



12-1-1979

Application of Noerr-Pennington and the First Amendment to Politically Motivated Economic Boycotts: *Missouri v. NOW*

Charles P. Cockerill

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Charles P. Cockerill, *Application of Noerr-Pennington and the First Amendment to Politically Motivated Economic Boycotts: Missouri v. NOW*, 13 Loy. L.A. L. Rev. 85 (1979).

Available at: <https://digitalcommons.lmu.edu/llr/vol13/iss1/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

APPLICATION OF *NOERR-PENNINGTON* AND THE FIRST AMENDMENT TO POLITICALLY MOTIVATED ECONOMIC BOYCOTTS: *MISSOURI V. NOW*

*By Charles P. Cockerill**

I. INTRODUCTION

Boycotts¹ or concerted refusals to deal historically have been held to be combinations that restrain trade in violation of section one of the Sherman Act.² Courts have predicated antitrust liability, not on the quantum of impact on interstate trade or the reasonableness of the methods used by the combination but, rather, on the fact that the combination was formed with the express or implied purpose of effecting a boycott in restraint of trade or competition.³

* J.D., 1979 (California Western School of Law); B.A., 1972 (University of California); Member, State Bar of California.

1. Boycott is defined as "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978).

2. 15 U.S.C. § 1 (1976) 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 hereby declared to be illegal." Despite the expansive wording of the Sherman Act, it has long been settled that not every form of combination in restraint of trade falls within its scope. *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911).

3. *See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (group boycott); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941) (group boycott); *Eastern States Lumber Ass'n v. United States*, 234 U.S. 600 (1914) (group boycott). Per se violations of the Sherman Act "are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *North Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (a tying arrangement is per se unreasonable and unlawful under the Sherman Act).

Contrasted with the per se rule is the so-called rule of reason approach, which is the prevailing standard of analysis for liability under § 1 of the Sherman Act. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 46-59 (1977) (the rule of reason is the appropriate standard for vertical restraints in the manufacturing process). Justice Brandeis articulated the rule of reason in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918):

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily 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

In 1961 the Supreme Court found a significant implied exemption from liability under the Sherman Act for combinations seeking governmental action.⁴ This "political activities" exemption was first formulated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*⁵ The exemption was based on the rationale that although purpose and intent may be relevant in analyzing antitrust liability, "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."⁶

In 1978, the *Noerr* political activities exemption was applied to the advocacy of boycotts by the National Organization for Women (NOW). Because the State of Missouri had failed to ratify the Equal Rights Amendment, NOW was urging that conventions in that state be boycotted. When several conventions were cancelled, the state brought a *parens patriae* action in the federal district court for Western Mis-

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. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

In a recent decision, the Court of Appeals for the District of Columbia stated that under the rule of reason

a court will be required to analyze "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues" to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the "net effect" of substantially impeding competition.

Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978) (quoting *National Soc'y of Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

4. A second implied exemption from the Sherman Act exists for state action. *Parker v. Brown*, 317 U.S. 341 (1943) (Sherman Act held inapplicable to California's regulation of raisin production). In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978), the Court refused to grant municipalities automatic immunity under the *Parker* doctrine and thus limited the implied state action exemption to situations in which the challenged activity was within the contemplation of the legislature. See Comment, *The Airport Car Rental Concessions: The Role of City of Lafayette v. Louisiana Power and Light Co. in Restricting Threats to Free Competition*, 14 CAL. W.L. REV. 325 (1978).

5. 365 U.S. 127, 136-38 (1961). In addition to exempting conduct that seeks to influence legislative action, succeeding decisions extended antitrust immunity to attempts to influence executive, *UMW v. Pennington*, 381 U.S. 657 (1965), and adjudicative governmental bodies as well, *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508 (1972).

6. 365 U.S. at 137-38. "[E]ven though the sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long distance freight business," *id.* at 138, "[t]o hold that . . . 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 in the legislative history of the Act." *Id.* at 137.

souri for injunctive relief.⁷ Missouri alleged that NOW was engaging in a combination in restraint of trade in violation of section one of the Sherman Act. NOW responded, and the district court agreed, that the antitrust laws were inapplicable to NOW's convention boycott campaign due to its noncommercial nature.⁸ NOW also argued that its conduct fell within the political activities exemption to the Sherman Act and was protected by the first amendment. The Eighth Circuit Court of Appeals affirmed the district court's decision on this basis.

This article discusses the general proscription of the antitrust laws against boycotts in restraint of trade and focuses on the 1979 decision of *Missouri v. NOW*.⁹ That decision, upheld on appeal, clarifies the scope of the political activities exemption and the protection afforded by the first amendment for conduct that, while causing severe economic injury, is clearly political.

II. SHERMAN ACT: PROSCRIPTION AGAINST BOYCOTTS IN RESTRAINT OF TRADE

The broad scope of liability under the Sherman Act was defined in 1911 in the landmark case of *Standard Oil Co. v. United States*,¹⁰ and its companion case of *United States v. American Tobacco Co.*¹¹ In *American Tobacco Co.*, the Court interpreted section one to prohibit conduct that "operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade."¹² The purpose of the Sherman Act is to proscribe all conduct that interferes with the natural flow of interstate commerce.¹³ This expansive scope of antitrust liability for boycotts or concerted refusals to deal has been refined by several Supreme Court decisions.

In 1914, the Court in *Eastern States Lumber Ass'n v. United*

7. *Missouri v. NOW*, 467 F. Supp. 289 (W.D. Mo. 1979), *aff'd*, No. 79-1379 (8th Cir. Mar. 28, 1980).

8. "The Supreme Court's reasons for nonapplication of the antitrust laws in *Noerr* apply with greater weight to this case, which 'involves political opponents, not commercial competitors; and political objectives, not market place goals.'" *Id.* at 305 (quoting *Council for Employment & Economic Energy Use v. WHDH Corp.*, 580 F.2d 9, 12 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979)).

9. 467 F. Supp. 289 (W.D. Mo. 1979), *aff'd*, No. 79-1379 (8th Cir. Mar. 28, 1980).

10. 221 U.S. 1 (1911) (Standard Oil Co. and its subsidiary companies were held to have formed a combination in violation of the Sherman Act).

11. 221 U.S. 106 (1911) (an attempt by American Tobacco Co. and several accessory corporations and subsidiary companies to dominate interstate commerce in the tobacco industry held to be a combination in restraint of trade and, thus, an antitrust violation).

12. *Id.* at 179.

13. *Standard Oil Co. v. United States*, 221 U.S. at 58-62.

*States*¹⁴ upheld the section one liability of certain retail lumber dealers for conspiring to boycott lumber wholesalers who were also selling at retail. The retail lumber dealers believed that such direct sales to the public by wholesalers was too great a competitive threat to their market to be tolerated. The various lumber associations representing the retail dealers distributed to their members an official report that listed those wholesale dealers who sold directly to consumers. Although there existed no agreement among the retailers to boycott the listed wholesalers, the Court stated that "the purpose in the predetermined and periodical circulation of this report [was] to put the ban upon wholesale dealers whose names appear[ed] in the list of unfair dealers."¹⁵ The combination in *Eastern States Lumber* was found to restrain trade unduly because the retailing wholesalers were blacklisted by the retail lumber associations and retailers were implicitly instructed not to purchase from them.

A similar anticompetitive practice was struck down in *Fashion Originators' Guild of America, Inc. v. FTC.*¹⁶ The Fashion Originators' Guild of America (FOGA) was comprised of designers and manufacturers of women's clothing and fashion textiles. Members of FOGA entered into agreements to boycott and refuse to sell to retailers who sold garments copied by non-member manufacturers from exclusive designs put out by FOGA members. It was held that the combination, which induced approximately twelve thousand retailers throughout the country to comply with FOGA's boycott program, constituted an unfair method of competition.¹⁷ The effect of the combination was to vest enough power and control in FOGA to exclude from the industry those manufacturers and distributors who failed to conform to FOGA's rules and regulations and thus tended to create a monopoly.¹⁸

A third instance in which a group boycott was found to violate the antitrust laws was in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*¹⁹ Klor's, an appliance store, competed with Broadway-Hale, a neighboring department store that also sold household appliances. Broadway-Hale was found to be liable for entering into agreements whereby appliance manufacturers and their distributors either refused to sell or sold only on unfavorable terms to Klor's. The effect of the concerted refusal to deal was that Klor's lost its "freedom to buy appliances in an

14. 234 U.S. 600 (1914).

15. *Id.* at 608-09.

16. 312 U.S. 457 (1941).

17. *Id.* at 463-64.

18. *Id.* at 466-67.

19. 359 U.S. 207 (1959).

open competitive market."²⁰

The common thread running through these leading boycott cases²¹ is the intent, express or implied, to impair or destroy competition in a *commercial* setting. The per se rule developed in these cases is applied when there exists a combination to boycott or refuse to deal that restrains trade, monopolizes, or lessens competition. An important factor in these and other group boycott cases in which antitrust liability has been imposed is that economic benefit can be traced to the principals, while economic detriment is suffered by the target of the boycott.

III. THE NOERR-PENNINGTON DOCTRINE²²

A. Noerr's Political Activities Exemption

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,²³ a group of trucking companies brought an action against several railroads and a public relations firm for violations of the Sherman Act. The truckers' complaint charged the defendant railroads with conducting a deceptive publicity campaign against the trucking industry to encourage the "adoption and retention of laws and law enforcement practices destructive of the trucking business . . . and to impair the relationship existing between the truckers and their customers."²⁴ The railroads readily admitted that they had mounted a publicity campaign to influence the passage of state legislation covering truck weight limits and tax rates. Such a campaign, the railroads argued, was simply outside the reach of the Sherman Act.

20. *Id.* at 213.

21. See also *United States v. General Motors*, 384 U.S. 127 (1966) (General Motors' collaborative action with dealers and associations was a per se violation of the antitrust laws).

22. See generally Costilo, *Scope of the Noerr-Pennington Doctrine*, 34 ANTITRUST L.J. 141 (1967); Fischel, *Antitrust Liability for Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 105 (1977); Holzer, *An Analysis for Reconciling the Antitrust Laws with the Right To Petition: Noerr-Pennington in Light of Cantor v. Detroit Edison*, 27 EMORY L.J. 673 (1978); Note, *Noerr-Pennington—Hole in the Umbrella*, 24 BAYLOR L. REV. 265 (1972); Note, *Antitrust—Noerr-Pennington Doctrine—Metro Cable Co. v. CATV of Rockford, Inc.*, 17 B.C. INDUS. & COM. L. REV. 511 (1976); Comment, *Antitrust Immunity: Recent Exceptions to Noerr-Pennington Defense*, 12 B.C. INDUS. & COM. L. REV. 1333 (1971); Note, *Antitrust—Supreme Court Extends Noerr Immunity from Sherman Act to Attempts To Influence Adjudication*, 76 DICK. L. REV. 593 (1972); Comment, *Solicitation of Government Action in Restraint of Trade—Noerr Revisited*, 8 HOUS. L. REV. 952 (1971); 48 MISS. L.J. 634 (1977); 22 SYRACUSE L. REV. 1151 (1971); 30 VAND. L. REV. 75 (1977).

23. 365 U.S. 127 (1961).

24. *Id.* at 129.

The district court held,²⁵ and the Third Circuit affirmed,²⁶ that the railroads' publicity campaign violated the Sherman Act. The Supreme Court, in a unanimous decision, reversed, holding in part that "a publicity campaign to influence governmental action falls clearly into the category of political activity,"²⁷ which is beyond the scope of conduct proscribed by the Sherman Act. Writing for the Court, Mr. Justice Black began his analysis with the simple statement "that no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."²⁸ When the trade restraint flows from valid governmental action, and not simply from private activities, no antitrust liability can be imposed.²⁹ Because no antitrust liability could be imposed for the passage or enforcement of laws, it was axiomatic for the Court to conclude that the Sherman Act likewise "does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."³⁰

The Court in *Noerr* stressed that the essential dissimilarity between combinations seeking passage of legislation or enforcement of laws and those seeking to impair trade or destroy competition constitutes "a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint."³¹ To hold that the Sherman Act forbids combinations that intend to influence the passage or enforcement of laws would ignore the fact that the purpose of the Sherman Act is to regulate the business activity, not the political activity, of individuals and corporations within the United States.³²

In addition to this essential dissimilarity, the Court rested its deci-

25. 155 F. Supp. 768 (E.D. Pa. 1957). The district court was careful to explain that it was not "illegal for an industry to seek any and every proper legislative goal." *Id.* at 816.

26. 273 F.2d 218 (3rd Cir. 1959) (per curiam).

27. 365 U.S. at 140-41.

28. *Id.* at 135. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601 (1976), the Court commented on the scope of the holding in *Noerr*, stating that "[t]he case did not involve any question of either liability or exemption for private action taken in compliance with state law."

29. 365 U.S. at 136 (citing *United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939) and *Parker v. Brown*, 317 U.S. 341 (1943)).

30. *Id.*

31. *Id.* at 137. The Court stated that "the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing or enforcement of laws." *Id.* at 136-37.

32. *Id.* See also *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. at 466-67.

sion on a consideration of two other factors. First, because a representative form of government relies on being informed by the citizens of their various needs and grievances, any statutory liability for such communication is totally outside the contemplation of the Sherman Act. Surely the prospect of prosecution for such activity would chill the free interchange of ideas between the governed and the governing.³³ Second, serious constitutional questions are raised by construing the Sherman Act as regulating political activity.³⁴ From the Bill of Rights, Justice Black singled out the right to petition the government and suggested that the Court could not "lightly impute to Congress an intent to invade these freedoms."³⁵

After concluding that the railroads could not be liable for the "mere solicitation of governmental action with respect to the passage and enforcement of laws,"³⁶ the Court looked at several other factors upon which the lower courts had based their holdings that the railroads' publicity campaign violated the Sherman Act. First considered was the railroads' anticompetitive purpose—their alleged intent to destroy the truckers as competitors in the long-haul freight business. The Court found that it was not illegal for persons to seek legislation that is more advantageous to them than to their competitors. In fact, such an ulterior motive, or anticompetitive purpose, is legally irrelevant when the objective is the passage or enforcement of certain laws.³⁷ Second, the Court looked at the railroads' attempt to give their propaganda the appearance of being spontaneous declarations from independent groups. The Court held that use of the so-called third party technique in a publicity campaign designed to influence governmental action does not violate the Sherman Act³⁸ and is thus also legally irrelevant.³⁹

B. *Scope of Noerr Expanded in Pennington*

In 1965, the Supreme Court decided *UMW v. Pennington*.⁴⁰ The decision re-emphasized the holding in *Noerr* and clarified the scope of the *Noerr* political activities exemption. In *Pennington* it was alleged that a group of coal companies and the UMW had conspired to drive small coal companies out of business by lobbying before the Secretary

33. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. at 137.

34. *Id.* at 138.

35. *Id.*

36. *Id.*

37. *Id.* at 138-40.

38. *Id.* at 140.

39. *Id.* at 142.

40. 381 U.S. 657 (1965).

of Labor for adjustment to the Tennessee Valley Authority (TVA) wage and purchasing policies.

One of the issues in *Pennington* was whether the trial court's instructions to the jury were in error. The jury was instructed that the UMW's lobbying efforts were legal "unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business."⁴¹ Mr. Justice White, writing for the Court, held such instruction to constitute reversible error⁴² because the jury was permitted to find liability if it determined that the requisite anticompetitive purpose was present. Such a finding of liability from intent was simply impermissible under *Noerr*. In holding that such lobbying before the Secretary of Labor was not actionable, the Court stated,

Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose 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 a violation of the Sherman Act.⁴³

Pennington expands the scope of *Noerr* by using the term "public officials."⁴⁴ When read together, *Noerr* and *Pennington* hold that "joint efforts to influence government action are outside the scope of the Sherman Act, even if the combination is formed for the sole purpose of eliminating competitors."⁴⁵

The *Noerr-Pennington* doctrine was given its broadest application in *United States v. Johns-Manville Corp.*⁴⁶ In that case, the defendants wanted "to increase the cost of selling foreign-made . . . pipe in the United States or to exclude such pipe entirely."⁴⁷ The concerted activities of the defendants to influence the decision of public procurement officials on pipe specifications were held to be constitutionally protected and could not "be the basis of a finding of violation of the anti-trust laws, . . . regardless of the intent with which they were

41. *Id.* at 670 (quoting jury instruction delivered by trial court).

42. *Id.*

43. *Id.*

44. *See* Mark Aero, Inc. v. TWA, Inc., 580 F.2d 288, 294-95 (8th Cir. 1978), in which the court stated that "[t]he use of the term public official" by the Supreme Court in *Pennington* "clearly expanded the *Noerr* decision, which had referred only to legislative or executive action."

45. *Id.* (citing with approval Note, *Trade Regulation: Noerr Antitrust Immunity—Defining the Sham Exception*, 29 OKLA. L. REV. 512, 514 (1976)).

46. 259 F. Supp. 440 (E.D. Pa. 1966).

47. *Id.* at 452.

undertaken."⁴⁸ Thus, the *Noerr-Pennington* doctrine was "expanded to protect joint efforts to influence governmental actions as a purchaser in the market, not merely when acting in a sovereign legislative or regulatory capacity."⁴⁹ Subsequent to the 1966 decision in *Johns-Manville*, courts applying the rules and policies of the *Noerr-Pennington* doctrine have substantially narrowed the doctrine's applicability.⁵⁰

C. *Sham Exception to the Noerr-Pennington Political Activities Exemption*

The Supreme Court in *Noerr* alluded to a limit to immunity under the political activities exemption when it stated that there may exist circumstances in which the alleged combination "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."⁵¹ From 1961 to 1972, however, the Supreme Court failed to clarify this "sham exception" to the *Noerr-Pennington* doctrine.

The Court first applied the sham exception in *California Motor Transport Co. v. Trucking Unlimited*.⁵² Certain highway carriers had used a trust fund to finance opposition to all applications filed by competing highway carriers with the Public Utilities Commission or the Interstate Commerce Commission.⁵³ Justice Douglas, writing for the

48. *Id.* at 452-53 (citations omitted).

49. *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 276 (D.C. Cir. 1972).

50. *Id.* See, e.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (discussed in text accompanying notes 52-63 *infra*); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (action by football franchise owners to attack a restrictive covenant in a public stadium lease that permitted only one team to have access to the stadium); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (owners of land in a natural gas field brought action against other owners alleging that false information had been given to the state's natural gas regulating commission); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30-31 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970) (commercial competitors seeking to sell products to public agencies under competitive bidding procedures).

51. 365 U.S. at 144. The sham exception has been narrowly interpreted to apply only to publicity campaigns. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1080 (9th Cir. 1976) (en banc), *cert. denied*, 430 U.S. 940 (1977).

52. 404 U.S. 508 (1972).

53. In considering *Trucking Unlimited* and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Supreme Court commented that "[t]hose cases together may be cited for the proposition that repetitive, sham litigation in state courts may constitute an antitrust violation and that an injunction may lie to enjoin future state-court litigation." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 n.6 (1977).

The Ninth Circuit has held "that in order to state a claim for relief under the *Trucking*

Court, began his discussion with a brief statement of the governing principles of *Noerr*, and re-emphasized the policy argument that it would be destructive of the rights of association and petition "to hold that groups with common interests may not, without violating the anti-trust 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-à-vis* their competitors."⁵⁴

Factual distinctions between *Noerr* and *Trucking Unlimited*, however, led the Court to conclude that the immunity granted political activity in the antitrust context is limited. Unlike *Noerr*, in which private concerted activity to influence public officials was shielded from the Sherman Act, the private conspirators in *Trucking Unlimited* "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process."⁵⁵ The Court noted that there are "many . . . forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations."⁵⁶ Examples include conspiracy with a licensing authority to eliminate a competitor⁵⁷ and bribery of a public purchasing agent.⁵⁸

Justice Douglas emphasized that the first amendment cannot be

Unlimited exception, a complaint must include allegations of the specific activities, not protected by *Noerr*, which plaintiffs contend have barred their access to a governmental body." *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1082 (9th Cir. 1976) (en banc), *cert. denied*, 430 U.S. 940 (1977). The Eighth Circuit noted the expansive nature of the sham exception in *Mark Aero, Inc. v. TWA, Inc.*, 580 F.2d 288, 295-96 n.28 (8th Cir. 1978) ("[c]onstruing the sham exception as enunciated in *Noerr* to include all activity not genuinely designed to influence the government is more consonant with the Court's central ruling" (quoting Fishel, *Antitrust Liability for Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 105 (1977)). See generally Oppenheim, *Antitrust Immunity for Joint Efforts To Influence Adjudication Before Administration Agencies and Courts—From Noerr-Pennington to Trucking Unlimited*, 29 WASH. & LEE L. REV. 209 (1972); Note, *California Motor Transport Co. v. Trucking Unlimited: A New Route For Noerr-Pennington and the Sham Exception*, 26 SW. L.J. 926 (1972); Note, *The Quagmire Thickens: A Post-California Motor View of the Antitrust and Constitutional Ramifications of Petitioning the Government*, 42 U. CIN. L. REV. 281 (1973); Comment, *Trucking Unlimited v. California Motor Transport: Determining the Noerr Route*, 1971 UTAH L. REV. 259 (1971).

54. 404 U.S. at 510-11.

55. *Id.* at 512.

56. *Id.* at 513.

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

58. *Id.* at 513 (citing *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965)).

used to immunize conduct that violates a valid statute.⁵⁹ Such an interpretation of first amendment guarantees would make it “practically impossible” to enforce the antitrust laws and prosecute other unlawful conspiracies.⁶⁰ In affirming the court of appeals decision, the Supreme Court said that “First Amendment rights may not be used as the means of the pretext for achieving ‘substantive evils’ . . . which the legislature has the power to control.”⁶¹ Thus, the shield of the first amendment may not be used as a sword to destroy a competitor by preventing or obstructing his access to administrative agencies and courts.

The Court in *Trucking Unlimited* concluded that the defendants had formed “[a] combination of entrepreneurs to harass and deter their competitors from having ‘free and unlimited access’ to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities.”⁶² The Court held that the defendants’ conduct came “within the ‘sham’ exception to the *Noerr* case.”⁶³

The Eighth Circuit recently considered and rejected an application of the sham exception in *Mark Aero, Inc. v. TWA, Inc.*⁶⁴ In that case Mark Aero, a chartered air taxi operator, brought an action alleging an antitrust violation by TWA for its opposition to the reopening of an old airport. Mark Aero desired to start a new air passenger service between Kansas City and St. Louis. Mark Aero argued that TWA and Frontier Airlines had acted to prevent “‘free and meaningful access’ to the organs of the City government” and thus their conduct came within the sham exception to the *Noerr-Pennington* doctrine.⁶⁵ The court stated that the “fundamental question presented in each case involving the ‘sham’ exception . . . is the question of intent.”⁶⁶ To determine intent, all factors in the case must be considered to decide whether there existed “true intent to injure competitors directly rather than to influence governmental action.”⁶⁷ The court concluded that the defendants had not intended to injure their competitors directly but, rather, had engaged in genuine political activity, and thus there was no basis for applying the sham exception.

59. *Id.* at 514 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949)).

60. *Id.* (also citing *Associated Press v. United States*, 326 U.S. 1 (1945)).

61. *Id.* at 515.

62. *Id.*

63. *Id.* at 516.

64. 580 F.2d 288 (8th Cir. 1978).

65. *Id.* at 297.

66. *Id.*

67. *Id.*

D. Recent Application of the Noerr-Pennington Doctrine

Several recent decisions clarify the far reaching effects of *Noerr-Pennington* in the context of "political boycotts,"⁶⁸ the first of which is *Metro Cable Co. v. CATV, Inc.*⁶⁹ Metro was unable to obtain a franchise from the City of Rockford, Illinois to construct and operate a cable television transmission system within that city. Metro brought suit against CATV of Rockford, a competitor who had been successful in obtaining an exclusive franchise and had sought to influence the city council to deny Metro's application for a franchise. The trial court dismissed the suit. In affirming, the Seventh Circuit stated that CATV's concerted efforts to induce governmental actions were not subject to the Sherman Act,

even though those efforts had the anticompetitive purpose and effect alleged by plaintiff [Metro], if those efforts were genuinely aimed at inducing the governmental actions and were not a pretext for inflicting on plaintiff an injury not caused by any governmental action. Unlike the injury to plaintiffs in *Trucking Unlimited*, the injury to plaintiff in the case at bar was caused by the governmental actions of the city council which the defendants genuinely and successfully attempted to induce the city council to take.⁷⁰

In *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*,⁷¹ Franchise Realty (McDonald's) sought permits from the City of San Francisco for the construction of additional McDonald's restaurants. McDonald's brought an action against two restaurant associations and a labor union, alleging that they had violated the Sherman Act by opposing the granting of building permits by the San Francisco Board of Permit Appeals. The district court dismissed McDonald's first amended complaint with prejudice. On appeal the Ninth Circuit affirmed, holding that under *Noerr* and *Pennington* the defendants' activities were absolutely im-

68. In addition to the recent political boycott cases discussed herein, see *Israel v. Baxter Labs., Inc.*, 466 F.2d 272 (D.C. Cir. 1972) (*Noerr-Pennington* exemption held applicable when drug manufacturer alleged that there existed a conspiracy to influence the Food and Drug Administration in its consideration of new drug applications); *Marjorie Webster Jr. College v. Middle States Ass'n*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (the Sherman Act is inapplicable in the context of noncommercial liberal arts and learned professions when there is an incidental restraint of trade, unless there is an intent or purpose to affect the commercial aspects of the profession).

69. 516 F.2d 220 (7th Cir. 1975).

70. *Id.* at 229.

71. 542 F.2d 1076 (9th Cir. 1976) (en banc), *cert. denied*, 430 U.S. 940 (1977).

mune from antitrust liability.⁷²

The court also rejected McDonald's claim that the defendants' conduct was analogous to that prohibited in *Trucking Unlimited*.⁷³

While McDonald's alleges, as did the plaintiffs in *Trucking Unlimited*, that the purpose and effect of the defendants' opposition is "to foreclose the Company from free and unlimited access" to administrative agencies, its complaint is unlike that in *Trucking Unlimited* in that it fails to allege any means by which defendants have achieved, or plan to achieve, their alleged goal of barring McDonald's from access to the Board.⁷⁴

The defendants' activities were within the "direct lobbying immunity recognized by *Noerr, Pennington* and *Trucking Unlimited* itself."⁷⁵ The Ninth Circuit went on to state that "in order to state a claim for relief under the *Trucking Unlimited* exception, a complaint must include allegations of specific activities, not protected by *Noerr*, which plaintiffs contend have barred their access to a governmental body."⁷⁶

In *Feminist Women's Health Center, Inc. v. Mohammed*,⁷⁷ the Feminist Women's Health Center brought an action for injunctive relief against several doctors in Tallahassee, Florida. The Center charged the doctors with violations of both federal and state antitrust laws for allegedly conspiring to boycott the Center's Tallahassee abortion clinic, fixing prices for abortions in the Tallahassee area, and monopolizing the local market providing women's health and abortion services. The trial court held that the defendant doctors' various letters and communications to the State Board of Medical Examiners and to private peer group review organizations were petitioning activities protected by the first amendment.

Following summary judgment against the antitrust claims on the basis of the *Noerr-Pennington* political activities exemption,⁷⁸ the Center appealed. The Fifth Circuit reversed, holding that only the letter of complaint to the executive director of the State Board of Medical Examiners was protected by the *Noerr-Pennington* doctrine.⁷⁹ Other

72. *Id.*

73. See text accompanying notes 52-63 *supra*.

74. 542 F.2d at 1081.

75. *Id.*

76. *Id.* at 1082.

77. 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 262 (1979).

78. 415 F. Supp. 1258, 1268-69 (N.D. Fla. 1976).

79. 586 F.2d at 542.

communications were held as a matter of law to be unprotected.⁸⁰

In *Subscription Television, Inc. v. Southern California Theatre Owners Ass'n*,⁸¹ the Ninth Circuit refused to apply the sham exception. Subscription Television was in the business of providing pay television over commercial telephone lines and announced its intention to begin operations in Los Angeles and San Francisco. California theatre owners organized to oppose this competitive threat by seeking enactment of legislation through California's initiative process. An initiative, Proposition 15, was drafted and passed in the 1964 general election. The California Supreme Court subsequently held the measure to be an unconstitutional infringement of freedom of speech.⁸²

Subscription Television commenced an action alleging a conspiracy to restrain trade in violation of the Sherman Act. On appeal, the Ninth Circuit affirmed the district court's grant of a directed verdict for defendants on the basis of the *Noerr-Pennington* doctrine. Subscription Television argued that the theatre owners' activities were a sham and that they knew that the initiative was unconstitutional from the very beginning. In rejecting these arguments, the court held that the "theatre owners' activities were not a sham because they were actually seeking and did obtain the desired legislative action."⁸³ Subscription Television also contended that "the *Noerr-Pennington* immunity does not apply where the political action sought is illegal or unconstitutional."⁸⁴ The Ninth Circuit answered that the "*Noerr-Pennington* doctrine is based on the first amendment right of petition and such a right would be considerably chilled by a rule which would require an advocate to predict whether the desired legislation would withstand a constitutional challenge in the courts."⁸⁵ The court in *Subscription Television* quoted its earlier language in *Franchise Realty*:⁸⁶ "We know of no case that holds that joint action which succeeds in persuading a public body to make an erroneous decision can give rise to a cause of action under the Sherman Act."⁸⁷

Thus, what exists today is a political activities exemption from lia-

80. *Id.*

81. 576 F.2d 230 (9th Cir. 1978).

82. *Weaver v. Jordan*, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537, cert. denied, 385 U.S. 844 (1966).

83. 576 F.2d at 233.

84. *Id.*

85. *Id.*

86. See text accompanying notes 71-76 *supra*.

87. 576 F.2d at 234 (quoting *Franchise Realty Interstate Corp. v. San Francisco Local Exec. Bd. of Culinary Workers*, 542 F.2d at 1079 n.2).

bility under the Sherman Act that immunizes concerted efforts to influence government action and policy. The limit to immunity under the political activities exemption of *Noerr* and *Pennington* is reached when, as in *Trucking Unlimited*, the conspirators seek not merely "to influence public officials," but . . . [also] to bar their competitors from meaningful access to adjudicating tribunals and so to usurp that decisionmaking process."⁸⁸ In light of section one of the Sherman Act, the political activities exemption, and the sham exception to the political activities exemption, this article now turns to and analyzes a new factual setting that raises the issue of liability under the Sherman Act for concerted action to effectuate politically motivated economic boycotts.

IV. CONVENTION BOYCOTTS: LIABILITY UNDER THE SHERMAN ACT?

A. *Facts of Missouri v. NOW*

In March 1972, the proposed Equal Rights Amendment to the Constitution was submitted to the states for ratification. To date, thirty-five states have ratified the ERA, three short of the thirty-eight required for adoption as a constitutional amendment.⁸⁹ As the proponents of the ERA neared their goal, the National Organization for Women intensified its lobbying effort in those states in which ratification had not yet occurred.⁹⁰ As early as 1975, the tactic of encouraging national organizations to cancel their conventions scheduled for states that had not ratified the ERA had been initiated by groups other than NOW.⁹¹ It was believed that convention boycotts of those states would provide the economic coercion necessary to convince state legislators to support passage of the ERA.

NOW formulated and adopted, in February 1977, its own resolution advocating convention boycotts.⁹² NOW's convention boycott campaign was centrally coordinated on a national level from an office

88. 404 U.S. at 512.

89. U.S. CONST. art. V.

90. Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

91. The National Federation of Business and Professional Women, the National Association of Women Deans, Administrators and Counselors, the League of Women Voters, and the American Political Science Association were among groups that adopted in 1975 resolutions to hold conventions only in states that had ratified the ERA. No evidence was found that any of these groups had been contacted or influenced by NOW. In fact, the national NOW organization was not involved with the boycott movement until 1977, when NOW became involved with efforts to secure ratification of the ERA in Nevada. *Missouri v. NOW*, 467 F. Supp. at 291-92.

92. *Id.* at 292.

in Washington, D.C. and involved a three-pronged approach to solicit support. The first prong was *information dissemination*: it included letter mailings with follow-up phone calls, boycott brochures with business reply cards, campaign-style buttons, boycott kits, a nationwide telephone campaign, and meetings with public and private groups, local civic leaders, and state and federal political leaders.⁹³ The second prong of the NOW campaign was *information gathering*, which consisted of compiling statistics on organizations that had adopted boycott resolutions⁹⁴ and the economic impact of convention cancellations or site changes.⁹⁵ The third prong involved *selling* the convention boycott campaign on a national level through the news media, including press coverage, press releases concerning the convention boycott campaign, interviews with NOW leaders to explain the importance of the boycott campaign to the overall plan to secure ratification of the ERA, and articles urging support of the convention boycott campaign in the National NOW Times, an internal publication of NOW.⁹⁶

This three-pronged approach was calculated to secure ERA ratification by enlisting support for NOW's convention boycott campaign and focusing that support directly on the legislative process. NOW's convention boycott campaign was motivated by three factors. First was a desire to employ the boycott as a symbolic gesture, the support of which meant support for ERA ratification.⁹⁷ In the words of the district court, "[t]he affirmative step of a boycott resolution or convention cancellation, urged by NOW and taken by many organizations including NOW, was conceived to show strong support for a political issue, support of a nature beyond a simple expression of policy or preference."⁹⁸ The second motivating factor was the necessity for widespread publicity.⁹⁹ The act of supporting NOW's convention boycott campaign would "attract attention and bring public visibility to the issue of [ERA] ratification."¹⁰⁰ Finally, with respect to its activities in Missouri, it was NOW's intent to influence state legislators with the "adverse economic impact of the [convention] boycott on those who would other-

93. *Id.* at 293-94.

94. "The NOW list of boycotting organizations dated October 17, 1978, contains 273 organizations and independent decision-making components thereof and 34 city and county governments." *Id.* at 297.

95. *Id.* at 293-94.

96. *Id.* at 294.

97. *Id.* at 295.

98. *Id.*

99. *Id.*

100. *Id.*

wise profit from the conventions in Missouri.”¹⁰¹

The State of Missouri, which has not yet ratified the ERA, was impacted by the boycott campaign in that at least ten major conventions scheduled for Missouri cities were cancelled,¹⁰² six smaller conventions were moved to facilities in other states,¹⁰³ and convention boycott resolutions were adopted that will remain in effect until Missouri ratifies the ERA. Missouri alleged in its complaint that the decisions to cancel conventions and the adoption of convention boycott resolutions were made “at the express urging” and “in combination with” NOW.¹⁰⁴

B. Noerr-Pennington Exemption for the NOW Boycott

In a *parens patriae*¹⁰⁵ action, Missouri urged that NOW’s national boycott campaign, which adversely affected Missouri’s convention industry, was a combination in restraint of trade and thus violated the Sherman Act. NOW responded that (1) its conduct was outside the scope of the Sherman Act because of its noncommercial nature,¹⁰⁶ (2) even if NOW was within the scope of the Sherman Act, its conduct was immunized by the political activities exemption,¹⁰⁷ and (3) most importantly, NOW’s activities were protected by the first amendment.¹⁰⁸

The Supreme Court in the *Klor’s* case had stated that the Sherman Act “is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives.”¹⁰⁹ Although NOW’s conduct had commercial impact, its objective was clearly political—the ratification of the ERA.¹¹⁰

101. *Id.*

102. *Id.* at 296. Cancellations represented an “approximate revenue loss of at least \$8.6 million to Missouri hotels, restaurants and numerous other businesses catering to the convention trade.” *Id.* at 297.

103. *Id.*

104. *Id.* at 295.

105. The district court considered and approved the *parens patriae* standing of Missouri to bring this suit. *Id.* at 296-301.

106. *Id.* at 301.

107. *Id.* at 302-03.

108. *Id.* at 303.

109. *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. at 213 n.7. See also *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). In *Missouri v. NOW*, Missouri cited various cases for the proposition that the Sherman Act does apply to non-traditional boycotts. 467 F. Supp. at 301 n.25.

110. The district court cited *Bird, Sherman Act Limitations on Non-Commercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, and *Coons, Noncommercial Purpose as a Sherman Act Defense*, 56 NW. L. REV. 705 (1962), to emphasize the importance of the commercial-non-

Both Missouri and NOW stipulated that the sole objective of the convention boycott campaign was the ratification of the ERA.¹¹¹ NOW and other organizations involved in the national convention boycott campaign were not motivated by a purpose to impair or destroy competition in Missouri's convention industry. In fact, neither NOW nor the convention industry were in any "competitive relationship."¹¹² The district court found the boycott to be noncommercial because its participants were not motivated by business interests and its purpose was not to increase profits.¹¹³ It found the boycott to be noneconomic because there was no intention to advance the economic self-interest of the participants.¹¹⁴ The court concluded that the "essential dissimilarity" between the convention boycott directed at the legislatures and agreements traditionally held violative of § 1 of the Sherman Act is of a greater magnitude in this case than that in *Noerr*.¹¹⁵

After finding this essential dissimilarity between NOW's boycott and more traditional boycotts to which the Sherman Act clearly would have applied, the district court proceeded in its analysis assuming *arguendo* that NOW's conduct fell within the scope of the antitrust laws. The court examined whether NOW's convention boycott campaign should fall within the immunity of the *Noerr-Pennington* political activities exemption from antitrust liability under the Sherman Act.¹¹⁶ Like

commercial distinction. 467 F. Supp. at 304. *But see* Note, "Political" Blacklisting in the Motion Picture Industry: A Sherman Act Violation, 74 YALE L.J. 567, 579-80 (1965), which was cited by Missouri to rebut the different treatment of noncommercial boycotts and to urge a *per se* test of illegality. Brief for Appellant at 29, *Missouri v. NOW*, No. 79-1379 (8th Cir. Mar. 28, 1980). *See also* *Hennessey v. NCAA*, 564 F.2d 1136, 1148-49 (5th Cir. 1977), in which the Fifth Circuit affirmed *per curiam* the district court's holding that the NCAA, a non-profit educational association, is "not entitled to a total exclusion from anti-trust regulations." *Id.* at 1149. The court in *Hennessey* cited *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975), for the proposition that neither the learned professions nor educational organizations are entitled to a blanket exclusion merely because they are not classic members of the business world. 564 F. Supp. at 1148-49. *Cf.* *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. at 141 (the proscriptions of the Sherman Act are intended for the business world and are not appropriate in the political arena); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493-94 n.5 (1940) (antitrust laws apply to business and commercial transactions); *Marjorie Webster Jr. College v. Middle States Ass'n*, 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (the antitrust laws are designed for use in the business world, "not for the non-commercial aspects of the liberal arts and the learned professions").

111. 467 F. Supp. at 295.

112. *Id.* at 304.

113. *Id.* *See also id.* at 304 n.28.

114. *Id.* at 304.

115. *Id.*

116. *See Council for Emp. & Econ. Energy Use v. WHDH Corp.*, 580 F.2d 9 (1st Cir. 1978), *cert. denied*, 99 S. Ct. 1421 (1979), in which the First Circuit held that the district

Noerr, in which railroads were seeking stricter government regulation of the trucking industry, and *Pennington*, in which the UMW was lobbying before the Secretary of Labor for adjustments to the TVA's wage and purchasing policies, NOW was engaged in conduct designed to influence governmental action. The Court in *Noerr* stated that to hold "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 the Act."¹¹⁷

Missouri advanced several arguments why the political activities exemption should not be applied in this case to immunize NOW's conduct. First, Missouri argued that "NOW's actions have gone far beyond the 'mere solicitation of government action' in *Noerr*, . . . and are therefore not within the *Noerr* 'exclusion' from antitrust coverage."¹¹⁸ Missouri sought to distinguish NOW's conduct from that of the railroads in *Noerr* by contending that the restraint of trade flowing from the convention boycott campaign was a direct result of the combination of NOW and other boycott participants.¹¹⁹ Unlike the restraint of trade in *Noerr*, which resulted from "a valid legislative act," the restraint of trade in this case was caused by convention boycotts, not by the passage of the ERA.¹²⁰ The combination in *Noerr* sought passage of legislation that would have restrained trade, whereas in *NOW* a boycott which itself restrained trade was employed as a vehicle to encourage ratification of the ERA.

Because both *Noerr* and *NOW* involve political activity, the question must be asked whether the political activities exemption is intended to immunize conduct that directly restrains trade or is intended merely to immunize political activity that influences the passage or enforcement of laws which have the incidental effect of restraining trade.

court had properly dismissed a private antitrust action brought by a political committee against four radio station operators. The political committee alleged that the broadcasters had violated the Sherman Act by agreeing on the amount of free advertising they would provide to the opponents of the political committee. The political committee argued that the defendants' activities denied it free and unlimited access to government agencies and the political process. The court dismissed the political committee's contentions and held that the *Noerr-Pennington* doctrine insulated the defendants' activities from the scope of the antitrust laws. *Id.* at 12-13. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. at 513-14 (first amendment rights not immunized from regulation when used to violate antitrust laws).

117. 365 U.S. at 137.

118. 467 F. Supp. at 303.

119. *Id.*

120. *Id.*

This issue is muddled by language of the Court in *Noerr* that some "direct injury upon the interests of the party against whom the campaign is directed" is inevitable and does not affect application of the political activities exemption.¹²¹ Although this language is tempting, it does not resolve the issue of whether the conduct may itself directly restrain trade. Both the district court and the Eighth Circuit failed to address this distinction in *NOW* and thus, by implication, concluded that the political activities exemption immunizes conduct which itself directly restrains trade—an interpretation that is a significant departure from and extension of the *Noerr-Pennington* doctrine.

Missouri's second argument was predicated on the "presumption against implied exclusions from the Sherman Act."¹²² The district court answered that the political activities exemption has "been held sufficiently weighty to overcome this presumption"¹²³ against implied exemptions.

Finally, Missouri contended that "a general 'first amendment exclusion' from Sherman Act coverage"¹²⁴ should not apply to exempt *NOW*'s conduct in this action. Without discussion, the district court rejected this argument, stating that Missouri's case authority for limiting application of the first amendment did "not touch the issue in this case, which is whether *NOW*'s actions, which are themselves an exercise of first amendment rights, constitute a violation of the Sherman Act."¹²⁵

When it held that the Sherman Act was inapplicable to *NOW*'s convention boycott campaign, the court made passing reference to the first amendment freedoms of petition and association and to the potential constitutional deprivations that could flow from holding *NOW* liable for antitrust violations. The district court concluded its analysis by stating that "[t]he Supreme Court's reasons for nonapplication of the antitrust laws in *Noerr* apply with greater weight to this case, 'which involves political opponents, not commercial competitors; and political objectives, not market place goals.'"¹²⁶

121. 365 U.S. at 143.

122. 467 F. Supp. at 303.

123. *Id.* (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978)).

124. 467 F. Supp. at 303.

125. *Id.* at 304. See also *id.* at 304 n.26 in which the district court briefly discussed the case cited by Missouri, *viz.*, *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920).

126. 467 F. Supp. at 305 (quoting *Council for Employment & Economic Energy Use v. WHDH Corp.*, 580 F.2d 9, 12 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979)). But see *Webb v. Utah Tour Brokers Ass'n*, 568 F.2d 670 (10th Cir. 1977), in which the Tenth Circuit held that concerted actions by tour brokers, licensed by the ICC, amounted to a boycott of

V. EIGHTH CIRCUIT REVIEW OF *MISSOURI V. NOW*

On appeal, Missouri's principal contentions were that the district court had erred both in its application of *Noerr* and in its analysis of the first amendment issues. Missouri argued that the *Noerr-Pennington* doctrine immunizes only political activity that incidentally and lawfully restrains trade, not conduct that directly restrains trade. Under this interpretation, NOW's convention boycott *campaign* would arguably be immune as a political activity, while the convention boycott itself, a product of the concerted activity,¹²⁷ and NOW, a participant in the combination, would be vulnerable to the sanctions of the Sherman Act. Although the district court's opinion observed this distinction,¹²⁸ the court failed to analyze it and did not adequately divulge the reasoning for applying the political activities exemption to NOW's boycott of the Missouri convention industry.

Until now, the *Noerr-Pennington* doctrine had only immunized political activity advocating conduct which itself lawfully restrained trade. In both *Noerr* and *Pennington* the political activity was immune from application of the Sherman Act because the restraint of trade resulted from government enforcement of valid laws. In *NOW*, the court extended immunity to conduct that is itself unlawful under the Sherman Act. Query: If the players were changed and the parties advocating the convention boycott were in the convention industry, would not such conduct violate the Sherman Act? Would not this be unlawful even if the competitors' sole motivation and purpose were ratification of the ERA?¹²⁹

The political activities exemption does not grant absolute immunity from antitrust liability. As previously discussed,¹³⁰ the Court in

new applicants for licenses and was thus covered by the per se rule of the "boycott cases rather than the exemption decisions in *Noerr Motor Freight, Inc.* and its progeny." As in *NOW*, the defendants in *Webb* intended and succeeded in bringing about a boycott of plaintiffs that reduced competition and caused a substantial monetary loss. Unlike *NOW*, the parties in *Webb* were competitors. Even with this dissimilarity, however, it is important to note the rationale in *Webb*. Supporting the holding that the defendants were not protected by the *Noerr-Pennington* doctrine was the fact that "the activities of the defendants went far beyond the use of legal procedures" in order to achieve their goals. *Id.* at 676. Compare this with *NOW*'s encouragement of third parties to boycott Missouri's convention industry.

127. 467 F. Supp. at 296.

128. *Id.* at 303.

129. An inherent weakness in this hypothetical is that if the party advocating the convention boycotts were in the convention industry, a commercial setting and a competitive relationship would exist. The Supreme Court discusses and sets out the basic facts of this hypothetical in *Noerr*. 365 U.S. at 142.

130. See text accompanying note 51 *supra*.

Noerr defined a sham exception that vitiates immunity under the political activities exemption. Further evidence of the conditional nature of antitrust immunity when political conduct is involved can be found in the Court's analytical approach in *Noerr* when determining whether there were additional factors¹³¹ that justified denying the railroads the benefit of the political activities exemption. The Court in *Noerr* indicated that had the trade restraint resulted not from government action but instead from the railroads' inducing third parties not to deal with the truckers the principles announced by the Court would have been inapplicable.¹³² Simply stated, had the railroads advocated boycotts of the trucking industry, the railroads would have been liable for antitrust violations under the Sherman Act. Is that not precisely the situation in *NOW*? Analogizing *NOW* to this discussion by the Supreme Court in *Noerr*, should not *NOW* be liable under the Sherman Act for its concerted activity to induce third parties to boycott Missouri's convention industry? *NOW*'s conduct was immune under the *Noerr-Pennington* doctrine only as long as its "activities comprised [a] mere solicitation of governmental action."¹³³ The convention boycott, itself unlawful conduct under the Sherman Act, vitiated the immunity of the political activities exemption, and thus it is arguable that *NOW* should have been held liable under section one of the Sherman Act.¹³⁴

The strongest argument for not enjoining *NOW*'s conduct lies not in the *Noerr* exemption from the Sherman Act but in the first amendment to the United States Constitution. The district court in *NOW* alluded to the importance of the first amendment but failed to discuss adequately why it was central to its holding. Rather, the district court in conclusory fashion stated that "[a]pplication of the Sherman Act to *NOW*'s boycott campaign . . . would involve serious questions concerning the right of petition and the freedom of association."¹³⁵ In its brief on appeal, *NOW* clarified and emphasized the "serious questions" grounded in the first amendment that were posited by the district court.¹³⁶

131. 365 U.S. at 138. The factors examined by the Court included the railroads' anticompetitive purpose and its use of the so-called third party technique. *Id.* at 138-42.

132. *Id.* at 142.

133. *Id.* at 138.

134. The Ninth Circuit has held that the *Noerr-Pennington* doctrine is inapplicable when illegal means are employed to influence governmental action. *Sacramento Coca-Cola Bottling Co. v. Chauffeurs Local No. 150*, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971) (union officials influenced State Fair officials by means of threats, intimidation, and other coercive measures).

135. 467 F. Supp. at 304.

136. Brief for Appellee at 18-24, *Missouri v. NOW*, No. 79-1379 (8th Cir. Mar. 28, 1980).

In affirming the district court's decision, the Eighth Circuit relied on the "broad-brush" principles set forth in *Noerr*. The court admitted that its decision was not based on the noncommercial and noneconomic aspect of the convention boycott but, rather, on the "right to use political activities to petition the government."¹³⁷ Unfortunately, the majority failed to resolve adequately the complex issues presented by the first amendment.¹³⁸ Furthermore, the Eighth Circuit failed to consider the factual distinctions between *Noerr* and *NOW*. As pointed out by the dissent, such distinctions mandated that the court "undertake a more comprehensive balancing of the important governmental interest in preserving the free enterprise system with the interest of people to use this particular method of influencing legislation."¹³⁹

VI. CONCLUSION

The district court in *Missouri v. NOW* based its decision on three factors: first, the antitrust laws were inapplicable to the convention boycott campaign due to its noncommercial nature; second, assuming application of the Sherman Act, *NOW*'s convention boycott was essentially political conduct and as such was immunized under the *Noerr-Pennington* doctrine; and finally, *NOW*'s conduct was protected by the first amendment.

In affirming, the Eighth Circuit held that "using a boycott in a noncompetitive political arena for the purpose of influencing legislation is not proscribed by the Sherman Act."¹⁴⁰ Thus, the principles of *Noerr* control and the Sherman Act applies solely to commercial and not social or political activity. Chief Judge Gibson¹⁴¹ stated in his dissent that "this is an over-broad interpretation of the *Noerr* case and ignores the basic factual difference between *Noerr* and the present situation of an economic boycott."¹⁴² The majority would answer that the distinctions between *Noerr* and *NOW* are not proper areas of concern; rather, one must examine legislative intent to determine the scope of the Sherman Act.

That the Sherman Act is not generally applied when the combination does not have commercial objectives is clear. There are, however,

137. No. 79-1379, slip op. at 30 n.16 (8th Cir. Mar. 28, 1980).

138. See *id.*, slip op. at 36-38; Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 630 (1978).

139. No. 79-1379, slip op. at 49 (Gibson, C.J., dissenting).

140. *Id.*, slip op. at 30.

141. The Honorable Floyd R. Gibson was Chief Judge of the Eighth Circuit at the time *Missouri v. NOW* was submitted and took senior status before the opinion was filed.

142. No. 79-1379, slip op. at 40 (Gibson, C.J., dissenting).

exceptions to this principle when the commercial impact of the combination is so great that it warrants antitrust liability.¹⁴³ The direct commercial injury to Missouri's convention industry is beyond question. Thus the district court and court of appeals should have asked whether this was a situation in which section one of the Sherman Act was applicable, even though the activity involved was noncommercial, for it was in fact a political activity.

Although the *Noerr-Pennington* doctrine provides immunity for political activity that restrains trade, that immunity is not absolute. NOW openly advocated that third parties should boycott Missouri's convention industry. While NOW's convention boycott campaign itself is political activity and is thus immune from antitrust liability, it may be argued that the group boycott of Missouri's convention industry vitiated any immunity available to NOW or other participants in the combination.

The decision of *Missouri v. NOW* has far-reaching implications for other politically motivated lobbying organizations. Not only has the importance of the *Noerr-Pennington* doctrine been underscored, but the underlying policy rationale of the first amendment which provides the foundation for that doctrine has been strengthened. While the dissent's suggestion that a balancing analysis be applied to the first amendment issues raised in *NOW*¹⁴⁴ is far-sighted and probably the better approach to determine Sherman Act liability, such a rule will have to be mandated by the United States Supreme Court.

143. See Bird, *Sherman Act Limitations on Non-Commercial Concerted Refusals To Deal*, 1970 DUKE L.J. 247, in which the author argues that noncommercial boycotts should be per se violations under the Sherman Act. *Id.* at 275. The district court specifically addressed and rejected the theory proposed by Bird, in part because it failed to demonstrate how a per se rule is consistent with the first amendment guarantees of freedom of association and the right of petition. 467 F. Supp. at 305 n.32.

144. No. 79-1379, slip op. at 43, 50-53 (Gibson, C.J., dissenting).