SOLICITATION OF ANTICOMPETITIVE ACTION FROM FOREIGN GOVERNMENTS: SHOULD THE NOERR-PENNINGTON DOCTRINE APPLY TO COMMUNICATIONS WITH FOREIGN SOVEREIGNS?

Ronald W. Davis*

I. INTRODUCTION

The pursuit of individual or group economic self-interest is a primary motivation for seeking governmental action, whether in the context of lobbying for the enactment of a statute, seeking an administrative ruling, or engaging in litigation. Often the governmental action sought would be harmful to the petitioners' competitors, foreign or domestic, or would have a negative impact on the process of competition. If not for the Noerr-Pennington doctrine,1 competitors seeking anticompetitive governmental action frequently might be inhibited by the risk of liability under section 1 of the Sherman Act,2 which prohibits any agreement between competitors where the purpose or effect of the agreement is to create an "unreasonable" restraint of trade.3 Solicitation of an-

* A.B., Princeton University (1968); J.D. Columbia Law School (1975).


3 Section 1 provides in pertinent part that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." According to case law, not all agreements in restraint of trade are illegal, but only those that are "unreasonable." See Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). An "unreasonable" agreement is one that is, on balance, more anticompetitive than procompetitive; as the courts see it, Congress has not delegated to the judiciary the power to weigh the benefits of competition versus other social desiderata, but rather has expressed an intent that every agreement the net effect of which is anticompetitive is to be held unlawful. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688-96 (1978).

Certain practices (known as "per se" section 1 violations), such as price-fixing
ticompetitive governmental action also potentially conflicts with other antitrust statutes.\(^4\)

Under the *Noerr-Pennington* doctrine, lobbying, publicity campaigns seeking governmental activities, and other governmental contacts, such as participation in judicial or administrative proceedings, are immune from antitrust liability unless such conduct is otherwise unlawful (e.g., bribery) or a "sham" in that its real purpose is not to seek governmental action but rather to cause some direct restraint on a competitor.\(^5\) The United States Supreme Court has not clarified whether *Noerr-Pennington* is based on the principle that the first amendment must prevail in any conflict with the Sherman Act or on an absence of a general congressional intent to regulate political activity and other contacts with government by means of the Sherman Act.\(^6\) The lower courts are divided on this question,\(^7\) which in any event does not affect the outcome of the typical case presenting a *Noerr-Pennington* issue.

Although a long line of cases establishes that the Sherman Act may apply to anticompetitive conduct outside the United States having a substantial effect on United States commerce,\(^8\) the agreements and division of markets, are held to be so anticompetitive that no particularized inquiry into their purpose and effect is necessary: they are automatically deemed to be unreasonable restraints of trade. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). Joint solicitation of anticompetitive governmental activity has never been held to be a *per se* antitrust violation, but such activity may be unlawful under the rule of reason to the extent that it is not within the scope of *Noerr-Pennington* protection.


\(^2\) See text accompanying notes 81, 88 infra. It is fairly well-established in lower court opinions that *Noerr-Pennington* immunity does not extend to the solicitation of governmental actions of a commercial nature. E.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3 (D.D.C. 1979).

\(^3\) See text accompanying notes 65-88 infra.


Supreme Court has not determined whether the extraterritorial effect of Noerr-Pennington immunity is congruent with the extraterritorial application of the Sherman Act. As the court noted in *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, "[i]t is an open question whether . . . [the Noerr-Pennington] doctrine, which protects legitimate attempts to petition the United States government, has any application to the lobbying of foreign governments." Similarly, Donald Baker, referring to the position taken on this question in the Antitrust Guide for International Operations issued by the Antitrust Division of the Department of Justice in 1977, stated that "[w]hat emerged as the most controversial issue in the Guide, at least in the discussion in the public press, was the Department's position that the Noerr-Pennington doctrine applied to petitions to foreign governments."

In the only lower court case directly on point, *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, the court held that Noerr-Pennington did not immunize defendant's inducing of a Persian Gulf sheikhdom to make a territorial claim for two reasons: (1) the "constitutional freedom 'to petition the Government' carries limited if indeed any applicability to the petitioning of foreign governments," and (2) the representative-government rationale underlying Noerr is inapplicable because the "persuasion of Middle Eastern states alleged in the present case is a far cry from the political process with which Noerr was concerned."

Many commentators agree that the rationale of the domestic Noerr-Pennington doctrine has no application to the petitioning of
foreign governments. For example, Graziano states flatly that "[p]olitical activity undertaken outside the United States and directed at foreign governments is not constitutionally protected." Likewise, in his recent treatise on international antitrust law, Professor Hawk states:

The limited statutory construction of the Sherman Act announced in *Noerr-Pennington* rests on related policy considerations: the constitutional rights to petition and association, and a desire not to inhibit the free flow of information and opinions from constituents to their elected representatives and decision-makers. It is highly questionable whether these policies support the extension of *Noerr-Pennington* to procurement of foreign government action.  

Other commentators share this opinion.  

Reasoning on the basis of this limited view of the first amendment, some commentators conclude that there is no protection whatever for solicitation of foreign-government action otherwise in violation of United States antitrust law. Fischel states:

If the *Noerr-Pennington* doctrine were based on statutory construction of the Sherman Act, the decision in *Occidental Petroleum* would be hard to justify; 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. But once it is recognized that *Noerr* rests on the first amendment right to petition, the reasoning of *Occidental Petroleum* seems persuasive. Since there is no first amendment right to petition a foreign government, attempts to influence such governments should not be protected by the *Noerr-Pennington* doctrine.

---

19 Fischel, *supra* note 18, at 120-21. To like effect is Immunities, *supra* note 18, at 500 n.27.
Others contend that considerations not germane to the domestic *Noerr-Pennington* cases, such as international comity and related concerns as well as the legitimate interests of private parties doing business in other countries, support the extraterritorial extension of *Noerr-Pennington*. Although in the past Professor Areeda has taken the intermediate position that *Noerr-Pennington* applies only to solicitation of democratic governments, he evidently has abandoned the view that a distinction between democratic and nondemocratic governments should be made in this context.

This article contends that the *Noerr-Pennington* doctrine should be extended to cover solicitation of foreign governments. This conclusion is premised not only on considerations of comity and the need to protect legitimate private interests, but also on the argument that failure to extend *Noerr-Pennington* is likely to lead to effective and serious retaliation. Furthermore, such failure arguably would be contrary to the rule of international law, embodied in section 18(b)(iv) of the *Restatement (Second) of Foreign Relations Law of the United States*, that jurisdiction based on the objective territorial principle may not be asserted where the rule of law being enforced is “inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.”

Moreover, just as Congress evidently did not intend the antitrust laws to apply to ordinary and legitimate political activity in the United States, there is little basis for a finding of congressional intent that the antitrust laws should be applied to ordinary and legitimate foreign political activity. Finally, although the question is a difficult one, there is good reason to believe that the first amendment protects the right to petition foreign governments.

---


21 B. Hawk, *supra* note 17, at 148; *Corporate Lobbyists Abroad, supra* note 18, at 1278-79.


23 I Areeda & Turner, *supra* note 20, at 275, recognizes a general “privilege” possessed by all governments to regulate their political processes.

24 See text accompanying notes 163-179 infra.

25 See text accompanying notes 210-211 infra.

26 See text accompanying notes 192-209 infra.

27 See text accompanying notes 180-191 infra.

28 See text accompanying notes 216-251 infra.
II. THE RELATION BETWEEN NOERR-PENNINGTON AND OTHER INTERNATIONAL ANTITRUST DOCTRINES

Whether Noerr-Pennington protects contacts with foreign governments is an important question in light of increasing international economic interdependence as well as the broad extraterritorial sweep of the Sherman Act and the simultaneous uncertainty as to precisely when and how the antitrust laws will be applied to conduct occurring outside the United States. Under recent authorities, the Sherman Act may apply not only to commodities trade in worldwide markets and to anticompetitive acts directly affecting United States imports, but also to local business activity in foreign countries where the effect on United States commerce is only incidental and is demonstrably less than the effect on the local economy.29

The law on extraterritorial application of the Sherman Act has undergone significant development recently as a result of two cases: Timberlane Lumber Co. v. Bank of America, N.T. & S.A.30 in the Ninth Circuit, and Mannington Mills, Inc. v. Congoleum Corp.,31 a Third Circuit decision heavily influenced by the opinion in Timberlane. These cases, which lay down a “jurisdictional rule of reason” as to the circumstances in which to accept or decline jurisdiction over Sherman Act claims involving foreign conduct substantially affecting United States commerce, establish a complex, multipart balancing test to be applied by the district court.

Even without extraterritorial application of Noerr-Pennington, the Timberlane-Mannington doctrine might provide some measure of protection to the solicitation of foreign governments, although that protection would be far more qualified and un-

29 This point is illustrated rather dramatically by Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680 (S.D.N.Y. 1979), where the alleged monopolization of tourist facilities in one portion of the Dominican Republic was held to state a claim for relief under the Sherman Act. In furtherance of their anticompetitive plan, defendants allegedly procured or attempted to procure various acts by the government of the Dominican Republic. The court found that neither the Noerr-Pennington doctrine nor the act-of-state doctrine provided a proper basis for summary judgment.
30 549 F.2d 597 (9th Cir. 1977).
31 595 F.2d 1287 (3d Cir. 1979). The Seventh Circuit, in its decision approving the entry of default judgments against certain foreign uranium producers, indicated general approval of Timberlane-Mannington, but noted that the Alcoa effects test still governs with respect to the power of a court to adjudicate the legality of extraterritorial activity. In re Uranium Antitrust Litigation, 617 F.2d 1248, 1253-55 (7th Cir. 1980).

The Antitrust Division of the Justice Department has also indicated its approval of the new “jurisdictional rule of reason.” See 5 Trade Reg. Rep. (CCH) ¶ 50,386 (remarks by the Assistant Attorney General John Shenefield, Aug. 9, 1978).
predictable in scope than the Noerr-Pennington doctrine. In other words, there are situations in which Timberlane-Mannington would produce the same result as application of Noerr-Pennington, but in other situations the results might be different. It is difficult to make accurate predictions and provide sound counsel on the basis of Timberlane and Mannington. The issue is whether antitrust jurisdiction over solicitation of foreign governments should be determined on a case-by-case basis, taking into account such factors as the nationality of the parties, the “contacts” with the United States as compared with foreign “contacts,” and many other considerations, or whether as a general matter one who legitimately solicits foreign governmental action will be reasonably assured that his activities are shielded from United States antitrust liability.

Timberlane involved an allegation that the defendants engaged in a conspiracy to prevent the plaintiff from milling lumber in Honduras and exporting it to the United States. One of the means by which the alleged conspiracy was perpetrated was the obtaining of an order of attachment from a court in Honduras and the appointment by the court of an intervenor (similar to a receiver) who was employed by the defendants. Defendants moved to dismiss the complaint and the district court granted the motion on the basis of the act-of-state doctrine. Finding “no indication that the actions of the Honduran Court and authorities reflected a sovereign decision that Timberlane’s efforts should be crippled or that trade with the United States should be restrained,” the court of appeals reversed the dismissal and remanded the case for further consideration in light of a tripartite analysis consisting of (1) a threshold showing of such actual or intended effect on American commerce, a test deemed to be a prerequisite for subject matter jurisdiction under the antitrust laws; (2) “a greater showing of burden or restraint” in a civil antitrust action; and (3) a multifactor balancing test looking to the interests of the United

---

2 The Timberlane opinion did not discuss the issue whether Noerr-Pennington applied to this solicitation of governmental action. Presumably the reason for this failure to discuss Noerr-Pennington was that, in view of the allegations of misfeasance in connection with defendants’ obtaining of the court order, the Noerr-Pennington doctrine would offer no protection to defendants. See text accompanying notes 81, 88 infra.

32 549 F.2d at 608.

3 Id. at 613.

33 Id.
States and the links with the United States as opposed to the links with and the interests of other nations.\(^a\)

Although the issues in *Mannington Mills* were quite different from those in *Timberlane*, the two cases are analogous for present purposes. In *Mannington Mills*, the plaintiff argued that defendant’s foreign patents, although assumed *arguendo* to be valid under applicable foreign law, were obtained by means constituting a fraud on the Patent Office under United States patent law.\(^b\) In addition, the plaintiff argued that case law holding that a monopolization claim could be based on the obtaining of United States patents by means constituting fraud under United States law should be extended to allow such a claim founded on the obtaining of foreign patents. The court remanded the case for further consideration of whether such a claim should be entertained, with such consideration to be based on a country-by-country analysis of ten factors, some taken from the *Timberlane* opinion and some added by the *Mannington* court.\(^c\)

To provide some insight into how communication with foreign sovereigns would be treated in the absence of extraterritorial ap-

\(^a\) *Id.* at 613, 614. The court’s analysis appears to have been strongly influenced by section 40 of the *Restatement (Second) Foreign Relations Law of the United States*, which it cited. 549 F.2d at 614 n.31. Section 40 provides as follows:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

This section of the *Restatement* was, of course, not literally applicable to the case at bar, in which there was no party who was subject to inconsistent requirements of law. The court recognized, however, that any extraterritorial application of United States antitrust laws should occur only with due regard for the vital national interests of other countries and other appropriate factors.

\(^b\) Just as the *Timberlane* court declined to hold that the Honduran judicial decision was an act-of-state, *Mannington* likewise found that the act of issuing patents does not amount to an act-of-state. 595 F.2d at 1293-94.

\(^c\) Once again the opinion fails to disclose any consideration of whether defendant’s solicitation of foreign governmental action was immunized by *Noerr-Pennington*. Again, as in *Timberlane*, it would have been difficult for the defendant to argue that the methods of solicitation that it allegedly employed were such as to afford *Noerr-Pennington* protection.
plication of Noerr-Pennington, each of the ten Mannington factors is analyzed below in the light of a few hypothetical cases.

"1. Degree of conflict with foreign law or policy."

Case 1. Defendants, high-cost producers of widgets in France, become concerned about the inundation of the French market by low-cost American widgets. They launch a publicity campaign, the primary purpose of which is to secure protective legislation. Defendants are successful in achieving this result. Plaintiffs, American widget manufacturers, sue for treble damages.

Timberlane-Mannington probably protects defendants from liability, as Noerr-Pennington surely would. The United States litigation impinges on France's public policy of protecting its home market, a policy important enough for a statute to be enacted. However, defendants' success is not certain, because under Timberlane-Mannington the court would be required to conduct a wide-ranging examination of such matters as the relative importance of widget exports to America and of widget production to France, the nationality of those who conducted the publicity campaign, and the possibility that entertaining the litigation might damage United States foreign relations.

Case 2. This hypothetical case involves the same facts as in Case 1, except that defendants are not successful in persuading the French government to take the action requested. Plaintiffs sue for treble damages on the theory that the publicity campaign disrupted and diminished their efforts in France in various ways, one of which was that the campaign's reliance on disputed scientific evidence convinced many French consumers that American widgets cause cancer.

A good argument can be made that Timberlane-Mannington would protect defendants once again, as would Noerr-Pennington.

39 595 F.2d at 1297-98. It is not entirely clear whether the factors are listed in order of importance, and it is certainly not clear from the Mannington opinion what relative weight is to be accorded to the various factors.

40 See text accompanying notes 66-75 infra.

41 Defendants probably could place successful reliance also on the act-of-state doctrine. But that doctrine might not be successful if defendants had sought not legislation but an administrative interpretation of existing legislation. The act-of-state doctrine is discussed in text accompanying notes 53-61 infra.

42 Trade defamation and other business torts may, in certain circumstances, be held to give rise to antitrust liability; the law in this area, however, is unsettled, and the extent to which common law torts may be deemed to be antitrust violations is problematic. See generally Yoerg, Should a Trade Secrets Misappropriation Claim Lie in the Procrustean Antitrust Bed?, 22 ANTITRUST BULL. 1 (1977).
However, the outcome is more problematic.\textsuperscript{43} France undoubtedly has a public policy in favor of promoting open channels of communication between the government and its citizens. The American litigation would conflict with that policy, and hence it is possible for a court to read \textit{Noerr-Pennington} into the \textit{Timberlane-Mannington} doctrine and to hold that the foreign law and public policy in favor of open channels of communication is so strong that inquiry into the remaining nine factors will be dispensed with.

Although there is much to command such a result, it is contrary to the \textit{Timberlane} and the \textit{Mannington Mills} opinions, which assume that even very important foreign public policies may be outweighed by competing considerations. These opinions are premised on the view that there are some circumstances so compelling as to justify United States regulation of competitive conditions in foreign countries, and if that is so then arguably there are some circumstances so compelling that United States courts can establish rules governing legitimate foreign political activity as well.

"2. Nationality of the parties." \textit{Timberlane} adds "allegiance," presumably referring to corporations, and also adds "the locations or principal places of business of corporations,"\textsuperscript{44} observing that "whether the alleged offender is an American citizen . . . may make a big difference. Applying American laws to American citizens raises fewer problems than application to foreigners."\textsuperscript{45}

\textit{Case 3.} \textit{A} is a Delaware corporation whose stock is publicly owned largely by United States citizens. \textit{B} is a corporation incorporated in Peru. Its principal place of business is also in Peru and most of its managers are Peruvians, but it is a wholly owned subsidiary of an American multinational. \textit{C} is incorporated in Peru and all of its stock is owned by citizens of Peru. \textit{D} and \textit{C}
have each brought several patent and trademark infringement actions against \( D \) in the courts of Peru and Bolivia. \( D \) sues in the United States for damages under section 1, alleging that \( A, B, \) and \( C \) cooperated with each other in instituting these meritless proceedings to dissuade \( D \) from continuing to do business in South America. Although the South American lawsuits have not yet been adjudicated, \( D \) alleges that they lack merit. \( A, B, \) and \( C \) move to dismiss.

\textit{Noerr-Pennington} probably would protect the defendants, unless it were shown that the foreign actions were based on claims known to be lacking in merit under applicable law.\footnote{A pattern of baseless litigation intended to discourage a competitor from exercising its rights enjoys no \textit{Noerr-Pennington} protection, California Motor Transp. v. Trucking Unlimited, 404 U.S. 508 (1972), and only one frivolous lawsuit may be enough on which to predicate Sherman Act liability. \textit{See} Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425 (1978). But in general \textit{Noerr-Pennington} protects a party’s right to adjudicate his nonfrivolous claims in a lawful manner, even if motivated by anticompetitive considerations. \textit{See} generally Balmer, \textit{Sham Litigation and the Antitrust Laws}, 29 BUFFALO L. REV. 39 (1980).} But the \textit{Timberlane} and \textit{Mannington Mills} opinions suggest that \( C \)’s motion might succeed and \( A \)’s might fail because (1) jurisdiction may be exercised over \( A \) under the relatively uncontroversial nationality principle,\footnote{Restatement (Second) of Foreign Relations Law of the United States § 10(b) (1969) [hereinafter cited as Restatement].} whereas jurisdiction over \( C \) must be based on the quite controversial objective territorial principle,\footnote{Restatement, \textit{supra} note 47, § 18(b). On the controversial nature of the American antitrust jurisdiction based on the objective territorial principle, see text accompanying notes 192-209 \textit{infra}.} and (2) on a more practical plane, foreigners are not so likely to be angry or cause foreign relations difficulties if Americans are punished for conduct abroad than if foreigners are punished.

The idea that \( A \) and \( C \) should be treated differently in this hypothetical case does not, however, commend itself on grounds of fairness. Moreover, it is doubtful whether, in this world of increasing economic interdependence, it is wise to handicap United States businesses operating abroad by making it more risky for them to resort to litigation or other governmental approaches than it is for their native competitors.

Finally, if \( A \) and \( C \) are to be treated differently, what is to be done with \( B \)? Should it make a difference if sixty percent of \( B \)’s stock were owned by the American multinational and forty percent by a citizen of Peru? What if ownership were split 50-50? At what point does a corporation become “foreign” for purposes of...
the Timberlane-Mannington rule? Extraterritorial application of Noerr-Pennington at least would reduce the significance of these imponderable considerations, because the latter doctrine would not take into account the nationality of the defendant.

"3. Relative importance of [sic, to] the alleged violation of conduct here compared to that abroad."

Case 4. E and F are United States multinational corporations. They decide jointly to petition an Italian administrative agency to establish safety standards of arguable public benefit, which their products can easily meet but their competitors find difficult to satisfy. The decision is made by E's New York office working together with F's Rome office. There are no personal meetings on this subject. All communications are by letter or telephone between Rome and New York.

Case 5. This hypothetical involves the same facts as case 4, except that the idea of approaching the Italian agency has its genesis at a meeting between two American vice-presidents of E and F that takes place in New York.

Is there any reason why E and F should be treated differently in case 3 or why case 3 should be treated differently than case 4? The Timberlane-Mannington doctrine indicates, however, that these sorts of distinctions should be drawn, at least when necessary to settle a close case.

"4. Availability of a remedy abroad and the pendency of litigation there." Foreign states naturally are unlikely to provide a remedy to those injured by solicitation of anticompetitive governmental action. This fourth Mannington factor might be read to suggest that the absence of a foreign remedy is an additional reason for application of United States antitrust law to contacts with foreign governments.

"5. Existence of intent to harm or affect American commerce and its foreseeability." Such intent and foreseeability are often present, particularly when governmental action is sought on matters of major economic importance. For instance, certainly the American steel and automobile manufacturers who are seeking relief from imports intend to cause an effect on Japanese commerce.

Case 6. Zambia produces 85 percent of the world's zambite, a rare and important mineral with many industrial uses. The United States consumes 25 percent of world zambite production, a fact well-known in Zambia. Zambian producers petition the government to enforce a production cut of 50 percent, intending
thereby to raise and stabilize world prices. The zambite industry employs one-quarter of the work force in Zambia and provides one-third of Zambia's foreign exchange.

Case 7. French truffle producers petition their government to cut production by 50 percent, intending thereby to raise and stabilize world prices. The dollar value of United States truffle imports is 1000 times less than that of its zambite imports; moreover, an increase in truffle prices causes little impact on the prices of other foods, whereas a zambite price increase affects many products. Truffle exports play a relatively small role in the French economy.

The intent and foreseeability factors support the view that case 6 should be treated more harshly than case 7, where the foreseeable impact on United States commerce is nil. But the first Mannington factor, "degree of conflict with foreign law or policy," suggests precisely the opposite conclusion. Subjecting the zambite producers to antitrust liability would cause a direct conflict with one of Zambia's most vital public policies, and might create serious foreign policy repercussions, considerations that suggest, according to Mannington, that the United States courts should tread very lightly.

Where solicitation of foreign governmental action is concerned, do factors 1 and 5 simply cancel one another out, leaving the issue of jurisdiction to be decided principally on the basis of the "nationality of the parties"?

"6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief." This factor might suggest that solicitation of governmental action in small and unimportant countries should be more readily subject to United States antitrust jurisdiction than solicitation of action on the part of major foreign powers.

"7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries." The court had in mind the possibility of a conflict such as arose in the British Nylon Spinners litigation, where a British company sued in Britain for specific performance of a contract, the performance of which a United States court had enjoined. It has no application to an action for damages or an injunction ordering the defendant not to solicit foreign governments.
“8. Whether the court can make its order effective.” The comments above with respect to the seventh factor apply here as well.

“9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances.” It is not clear whether the Mannington court is addressing merely the question of the form of positive injunction that is being requested, or whether the court is making the more interesting observation that a kind of international “Golden Rule” is appropriate. Congress has taken very serious exception to the efforts on the part of certain foreign countries to tell American businesses with whom they can and cannot do business.50 There is little doubt that we would react even more forcefully if foreign governments attempted to regulate political activity in this country.

If the Mannington court is making the general suggestion that a court, in deciding whether to exercise jurisdiction, should put itself in the position of the foreign country in question, then that indicates once again a method by which Noerr-Pennington might be read into Timberlane-Mannington, as a kind of special case of the general principles laid down in the authorities on subject matter jurisdiction.

“10. Whether a treaty with these affected nations has addressed the issue.” This factor is likely to be of little or no significance in the typical case presenting a Noerr-Pennington issue. Many treaties of friendship, commerce, and navigation guarantee non-discriminatory treatment and equal access to the courts to the citizens of both parties,51 but it is arguable whether such treaties would be interpreted as modifying any of the principles of Sherman Act jurisprudence, including the Timberlane-Mannington doctrine.52

Cases involving the solicitation of foreign governments often will involve a third doctrine in addition to Noerr-Pennington and Timberlane-Mannington, namely the act-of-state doctrine. In circumstances where the act-of-state doctrine applies, it operates to preclude the judiciary from entertaining a claim that necessarily

---


THE NOERR-PENNINGTON DOCTRINE calls into question the validity of a foreign act of state. Although not compelled by the doctrine of separation of powers, the principal basis for the act-of-state doctrine is a concern that the judicial branch should not interfere with the conduct of foreign affairs by the executive branch or cause embarrassment to the United States in the foreign policy area.\(^{53}\)

Like Noerr-Pennington, the act-of-state doctrine yields more predictable results than the ten Mannington Mills factors. Although the act-of-state doctrine operates to immunize some of the same conduct within the scope of Noerr-Pennington protection, the act-of-state doctrine is much narrower than Noerr-Pennington. For example, a party may not avail himself of the act-of-state doctrine unless the validity or motivation of some foreign act of state is called into question. Thus, the act-of-state doctrine is inapplicable in the absence of an act of state.\(^{56}\) It follows that if a party tries unsuccessfully to persuade a foreign government to take some action, no matter how legitimate his conduct, the act-of-state doctrine does him no good. Moreover, while both Noerr-Pennington\(^{57}\) and act-of-state\(^{58}\) probably are inapplicable to the solicitation of governmental activity of a commercial nature, Noerr-Pennington potentially applies to all sovereign acts.\(^{59}\) By contrast, the act-of-state doctrine does not protect the solicitation of sovereign acts not involving the establishment of public policy. For example, the doctrine does not ordinarily protect litigation in foreign courts\(^{60}\) or the application for foreign patents.\(^{61}\)

In circumstances where the plaintiff's injury was not the direct result of foreign governmental action but instead was caused by the acts of private parties taken pursuant to a foreign government-


\(^{57}\) E.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970); In re Airport Car Rental Antitrust Litigation, 1979-2 Trade Cas., ¶ 62,746 (N.D. Cal. 1979).


\(^{60}\) Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 608 (9th Cir. 1977).

tal directive, the defense of foreign sovereign compulsion may apply. 62 This doctrine appears to be merely a special case of the common-law doctrine of duress; as such, it may have no application if the coercive action was taken at the request of the party attempting to set up the defense. 63 By contrast, it is probably true that in a domestic context the state-action doctrine provides antitrust immunity to private parties acting pursuant to a command of the sovereign qua sovereign, even if the private party asserting the defense solicited the state action. 64

In conclusion, it is clear that the scope of protection that would be provided by extraterritorial application of Noerr-Pennington is significantly different from that of other international antitrust doctrines. The question whether to apply Noerr-Pennington to solicitation of foreign governments is an issue of very considerable practical significance as well as one of academic interest.

III. POLICY BASIS OF THE NOERR-PENNINGTON DOCTRINE

Although the considerations relevant to whether Noerr-Pennington should be applied extraterritorially may involve factors different from those underlying the application of the doctrine in a domestic context, 65 the starting point for analysis of extraterritorial application is an examination of the policy basis of Noerr-Pennington on the domestic front as articulated by the Supreme Court.

In the first of this line of cases, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 66 the Supreme Court, in a unanimous opinion written by Justice Black, held that a group of railroads that had conducted a public relations campaign designed to induce a state legislature to pass legislation harmful to their competitors, the truckers, were not guilty of violating the Sherman Act, even assuming the truth of plaintiffs' allegations that (i) defendants acted with malice, in that their purpose was to destroy competition by legislative action, (ii) their ancillary purpose was to harm the good will of the truckers by means of publicity, and (iii) the campaign was characterized in some degree by fraud and un-

---

65 See text accompanying notes 20-21 supra and notes 164-215 infra.
truth. Noerr did, however, leave open a possible "sham exception" to its holding, indicating that liability might be found where the primary purpose of ostensibly political activity is actually to cause a direct restraint of trade by means other than government action.

In reaching its conclusion that "the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of government action with respect to the passage and enforcement of laws," the Court began by noting that the Act has no application to a restraint of trade or monopolization that is the result of valid governmental action. The Court then went on to state: "We think it equally clear that the Sherman Act 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." The Court thought it highly significant that combinations for political action "bear very little if any resemblance to the combinations normally held violative of the Sherman Act . . ." such as price fixing, group boycotts, and market-division agreements. However, this was not the conclusive point. Rather, the Court held that the nonap-

67 Id. at 138-44.
68 Id. at 144.
69 Id. at 138.
70 Parker v. Brown, 317 U.S. 341 (1943), and other authorities for this proposition are based principally on considerations of federalism. See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 400 (1978). Since foreign states are not part of our federal system, it does not necessarily follow from Parker and its progeny that foreign governmental restraints of trade are immune under the Sherman Act. However, there is authority that foreign governments, like states of the union, may not be sued on the basis of governmental restraints of trade. IAM v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), aff'd on other grounds, 649 F.2d 1354 (9th Cir. 1981).
71 365 U.S. at 136. One writer has implied that this reasoning is fallacious: "It does not necessarily follow from the fact that a particular governmental act is legal that every attempt to procure that act is also legal." Corporate Lobbyists Abroad, supra note 18, at 1257 n.27. Justice Black did not say of course that every attempt to procure governmental action is lawful. His point was simply that it would be incongruous to hold that the State of Pennsylvania has power to enact a given statute but that a group of private citizens may not lawfully petition for the enactment of the statute.
72 365 U.S. at 136. It has been observed that this statement by the Court in Noerr rests on the erroneous premise that "atypical, untraditional, anticompetitive agreements are not violative of the antitrust laws . . . ." Fischel, supra note 18, at 83. Defendants' activities, however, were by no means atypical and untraditional. On the contrary, the Court considered their behavior to be very traditional and typical political conduct.

What the Court saw as the "dissimilarity" between defendants' conduct and traditional antitrust violations was the dissimilarity between directly interfering with free trade, on the one hand, and seeking action by government, on the other hand. 365 U.S. at 136.
plicability of the Sherman Act to defendants' activities was decisively settled
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 the passage or enforcement of laws.

In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.73

Although constitutional considerations were an ingredient in the Noerr opinion, the Court specifically stated that it discerned no conflict between the Sherman Act and the Constitution.74 Instead, its opinion was based on a construction of the antitrust laws under which activities characterized as belonging to the "category of political activity" fall outside the scope of the Act.75

In the second Supreme Court Noerr-Pennington case, United Mine Workers of America v. Pennington,76 the question was presented whether, as part of an alleged conspiracy between the

---

73 Id. at 137-38 (citations omitted).
74 Id. at 132 n.6.
75 Id. at 140-41.
76 381 U.S. 657 (1965).
mine workers’ union and large coal companies to drive small coal companies out of business, liability could be predicated either (i) on an approach to the Secretary of Labor to request that he act pursuant to the Walsh-Healy Act\textsuperscript{77} to establish a high minimum wage in the Tennessee Valley Authority (TVA) term contract coal market, or (ii) on a request to the TVA to curtail its purchases in the spot coal market. Answering both questions in the negative, the Court announced the broad rule that “Noerr shields . . . a concerted effort to influence public officials regardless of intent or purpose.”\textsuperscript{78} Although the Court’s opinion in Pennington broke no new ground in terms of elucidating the policy considerations discussed in Noerr, it appeared to broaden the Noerr holding to cover governmental procurement activities as well as solicitation with respect to the passage or enforcement of laws.\textsuperscript{79}

California Motor Transport v. Trucking Unlimited\textsuperscript{80} involved an alleged agreement among one group of highway carriers to institute state and federal proceedings, regardless of merit, to oppose the right of other carriers to operate, thereby effectively barring meaningful access by the latter to agencies and courts. The Supreme Court, in an opinion written by Justice Douglas and representing the views of five Justices, firmly established that Noerr-Pennington applies to contacts with judicial bodies and administrative agencies as well as to contacts with the legislative branch. The Court indicated, however, that conduct corrupting the administrative or judicial process, such as that of the defendants in the case under consideration, would not be immune from antitrust liability.\textsuperscript{81}

\begin{itemize}
  \item \textsuperscript{78} 381 U.S. at 670.
  \item \textsuperscript{79} However, later cases have undercut the implication in Pennington that commercial dealings with governmental bodies enjoy antitrust immunity. See authorities cited in note 7 supra.
  \item \textsuperscript{80} 404 U.S. 508 (1972).
  \item \textsuperscript{81} The view that the holding in California Motor Transport should not be limited to the precise facts in that case, which involved the bringing of baseless, repetitive claims with an anticompetitive purpose, was adopted by the plurality and dissenting opinions, representing the views of a total of seven Justices, in Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977). The opinions in Vendo seem to indicate a disinclination by the present Court either to extend or cut back Noerr-Pennington immunity beyond the point indicated in Justice Douglas’ opinion in California Motor Transport.
  
  One other Supreme Court opinion, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), briefly addresses Noerr-Pennington. There the Court indicated that a district court’s dismissal of an antitrust claim based on defendant’s bringing of repetitive actions intended to harm its competition should be reconsidered in the light of California Motor Transport.
\end{itemize}
The California Motor Transport Court stated that the opinion in *Noerr* rested on two grounds: (i) the concept of representative government, and (ii) the right of petition protected by the first amendment. After noting that it had adhered to the same approach in *Pennington*, the court went on to observe:

The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.

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

Justice Douglas' addition, in this passage, of freedom of association to the considerations mentioned in *Noerr* should be read in the context of other Supreme Court cases holding that freedom of association is a fundamental right found in the penumbra of the first amendment; that it is intimately connected in its origin and purpose with the first amendment rights of free speech and free press; and that it protects association for political ends as well as "forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members."

Despite its extension of the *Noerr*-*Pennington* rationale to include the right of association, and despite its extension of the scope of *Noerr*-*Pennington* specifically to include contacts with all branches of government, the Court held that defendants could not invoke the broad rule of *Pennington* and the *Noerr* exemption for unethical activities, in connection with a campaign to influence the legislature, to shield their alleged attempt to bar their com-

---

82 404 U.S. at 510.
83 *Id.* at 510-11 (emphasis added)(citations omitted).
petitioners from meaningful access to the courts. Distinguishing the regulation of ordinary political activity from the higher standards that may be required of litigants, the Court stated:

Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in *Walker Process Equipment v. Food Machinery & Chemical Corp.* Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. Similarly, bribery of a public purchasing agent may constitute a violation of §2(c) of the Clayton Act, as amended by the Robinson-Patman Act.

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression." 8

These leading authorities and their numerous progeny in the lower courts indicate that a *Noerr-Pennington* analysis involves three steps, each of which may present close questions. First, it must be established that an element of the claim in question involves defendant's direct petitioning for governmental action.

---

8 404 U.S. at 512-13. Justices Stewart and Brennan, concurring in the judgment, expressed the view that the antitrust laws and the first amendment do not suggest the propriety of a distinction between influencing legislatures and influencing courts. Although they agreed that perjury, fraud, bribery, or misrepresentation in connection with the litigation might render the activity subject to antitrust liability, they noted that defendants in the case at bar were not charged with such activities. The concurring justices joined in the judgment remanding the case for trial only because the complaint could be read as alleging an intent to discourage and prevent plaintiffs from exercising their right to engage in litigation. Id. at 516-18. Justices Powell and Rehnquist did not take part in the case.
Purely private conduct has been held not to qualify for Noerr-Pennington protection even though intended to provoke a decision by administrative authorities or the courts.

If defendant did communicate directly with a governmental body, the second question is whether its primary purpose in doing so was to seek action by that body in a sovereign capacity or whether the conduct was a “sham” in that defendant’s actual intent was to interfere directly with its competitors or with the process of competition. For instance, if competitors engage in a data sharing program that is related to their petitioning for governmental relief but which also has a negative impact on competition among themselves, a very delicate question could be presented.

If defendants’ primary purpose was indeed to bring about action by the government, the final question then becomes whether, in the course of their contact with the governmental agency in question, they acted in a manner that was lawful and privileged under the first amendment—taking into account that the scope of first amendment protection is wider in some spheres of activity, such as lobbying and political campaigning, than it is in other areas, such as litigation. Once again, the courts sometimes have trouble resolving this kind of question. Nevertheless, despite the difficulties that remain, Noerr-Pennington analysis is quite different from an analysis that starts afresh with each case, balancing all conceivable factors including the importance of antitrust...
policy and the value of protecting the integrity of political institutions.

IV. CURRENT STATE OF THE LAW ON APPLICATION OF ANTITRUST LAW TO SOLICITATION OF FOREIGN SOVEREIGN ACTS

As we have seen, some contend (i) that the public policy embodied in the Sherman Act is so important that all combinations the purpose or effort of which is to bring about an unreasonable restraint of trade effectuated by means of governmental action are forbidden, with the sole exception of those governmental contacts privileged under the first amendment, and (ii) that inasmuch as the first amendment has no application to the petitioning of foreign sovereigns, the rationale of Noerr-Pennington and California Motor Transport does not apply to extraterritorial conduct. Each proposition is highly debatable and presents difficult legal issues. The first issue, which turns on legislative intent concerning the scope of the Sherman Act, is considered in part IV of this article. The second issue, concerning first amendment limitations on Congress' use of its interstate commerce power to regulate foreign conduct, is considered in part V.

The Supreme Court has never ruled definitively on the question whether contacts with foreign governments enjoy protection from antitrust liability—the issue is an open question. In United States v. Sisal Sales Corp., decided in 1927 (long before the Noerr opinion), the government alleged that defendants conspired in violation of the Sherman Act and the Wilson Tariff Act to monopolize the purchase of sisal from Mexican producers as well as its importation into, and sale in, the United States. As a part of their concerted activity, defendants induced the legislatures of Mexico and Yucatan to enact legislation discriminating against other purchasers of sisal.

The district court dismissed the case, evidently on the ground that the gravamen of the complaint was the inducement of foreign government acts and that such inducement had been held outside the scope of United States antitrust laws in American Banana Co.

---

7 See text accompanying notes 13-19 supra.
8 See text accompanying notes 10-12 supra.
9 274 U.S. 268 (1927).
In American Banana, the Supreme Court held that plaintiff had no claim under the Sherman Act for defendant's inducing the government of Costa Rica to seize the property of the plaintiff. In reaching this conclusion, the Court relied on the act-of-state doctrine as well as the now-discredited view that the tortious quality of an act will be judged solely by the law of the place where the act occurs.

The Supreme Court in Sisal Sales reversed the lower court, holding that although the complaint was "rambling and obscure," nevertheless, "enough is alleged to indicate a meritorious cause. . . ." The Court went on to state:

Here we have a contract, combination, and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.

There is an unusual diversity of opinion concerning the teaching of Sisal Sales and the significance of its attempt to distinguish American Banana. Some contend that Sisal Sales is authority that conspiracies implemented by inducing foreign governmental actions enjoy no United States antitrust immunity. Others maintain that the distinction turns on whether it was the foreign government (as in American Banana) or the private party (as in Sisal Sales) which was the direct cause of the injury. Still others are of the view that the facts in Sisal Sales were distinguished from American Banana in that in Sisal the procurement of govern-

\[100\] 213 U.S. 347 (1909).

\[101\] 274 U.S. at 271.

\[102\] Id. at 276 (emphasis added).


mental action was only one element of the conspiracy. In subsequent decisions, the Supreme Court has twice observed that the distinction turned on the lack of demonstrated effects on United States commerce in American Banana. Finally, one writer contends that there is a twofold distinction, namely, the absence of documented effects on American commerce and the absence of conduct in the United States in American Banana.

It may fairly be concluded that the significance of Sisal Sales is an imponderable question. Fortunately, a more recent Supreme Court opinion, Continental Ore Co. v. Union Carbide & Carbon Corp., provides somewhat more enlightenment. There, the plaintiff claimed that, as part of an unlawful conspiracy to monopolize the vanadium market, one of the defendants directed its wholly-owned Canadian subsidiary —which had been given discretionary power as exclusive purchasing agent for the Canadian government under wartime regulations—to exercise its power to prevent the plaintiff from selling in Canada.

The Ninth Circuit held that this claim was barred by Noerr because defendant's subsidiary was acting in its capacity as agent of the government. However, the Supreme Court held that Noerr was inapplicable, because there was "no indication that the [Canadian Metals] Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped." The Court further stated in dictum:

The case of Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., cited by the court below and much relied upon by respondents here, is plainly inapposite. The Court there held not cognizable under the Sherman Act a complaint charging, in essence, that the defendants had engaged in a concerted publicity campaign to foster the adoption of laws and law enforcement practices inimical to plaintiffs' business. Finding no basis for imputing to the Sherman Act a purpose to regulate political activity, a purpose which would have encountered serious constitutional bar-

---

107 Corporate Lobbyists Abroad, supra note 18, at 1267.
109 289 F.2d 86, 94 (9th Cir. 1961).
110 370 U.S. at 706.
riers, the Court ruled the defendants' activities to be outside the ban of the Act "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." In this case, respondents' conduct is wholly dissimilar to that of the defendants in Noerr. Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr. 111

Because the defendant in Continental Ore was never shown to have induced the Canadian government to adopt an anticompetitive policy, it was unnecessary for the Court to determine whether such hypothetical inducement would be protected by Noerr112 and the case therefore cannot be regarded as a precedent directly supporting the extraterritorial application of Noerr-Pennington. However, if the Court had believed that Noerr was not applicable to a foreign government, the Continental Ore opinion probably would have said so.113 Hence, the opinion lends no comfort to those who contend that Noerr-Pennington has a purely domestic application.114

As previously noted, one lower court case, Occidental Petroleum Corp. v. Buttes Oil & Gas Co., held that Noerr-Pennington should not be extended, at least on the facts alleged in that case, to foreign governments.115 There, plaintiff asserted an antitrust claim based on defendant's instigation of a territorial dispute between two Arabian sheikhdoms, as a result of which the plaintiff was prevented from enjoying the fruits of its concession agreement with one of the governments. Noting that "the

111 370 U.S. at 707-08 (emphasis added).
112 Similarly, in United States v. Amax, Inc., 1977-1 Trade Cas. ¶ 61,467 (N.D. Ill. 1977), it was held that Noerr-Pennington did not bar prosecution for voluntary activities enjoying the approval of a foreign government; again, the issue of immunity for solicitation of government action was not reached.
113 See International Antitrust Guide, supra note 11, Case N.
114 One writer has stated that Continental Ore "impliedly created a foreign governmental exception to Noerr." Immunities, supra note 18, at 500 n.62 (1978). As the preceding discussion indicates, this view is clearly not correct.
threshold question is whether the teaching of these cases [Noerr and Pennington] is applicable where foreign governments are involved", the court held:

Examination of the premises underlying Noerr indicates that the case's rationales do not readily fit into a foreign context, such as the facts of this case. One of the roots of the Noerr decision was a desire to avoid a construction of the antitrust laws that might trespass upon the First Amendment right of petition. The constitutional freedom "to petition the Government" carries limited if indeed any applicability to the petitioning of foreign governments. A second basis of Noerr is a concern with insuring that, "[i]n a representative democracy such as this," lawmaking organs retain access to the opinions of their constituents unhampered by collateral regulation. Noerr has been held inapplicable to situations in which this relationship has not been deemed threatened. [Citations omitted]. The persuasion of Middle Eastern states alleged in the present case is a far cry from the political process with which Noerr was concerned.

In sum, the interests asserted in this case are dissimilar to those that Noerr was concerned with safeguarding; therefore, the wholesale application of that exception to the Sherman Act appears inappropriate.

Footnote 26 in the above quotation does not bear on the question whether the constitutional right of petition applies to foreign governments, but instead states:

One authority extracts from Noerr and Continental Ore the notion that the antitrust laws do not apply to petitioning a democratic government. P. Areeda, Antitrust Analysis ¶187 & n. 206 (1967).

This interpretation, not presently adopted herein, would in any event not cover much of the conduct alleged in the instant complaint.

The italicized language in this footnote seems to indicate that the court was making a blanket holding that Noerr-Pennington does not apply at all to contacts with foreign governments. Although this interpretation of the Occidental opinion is perhaps open to question, the case is clearly inhospitable to the extraterritorial application of Noerr-Pennington.

---

117 Id. at 107-08. The Court further held, however, that since plaintiff's alleged injuries flowed from an act-of-state, the act-of-state doctrine required that the claim be dismissed.
118 Id. at 108 (emphasis added).
In 1977, the Justice Department expressed a view contrary to that of the Occidental court and indicated that, in its opinion, Noerr-Pennington should apply generally to contacts with foreign governments. However, as has been noted, some commentators have joined with the Occidental view and expressed a lack of enthusiasm for such extraterritorial application of the doctrine, while others contend that although the policy bases underlying the domestic Noerr-Pennington doctrine are largely inapplicable abroad, other considerations support extraterritorial application of the doctrine.

V. THE SCOPE OF THE ANTITRUST LAWS AS APPLIED TO SOLICITATION OF FOREIGN GOVERNMENTS

Let us assume for the sake of discussion that the first amendment has no application whatsoever to communications with foreign governments and that Congress (insofar as it is acting within the scope of its power to regulate the interstate and foreign commerce of the United States) will be deemed by American courts to have plenary power to prescribe rules governing the manner or substance of contacts between private parties and foreign governmental bodies. Even when this assumption is made, there are a number of reasons, both practical and legal, to adopt the view that the antitrust laws apply no more broadly to political activities abroad than in the United States.

A. The Noerr-Pennington Rationale

No one doubts that all conduct privileged under the first amendment is immunized from antitrust liability. But as has been noted before, it is arguable whether this rule is premised on (i) a conflict between the antitrust laws, especially section 1 of the

---


120 See text accompanying notes 16, 18 supra.

121 See text accompanying notes 20-21 supra.

122 The validity of this assumption is considered in part VI infra.


Sherman Act, and the first amendment, a conflict that is resolved by the Constitution's precedence over statutory enactments, or (ii) the use of the first amendment as an authoritative guide to congressional intent in much the same way that constitutional principles concerning the nature of the United States federal system,\textsuperscript{125} federal statutes regulating the securities industry,\textsuperscript{126} state and federal laws condemning perjury,\textsuperscript{127} and other statutes and case-law doctrines have been used to give specific content to the broad congressional delegation to the judiciary that the Sherman Act represents.\textsuperscript{128}

As discussed above,\textsuperscript{129} the Supreme Court in \textit{Noerr} explicitly declined to find any conflict between the Sherman Act and the first amendment. One of the defendants' affirmative defenses in \textit{Noerr} was "the contention that the activities complained of were constitutionally protected under the First Amendment. . ."\textsuperscript{130} The Court stated, however, that "[b]ecause of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses."\textsuperscript{131}

Although the Supreme Court's later opinion in \textit{California Motor Transport} deemphasized the \textit{Noerr} concern with the characterization of activity as political or nonpolitical and emphasized instead the first amendment issues, nothing in that opinion overrules \textit{Noerr}'s holding that Congress never intended to subject ordinary political conduct to antitrust scrutiny.\textsuperscript{132} Looking back on \textit{Noerr} in its 1977 opinion in \textit{City of Lafayette}, the Court stated:

"The presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusions. Two policies have been held sufficiently weighty to override the presumption against implied exclusions from coverage of the antitrust laws. In \textit{Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.}, the Court held that, regardless of anticompetitive purpose or intent, a concerted effort by persons to influence lawmakers to enact legislation beneficial to . . ." \textsuperscript{133}
themselves or detrimental to competitors was not within the scope of the antitrust laws. Although there is nothing in the language of the statute or its history which would indicate that Congress considered such an exclusion, the impact of two correlative principles was held to require the conclusion that the presumption should not support a finding of coverage. The first is that a contrary construction would impede the open communication between the policy and its lawmakers which is vital to the functioning of a representative democracy. Second, “and of at least equal significance,” is the threat to the constitutionally protected right of petition which a contrary construction would entail.\textsuperscript{183}

With its references to the “construction,” “coverage,” and “scope” of the antitrust laws, this passage is fully consistent with \textit{Noerr}'s finding that there is no conflict between the antitrust laws and the first amendment and that there is some additional basis separate and apart from first amendment considerations for finding that the Sherman Act does not apply generally to political activity.

Some courts and commentators adhere to the view that, under \textit{California Motor Transport}, the Sherman Act is correctly understood as applying to all political activity otherwise within its scope\textsuperscript{184} except where the activity in question enjoys a first

\textsuperscript{183} 435 U.S. at 399 (emphasis added)(citations omitted). In the footnote the Court went on to make the accurate observations that:

Cases subsequent to Pennington have emphasized the possible constitutional infirmity in the antitrust laws that a contrary construction would entail in light of the serious threat to First Amendment freedoms that would have been presented. \textit{See Continental Ore Co. v. Union Carbide & Carbon Corp.}, 370 U.S. 690, 707-708 (1962); \textit{California Motor Transport Co. v. Trucking Unlimited}, 404 U.S. 508, 516 (1972)(Stewart, J., concurring judgment).

\textit{Id.} at 399-400 n.17.

\textsuperscript{184} Communication with a governmental body that leads to a diminution of the competitive process or an injury to one's competitors is by no means necessarily within the general rules of Sherman Act jurisprudence. \textit{See W. Fugate, FOREIGN COMMERCE AND THE ANTITRUST LAWS} \textsuperscript{¶} 2.23, at 86 (2d ed. 1973). However, in a private litigation, if the defendant has procured governmental action (not amounting to an act of state); if the link between defendant's conduct and the resulting governmental action is sufficiently direct, \textit{see Outboard Marine Corp. v. Pezetel}, 474 F. Supp. 168 (D. Del. 1979); if plaintiff was within the “target area” of defendant’s conduct, \textit{see Karseal Corp. v. Richfield Oil Corp.}, 221 F.2d 358 (9th Cir. 1955); and if he suffered “antitrust injury,” \textit{see Brunswick Corp. v. Pueblo Bowl-o-Mat}, 429 U.S. 477 (1977), then damages may be recovered, absent \textit{Noerr-Pennington} immunity.

Even if the defendant was not successful in procuring any governmental act, the mere attempt may have effected a true barrier to entry, raised perceptibly the cost of entry or continued competition (as was the case in \textit{California Motor Transport}) or caused some harm to the competitive process with resulting “antitrust injury” to private parties.
amendment privilege. Others disagree. The issue, however, has never been resolved because the courts have never dealt with a set of facts exhibiting conduct which is (i) actionable under the general principles of antitrust jurisprudence, (ii) in which liability is predicated on communications with government officials who are acting in a governmental (i.e., noncommercial) capacity and who are not coconspirators, (iii) where the conduct in question is legitimate, given its setting, in the California Motor Transport sense, (iv) but unprivileged under the first amendment.

In a domestic context, such a combination of factors obviously would be rare, because in almost all instances conduct sufficiently legitimate to survive scrutiny under California Motor Transport also would be protected by the first amendment. But assuming, as we still are, that the first amendment does not apply to foreign government solicitation cases, such a combination of factors would be present in many cases involving foreign political activity or other governmental contacts.

Noerr suggests, though in a rather equivocal fashion, that Congress meant to draw a basic distinction between political and commercial activity—a distinction based not on a party's motive, because political activity is often (perhaps usually) motivated by the desire to advance one's commercial interests, but rather on the nature of the conduct in question; the distinction is between influencing a governmental body versus engaging in commercial transactions. The distinction between commercial and political

---

135 See note 6 supra.
136 See note 6 supra and text accompanying note 19 supra.
137 See note 7 supra.
138 See Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964).
139 In Missouri v. National Organization for Women, Inc., 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980), the court decided the Noerr-Pennington issue (presented by defendant's politically-motivated group boycott) on grounds of statutory coverage rather than the first amendment, but also held that the conduct in question was privileged under the first amendment. In Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696 (D. Colo. 1975), the plaintiff producer charged that defendant trade association made illegal payments to United States government personnel, as a result of which minimum milk prices became politically sensitive, as a result of which administrative agencies have subsequently refused to raise the minimum prices, and as a result of which plaintiff has suffered injury and has a claim under the antitrust laws. The Court purportedly relied on Noerr in dismissing the complaint, holding that: "In fact, the harm to competition of which plaintiffs complain is, by their own allegations, wholly at odds with the object of the alleged conspiracy." Id. at 705. The court's failure to discuss the antitrust injury doctrine announced in Brunswick Corp. v. Pueblo Bowling-o-Mat, 429 U.S. 477 (1977), is understandable, since the latter case was decided two years subsequent to Cow Palace.
140 Fischel, supra note 18, at 96, properly notes that many cases subsequent to Noerr, notably California Motor Transport and United States v. Otter Tail Power Co., 417 U.S. 901
activity is familiar in other legal contexts and probably no more
difficult to draw in practice than are many other issues of legal
characterization.\(^{141}\)

Although *Noerr* and its progeny distinguish political from com-
mercial activity—and sovereign acts of government from com-
mercial activity—and although *Noerr* rested in part on the view that
it would be unwise to predicate Sherman Act liability on the in-
ducing of a governmental act that is itself lawful,\(^{142}\) it must be
noted that under current law it is not true that all governmental,
mandatory, noncommercial acts are outside the scope of the Sher-
man Act. In *California Retail Liquor Dealers Association v. Mid-
cal Aluminum, Inc.*,\(^{143}\) the Supreme Court affirmed the grant of an
injunction against the enforcement of a California statute requir-
ing resale price maintenance of wine on the ground that California
had acted in violation of section 1 of the Sherman Act. The Court
found that the doctrine of *Parker v. Brown,*\(^{144}\) under which state
action of an anticompetitive nature may be immune from the Sher-
man Act, was not applicable. Under the *Parker* doctrine, which is
“grounded in our federal structure,”\(^{145}\) the state regulatory action
must be both “clearly articulated and affirmatively expressed as
state policy” and “actively supervised.”\(^{146}\) It was the latter test,
presumably intended to ensure that consumer interests are taken
continuously into account, that the California program failed to
meet, inasmuch as there was no attempt to make sure that the
resale prices were fair and reasonable.\(^{147}\)

Where both tests are met, *Parker v. Brown* immunity still ap-
plies. It is thus presumably still the law that one of the fifty states
of the Union may enact valid legislation ensuring that its own pro-
ducers receive supracompetitive profits at the expense of its own
consumers as well as those located in other jurisdictions.\(^{148}\) Local

\(^{141}\) See, e.g., Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603(d), 1605(a)(2) (1976) (no
immunity *inter alia* for commercial acts of foreign states outside the United States which
cause a direct effect in this country).

\(^{142}\) 365 U.S. at 136. See text accompanying note 71 supra.

\(^{143}\) 445 U.S. 97 (1980).

\(^{144}\) 317 U.S. 341 (1943).

\(^{145}\) 445 U.S. at 104.

\(^{146}\) *Id.* at 106 (citing City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410
(Brennan, J.)).

\(^{147}\) *Id.*

\(^{148}\) Of course, such legislation may be invalid if it constitutes an undue interference with
interstate commerce. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).
governments, however, even when acting in a governmental capacity, may not so exalt their own parochial interests except in circumstances where the two Parker tests referred to above are met. Clearly, then, although it may once have been the law that all governmental acts of a noncommercial nature are outside the purview of the antitrust laws, that simple distinction no longer holds.

Likewise, it is not accurate to say that all genuine attempts to induce government to act in a noncommercial capacity are outside the scope of the antitrust laws. By no means, however, does it follow that the distinctions between sovereign and commercial acts of governments, and between political and commercial behavior of private parties, are without antitrust significance. On the contrary, the legislative history of the Sherman Act, though hardly dispositive for present purposes, provides some indications that such distinctions were within the contemplation of Congress.

In particular, Senator George, who was concerned that the law might be construed to outlaw some of the activities of temperance societies, responded to a question about legislative activities by observing: "I have thought possibly that the courts might say that the right of political organizations to bring about political results by Legislation was not embraced within the provisions of the bill." To this somewhat equivocal statement should be added the comment by Senator Sherman to the effect that the bill "does not interfere in the slightest degree with voluntary associations made to affect the public opinion to advance the interests of a particular trade or occupation."

In short, the legislative history, though not dispositive, provides rather more specific support for the Noerr result than Justice Black in Noerr seems to have been aware of and certainly lends no support to the contention that the policy behind the protection of competition and of consumer interests is of such overwhelming importance that all countervailing considerations should be swept away.

Exceptions and implied repeals of the antitrust laws are highly

150 See id. at 428-41 (dissenting opinion of Justice Stewart deploring the majority's failure to adhere to Parker's distinction of private from state action).
151 See text accompanying note 88 supra.
153 21 Cong. Rec. 2562 (1890), quoted in Areeda & Turner, supra note 20, at ¶ 204b n.3.
disfavored in view of the importance of antitrust as the Magna Carta of our economic liberty. At the same time, however, it is well recognized that the words of the Sherman Act are of such generality that they must be approached as would the provisions of the Constitution.

The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of the language, perhaps not uncalculated, the courts have been left to give content to the statute, and in performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed.

In exercising their function of "giving content to the statute," the courts not infrequently have been faced with what may be referred to as systemic questions. The Noerr-Pennington cases involve the proper "fit" between the policy in favor of competition and what Professor Emerson has called "the system of freedom of expression." Parker v. Brown and its progeny deal with the proper ordering of the relationship between state and national economic regulation in the United States federal system. Similarly, a number of other judicial decisions have dealt with the often abstruse question of the relationship between regulatory regimes in particular industries such as insurance, shipping, and securities and the general policies of the Sherman Act.

The problem dealt with here is analogous: it concerns the issue of the proper scope of the antitrust laws insofar as they affect the political systems of foreign nations. The question is novel and unsettled and it is abundantly clear that the answer does not follow mechanically from Noerr, Parker, or any other authority. Nevertheless, the authorities make clear that the analysis should proceed by posing the question whether, notwithstanding the weighty policies of the Sherman Act, there are not still weightier

155 Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).
156 Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940)(footnote omitted).
considerations relating to the international system in which we live that prevent the Sherman Act from being correctly understood as having general application to solicitation of foreign governments.

B. Comity

By hypothesis, the question posed involves a situation presenting a clash between a foreign government's policy of protecting the integrity of its governmental processes, as well as its ability to communicate with private parties, and the United States government's policy of protecting its consumers or producers from foreign anticompetitive activity. First amendment considerations aside, the principal reason for reading the antitrust laws as subject to a general rule favoring the integrity of foreign governmental processes over the preservation of competition in foreign trade lies in the nature of the international system. Just as the doctrine of *Parker v. Brown* holds that antitrust law must be construed in light of the nature of the federal system in which it functions, so also a construction of antitrust law that would impinge on the sovereignty of other states in the international system is unsound as well as unworkable.

This approach is not dictated by considerations of international etiquette. It is not founded on a mere desire to avoid hurting the feelings of foreigners, nor is its primary basis a perceived need to avoid judicial decisions that prejudice the foreign relations of the United States, although these are all factors to be considered. The principal basis is rather a recognition that we live in a world of sovereign states and that the right to regulate political activity is a fundamental attribute of sovereignty. Therefore, absent a clear contrary indication of congressional intent, based on the principle of statutory interpretation that statutory constructions contrary to the principles of international law are disfavored, it should be held that the antitrust laws go no further in regulating communications with foreign governments than they do in a domestic context.

The doctrine of international comity was described as follows in this often-quoted passage from the 1895 Supreme Court opinion in *Hilton v. Guyot*:

---

183 *See* text accompanying notes 192-209 infra.
No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticized, no satisfactory substitute has been suggested.

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.65

The doctrine of comity applies not only to recognition of foreign court judgments66 and to resolution of situations of direct conflict between the laws of the United States and a foreign country,67 but also as a principle of statutory construction.68 In other words, the basic idea that conflicts with the laws of other sovereign nations should be avoided, especially where foreign state interests that we understand to be legitimate are at stake, is an idea that may, where appropriate, affect either the manner of enforcement of American law69 or the content of the substantive law.70

Clearly, comity has some application to the problem under consideration.71 How it should apply is more problematic. In their brief discussion of the issue considered herein, Areeda and Turner remark that "every government, whether representative

---

159 U.S. 113, 163-64 (1895).
165 Id.
166 In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977); Restatement, supra note 47, § 40.
167 See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 609 (9th Cir. 1977); United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945). It is axiomatic that the Timberlane-Mannington doctrine uses the doctrine of comity not to limit the exercise of legislative power but rather as an aid in finding legislative intent.
168 Restatement, supra note 47, § 40.
169 For example, comity has been recognized as an appropriate consideration to be employed by an administrative agency in exercising its power to implement legislation by appropriate regulations. See Statement of Basis and Purpose of Rules Implementing Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 43 Fed. Reg. 33,452, 33,456 (July 31, 1978).
170 See text accompanying note 36 supra.
or not, is privileged to set the terms on which persons within its borders may seek its legislation, decrees, or other sovereign action. But one supposes that governments are equally "privileged" to regulate their own economies, and yet a private party who procures a valid foreign act is not necessarily immune from United States liability. Nor does procurement of a valid United States governmental regulatory act necessarily provide immunity from foreign prosecution.

Where foreign economic regulation is concerned, comity dictates a factor-based, case-by-case approach. This point is illustrated not only by Timberlane-Mannington but in other areas as well. Comity is not always applied, however, in an ad hoc manner. For instance, section 98 of the Restatement (Second) of Conflicts of Law provides: "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying issues are concerned."

It is evident that recognition of foreign judgments could be determined under a rule as ad hoc as the Mannington Mills rule, and yet a different approach is taken. Why? The answer seems to be based partly on institutional considerations, or considerations of what makes sense in terms of how the system operates, and in particular on the powerful policy that litigation eventually must come to an end. In addition, the law recognizes that what the foreign courts are doing is essentially the same as what American courts are doing, although they may do it differently.

The analogy can be pressed too far, however, because as soon as the courts perceive a clash of fundamental public policies,
the general rule as to recognition of foreign judgments ceases to apply and an ad hoc analysis is substituted. Nonetheless, the analogy is still suggestive. What it suggests is that, if what foreign institutions are doing is fundamentally the same as what the United States institutions do (albeit with different methods and sometimes with different results), it may be the wisest course of action to give effect to the outcomes abroad, especially if institutional considerations indicate that a similar foreign respect for our governmental processes is desirable.

C. Legislation Contrary to Internationally Recognized Principles of Justice

The jurisdictional basis underlying extraterritorial application of United States antitrust law, at least insofar as foreign defendants are concerned, is the "objective territorial principle." That principle is authoritatively stated in section 18 of the Restatement, which provides in pertinent part as follows:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . .

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Section 18(b)(iv) is illuminated by the following two illustrations:

10. State A has a law establishing a state monopoly on the sale of coffee. X sends parcels of coffee from state B to A for sale to

---

179 See Uniform Act, supra note 78, § 4(b)(3)(providing that a foreign judgment need not be recognized if inter alia it is based on a cause of action which is repugnant to the forum state's public policy).

180 As recognized in Comment a to section 18 of the Restatement, jurisdiction over the foreign acts of United States citizens may be based on the nationality principle. The thesis is advanced below that the use of American antitrust law to interfere with freedom of speech and the right to petition in foreign nations would be contrary to recognized principles of justice within Restatement § 18(b)(iv). If that argument is valid, it would be anomalous, to say the least, to hold that the nationality principle would uphold such jurisdiction over United States citizens where jurisdiction over foreigners is impermissible.


182 (Emphasis added).
private persons. A has jurisdiction to prescribe a rule making this action criminal.

11. While in state A, X broadcasts a program intended for listeners in state B that praises the way of life in A. The program is heard in B and leads there to criticism of the government of B. B has no jurisdiction to prescribe a rule making this action criminal.\footnote{183}

Section 18 is widely recognized as an authoritative statement concerning the objective territorial principle and its limitations in American jurisprudence. For instance, the Second Circuit has held that the objective territorial principle must be applied with caution, particularly in an international context, and that “[a]t minimum the conduct must meet the tests laid down in §18 of the Restatement (Second) of Foreign Relations Law...”\footnote{184} Similarly, the legislative history of the Foreign Sovereign Immunities Act indicates that that statute is to be construed consistently with section 18.\footnote{185}

Freedom of speech and petition should be regarded as “principles of justice generally recognized by states that have reasonably developed legal systems” within section 18(b)(iv) of the Restatement. To the extent that this proposition may require any proof, reference may be made to the constitutions of many nations. For instance, article 4 of the French Constitution provides that “[p]olitical parties and groups . . . shall be formed freely and shall carry on their activities freely.”\footnote{186} Article 21 of the Japanese Constitution provides that “[f]reedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.”\footnote{187} To like effect is section 19(1)(a) of the Indian Constitution, which states that “[a]ll citizens shall have the right . . . to freedom of speech and expression.”\footnote{188}

\footnote{183} Restatement, \textit{supra} note 47, § 18, comment g.
\footnote{184} Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972).
\footnote{187} VIII Blaustein & Flanz, \textit{The Constitution of Japan}, at 3.
\footnote{188} VII Blaustein & Flanz, \textit{The Constitution of India}, at 6.
International recognition of the protection of free speech and the right of petition as required by the principles of justice is further shown by the Universal Declaration of Human Rights, approved by the General Assembly of the United Nations in 1948 with the support of the United States, which provides:

**Article 20**

1. Everyone has the right to freedom of peaceful assembly and association.

**Article 21**

1. Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives.

The United States government’s commitment to promotion of civil liberties has been reconfirmed on many occasions, notably in 1975 when the United States signed the Final Act of the Conference on Security and Cooperation in Europe (the Helsinki Declaration), which provides in pertinent part: “In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration on Human Rights.”

Accordingly, as recognized by illustration 11 in the commentary to section 18 of the Restatement, quoted above, application of the Sherman Act extraterritorially in a manner that derogates from the political freedoms enjoyed by foreigners in foreign countries is contrary to international law as understood by the American courts, and such a construction should not be adopted, at least in the absence of a clear indication of congressional intent to enact legislation contrary to international law.

D. Retaliation by Foreign Countries

Descending from the high-minded plane of concern for international human rights, let us take note of a more “practical” consideration. Since World War II, there have been at least twenty diplomatic protests by foreign countries over American assertions of extraterritorial jurisdiction to enforce its antitrust laws.

---

189 Whiteman, Digest of International Law 243 (1965).

190 Id. at 240.

191 14 Intl Legal Matls 1295 (1975).

192 Foreign Resentment over Extraterritorial Enforcement is Growing, Conference is Told, 993 Antitrust & Trade Reg. Rep. (BNA) A-7, 8 (Dec. 11, 1980)(reporting remarks by Joel Griffin).
American jurisprudence in this field is widely believed to be both contrary to international law and premised on a failure to appreciate how foreign political processes operate.

We now have passed the era of the diplomatic note and entered the age of foreign "blocking" legislation. The most drastic legislation was enacted by France in July 1980. It provides in pertinent part:

Article 1. Subject to treaties or international agreements, it is prohibited for any individual of French nationality or who usually resides on French territory and for any officer, representative, agent, or employee of an entity having a head office or establishment in France to communicate to foreign public authorities, in writing, orally or by any other means, anywhere, documents or information relating to economic, commercial, industrial, financial or technical matters, the communication of which is capable of harming the sovereignty, security, or essential economic interests of France or contravening public policy, specified by the administrative authority in so far as is needed.

Article 1-bis. Subject to any treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, to investigate, or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings.

Article 2. Persons aimed at by articles 1 and 1-bis are required to inform without delay the relevant minister when they are in receipt of any request concerning such communications.

Article 3. Without prejudice to any greater penalties provid-

---

189 The cogent observation has been made that [a] policy endorsed by the U.S. Administration may or may not enjoy the support of Congress. When a Canadian Minister announces Government policy, however, it is recognized that implementation of that policy can, if necessary, be secured through the enactment of legislation by virtue of the Government's majority in Parliament. But both the Government and the private sector may prefer to avoid the formality and rigidity of legislation, and compliance with policy may instead be secured through discussions and voluntary action permitted, but not compelled, by domestic law. This is a feature of the Canadian system of government which may differ from that of the United States and which the doctrine of "foreign compulsion," if rigidly applied, would be unable to accommodate.

189 Foreign Resentment over Extraterritorial Enforcement is Growing, Conference is Told, 993 Antitrust & Trade Reg. Rep. A-7 (Dec. 11, 1980).
ed by law, any violation of the provisions of articles 1 and 1-bis of this law will be punished by imprisonment of from two to six months and by a fine of from 10,000 Francs to 120,000 Francs or by only one of these two penalties.196

Although the construction and effect of the French statute are beyond the scope of this article, it is clear that a law of this type is capable of greatly prejudicing United States governmental processes and the legitimate interests of private parties. Yet it seems clear that the United States would virtually invite more foreign legislation of this nature, or other unpalatable acts,197 if its judiciary undertakes to judge the propriety of foreign political activity by United States antitrust standards.

Moreover, France is not the only country whose concern over extraterritorial application of United States antitrust law has gone beyond the diplomatic note stage. In 1979, Australia enacted the Foreign Antitrust Judgment (Restriction of Enforcement) Act,198 which permits the Commonwealth Attorney-General to prevent the enforcement of a foreign judgment where either (1) “he is satisfied that the foreign court exercised jurisdiction in a manner inconsistent with international law or comity” or (ii) he determines that Australia’s national interests require restriction of enforcement.199

The Australian legislation was followed one year later, in March 1980, by Britain’s enactment of a statute200 providing inter alia (i) that where a foreign discovery order relates to documents or information outside the territory where it was not entered201 and is determined by the Secretary of State to be “prejudicial to the sovereignty of the United Kingdom”202 or its security or relations

197 Corporate Lobbyists Abroad, supra note 18, written in 1973, suggests that expropriation of American-owned businesses is a possible form of retaliation. Id. at 1279. However, it would seem that foreign legislation prejudicial to American judicial or other governmental processes would be a much more logical response.
201 British Stat., supra note 200, § 2(1)(a).
202 Id. § 2(2)(a).
with foreign governments,\textsuperscript{203} he may prohibit compliance;\textsuperscript{204} (ii) that foreign antitrust judgments may be denied enforcement;\textsuperscript{206} and (iii) that British citizens and corporations and persons carrying on business in Britain may have a cause of action for recovery of foreign judgments in excess of single damages,\textsuperscript{206} unless "the proceedings in which the judgment was given were concerned with activities exclusively carried on in that country."\textsuperscript{207} The enactment of similar damage recovery statutes in other countries is encouraged by a provision that foreign judgments based on a corresponding statute may be enforced in Britain.\textsuperscript{208} Canada is considering similar legislation.\textsuperscript{209}

In short, American attempts to govern world commodity markets by United States antitrust principles are being countered by foreign governmental interference in the American judicial process. Obviously, no one can predict what the outcome would be of a more extreme assertion of United States extraterritorial jurisdiction, but it seems safe to predict that the reaction would be very serious.

E. Prejudice to Legitimate Private Interests

Participation in lobbying, litigation, and other governmental contacts are a natural concomitant to the carrying on of business abroad, as they are in the United States. As matters now stand, Americans conducting business abroad must deal not only with the trade regulation and other laws of their host country but also with the provisions of the Foreign Corrupt Practices Act.\textsuperscript{210} Legal considerations already may unreasonably hinder American multinational business.\textsuperscript{211} Refusal to apply Noerr-Pennington to

\textsuperscript{203} Id. § 2(2)(b).
\textsuperscript{204} Id. § 2(1).
\textsuperscript{206} Id. § 5.
\textsuperscript{207} Id. § 6.
\textsuperscript{208} Id. § 6(4).
\textsuperscript{209} Id. § 7; see British Statute Seeks to Discourage U.S. Antitrust Suits Against U.K. Firms, 959 Antitrust & Trade Reg. Rep. (BNA) A-4 (April 10, 1980).
\textsuperscript{212} The Senate Committee on Governmental Affairs noted in 1980 that "[t]he Committee has been troubled by wide-spread complaints that the application of these laws [antitrust laws] may have straightjacketed U.S. firms in international trade." S. Rep. No. 96-770, 96th Cong., 2d Sess. at 2, reprinted in 439 (CCH) Trade Reg. Rep. (Part II)(May 28, 1980).
communications with foreign governments would complicate matters still further.

No doubt the multinationals would survive and flourish, and would continue to approach foreign governments where so advised. But in this area, as well as others, where the law becomes inordinately complex, real costs are imposed that may well exceed any benefits achieved by a flexible legal rule.

F. Protection of United States Economic Interests

Finally, one commentator has adduced the following argument:

The purpose of American antitrust law is nothing less than the preservation of the traditional economic fabric of this country. Accordingly, the mandate of the Sherman Act is very broad, and any judicially created exceptions to it must be as narrow as possible. Other than its generalized reference to the proper functioning of a "representative democracy," Noerr itself gives no clue to the appropriateness of extraterritorial application of antitrust immunity for corporate petitioners. Since the potential in most other countries for the enactment of economic legislation harmful to American interests is much higher than it is in this country and since foreign lobbying activity by companies which do business in the United States has a much greater chance of inducing injurious anticompetitive restraints on American trade than does domestic lobbying, the term "representative democracy" should probably be interpreted to refer primarily to domestic states and the federal government.

In the absence of a clear indication that the court in Noerr intended it, a broader construction seems unwarranted.\footnote{Corporate Lobbyists Abroad, supra note 18, at 1276-77.}

This argument is objectionable on several grounds. First, Noerr is based on respect for the democratic process. Justice Black made no attempt to discover the rule that would best ensure wise economic legislation by the State of Pennsylvania. He sought the rule that would best protect the process of representative government and the civil rights of citizens. Second, as we have seen, the doctrine of Parker v. Brown holds that the nature of the federal system requires that states be permitted, within constitutional limits, to advance the parochial interests of state consumers over the contrary interests of consumers throughout the country.\footnote{See text accompanying notes 145-148 supra.} The nature of the international system likewise dictates the inad-
visability of attempting to protect Americans from the anticompetitive acts of other countries by means of interference with their governmental processes.\(^{214}\) Third, if the United States attempts to advance its national economic interest and ideas about competition at the expense of interference with other nations' political processes, there is every reason to believe that effective retaliation will follow swiftly.\(^ {215}\)

VI. EXTRATERRITORIAL APPLICATION OF FREEDOM OF SPEECH AND ASSOCIATION AND THE RIGHT TO PETITION

We now return to the question that previously was set aside, namely, to what extent if any does the first amendment inhibit Congress, acting within the scope of its power to regulate United States interstate and foreign commerce, from enacting legislation interfering with freedom of speech and association for political ends abroad and the right to petition foreign governments for the redress of grievances? It is clear that the first amendment applies to extraterritorial activity related to the United States government and its political processes.\(^ {216}\) But that, of course, does not resolve the separate and distinct issue of whether the first amendment has anything to do with the government and politics of foreign countries.\(^ {217}\)

A. Extraterritorial Application of the United States Constitution

Other commentators on the issue under discussion in this article have relied on the antique authorities of *The City of Panama*\(^ {218}\) and *Downes v. Bidwell*,\(^ {219}\) Supreme Court decisions dating respectively from 1879 and 1901, for the propositions (in the words of the commentators) that "the protection by the Federal Constitution does not extend to the petitioning of foreign governments"\(^ {220}\) and that "[c]orporations have no First Amendment right of petition overseas."\(^ {221}\) This analysis is unsound. As Justice Frankfurter

\(^{214}\) See text accompanying notes 164-179 *supra*.

\(^{215}\) See text accompanying notes 192-209 *supra*.

\(^{216}\) See text accompanying notes 230-237 *infra*.

\(^{217}\) See text accompanying notes 238-251 *infra*.

\(^{218}\) 101 U.S. 453 (1879).

\(^{219}\) 182 U.S. 244 (1901).

\(^{220}\) *Corporate Lobbists Abroad, supra* note 18, at 1277.

\(^{221}\) McManis, *supra* note 18, at 240. Graziano, *supra* note 16, likewise states: "Political activity undertaken outside the United States and directed at foreign governments is not constitutionally protected." Id. at 132. He also cites *Downes* and *The City of Panama.*
noted in 1957, the "view that the Constitution is not operative outside the United States" is a "notion which has long since evaporated."\(^{222}\)

The City of Panama held simply that, pursuant to a valid federal statute, the district courts of the Territory of Washington had jurisdiction in admiralty cases. In the course of arriving at this conclusion, the Court observed in passing that "[o]ur constitution, in its operation, is coextensive with our political jurisdiction. . . ."\(^{223}\) This obsolete dictum\(^{224}\) is cited in support of a territorially limited view of the Constitution.

Downes v. Bidwell, the other authority that has been cited to the effect that there is no constitutional right to petition foreign governments,\(^{225}\) is more interesting. The holding of Downes was that the recently-acquired island of Puerto Rico was not a part of the United States within the constitutional provision that "all duties, imposts and excises shall be uniform throughout the United States." However, in the course of a lengthy and scholarly opinion, the Court twice alluded in dictum to a possible distinction between provisions of the Constitution, such as the first amendment, going to the power of Congress to enact specified classes of legislation and provisions, such as the one under consideration, requiring uniformity throughout the United States. The Court stated:

There is a clear distinction between such prohibitions as to the

\(^{222}\) Reid v. Covert, 354 U.S. 1, 56 (1957) (Frankfurter, J., concurring).

\(^{223}\) 101 U.S. 453, 460 (1879).

\(^{224}\) As late as 1936, the Supreme Court stated in United States v. Curtiss-Wright Export Corp. (not cited by Graziano et al.):

It results that the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in the foreign territory unless in respect of our own citizens (see American Banana Co. v. United Fruit Co., 213 U.S. 347, 356) and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in the field are equal to the right and power of the other members of the international family.

\(^{225}\) See notes 220-21 supra. All these commentators cite dictum to the effect "[t]hat the Constitution does not apply to foreign countries or to trials conducted therein. . . ." 183 U.S. at 270. That is no longer good law. Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion and concurring opinion of Justice Frankfurter).
very root of the power of Congress to act at all, irrespective of
time or place, and such as are operative only “throughout the
United States” or among the several States.

Thus, when the Constitution declares that “no bill of attainder
or ex post facto law shall be passed,” and that “no title or nobil-
ity shall be granted by the United States,” it goes to the com-
petency of Congress to pass a bill of that description. Perhaps,
the same remark may apply to the First Amendment, that “Cong-
gress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof; or abridging the
freedom of speech, or of the press; or the right of the people to
peacefully assemble, and to petition the government for a
redress of grievances.” We do not wish, however, to be
understood as expressing an opinion how far the bill of rights
contained in the first eight amendments is of general and how
far of local application.228

Later in its opinion, the Court returned to the same theme,
remarking:

We suggest, without intending to decide, that there may be a
distinction between certain natural rights, enforced in the Con-
stitution by prohibitions against interference with them, and
what may be termed artificial or remedial rights, which are
peculiar to our own system of jurisprudence. Of the former class
are the rights to one’s own religious opinion and to a public ex-
pression of them, or as sometimes said, to worship God accord-
ing to the dictates of one’s own conscience; the right to personal
liberty and individual property; to freedom of speech and of the
press; to free access to courts of justice, to due process of law
and to an equal protection of the laws; to immunities from
unreasonable searches and seizures, as well as cruel and unusual
punishments; and to such other immunities as are indispensable
to a free government. Of the latter class are the rights to
citizenship, to sufferage, and to the particular methods of pro-
cedure pointed out in the Constitution, which are peculiar to
Anglo-Saxon jurisprudence, and some of which have already
been held by individuals.

Whatever may be finally decided by the American people as
to the status of these islands and their inhabitants—whether
they shall be introduced into the sisterhood of States or be per-
mitted to form independent governments—it does not follow
that, in the meantime, awaiting that decision, the people are in
the matter of personal rights unprotected by the provisions of

228 182 U.S. at 277 (emphasis added).
our Constitution, and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property. This has been frequently held by this court in respect to the Chinese even when aliens, not possessed of the political rights of citizens of the United States.\(^{227}\)

It is, however, well established as a general proposition that aliens do not possess all the constitutional rights of United States citizens and that the legislative and executive branches, without running afoul of the Constitution, may make distinctions among categories of aliens that would be impermissible if applied to United States citizens.\(^{228}\) Enemy aliens engaged in operations hostile to the United States are the least favored category of aliens; there is high dictum to the effect that they do not enjoy the civil rights guarantees of the Constitution.

If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerilla fighters, and "werewolves" could require the American judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as in the Fifth and Sixth Amendments.

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one work can be cited. No decision of this Court supports such a view. Cf. Downes v. Bidwell, 182 US 244. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punish-


\(^{228}\) Id. at 282-83 (emphasis added). In making the point that the first amendment and similar constitutional provisions may have a greater territorial scope than other portions of the Constitution, the Downes Court did not raise the question of whether the first amendment might extend to areas which were neither states of the union nor occupied by the United States—presumably because in 1901 the thought that Congress might enact legislation valid in foreign countries was beyond the contemplation of the Court.
ment upon an alien enemy engaged in the hostile service of a government at war with the United States.229

On the other hand, aliens of friendly countries, including corporations organized in such states, enjoy the fifth amendment protection against governmental taking of property without just compensation.230 It would appear, in light of the authorities discussed above, that the case for extending the "natural rights"231 of petition, free speech, and association to friendly alien individuals and corporations is even stronger than the case with respect to fifth amendment rights.

With respect to the constitutional rights of United States citizens in foreign countries, the leading case is Reid v. Covert,232 holding that Congress could not constitutionally provide for trial by court-martial of overseas military dependents. In Reid, the plurality opinion of Justice Black, representing the views of Chief Justice Warren and Justices Douglas and Brennan, stated:

At the beginning we reject the idea that when the United States acts against its citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.233

Justice Frankfurter concurred with the plurality on this point.234

Similarly, United States v. Toscanino235 held that constitutional protections, including that against illegal searches and seizure, apply to conduct abroad of American officials directed against United States citizens as well as aliens, although they do not apply to the independent conduct of foreign officials. Likewise, in

229 Johnson v. Eisentrager, 339 U.S. 763, 784-85 (1949). In his dissenting opinion, Justice Black wrote: "Probably no one would suggest, and certainly I would not, that this nation either must or should attempt to apply every constitutional provision of the Bill of Rights in controlling temporarily occupied countries." Id. at 796-97.
233 Id. at 5-6 (emphasis added).
234 Id. at 56.
235 500 F.2d 267 (2d Cir. 1974).
United States ex rel. Allinson v. New Jersey,\textsuperscript{236} the court held that citizens of the United States may invoke constitutional protections against extraterritorial conduct by federal or state governments. In addition, in Williams v. Blount\textsuperscript{237} the court ruled that American citizens located outside the United States have the same rights to use the mails as do citizens inside the United States. The court stated that the rule may be the same as to mail directed into the United States by noncitizens.

B. Extraterritorial Content of the First Amendment

If, as Williams v. Blount indicates, constitutional questions are raised by an attempt to inhibit aliens from sending communications into the United States, are constitutional questions also presented by any attempt on the part of Congress to inhibit aliens and United States citizens from communicating with foreign governments?

There seems to be no authority directly on point. In that connection it is interesting, and possibly significant, that the Logan Act,\textsuperscript{238} an eighteenth-century criminal statute broadly forbidding communications with foreign governments in connection with disputes with the United States, has been the subject of virtually no enforcement efforts during its two centuries of existence.\textsuperscript{239}

The question, then, is a novel one, but several points are clear. First, regardless of whether corporations "have" first amendment

\textsuperscript{239} The Logan Act provides:

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

The statute was criticized for the vagueness of its language in Waldron v. British Petroleum Co., 231 F. Supp. 72 (S.D.N.Y. 1964), in which the court suggested that Congress should consider tightening its loose language so as to clarify the limited application of the act to circumstances in which private citizens interfere in the conduct of foreign affairs by the United States government. \textit{Id.} at 89 n.30. Otherwise constitutional questions would be presented under the void-for-vagueness doctrine. \textit{Id.} at 89.
rights, recent cases make clear beyond peradventure that first amendment questions may be implicated by corporate speech. Moreover, it is equally clear that, while the first amendment is especially solicitous of political speech because of the intimate relationship between free speech and self-government, there is nevertheless underlying the first amendment a separate and distinct concern with protecting self-expression as an end in itself, and this separate concern with self-expression may extend to circumstances in which the speaker is a corporation rather than a natural person.

Noerr and many other cases dealing with first amendment issues concerning political matters base their analysis upon a consideration of how the values embodied in the first amendment interact with the institutions of free government found in the United States. That, of course, is perfectly natural, because in those cases it is the impact of first amendment values on the United States institutions that the courts must determine.

Some commentators conclude from these authorities that the first amendment’s concerns are parochial and lack application to other nations’ institutions. Such a conclusion appears to be fallacious. In the first place, the authorities generally refer not to the unique institutions of the United States but rather to the relationship between free speech and democratic self-government considered abstractly. Moreover, such a conclusion totally ignores the context in which the Bill of Rights was enacted—a desire to protect the “inalienable” rights of man referred to in the Declaration of Independence. As Jefferson said in a letter to James

---

240 The Supreme Court has properly indicated that is “the wrong question.” First Nat'l v. Bellotti, 435 U.S. 765, 776 (1978).
241 Id. In Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980), the Court held that the corporate status of a speaker does not permit a state to confine its speech to specified issues.
244 The Bellotti analysis suggests that the fact that corporations as such do not “have” thoughts to express is no more dispositive than the fact that corporations as such do not vote. The question is whether interference with speech by corporations would interfere with the values protected by the first amendment.
246 See text accompanying notes 16-18 supra.
247 “Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned . . . . For speech concerning public affairs is more than self-expression; it is the essence of self-government.” Garrison v. Louisiana, 379 U.S., 64, 74-75 (1964).
Madison urging him to support the adoption of a Bill of Rights: 
"[A] Bill of Rights is what the people are entitled to against every
government on earth . . . ."^248

In short, the idea that the first amendment has no bearing on
any congressional attempt to limit free speech and the right of
petition in foreign countries is contrary to the language of the
first amendment, contrary to its spirit, and unsupported by subse-
quent judicial authorities. Whether Congress may constitutionally
interfere with free speech and freedom to petition in
nondemocratic countries is more problematic. It should be
recognized that free government and tyranny are not the only ex-
tant types of government, but represent instead opposite ends of
a spectrum. Most governments, and particularly those that ex-
hibit any degree of stability, have their own ways of learning
about public opinion and taking it into account. It would be a
mistake for the judiciary to proceed on the basis of a culture-
bound bias that overlooks this continuum and assumes that all
non-Western states are benighted.^249

Is the first amendment, then, implicated in every communica-
tion between a business entity and a dictator, no matter how op-
pressive? Such a conclusion cannot be justified. The courts cannot
protect free speech if there is no free speech, and they cannot pro-
tect the right to petition if the foreign state recognizes no such
right.

Where the channel of communication is a natural monopoly, the
Supreme Court has recognized that governmental regulation may
be greater than would otherwise be permissible under the Con-
stitution.^250 More generally, where one speaker "drowns out" all
other voices, there may be instances where regulation is constitu-
tionally permissible to restore the balance and permit a multiplicity
of voices to be heard. The Bellotti opinion is suggestive. There
the Court noted:

Appellee advances a number of arguments in support of his

^248 Letter of Thomas Jefferson to James Madison, Dec. 20, 1787, quoted in A. Mason,

^249 The district court in Occidental said: "The persuasion of Middle Eastern States alleged
in the present case is a far cry from the political process with which Noerr was concerned." 331 F. Supp. at 108. In what respect did he understand it to be "a far cry" from United
States governmental process? What was his source of information? Presumably, he did not
base a constitutional determination solely on the factual allegations of the complaint. Did he
perhaps base his view on judicial notice, and if so, did he have a sound basis for so doing?

view that these interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.\footnote{435 U.S. at 789-90 (emphasis added) (citations omitted). See also id. at 791-92.}

There may be instances involving communications with foreign governments that are not functioning parliamentary democracies where the speaker succeeds in "monopolizing the channels of communications" and "drowning out other voices" and where consequently there is simply no discernible relationship between the values embodied in the first amendment and the institutions in question. But the fact that such a situation is possible or even likely in some countries no more justifies blanket holdings concerning the inapplicability abroad of the first amendment than hypothetical corporate abuses justify a state in enacting blanket prohibitions on corporate speech.

In short, it may be true that there are instances where the first amendment would constitute no bar to an action under the Sherman Act for solicitation of anticompetitive foreign governmental action. Even in such cases, however, considerations of comity as well as evidence of prejudice to legitimate private interests and United States foreign policy indicate that \textit{Noerr-Pennington} should be applied extraterritorially.

VII. CONCLUSION

The public policy considerations underlying the domestic \textit{Noerr-Pennington} doctrine, which immunizes from antitrust attack legitimate forms of solicitation of executive, legislative, or judicial action, are by and large applicable to the petitioning of foreign
governments. Moreover, there are additional factors in the international sphere that point toward extraterritorial as well as domestic application of the doctrine.

Domestically, the solicitation of commercial action by governmental bodies enjoys no Noerr-Pennington protection, nor does the solicitation of any type of governmental action by means of bribery, perjury, or similar unethical activities. To the extent that application of United States antitrust law to communication between business firms and foreign governments presents issues different from those arising in a domestic context, such novel factual patterns are best dealt with by appropriate adaptation of existing case law exceptions to Noerr-Pennington rather than by a wholesale refusal to apply the doctrine outside the United States. If the foreign conduct in question passes muster under California Motor Transport and other Noerr-Pennington authorities and if it is lawful under the Foreign Corrupt Practices Act, then considerations of legislative intent, comity, concern over retaliation, and protection of the legitimate interests of foreign and multinational businesses all indicate that the conduct should be protected by Noerr-Pennington.