’s counsel at a November 15, 1979 hearing, the court did not believe that Crown Central needed an opportunity to present any further material. Id. at 762.

The district court’s treatment of the motion to dismiss as a motion for summary judgment without opportunity for further briefing served as the basis of the reversal in the Third Circuit. 634 F.2d 127 (3d Cir. 1980).

The Department of Justice filed an amicus curiae brief for the United States of America in the Third Circuit action. The Department of Justice argued that neither Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), nor any other case supported the principle that any action taken for the purpose of expression, no matter how clearly in violation of the Sherman Act, is exempt from regulation under the Act. For a more detailed discussion of the Department of Justice’s views toward the Noerr-Pennington
sures were an expression of his right to petition the government for redress of grievances, and thus protected under the *Noerr-Pennington* doctrine.\(^{131}\)

Although the district court initially characterized the closures as a boycott, i.e. a concerted refusal to deal,\(^{132}\) the court recognized that the dealers' action was not an attempt to destroy a competitor or an attempt to prevent access to an available market.\(^{133}\) Thus, because the united closings were not "manifestly anticompetitive,"\(^{134}\) the court advocated the application of the rule of reason as the appropriate standard of analysis.\(^{135}\) The court, however, did not decide the reasonableness of the dealers' actions.\(^{136}\) Instead, the *Noerr-Pennington* doctrine was held to exempt the conduct from antitrust attack.\(^{137}\)

The district court classified the dealers' actions as conduct pro-
tected as political speech used to petition the government. The action of the gas station dealers was actually conduct beyond pure speech used to petition the government. The dilemma of the district court, then, was whether the closure could be construed as conduct protected as political speech used to petition the government under the Noerr-Pennington doctrine. Id. at 766.

Certain conduct has been classified by the Supreme Court as a form of expression protected under the first amendment. "Symbolic speech" is the label applied by the Court to the type of conduct which criticizes public policies through behavior rather than words. Examples of symbolic expression considered by the Supreme Court include the burning of a draft card, the wearing of black armbands in a classroom, and the mutilation of the American flag. See, e.g., Spence v. Washington, 418 U.S. 405 (1974) (Rehnquist, J., Burger, C.J., and White, J., dissenting) (flag); Tinker v. Des Moines School District, 393 U.S. 367 (1969) (Black, J., dissenting) (armbands); United States v. O'Brien, 391 U.S. 367 (1968) (Douglas, J., dissenting) (draft cards).

The Crown Central court utilized a three-part test from Spence v. Washington, 418 U.S. 405 (1974) to distinguish conduct protected as symbolic speech from conduct not within first amendment protections. According to the Crown Central court, under this test conduct is protected expression:

1. If the conduct is a clear departure from the normal conduct of the actor and cannot be explained in any other way than that the actor is expressing himself through his actions;
2. If the actor has a legitimate reason to expect the audience of his conduct to view the action as communication; and
3. If the actor intended to and does communicate a message.

486 F. Supp. at 767-68. The district court concluded that the gas station closures satisfied these criteria. 486 F. Supp. at 768.

Because the closures were thus classified as symbolic speech, the court next applied a four-part test from United States v. O'Brien, 391 U.S. 367 (1968), to determine the degree of governmental regulation which could be placed on the symbolic expression. Under O'Brien, a government regulation is justified:

1. If the regulation is within the constitutional power of the government;
2. If the regulation furthers an important or substantial governmental interest;
3. If the governmental interest is unrelated to the suppression of free expression; and
4. If the incidental restriction is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. The first and third O'Brien factors were found by the district court to be easily satisfied by the federal antitrust laws. 486 F. Supp. at 768. The second and fourth factors caused more difficulty. The court ultimately decided, however, that a "legitimately exercised First Amendment right, unquestionably conducted for the purpose of expression, outweighs the government's interest in free trade." Id., citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

closure had been designed to communicate a grievance to the government through conduct, thereby implicating the broader protection accorded to political expression under the first amendment. In weighing the dealers' interest in free expression against the government's interest in free trade, the first amendment prevailed. Thus, despite the fact that the gas station closures were more than the "mere solicitation of governmental action," the Noerr-Pennington doctrine exempted the three-day shut-down from antitrust sanctions.

*Osborn v. Pennsylvania-Delaware Service Station Dealers Association*

Whereas the *Crown Central* court found the closures to be conduct protected by the first amendment, the district court in *Osborn v. Pennsylvania-Delaware Service Station Dealers Association* found the same series of closures to be conduct proscribed by the Sherman Act. Dale Osborn, a consumer, initiated the antitrust action against the service station dealers association involved in the closure. A class action suit was filed on behalf of all

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139. 486 F. Supp. at 769.
140. The *Crown Central* court noted that only the most important concerns of the government outweigh an individual's right to free expression. Id. at 767. Although symbolic speech traditionally has not commanded as much protection from government infringement as pure speech, it has, nevertheless, commanded that the governmental interest be substantial before regulation is regarded as permissible. See United States v. O'Brien, 391 U.S. 367 (1968).
141. 486 F. Supp. at 769.
142. Id. at 766.
144. Id. at 560.
145. It is interesting to compare the respective plaintiffs in *Crown Central* and *Osborn*. Because of a franchise relationship, plaintiff petroleum corporation in *Crown Central* had a choice of potential actions against Waldman, ranging from breach of contract to unlawful restraint of trade. The district court's denial of Crown Central's antitrust count did not leave the company without a remedy for any injury caused by the closures.

In contrast, no contractual arrangement existed between plaintiff Osborn and the gas stations involved in the boycott. As a result, Osborn had a much more narrow choice of actions on which to base a claim. His most viable claim was an allegation of antitrust violations under the Sherman Act. See generally Note, Antitrust: Consumer Standing After Reiter v. Sonotone Corp. and Illinois Brick Co. v. Illinois, 11 LOV. CHI. L.J. 327 (1980).
146. 499 F. Supp. at 555-56.

The United States Department of Energy and the Secretary of the Department of Energy were also named as defendants in *Osborn*. The federal defendants were included in the action because Osborn sought to enjoin the implementation by the DOE of the "illegal gasoline price increase improperly implemented solely in response to the illegal conspiracy." Id. at 555. See 10 C.F.R. § 212.93; 44 Fed. Reg. 42541-45 (1979). The motion to dismiss of the
those who regularly purchased gasoline from New Castle, Delaware dealers who participated in the protest.\textsuperscript{147} Obsorn claimed that the dealers' activities were in violation of sections 1 and 2 of the Sherman Act.\textsuperscript{148} In addition, he sought damages for those who had been injured or would be injured by the alleged conspiracy to cause the Department of Energy to raise the maximum retail price of gasoline,\textsuperscript{149} and an injunction against future illegal conduct by the dealers.\textsuperscript{150}

As in the Crown Central litigation, defendant dealers in Osborn filed a motion to dismiss based on an asserted Noerr-Pennington defense.\textsuperscript{151} The Osborn court, however, refused to hold that the right to petition required a blanket antitrust immunity for boycotts ultimately intended to influence governmental action.\textsuperscript{152} According to the court, boycotts protesting governmental policy, despite their communicative component, have coercive economic effects which ordinarily may be regulated without serious jeopardy to first amendment interests.\textsuperscript{153} Thus, the court focused upon the impact of the closures, rather than upon the closures themselves.\textsuperscript{154}

\textsuperscript{147} Id. at 554-55. Defendant Dealers Association, as an alternative to its motion to dismiss, challenged the maintainability of plaintiff's claim as a class action under Fed. R. Civ. P. 23. The district court, however, postponed its decision regarding the appropriateness of class certification. Id. at 560.

\textsuperscript{148} Id. at 555. Osborn asserted that in order to bring public pressure to bear on the DOE in support of the alleged objective of increasing the maximum retail price of gasoline, the dealers planned and executed a group boycott of gasoline sales to the public. Id.

\textsuperscript{149} Id.

\textsuperscript{150} Id.

\textsuperscript{151} Id. The dealers' motion to dismiss was denied. Id. at 555.

\textsuperscript{152} Id. at 557-58.

\textsuperscript{153} The Osborn court noted that the Supreme Court "has repeatedly held that the government has a strong interest in regulating anti-competitive activity." Id. at 558, citing California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. 445 U.S. 97 (1980). "Moreover, [the Court] has repeatedly recognized that joint refusals to deal, as a class, possess great anti-competitive potential." 499 F. Supp. at 558, citing United States v. General Motors Corp., 384 U.S. 127 (1966).

\textsuperscript{154} The Osborn court conceded that situations were conceivable in which application of the Sherman and Clayton Acts to boycotts would substantially impair the participants' ability to be heard. Id. at 558. The gas station dealers boycott, however, was not one of them. Id. But even those potential situations, according to the court, do not require "across-the-board" antitrust immunity. Id.
In denying the Association's motion to dismiss, the district court in Osborn held that the Noerr-Pennington doctrine would not exempt conduct from the Sherman Act where (1) the effect of application of the Act would be content neutral; (2) application would not materially inhibit effective expression; and (3) application would alleviate the coercive economic impact of concerted refusals to deal. By using these criteria as a method of analysis, the Osborn court applied the protection afforded by the Noerr-Pennington doctrine much more narrowly, to reach the conclusion that not all boycott activity used to petition the government could be protected under the doctrine.

Analysis

The simultaneous closure of the service stations precariously rests on the fringes of both the scope of protected conduct under the Noerr-Pennington doctrine and the scope of conduct recognized as expression under the first amendment. There was no dispute in Crown Central and Osborn that the service station dealers were addressing the federal government through the communicative medium of closed stations. Rather, the principal dispute arose over the type of activity chosen by the dealers to draw legislative attention to their grievances. Although boycotts typically are held violative of the Sherman Act and are not protected by the Noerr-Pennington doctrine, the gas station shut-downs were a group boycott minus the nucleus of boycott theory: the dealers made no direct attempt to destroy a competitor or to deny access to a competitive market. The dealers simply closed their businesses for a three-day period. The activity was designed solely to make their grievances over pricing policies known to government officials.

155. Id. at 555.
156. A content neutral statute is one which regulates only the time, place, or manner of protected expression, but does not regulate the substance of the expression.
158. Id.
159. Id. To illustrate its holding that the Noerr-Pennington antitrust exception was not controlling, the Osborn court used the following example:
   It would be one thing . . . to say that United States automakers have a right to seek, and promote public support for, higher tariffs; it would be quite another to sanction an agreement between Ford, GM and Chrysler that they will market no new cars until the government provides some protection against foreign imports. 
   Id. The court acknowledged, however, that the gas station dealers' boycott did not have the same anticompetitive potential as the one described above. Id.
160. See notes 113 through 115 supra and accompanying text.
161. 486 F. Supp. 759, 763 (M.D. Pa.), rev'd on other grounds, 634 F.2d 127 (3d Cir.)
Moreover, both district courts noted that action taken purely for its expressive value implicates the first amendment’s freedom of speech clause, although expression through conduct traditionally has not commanded as much constitutional protection as expression through words alone. The dilemma confronting the district courts in their considerations of the boycott and its expressive component, then, was to find a means of upholding the regulatory function of the Sherman Act without impermissibly infringing upon first amendment freedoms.

The crucial difference in the diametrically opposed conclusions in *Crown Central* and *Osborn* is in the weight each district court attached to the position of the first amendment in the *Noerr-Pennington* doctrine. *Crown Central* interpreted the *Noerr-Pennington* doctrine as detached from its original antitrust underpinnings. Any infringement upon economic freedom resulting from the closures was dismissed as incidental to the overriding need to protect the first amendment rights of speech and petition. In contrast, the *Osborn* court carefully examined the doctrine’s original ties to the Sherman Act and, as a consequence, refused to consider the dealers’ conduct without evaluating its impact on competition. Of the two approaches, the latter is more consistent with the original intent of the *Noerr-Pennington* doctrine.

The reliance of the *Crown Central* court on the *Noerr-Pennington* doctrine, however, is not totally misplaced. The most persuasive factor against applying the antitrust laws to the closings is that the passive shut-down of service stations created a boycott only in the sense of signaling and effecting a concerted refusal to deal. The element of refusal to deal with a competitor was lacking. The *Crown Central* court attached paramount importance to the dealers’ freedom to express their beliefs, even if the way chosen had adverse economic effects.

The *Osborn* court was not so persuaded. Even internalized or

162. *Id.* at 767-70; 499 F. Supp. at 557.
163. See note 140 *supra*.
164. 486 F. Supp. at 769.
166. For a discussion of the Supreme Court’s intent in granting an exception to the antitrust laws for attempts to solicit governmental action, see notes 40 through 46 *supra* and accompanying text.
167. 486 F. Supp. at 769.
168. *Id.* The *Crown Central* court considered and rejected alternative means of communication that were available to the dealers. *Id.*
self-directed boycotts, according to the court, create anticompetitive effects which, if ignored, would emasculate the policies of the Sherman Act. In addition, regulation of these modified boycotts would not substantially inhibit the dealers' ability to express their grievances to the government. The service station association could still attract the desired attention through less economically disruptive means. The Osborn court was particularly troubled by the attempt to attain changes in legislation by exercising economic power in a coercive fashion. Instead of achieving favorable laws or regulations through lobbying or public persuasion, the dealers had coerced government officials into action by withholding from many consumers a product already in short supply. The Osborn court refused to immunize conduct with such anti-competitive potential.

The factual situation in Crown Central and Osborn exceeds the original framework of the Noerr-Pennington doctrine as established by the Supreme Court. By using a group boycott as their chosen method of political activity, the gas station dealers went beyond mere solicitation of governmental action. Their activity, however, was more in the nature of expressive conduct under the first amendment than anticompetitive conduct under the Sherman Act. The opposite results reached by the district courts indicate the need for proper evaluation of the expanded role of the first amendment in the Noerr-Pennington defense.

**Missouri v. National Organization for Women**

Another variation on the expanded use of the Noerr-Pennington doctrine was the assertion of the immunity by a non-commercial group in Missouri v. National Organization for Women. In NOW, the National Organization for Women organized a boycott against those states whose legislatures had not passed the Equal

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169. 499 F. Supp. at 556.
170. Id. at 557.
171. Id. "[A] boycott, along with its communicative component, has a coercive economic effect which ordinarily may be regulated without serious jeopardy to First Amendment interests." (footnote omitted). Id.
172. Id. The dealers' argument that boycotts designed to influence governmental action are different from conventional boycotts was acknowledged by the court as persuasive against application of the per se liability test. Id. at 558.
173. See notes 40 through 46 supra and accompanying text.
175. 620 F.2d 1301 (8th Cir.), cert. denied, 101 S. Ct. 122 (1980).
Rights Amendment.\textsuperscript{176} The organization urged groups and associations to hold annual meetings and conventions only in those states supporting the amendment. By withholding substantial amounts of commerce and trade from recalcitrant states,\textsuperscript{177} NOW hoped to prompt business interests to influence their legislators to support ERA ratification.\textsuperscript{178}

The state of Missouri brought an action for injunctive relief against NOW alleging that the organization's convention boycott campaign constituted a combination and conspiracy in restraint of trade.\textsuperscript{179} The Eighth Circuit held that the boycott was beyond the regulatory scope of the Sherman Act.\textsuperscript{180} Because the boycott was categorized by the court as simply an effort to influence state legislatures,\textsuperscript{181} the conduct was privileged on the basis of the right to petition the government.\textsuperscript{182}

In reaching these conclusions, the court relied heavily upon the reasoning in \textit{Noerr}.\textsuperscript{183} Two factors in \textit{Noerr} appeared to the Eighth Circuit to make the antitrust exception even more appropriate for non-commercial organizations than for commercial groups. First, the subject matter of the legislation which NOW sought was characterized as social or political, instead of financial or economic as in \textit{Noerr}.\textsuperscript{184} Second, although NOW had an interest in the outcome of the legislative battle, its support of the Equal Rights Amendment was not based on profit motivation,\textsuperscript{185} unlike the railroads'
interest in anti-trucking legislation. These two factors, coupled with the necessity of protecting the right to petition the government, sufficiently excluded the boycott activity from the coverage of the Sherman Act, according to the court's analysis of the Act's pertinent legislative history.186

Analysis

The NOW decision is unsettling in several respects. First, the Eighth Circuit's interpretation of congressional intent with regard to the Sherman Act is overbroad. Although it is apparent that Congress, in enacting the Sherman Act, did not intend to regulate the normal activities of social or political groups, there is no indication in the history relied upon by the NOW court that Congress intended exclusionary treatment for non-commercial organizations utilizing inherently anticompetitive techniques. NOW's actions were not especially dissimilar from conduct traditionally held violative of the Sherman Act. The organization directly attempted to persuade sympathetic groups not to deal with certain states.

The court's view of the significance of NOW's non-economic motivation is similarly misguided. Under Noerr, the Supreme Court stressed that the goal of parties attempting to influence the passage of laws was legally irrelevant, and accordingly refused to create a double standard of protection based upon the commercial or non-commercial motivation or purpose of the parties involved. The conclusion that a non-economic goal merits greater protection distorts the Noerr-Pennington doctrine into protecting more conduct on first amendment grounds for non-commercial groups with a political purpose than for commercial groups with a business purpose.

To achieve the proper equilibrium between the Sherman Act

186. Id. at 1304-09. Senior Circuit Judge Gibson filed a strong dissent to the court's opinion. Judge Gibson believed that the majority's interpretation of Noerr was overly broad and ignored the basic factual differences between an advertising campaign and an economic boycott. Further, according to Judge Gibson, the majority had practically ignored the "critical issue" in dispute by merely assuming, "without any analysis," that NOW's actions were an exercise of first amendment rights. Id. at 1319-1320 (Gibson, J., dissenting). The court should have balanced the governmental interest in preserving the free enterprise system with the interest of the people to use boycotts as a means of influence legislation. Id. at 1324.

The initial trial brief of the State of Missouri stressed that the NOW boycott was the antithesis of Noerr. While Noerr involved a combination to get legislation harmful to others, NOW involved a combination to harm others to get legislation. State of Missouri, Plaintiff's Initial Trial Brief at 15-16.
and the first amendment in the application of the Noerr-Pennington doctrine, current analytical biases must be reversed in order to restore uniformity and even-handedness to the application of the doctrine. Thus, when confronted with non-commercial organizations, the courts should curb their inclination to over-emphasize first amendment considerations and more adequately address whether the economically destructive aspects of the actions of these organizations are violations under the Sherman Act. Similarly, when faced with commercial entities, the courts should resist focusing primarily on anticompetitive effects and give due consideration to the protection of expressive conduct under the first amendment.

FACTORS TO BE CONSIDERED IN THE APPLICATION OF THE NOERR-PENNINGTON DOCTRINE

Application of the Noerr-Pennington doctrine to any petitioning activity should involve a balancing of first amendment considerations against the interest in maintaining free and open economic competition. To achieve the proper balance, courts should consider first whether the petitioning activity tends more toward economic coercion than political persuasion. If the activity is economically coercive, a much stronger argument exists for applying the Sherman Act. But if the activity is politically persuasive, then the expressive value of the activity should be shielded from the potentially inhibiting influence of the Sherman Act.

Furthermore, courts should determine whether there is a less economically restrictive alternative which could be used to achieve comparable influence on the passage or enforcement of laws. If, however, the most effective means of communication is being utilized, then courts should be wary of abridging an individual's ability to make the most impact through expression.

The final and most important factor which should be considered is the severity of the danger to competition caused by the petition-

188. The district court in Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 499 F. Supp. 553 (D. Del. 1980), for example, believed that such a less restrictive alternative existed for the gas station dealers in making their grievances known to the government. Id. at 557.
189. The district court in Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759 (M.D. Pa.), rev'd on other grounds, 634 F.2d 127 (3d Cir. 1980), believed that the dealers were implementing their most effective means of communication.
ing activity. If it is substantial, as in NOW, the activity should not be protected but should be open to possible antitrust violations. If the effect is incidental, as in Crown Central and Osborn, the expressive value of the conduct should be protected against any chilling effect of the antitrust laws.

CONCLUSION

The Noerr-Pennington doctrine represents a necessary interface between the proscriptions of the Sherman Act and the protected freedoms of the first amendment. The doctrine ensures that genuine petitioning activity will be shielded from antitrust attack. There should be limits, however, on the scope of available protection. The Noerr-Pennington doctrine should not be allowed as a defense to activity causing the kind of substantial harm to free trade that the Sherman Act was intended to prevent. Moreover, the doctrine should be uniformly applied to both commercial and non-commercial actors.

The accommodation which the Noerr-Pennington doctrine achieves between the freedom of competition and the freedom of expression is unique and should not be abused. All types of anticompetitive activity contain an element of expression. To permit the Noerr-Pennington doctrine to protect all expressive conduct in restraint of trade would usurp the original limitations on the doctrine imposed by the Supreme Court and could severely undermine the effectiveness of the Sherman Act. As the use of economic tools, such as group boycotts, by political organizations and commercial associations becomes more popular as a means to induce the passage of legislation, the application of the Noerr-Pennington doctrine will become increasingly important. The scope of petitioning activity under the doctrine should not depend on the

191. See note 177 supra. Even if activity does not fall within the Noerr-Pennington exception to the Sherman Act, the activity does not necessarily constitute a Sherman Act violation. Under the rule of reason analysis, see note 114 supra, the activity may still be held not violative of the antitrust laws. Thus, while boycotts by non-commercial organizations may not be immunized by the Noerr-Pennington doctrine, the boycotts may still survive subsequent antitrust attack.
192. See notes 160 through 164 supra and accompanying text.
193. Price fixing, for example, contains a communicative element which could not be construed to be protected under the first amendment.
character of the actor, but rather on the nature and scope of the conduct.

Diane MacArthur