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COMMENTS

NOERR PETITIONING IMMUNITY EXTENDED TO ATTEMPTS TO INFLUENCE FOREIGN GOVERNMENTS: COASTAL STATES MARKETING, INC. V. HUNT

The Sherman¹ and Clayton² Acts were promulgated to encourage competition and to prevent “restraints upon freedom of trade.”³ The Supreme Court’s interpretation of the antitrust laws

¹ Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

² Clayton Act, ch. 323, § 1, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1982)).

³ L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 14 (1977). The primary antitrust enforcement provision of the Sherman Act provides that “[e]very 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.” 15 U.S.C. § 1 (1982). The Supreme Court, however, has interpreted the Sherman Act to prevent only “unreasonable” restraints of trade. *See Standard Oil Co. v. United States*, 221 U.S. 1, 87 (1911) (Harlan, J., concurring in part and dissenting in part). In order to prevent economic harm from restraints of trade, Congress exercised the full scope of its power under the commerce clause in enacting the provisions of the Sherman Act. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 84 (1977). Because of the broad language of the Sherman Act, however, the Court has at times struggled with its application. *See generally* M. HANDLER, H. BLAKE, R. PRTOFSKY & H. GOLDSCHMID, CASES AND MATERIALS ON TRADE REGULATIONS 11 (1975) (noting the conflict between the legislative intent “to protect equal opportunity and equal access for small business” and the desire to promote competition). Caution must be observed when the legislative history of the Sherman Act is analyzed because, to a large extent, “Congress simply had no discoverable intention that would help a court decide a case one way or the other.” Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 783 (1965).

The provisions of the Sherman Act were supplemented by the enactment of the Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§12-27 (1982)). Section 3 of the Clayton Act measures the legality of both foreclosure agreements, *see Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-29 (1961), and tying arrangements, *see International Salt Co. v. United States*, 332 U.S. 392, 396 (1947). Section 7 provides:

No corporation engaged in commerce shall acquire, directly or indirectly, . . . the

permits few immunities from government regulation of anticompetitive conduct.⁴ One such immunity, recognized by the Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,⁵ permits joint petitioning efforts which are intended to influ-

stock . . . [or] assets of another corporation engaged also in commerce, where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (1982); see *General Dynamics Corp. v. United States*, 415 U.S. 486, 510-11 (1974); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657-58 (1964); *United States v. M.P.M., Inc.*, 397 F. Supp. 78, 86 (D. Colo. 1975).

Another enforcement provision of the antitrust laws is the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1982), which prohibits “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” *Id.* § 45(a)(1) (1982).

⁴ See, e.g., *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 600 (1976); *Parker v. Brown*, 317 U.S. 341, 351 (1943). State action immunity, established in *Parker*, exempts activity undertaken by state governments from Sherman Act scrutiny. 317 U.S. at 351. In *Parker*, the State of California, pursuant to the California Agricultural Prorate Act, adopted a program to market agricultural products in a more efficient manner. *Id.* at 346. The Act authorized state officials to prevent competition among growers and thereby to raise the price of the products shipped to packers. *Id.* Pursuant to the Act, the Director of Agriculture established a proration program for the marketing of raisins grown within a “defined production zone.” *Id.* at 346-49. Analyzing the legislative history of the Sherman Act, the Supreme Court noted that there is no indication that the Act was intended to restrain state action or private action directed by the state. *Id.* at 351. The Court reasoned that the Act was designed to eliminate restraints on competition that were generated by individuals and corporations, *id.*, and concluded that the action taken by the State to enforce the proration program was not a Sherman Act violation, *id.* at 351-52.

The state action exemption was refined in *Lafayette*, 435 U.S. 389 (1978), and *Cantor*, 428 U.S. 579 (1976). In *Lafayette*, a Louisiana statute permitted the cities of Lafayette and Plaquemine to “own and operate electric utility systems both within and beyond their city limits.” 435 U.S. at 391 (footnote omitted). The cities claimed that the Louisiana Power and Light Co. violated sections 1 and 2 of the Sherman Act by engaging in boycotts, “sham litigation,” the foreclosure of suppliers, and other illegal tactics intended to thwart the construction of a power plant. *Id.* at 392 n.5. The defendants made similar allegations in their counterclaim, which the plaintiffs sought to dismiss by asserting that the *Parker* state action exemption shielded their conduct. *Id.* at 392. The Court found no policy considerations sufficient to immunize municipalities from the antitrust laws. *Id.* at 408. In *Cantor*, Detroit Edison, a supplier of electricity to several million consumers in Michigan, was allegedly violating the Sherman Act by distributing light bulbs to its customers free of charge. 428 U.S. at 581. The Michigan Public Service Commission (the PSC) approved the rates charged by Detroit Edison and the distribution of light bulbs without charge. *Id.* at 582. The plaintiff, a druggist who sold light bulbs, alleged that Detroit Edison had utilized its monopoly power in electricity to restrain competition in light bulbs. *Id.* at 581. The Supreme Court held that the state action exemption would not apply to Detroit Edison, reasoning that “neither Michigan’s approval of the tariff filed by [Detroit Edison] nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program.” *Id.* at 598.

⁵ 365 U.S. 127 (1961).

ence government action with respect to the passage or enforcement of trade laws.⁶ The Supreme Court, however, has left undecided the applicability of this "petitioning" immunity to attempts to influence foreign governments.⁷ Recently, in *Coastal States Marketing, Inc. v. Hunt*,⁸ the Court of Appeals for the Fifth Circuit extended the immunity enunciated in *Noerr*, holding that joint efforts to influence foreign sovereigns are not violative of the anti-trust laws.⁹

In 1957, the Government of Libya granted an oil concession to Nelson Bunker Hunt.¹⁰ Hunt assigned interests to his two brothers and to the British Petroleum Company (BP).¹¹ By 1967, the Hunts and BP had developed the concession into a productive oil field.¹² After the Libyan Government nationalized the oil interests in 1973, the Hunts notified potential oil purchasers of their title claims¹³ and joined in a number of lawsuits initiated by BP, claiming title to the petroleum.¹⁴

⁶ *Id.* at 137.

⁷ See *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680, 690 n.3 (S.D.N.Y. 1979) ("[it] is an open question whether that doctrine, which protects legitimate attempts to petition the United States government, has any application to the lobbying of foreign governments"); Davis, *Solicitation of Anticompetitive Action From Foreign Governments: Should the Noerr-Pennington Doctrine Apply to Communications with Foreign Sovereigns?*, 11 GA. J. INT'L & COMP. L. 395, 397 (1981). In *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), Judge Pregerson opined that *Noerr* petitioning immunity is not extended to activities undertaken outside the United States. *Id.* at 108 (dictum). The court noted that one issue in *Noerr* involved first amendment considerations which have no applicability to the petitioning of foreign governments. *Id.* Recognizing that *Noerr* emphasized free access to the "representative democracy," the district court concluded that "[t]he persuasion of Middle Eastern states alleged in the present case is a far cry from the political process with which *Noerr* was concerned." *Id.*; see also *United States v. AMAX Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,467, at 71,799 (N.D. Ill. May 6, 1977) (*Noerr* petitioning immunity deemed inapplicable to efforts undertaken to influence the Canadian Government).

⁸ 694 F.2d 1358 (5th Cir. 1983).

⁹ *Id.* at 1366.

¹⁰ *Id.* at 1360. By the terms of the oil concession, Hunt was given the exclusive right to "search for . . . and extract petroleum' . . . and 'to use, process, store, export and dispose of the same'" for a period of 50 years. *Id.*

¹¹ *Id.* Hunt assigned a 50% interest to BP in 1960. *Id.*

¹² *Id.*

¹³ *Id.* The Government of Libya assigned the concession to the Arabian Gulf Exploration Co. (AGEC), as it previously had done with BP's interest. *Id.* The Hunts' response was to publish worldwide their title claim to the nationalized oil and to notify anyone handling the oil, including Coastal, of its claim. *Id.*

¹⁴ *Id.* BP investigators traced the sale and transportation of the disputed oil and filed 29 lawsuits in numerous countries. *Id.* A BP director wrote to Nelson Bunker Hunt, suggesting "joint action to protect our respective rights." *Id.* Thereafter, the Hunts joined in

The plaintiff, Coastal States Marketing, Inc., purchased the nationalized oil from a Libyan Government agency.¹⁵ As a result of the Hunts' communications to potential oil purchasers, attempts by Coastal to sell the nationalized oil were frustrated.¹⁶ Coastal filed an antitrust action claiming that the Hunts' actions constituted a conspiracy in restraint of trade in violation of the Sherman Act.¹⁷ The district court granted the Hunts' motion for a directed verdict, concluding that the activity was protected under the *Noerr* doctrine.¹⁸

The Fifth Circuit affirmed, holding that the Sherman Act does not "penalize" the petitioning of a foreign government agency.¹⁹ Judge Rubin, writing for a unanimous court,²⁰ summarily dismissed Coastal's contention that the Hunts' activity constituted an actionable boycott.²¹ In response to Coastal's argument that *Noerr* petitioning immunity is based on first amendment rights and therefore, limited to concerted efforts to influence domestic officials,²² Judge Rubin reasoned that the doctrine of petitioning im-

21 of the suits filed by BP. *Id.* The parties discontinued the litigation after settling with the Libyan Government. *Id.* at 1361-62.

¹⁵ *Id.* at 1360. In response to Coastal's purchase of oil from AGEK, the Hunts and BP instituted a conversion action against Coastal in a Texas state court. *Id.* at 1361. In a counterclaim, Coastal alleged tortious interference with business relations. *Id.* Neither party was granted recovery, *id.*, and the decision was affirmed on appeal, *id.* at 1361 & n.7; see *Hunt v. Coastal States Gas Producing Co.*, 570 S.W.2d 503, 511 (Tex. Civ. App. 1978), *aff'd*, 583 S.W.2d 322, 326 (Tex.), *cert. denied*, 444 U.S. 992 (1979). In another action, Hunt attempted to attach a cargo of oil that Coastal had imported to the United States on the oil tanker *Hilda*, but the claim was dismissed for lack of jurisdiction. See *Hunt v. A Cargo of Petroleum Products Laden on the Steam Tanker Hilda*, 378 F. Supp. 701, 702-03 (E.D. Pa. 1974), *aff'd mem.*, 515 F.2d 506 (3d Cir.), *cert. denied*, 423 U.S. 869 (1975).

¹⁶ 694 F.2d at 1361.

¹⁷ *Id.* Coastal sought economic recovery for lost profits on the sale of its rights to purchase the nationalized oil, as well as recovery for penalties incurred in failing to utilize processing time at a refinery in Italy. *Id.*

¹⁸ *Id.* at 1363.

¹⁹ *Id.* at 1366.

²⁰ Judge Rubin was joined by Judges Randall and Jolly.

²¹ 694 F.2d at 1364. The Fifth Circuit reasoned that "[t]he mere fact that a boycott forms a part of the petitioning conduct does not vitiate the immunity of such conduct." *Id.*; see *Feminist Women's Health Center, Inc., v. Mohammad*, 586 F.2d 530, 542-43 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

²² 694 F.2d at 1364. The determination of whether the *Noerr* doctrine is based on constitutional or statutory grounds is crucial in ascertaining whether the doctrine extends to foreign governments:

'If the *Noerr-Pennington* doctrine were based on statutory construction of the Sherman Act, . . . it would be difficult to argue that Congress intended attempts to influence our government to be exempt but not similar attempts to influence a foreign government Since there is no first amendment right to

munity also is based on a statutory construction of the Sherman Act.²³ Although subsequent Supreme Court decisions have "stressed the first amendment underpinnings" of *Noerr*, the *Coastal* court concluded that *Noerr* immunity, based on an interpretation of the Sherman Act, was not thereby abolished.²⁴ Indeed, the Supreme Court has on several occasions subsequent to *Noerr* "reaffirmed" its conclusion that *Noerr* petitioning immunity is based on a construction of the Sherman Act.²⁵ The *Coastal* court thus deemed it proper to conclude that "petitioning immunity is not limited to the domestic political arena."²⁶

petition a foreign government, attempts to influence such governments should not be protected by the *Noerr-Pennington* doctrine.'

Davis, *supra* note 7, at 398 (quoting Fischel, *supra* note 3, at 120-21).

²³ 694 F.2d at 1364 & n.21 (citing *Noerr*, 365 U.S. at 138). The court relied on the language of *Noerr*, in which the Supreme Court stated that the Sherman Act does not prohibit activities consisting of "mere solicitation of governmental action with respect to the passage and enforcement of the laws." 694 F.2d at 1364 n.21 (quoting *Noerr*, 365 U.S. at 138). In addition, the *Coastal* court quoted Senator Sherman's statement that the Act was not intended to prohibit associations from voicing partisan interests. 694 F.2d at 1364 n.21; *see infra* note 35.

²⁴ 694 F.2d at 1365; *see, e.g.*, *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964).

²⁵ 694 F.2d at 1365 & n.24 (citing *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3426 (1982)). The court also found support for its conclusion that *Noerr* immunity was based on the Sherman Act from Supreme Court cases addressing the "state action" exemption to the Act. 694 F.2d at 1365 & n.24. However, the Fifth Circuit's reliance on the state action cases of *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), seems misplaced. The state action exemption involves the application of the federal antitrust laws to states and corresponding notions of federalism. *See Davis, supra* note 7, at 411; Comment, *Antitrust Law—Municipal Immunity—Application of the State Action Doctrine to Municipalities*, 1979 WIS. L. REV. 570, 571; *supra* note 4. *Lafayette* addressed the extent to which the *Parker* state action exemption shielded municipalities engaged in commercial activities. *See Lafayette*, 435 U.S. at 391; Comment, *supra*, at 570-71. At issue in *Cantor* was whether private action, when approved by the state, fell within the *Parker* exemption. 428 U.S. at 581; *see supra* note 4. It is highly unlikely that the narrow focus of *Lafayette* and *Cantor* was intended to address any premise on which *Noerr* was based. *See Griffin, A Critique of the Justice Department's Antitrust Guide for International Operations*, 11 CORNELL INT'L L.J. 215, 253 (1978) (federalism was a "key factor" in *Lafayette*). Compare *In re Airport Car Rental Antitrust Litig.*, 474 F. Supp. 1072, 1084 (N.D. Cal. 1979) (citing *Lafayette* for the proposition that *Noerr* represents a first amendment restriction on the Sherman Act) with *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1365 n.24 (5th Cir. 1983) (citing *Lafayette* for the proposition that the *Noerr* doctrine is a result of statutory construction of the Sherman Act). One commentator concludes from *Lafayette* that if commercial activities undertaken by a government are not protected by the state action exemption, then petitioning such a government official likewise would not be protected. Baker, *Critique of the Antitrust Guide: A Rejoinder*, 11 CORNELL INT'L L.J. 255, 260 (1978); *see George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

²⁶ 694 F.2d at 1365 (footnote omitted). The *Coastal* court relied on the Supreme Court

In addition, the Fifth Circuit concluded that the Hunts' activities did not fall within the "sham" exception to *Noerr*,²⁷ which precludes immunity for activity "which is in fact a 'mere sham to cover what is nothing more than an attempt to interfere with business relationships of a competitor . . .'"²⁸ Although the Supreme Court has not established a precise standard for determining when litigation will be considered a "sham,"²⁹ Judge Rubin concluded that on the basis of *Noerr's* progeny, petitioning will be an immune activity as long as the petitioner does not act solely with anticompetitive motives.³⁰ Reasoning that "multiple motivations" normally

decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). During World War II, the defendant, a subsidiary of Union Carbide, was appointed "the exclusive wartime agent to purchase and allocate vanadium" by the Canadian Government. *Id.* at 695. *Continental Ore* brought a private antitrust action, alleging that the defendant had violated sections 1 and 2 of the Sherman Act. *Id.* at 693. The Supreme Court distinguished *Noerr*, reasoning that the defendant's activity was commercial in nature, rather than the political conduct envisioned by the *Noerr* Court. *Id.* at 707-08. Therefore, the Court concluded, the defendants were subject to the antitrust laws for any anticompetitive conduct. *Id.* The *Coastal* court reasoned that since in *Continental Ore* the Supreme Court distinguished *Noerr* on factual grounds rather than declaring petitioning immunities inapplicable to foreign governments, the implication arose that petitioning immunity extended to joint efforts to influence foreign governments. 694 F.2d at 1365. This view also has been adopted by the Antitrust Division of the Department of Justice. *See id.* at 1365 n.25; *Government Provides Antitrust Guide for International Operations*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-18 (Feb. 1, 1977) [hereinafter cited as *Antitrust Guide*].

²⁷ 694 F.2d at 1368. Since the Hunts' threats to litigate "wherever and whenever" to establish title to the crude oil were reasonably necessary to a sincere effort to settle the dispute, the Fifth Circuit reasoned that such actions were immune from antitrust scrutiny. *Id.* at 1367.

²⁸ *Id.* (quoting *Noerr*, 365 U.S. at 144).

²⁹ 694 F.2d at 1371.

³⁰ *See id.* at 1372. In support of its conclusion, the Fifth Circuit quoted *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1981), in which the Supreme Court stated that "[d]ealers who press sham protests . . . for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suit under the federal antitrust laws." 694 F.2d at 1372 (quoting *Orrin*, 439 U.S. at 110 n.15) (emphasis in original); cf. *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254 (9th Cir. 1982) ("[g]enuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition"), *cert. denied*, 103 S. Ct. 1234 (1983). Similarly, the Fifth Circuit noted that in *Otter Tail Power Co. v. United States*, 417 U.S. 901 (1974), the Supreme Court summarily affirmed the lower court decision, which applied a "principle purpose" test in recognizing that anticompetitive and other reasons motivate a party to seek litigation. 694 F.2d at 1371. Although the *Otter Tail* Court merely approved of the result reached by the lower court, and not its rationale, Judge Rubin reasoned that the *Otter Tail* opinion suggested a "principle purpose test." *Id.* Moreover, Judge Rubin noted that lower courts have recognized that "anticompetitive motives do not taint a suit filed, at least in part, in hope of judicial relief." *Id.* at 1372; *see Alexander v. National Farmers Org.*, 687 F.2d 1173, 1200 (8th Cir. 1982).

underlie a decision to institute legal proceedings,³¹ Judge Rubin stated that to establish petitioning immunity the "significant motivating factor" must be a "genuine desire for judicial relief."³² After reviewing the evidence, including Coastal's pretrial stipulation that one of Hunts' motives in instituting the legal proceedings was a genuine effort to seek judicial relief,³³ Judge Rubin concluded that it was unnecessary to instruct the jury on the "sham" issue.³⁴

In upholding the application of *Noerr* immunity to the solicitation of foreign governments, it is submitted that the *Coastal* court properly concluded that the petitioning exemption rests on statutory grounds.³⁵ This Comment will analyze the statutory basis

³¹ 694 F.2d at 1371.

³² *Id.* at 1372. The *Coastal* court noted that the burden of proof necessary to establish a "sham" exception is similar to that required of a public employee attempting to prove that he was terminated for engaging in "constitutionally protected conduct." *Id.* at 1372 n.45; see *Givhan v. Western Lines Consol. School Dist.*, 439 U.S. 410, 416 (1979). The court reasoned that the standard was identical to that utilized in fourteenth amendment adjudications. 694 F.2d at 1372 n.45; see *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977).

³³ 694 F.2d at 1371. The Fifth Circuit refused to "disturb" the stipulations before the district court, since the lower court was better situated to ascertain the parties' intent. *Id.* at 1369-70. The only possible instances of bad faith that the Fifth Circuit could specify were the large number of unsuccessful lawsuits initiated by the Hunts and the dismissal of the suits after a settlement with the Libyan Government. *Id.* at 1369 n.37.

³⁴ *Id.* at 1367.

³⁵ The Fifth Circuit previously espoused the view that "the [*Noerr*] doctrine is rooted in the first amendment's . . . right to petition." *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 542 (5th Cir.), *cert. denied*, 444 U.S. 924 (1979). The *Coastal* court's holding that *Noerr* is premised on statutory construction is not without support, however. See, e.g., Costillo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 338 (1967) (whether petitioning violates the antitrust laws is a question of statutory construction); cf. Baker, *Exchange of Information for Presentation to Government Agencies: The Interplay of the Container and Noerr Doctrines*, 44 ANTITRUST L.J. 354, 367 (1975) (*Noerr* "is sufficiently ambiguous to be read on either or both grounds"). But see McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 240 (1976) (*Noerr* rests on constitutional underpinnings); Note, *Antitrust: The Brakes Fail on the Noerr Doctrine—Trucking, Unlimited v. California Motor Transp. Co.* (N.D. Cal. 1967), 57 CALIF. L. REV. 518, 532, 536 (1969) (*Noerr* is based on first amendment grounds). The legislative history cited by the *Coastal* court appears to buttress the conclusion that the Sherman Act was not intended to prohibit joint solicitation for the purpose of influencing the legislature. See 694 F.2d at 1364 n.21 (quoting Senator Sherman). Senator Sherman, discussing petitioning, stated that the Act

does not interfere in the slightest degree with voluntary associations made to affect public opinion to advance the interests of a particular trade or occupation And so the combinations of working men to promote their interests, promote their welfare, and increase their pay if you please, to get their fair share in the division of production, are not affected in the slightest degree, nor can they be included in the words or intent of the bill as now reported.

of the *Noerr* decision and suggest that the rule of reason should determine when *Noerr* immunity may be applied to attempts to influence foreign governments.

THE BASIS OF *Noerr* PETITIONING IMMUNITY

In *Noerr*, Pennsylvania truckers alleged that twenty-four eastern railroads had violated the Sherman Act by undertaking a joint publicity campaign to persuade state legislatures to enact laws "destructive of the trucking business."³⁶ The Supreme Court reasoned that two considerations militated against a finding that joint petitioning was prohibited by the Act:

[First,] [t]o 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. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions.³⁷

The *Noerr* exemption similarly was at issue in *California Motor Transport v. Trucking Unlimited*,³⁸ which extended the exemption to protect joint petitioning of administrative agencies from Sherman Act liability.³⁹ The Court stated that *Noerr* was

21 CONG. REC. 2562 (1889).

³⁶ 365 U.S. 127, 129 (1961). The truckers alleged that the "sole purpose" of the railroads' campaign was to reduce competition in the long-distance freight business, thus destroying the trucking industry as competition. *Id.* In addition, the truckers complained of the third-party technique employed by the railroads, whereby disparaging publicity was made to appear as the remarks of independent third parties, rather than the statements of the railroads. *Id.* at 130.

³⁷ *Id.* at 137-38 (footnote omitted). The Court noted that it could not "lightly impute" an intent to impinge the first amendment right of petition. *Id.* at 138. If petitioning constituted nothing more than anticompetitive conduct, however, the Court reasoned that the Sherman Act may prohibit such activity. *See id.* at 144; *supra* notes 29-34 and accompanying text. In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the *Noerr* exemption was reaffirmed in the context of an action involving joint petitioning by a labor union and employers to persuade a public official to pass uniform labor standards. *Id.* at 660, 670. The Court concluded that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Id.* at 670; *see Davis, supra* note 7, at 413.

³⁸ 404 U.S. 508 (1972). In *California Motor Transport*, highway carriers alleged that competitors had instituted proceedings in federal and state courts to "defeat applications by [Trucking Unlimited] to acquire operating rights," *id.* at 509, intending to "harass and deter [Trucking Unlimited] in its use of administrative and judicial proceedings," *id.* at 511.

³⁹ *Id.* at 509-11.

based on a statutory construction of the Sherman Act and on the first amendment right of petition.⁴⁰ Noting that the same "philosophy" applied to petitioning of courts and administrative agencies,⁴¹ Justice Douglas opined that to preclude groups from soliciting state and federal agencies by imposing antitrust sanctions "would be destructive of rights of association and of petition"⁴²

In *Coastal*, Judge Rubin noted that the Supreme Court had expressly declined to address the first amendment issue in *Noerr*.⁴³ The *Noerr* Court found that first amendment rights impliedly were protected by the Sherman Act, since it could not "lightly impute to Congress an intent to invade these freedoms."⁴⁴ Thus, the Supreme Court was cognizant of the constitutional difficulties that would result if the Sherman Act were held to impinge first amendment freedoms by barring joint efforts to influence government action.

The *Coastal* court's conclusion that *California Motor Transport* did not overrule the *Noerr* construction of the Sherman Act recognizes that the "elevation" of the *Noerr* doctrine to one based on the first amendment⁴⁵ would not eviscerate the Court's prior construction of the Act.⁴⁶ This conclusion seems even more appropriate in light of other considerations which suggest that *California Motor Transport* was not constitutionally based.

First, although the Supreme Court takes cognizance of any constitutional issue which may affect the outcome of a decision,⁴⁷ the mere involvement of such an issue in the Court's decisionmaking process does not convert the decision into one resting on constitutional grounds.⁴⁸ The Court's recognition of the rights of asso-

⁴⁰ *Id.* at 510. The Court noted that the right of access to the courts is part of the first amendment right of petition. *Id.*

⁴¹ *Id.*; see *supra* text accompanying notes 39-40.

⁴² 404 U.S. at 510-11.

⁴³ 694 F.2d at 1364-65 & 1365 n.22; see *Noerr*, 365 U.S. at 132 n.6. The *Noerr* Court stated that it was not necessary to consider first amendment issues because of the Court's "view . . . of the proper construction of the Sherman Act" 365 U.S. at 132 n.6.

⁴⁴ 365 U.S. at 137-38; see Comment, *Corporate Lobbyists Abroad: The Extraterritorial Application of the Noerr-Pennington Antitrust Immunity*, 61 CALIF. L. REV. 1254, 1258 n.31 (1973).

⁴⁵ See *Coastal*, 694 F.2d at 1364-65; 2 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 1021-22 (1973).

⁴⁶ 694 F.2d at 1365.

⁴⁷ See, e.g., *Greene v. McElroy*, 360 U.S. 474, 507 (1959); *Barenblatt v. United States*, 360 U.S. 109, 140 n.7 (1959) (Black, J., dissenting); *Lee v. Madigan*, 358 U.S. 228, 235 (1959); *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

⁴⁸ See, e.g., *Kent v. Dulles*, 357 U.S. 116, 129 (1958). In *Dulles*, the plaintiffs alleged

ciation and petition in *California Motor Transport* evidences such a sensitivity to those rights without making them the basis for its holding.⁴⁹ Second, this conclusion is supported by the Court's recognition that its proper function is to decide "cases and controversies" under Article III.⁵⁰ If a case properly can be adjudicated without addressing a constitutional issue, the Court usually will not base its holding on constitutional grounds.⁵¹ Since *Noerr* involved statutory construction rather than constitutional interpretation, it is probable that *California Motor Transport* similarly was not constitutionally based.

Because of the broad first amendment language in *California Motor Transport*, it unquestionably is difficult to ascertain when the first amendment, rather than the Sherman Act, is determinative in a given case. However, given the Court's traditional restraint with respect to passing on constitutional issues, and the Court's adherence to statutory precepts in *Noerr*, the conclusion that *Noerr* petitioning is statutorily based appears justifiable.⁵²

that two passports were denied by the Director of the Passport Office because of the applicants' political affiliation. *Id.* at 117-18. Although the Court recognized that the constitutional right to travel was invoked, it expressly noted that it need not address that issue. *Id.* at 129-30.

⁴⁹ See *California Motor Transport*, 404 U.S. at 510-11. It is submitted that *California Motor Transport* stands for the proposition that the existence of first amendment rights does not necessarily immunize one from the antitrust laws. This appears to be the logical interpretation of that case in light of the Supreme Court's recent decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S. Ct. 2161 (1983). In *Bill Johnson's*, the Court construed the National Labor Relations Act with reference to first amendment rights, particularly the right of access to the courts. *Id.* at 2169. The Court concluded that "the prosecution of an improperly motivated suit lacking a reasonable basis constitutes a violation of the [NLR] that may be enjoined by the [NLRB]." *Id.* at 2171. Although *Bill Johnson's* import lies in the area of labor-management relations, its antitrust implications are clear—one would be hard pressed to justify *California Motor Transport* as a decision premised on the first amendment.

⁵⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803); U.S. CONST. art. III, § 2. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 54-85 (1978) (examining the "cases and controversies" doctrine).

⁵¹ See, e.g., *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (Court will not pass on a constitutional question presented by the record when the case may be disposed of on another ground); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 193 (1909) (question of due process not reached where action of railroad commission was beyond statutory power); *United States v. Graves*, 554 F.2d 65, 77 n.40 (3d Cir. 1977) (questions of constitutional validity may be avoided by a "saving" interpretation of the legislative enactment); *Negron v. Warden, Hartford Community Correctional Center*, 180 Conn. 153, 429 A.2d 841, 847 (1980) (alternative claim of violation of Connecticut constitution not addressed in recognition of judicial policy of self-restraint).

⁵² Interestingly, because the broad first amendment language in *California Motor Transport* allows for a less complex analysis based solely on constitutional grounds, it ap-

ANALYZING THE *Coastal* EXTENSION OF *Noerr* TO PETITIONING OF
FOREIGN GOVERNMENTS

It is suggested that the *Coastal* court, in determining that petitioning of foreign governments is immune from the antitrust laws, failed to recognize that the statutory basis underlying the *Noerr* doctrine may not fully be applicable abroad. It is submitted, however, that an approach does exist which both reflects the underlying premise of *Noerr* and facilitates a proper application of the petitioning immunity doctrine to foreign governments.

Since *Noerr* apparently was based on statutory, and not on constitutional considerations, it appears that the petitioning doctrine has equal applicability to activity engaged in outside the United States. Indeed, foreign governments have as much of an interest in making informed decisions concerning trade regulation as their American counterpart.⁵³ The difference, however, is that *Noerr* petitioning immunity is premised on the legislative system of the United States, in which the Legislature acts as the will of the people.⁵⁴ Because the same representative process that under-

appears that most courts have eschewed the more cumbersome task of analyzing cases in terms of both first amendment and Sherman Act concerns. See, e.g., *Clipper Express v. Rocky Mountain Motor Tariff Bureau*, 674 F.2d 1252, 1265-66 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 814 (1983); *In re Airport Car Rental Antitrust Litig.*, 474 F. Supp. 1072, 1084 (N.D. Cal. 1979); *United States v. Braniff Airways*, 453 F. Supp. 724, 730-31 (W.D. Tex. 1978). Courts and commentators have opined that the repetition of broad first amendment language throughout the *California Motor Transport* opinion demonstrates that the decision was based on an application of the first amendment. See *Clipper Express*, 674 F.2d at 1265 & n.21; *In re Airport Antitrust Litig.*, 474 F. Supp. at 1083-84; Fischel, *supra* note 3, at 88.

⁵³ See B1 I. BAEI & J. BELLIS, *WORLD LAW OF COMPETITION* § 1.01, at 1-1 to -2 (1982).

⁵⁴ See *California Motor Transport*, 404 U.S. at 510 (citing *Noerr*, 365 U.S. at 137); Comment, *supra* note 44, at 1275. The Fifth Circuit's failure to acknowledge the differences between government in the United States and government in foreign nations is the major defect in the Court's application of *Noerr* to petitioning in the international context. Moreover, the Court's reliance on *Continental Ore* in determining that petitioning immunity extends to foreign governments, see 694 F.2d at 1365; *supra* note 26, does not appear justifiable. As several courts and commentators have suggested, resolution of the petitioning immunity question was unnecessary to the holding in *Continental Ore* and, therefore, no implications may properly be drawn from that case. See, e.g., *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 107 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); Comment, *supra* note 44, at 1269. Similarly, any reliance on the Department of Justice Merger Guidelines to support an extension of *Noerr* immunity to petitioning in the international arena appears improper, since the Guidelines adopt the same reading of *Continental Ore* as the *Coastal* court did. See 694 F.2d at 1365 n.25; *Antitrust Guide*, *supra* note 26, at E-18; *supra* note 26. Indeed, the Justice Department has cautioned against any reliance on the Guidelines, noting that they are "intended to be of

lies the *Noerr* rationale does not necessarily operate outside the United States, an extension of *Noerr* immunity abroad to the extent it is enjoyed domestically may result in the formation of anticompetitive arrangements which would not be tolerated within the United States.⁵⁵ Conversely, a complete failure to apply the *Noerr* doctrine to petitioning of foreign governments may result in conflicts between Sherman Act enforcement policies and sensitive issues concerning foreign sovereignty.⁵⁶ Such an approach, in addition to being inconsistent with the holding in *Noerr* that petitioning of government officials is not within the scope of the Sherman Act, also would be inconsistent with the deep-rooted policy of American courts not to pass judgment on the political activity of another sovereign.⁵⁷ Indeed, this practice has sparked a significant amount of retaliatory conduct, including the enactment of foreign statutes curtailing the effectiveness of American antitrust enforcement.⁵⁸ Therefore, it is suggested that a flexible approach is neces-

assistance to—and not a substitute for—experienced private antitrust counsel.” *Antitrust Guide*, *supra* note 26, at E-1.

⁵⁵ See Comment, *supra* note 44, at 1273. One commentator has suggested that, because the American representative process is not at work outside the United States, there should be no extension of *Noerr* immunity to petitioning of foreign governments. *Id.* at 1275, 1277.

⁵⁶ Davis, *supra* note 7, at 429.

⁵⁷ See *International Ass’n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); Davis, *supra* note 7, at 429.

⁵⁸ Davis, *supra* note 7, at 434. The Westinghouse uranium litigation is the most noteworthy case to have provoked retaliatory conduct. See *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1259 (7th Cir. 1980). In 1973, a uranium cartel was established among several foreign corporations, possibly with the approval of their respective governments. Kohlmeier, *The Uranium Affair*, 13 J. INT’L L. & ECON. 149, 150, 152 (1978). After the formation of the cartel, uranium prices escalated from \$9 per pound to \$40 per pound. *Id.* at 150. Westinghouse abrogated its long term supply contracts, claiming commercial impracticability due to rising costs. *Id.* at 151. Westinghouse then filed suit in the district court against 29 foreign and American uranium producers, alleging price fixing. *Id.*; *In re Uranium Antitrust Litig.*, 473 F. Supp. 382, 384-85 (N.D. Ill. 1979). Westinghouse sought testimony and documents from several foreign governments to prove its anticompetitive theory. *Re Westinghouse Elec. Corp. and Duquesne Light Co.*, 16 Ont. 2d 273, 276-77 (1977). As a direct result of the American application of antitrust laws to activities conducted on foreign soil, the Australian Government, for example, enacted a statute revoking the enforceability of American antitrust judgments. See *Recent Developments, Antitrust: Australian Restrictions on Enforcement of Foreign Judgments*, 20 HARV. INT’L L.J. 663, 665 n.14 (1979). The Australian statute provides that:

Where . . . a foreign court has . . . given a judgment in proceedings instituted under an antitrust law . . . the Attorney-General may . . . in the case of any judgment—by order in writing, declare that the judgment shall not be recognized as enforceable in Australia

Austl. Acts No. 13 of 1979.

A more common form of retaliation is the enactment of blocking statutes which prevent

sary to balance the important American interest in safeguarding its commerce against the legitimate interest of foreign sovereigns in regulating political activity within their own territory.⁵⁹

The Rule of Reason

It is suggested that the "rule of reason," a recognized mode of antitrust analysis,⁶⁰ is applicable to an extension of *Noerr* petitioning immunity to efforts to influence foreign governments. As stated by Justice Powell, "[u]nder this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be deemed anticompetitive."⁶¹ The market share of the

discovery procedures within foreign countries by American courts. Davis, *supra* note 7, at 435-36. In *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. Dec. 20, 1962), the district court declared that agreements among Swiss and American watchmakers were violative of section 1 of the Sherman Act. *Id.* at 77,455. The Swiss Government was angered by and protested strenuously an alleged failure of American courts to recognize Swiss sovereignty. Comment, *supra* note 44, at 1277.

⁵⁹ *But see* Davis, *supra* note 7, at 429. Davis suggests a rigid, per se application of *Noerr* to petitioning of foreign governments. *Id.* The use of a strict standard to protect foreign petitioning, however, does not appear to recognize the potential anticompetitive harm from foreign trade restrictions. Such an approach is also inconsistent with the purpose of the antitrust laws, which is to prevent restraints of trade. *See supra* note 3.

⁶⁰ *See* L. SULLIVAN, *supra* note 3, at 172.

⁶¹ *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 49 (1977); *see Zelek, Stern & Dunfee, A Rule of Reason Decision Model After Sylvania*, 68 CALIF. L. REV. 13, 14 & n.12 (1980). Congress, cognizant of the fact that in enacting the Sherman Act it could not envisage every conceivable anticompetitive situation that may arise, gave considerable discretion to the judiciary. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 n.11 (1978). Senator Sherman has noted:

The first section [§ 1], being a remedial statute, would be construed liberally, with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally; they will prescribe the precise limits of the constitutional power of the government; they will distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and restraint of trade; they can operate on corporations by restraining orders and rules; they can declare the particular combination null and void and deal with it according to the nature and extent of the injuries.

21 CONG. REC. 2456-57 (1890) (summarizing statements of Senator Sherman). Because the rule has few precise guidelines, cases involving similar facts have been decided inconsistently. *Compare* *Buffalo Broadcasting Co. v. American Soc'y of Composers, Authors and Publishers*, 546 F. Supp. 274, 296 (S.D.N.Y. 1982) ("blanket licensing of music performing rights unreasonably restrains trade") with *Columbia Broadcasting Sys. v. American Soc'y of Composers, Authors and Publishers*, 620 F.2d 930, 939 (2d Cir. 1980) (blanket licensing procedure not proved unreasonably to restrain trade). Foreign policy concerns and the paucity of antitrust case law in international contexts suggest that the rule of reason has greater applicability internationally than in purely domestic cases. *See, e.g., Antitrust Guide, supra* note 26, at E-2; Beausang, *The Extraterritorial Jurisdiction of the Sherman Act*, 70 DICK.

party, the characteristics particular to the trade or industry, the nature of the restriction, the intent of the parties, and the possibility of less restrictive means of accomplishing the business purpose are considerations for the court when it determines whether an act is in restraint of trade.⁶² These competing considerations mandate flexibility in the rule of reason approach, making it particularly useful in the international context, where competing interests are even more complex.

Application of the Rule of Reason

Before adjudication of an antitrust action in an American court is possible, certain jurisdictional requirements first must be satisfied.⁶³ Although jurisdiction over international transactions previously was not permitted,⁶⁴ the Court now exercises jurisdiction over anticompetitive conduct occurring outside the United States when that conduct has a substantial impact on American

L. Rev. 187, 196-97 (1966).

In addition to the more flexible rule of reason approach, the Court will at times use a per se methodology. Under the per se rule, certain conduct is considered so pernicious and anticompetitive that, in the interests of predictability and finality of litigation, no extended review of the factual context is necessary to establish illegality. *Zelek, Stern & Dunfee, supra*, at 13 n.2 (quoting *National Soc'y of Eng'rs*, 435 U.S. at 692); see, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 347 (1982) (agreements among competitors to fix maximum prices); *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) (horizontal division of markets); *United States v. General Motors Corp.*, 384 U.S. 127, 147-48 (1966) (boycotts to eliminate discount dealers); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958) (tying arrangements).

Interestingly, application of *Noerr* petitioning immunity in the domestic context appears to be analogous to a per se concept. Once it is determined that a defendant's activity is undertaken to inform representatives in government of the defendant's desires, courts will not question whether there might be a damaging effect on competition or on competitors. *Noerr*, 365 U.S. at 139-40. Indeed, the Court has recognized that it is "neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Id.* at 139.

⁶² Note, *Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?*, 40 GEO. WASH. L. REV. 123, 126-27 (1971); see *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). For a restraint to be deemed illegal under a rule of reason analysis, the anticompetitive effects of the particular activity must outweigh its procompetitive effects. *Columbia Broadcasting Sys. v. American Soc'y of Composers, Authors and Publishers*, 620 F.2d 930, 934 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

⁶³ See E. KINTNER & E. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 21-22 (1974). Just as the Legislature gave considerable discretion to the judiciary to determine what conduct is anticompetitive, it also left discretion with the courts to determine when to exercise jurisdiction over foreign transactions. See B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 22 n.12 (1981).

⁶⁴ See *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1253 (7th Cir. 1980).

commerce.⁶⁵

The same considerations that apply in determining jurisdiction also apply in assessing the applicability of petitioning immunity. Thus, the United States appears to have little interest in the advocacy of foreign legislation which has little or no impact on American commerce. This analysis is consistent with the antitrust jurisprudence that measures the "substantiality" of a restraint of trade before labeling it illegal.⁶⁶ It also is consistent with the Fifth Circuit's criterion in determining when a particular petitioning activity is a "sham."⁶⁷ The rule of reason is the standard by which to measure this "substantiality" in the international arena. Thus, it is submitted that an approach which provides for an evaluation of the nature, purpose and impact of the particular petitioning conduct is the proper method for determining the international applicability of petitioning immunity in any particular case.

The rule of reason as applied to the conduct of the Hunts in *Coastal* suggests the same result as that reached by the Fifth Circuit. The record established that the conduct was undertaken to secure title rights reasonably subject to dispute rather than to further an anticompetitive purpose.⁶⁸ By publicizing their title claim, threatening litigation, and pressuring purchasers of the nationalized crude, the Hunts acted to effect title to the oil.⁶⁹ The means utilized were no broader than necessary to achieve that goal.⁷⁰ It is suggested that, weighing all these factors, a court applying a rule of

⁶⁵ B. HAWK, *supra* note 63, at 22; see *In re Uranium Antitrust Litig.*, 617 F.2d at 1253; E. KINTNER & E. JOELSON, *supra* note 63, at 25; Baker, *supra* note 25, at 273; see also *Vanity Fair Mills, Inc. v. Eaton Co.*, 234 F.2d 633, 641 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956); *Securities and Exch. Comm'n. v. Myers*, 285 F. Supp. 743, 746 (D. Md. 1968). Beginning with *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), in which the Supreme Court concluded that deliberate acts outside the United States that tend to restrain trade within the United States confer jurisdiction on American courts, *id.* at 276, a consistently broader application of the Sherman Act which included international activities has been imposed, see *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282-86 (1952) ("Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States") (quoting *Branch v. Federal Trade Comm'n.*, 141 F.2d 31, 35 (7th Cir. 1944)); *Beausang*, *supra* note 61, at 187; Comment, *supra* note 44, at 1264. For a discussion of subject matter jurisdiction under the Sherman Act, see Kramer, *The Application of the Sherman Act to Foreign Commerce*, 3 ANTITRUST BULL. 387, 390-400 (1958).

⁶⁶ See *supra* note 3.

⁶⁷ See 694 F.2d at 1372; *supra* notes 29-34 and accompanying text.

⁶⁸ 694 F.2d at 1372; see *supra* notes 29-34.

⁶⁹ 694 F.2d at 1368.

⁷⁰ See *id.*

reason approach similarly would conclude that the conduct was protected under the *Noerr* doctrine.

CONCLUSION

Although the *Noerr* doctrine of petitioning immunity espouses first amendment concerns, it more importantly recognizes that the Sherman Act does not prohibit joint efforts to influence public officials with respect to the passage or enforcement of laws. Reason therefore dictates that petitioning immunity should protect activities undertaken to influence foreign sovereigns. Recognition of both the varying political systems of foreign nations and the disparate levels of foreign antitrust enforcement leads to the conclusion that a full extension of *Noerr* might result in legislation that would not pass constitutional muster within the United States. Similarly, a nonextension of petitioning immunity might lead American courts to assess political activity within other nations.

These competing considerations point toward the use of the rule of reason by the judiciary when analyzing petitioning of foreign sovereigns as a possible violation of American antitrust laws. Courts have been given wide discretion in the enforcement of the provisions of the Sherman Act. There appears to be no reason why the judiciary cannot exercise the same discretion when determining whether *Noerr* petitioning immunity is available in the international context.

Douglas Wamsley