THREATS OF FOREIGN GROUP BOYCOTTS OF AMERICAN INDUSTRY MADE IN RESPONSE TO U.S. GOVERNMENT TRADE POLICY: ILLEGAL ANTICOMPETITIVE ACTIVITY OR PROTECTED LOBBYING UNDER THE NOERR-PENNINGTON DOCTRINE?

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During the summer of 1994, in the heat of trade negotiations between the United States and Japan, over Japan’s alleged trade barriers to the importation of foreign automobiles and automobile parts, the United States announced that it was contemplating the application of “Super 301” punitive tariffs on the import of certain Japanese manufactured automobiles. These punitive tariffs would punish the Japanese auto industry (and indirectly Japan) for alleged anticompetitive acts committed to protect the Japanese domestic market from foreign competition. Many observers

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2. See 19 U.S.C. § 2411(c)(3) (1994); Friedman, supra note 1, at Al. The punitive tariffs available under regular, Super, and Special 301 actions may be applied to any goods from the same country of origin as the alleged exclusionary practices. 19 U.S.C. § 2411(b)(2) (1994). Thus, the punitive tariffs may be used to punish the private "wrong-
assumed that the U.S. “threat” to apply punitive tariffs was only a negotiating ploy, but the reaction of the Japanese automobile manufacturing and parts industries was immediate and forceful. In September 1994, the Japanese automobile manufacturers and their trade association, Japan Automobile Manufacturers’ Association (JAMA), threatened to boycott U.S. automobile parts manufacturers if the U.S. government applied Super 301 punitive tariffs. The threat never materialized. Nevertheless, the antitrust implications of a threatened group boycott by foreign companies, in retaliation for tough U.S. policy statements, should be a serious subject of inquiry. As the United States increasingly turns to punitive tariffs to counter the anticompetitive practices of foreign industries, we should expect to see more threats of retaliatory actions against U.S. businesses and a concomitantly increased interest in using the extraterritorial jurisdiction of the Sherman Act to respond to such threats.

This Article addresses whether the Noerr-Pennington doctrine (Noerr doctrine) allows foreign industries to threaten group boy-
cots of U.S. industries when the threats are made in the context of U.S. trade negotiations, and specifically, when the threats are made in response to U.S. government threats to exercise "Super 301" authority. First, this Article examines U.S. antitrust law to determine whether private U.S. parties can successfully sue foreign manufacturers with market power that have threatened a group boycott. Next, this Article examines whether foreign industries can qualify for Noerr-Pennington immunity (Noerr immunity). Finally, assuming Noerr immunity applies to foreign industries, this Article addresses whether the Noerr doctrine provides immunity for retaliatory threats of anticompetitive activity in the trade-negotiation/punitive-tariff context.

I. GROUP BOYCOTTS

Group boycotts are horizontal agreements among competitors with market power to make collective judgments about the competitors, suppliers, and buyers with whom they each will deal. Absent Noerr immunity, the legality of group boycotts by domestic companies with market power was traditionally measured by the "per se" standard. More recently, the Supreme Court has fluctuated between using the per se approach and applying standards that are usually associated with the rule of reason. Although the Court has never formally abandoned the per se standard in group boycott cases, its opinions over the past decade have ranged from the


9. See infra notes 55-63 and accompanying text.

10. These agreements are also known as concerted refusals to deal. See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290 (1985).

11. See United States v. General Motors Corp., 384 U.S. 127, 145-46 (1966) (applying the per se standard); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (refusing to apply the reasonableness test); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 468 (1941) (stating that under the circumstances of the case, "it was not error to refuse to hear evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination"). But cf. Silver v. New York Stock Exch., 379 U.S. 541, 548-49 (1964) (noting in dicta that the per se standard would apply "absent any justification derived from the policy of another statute or otherwise").

12. The U.S. Supreme Court declined to review the application of the rule of reason to group boycott cases in National Association of Review Appraisers & Mortgage Under-
examination of additional factors and/or a severely limited application of the per se standard to a revival of a rigid application of per se. Regardless of whether the Court applies a per se or rule of reason standard to group boycotts, an examination of the applicable case law reveals that unless the putative boycotters have \textit{Noerr} immunity, the Sherman Act may be successfully used to prosecute the threat of a group boycott in response to a U.S. government threat to establish Super 301 punitive tariffs.

In \textit{Northwest Wholesale Stationers, Inc. v. Pacific Stationery \& Printing Co.}, the Court limited the application of the per se standard in group boycotts. The Court determined that group boycotts warranted per se treatment only where the defendants have "market power or exclusive access to an element essential to effective competition," "the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." The next year, the Court limited per se treatment even further in \textit{FTC v. Indiana Federation of Dentists}. Stating that it "decline[d] to resolve this case by forcing the Federation's policy into the 'boy-

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16. \textit{Id. at 293-98.}

17. \textit{Id. at 293-96. But cf. Superior Court Trial Lawyers Ass'n}, 493 U.S. at 434-36 (rejecting the court of appeal's assertion that illegality required proof of the defendants' market power).

18. \textit{Northwest Wholesale Stationers}, 472 U.S. at 294. This philosophy is consistent with the Court's view expressed in \textit{Monsanto Co. v. Spray-Rite Service Corp.}, 465 U.S. 752, 761 (1984). In \textit{FTC v. Indiana Federation of Dentists}, however, the Court eased the plaintiff's burden of showing market power. It placed the burden on defendants to come forward with proof that the conduct had "countervailing procompetitive virtues" because the dentists' refusal to deal "impair[ed] the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." 476 U.S. 447, 459 (1986).

cott' pigeonhole and invoking the per se rule, the Court chose instead to cite Northwest Wholesale Stationers for the proposition that: the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor . . . . Moreover, we have been slow . . . to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.

The Court concluded that it was more appropriate to apply the rule of reason. On the other hand, the Court revived the rigid application of the per se standard in a recent Noerr doctrine case involving group boycotts. In FTC v. Superior Court Trial Lawyers’ Association (SCTLA), the Court asserted that the application of the per se standard “reflect[s] a longstanding judgment that the prohibited practices [of both price-fixing and group boycotts] by their nature have a ‘substantial potential for impact on competition.’” In SCTLA, the joint evil of a horizontal price-fixing agreement facilitated through a group boycott may have driven the Court’s return to a rigid per se standard. By rejecting the view that illegality required proof of the defendants’ market power, the Court severely weakened the requirement of “market power or unique access to a business element necessary for effective competition” asserted in Northwest Wholesale Stationers and Indiana Federation of Dentists. The court of appeals had ruled that absent proof of market power, the group boycott disclosed by the record was totally harmless. The Supreme Court rejected that view as being “flatly inconsistent with the clear course of our antitrust jurisprudence. Conspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that already dis-

20. Id. at 458.
21. Id. at 458-59.
22. Id. at 459.
24. Id. at 433 (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984)).
25. Id. at 436 n.19.
26. Id. at 436.
29. See Superior Court Trial Lawyers Ass’n, 493 U.S. at 435-36.
closed by this record, to warrant condemnation under the antitrust laws.\textsuperscript{30}

Clearly, where foreign parties with significant market power threaten or effect a group boycott against the U.S. government and private companies in the United States, such concerted threats fall well within the criteria for per se application of the Sherman Act.\textsuperscript{31} Even the additional factors used in \textit{Northwest Wholesale Stationers}, and the rule of reason considerations in \textit{Indiana Federation of Dentists}, pose virtually no barrier to proof of a violation.

In the case of the Japanese automakers' threat, the boycotters have clear market power and exclusive access to an element essential to effective competition. Virtually every study of Japan's automobile market reveals that the percentage of the market held by Japanese automobile and automobile parts manufacturers approaches oligopolistic control.\textsuperscript{32} In fact, the United States considered punitive tariffs because of the virtual absence of foreign-car and car-parts manufacturers as factors in the Japanese market.\textsuperscript{33} Because of the oligopolistic power of the Japanese automobile

\textsuperscript{30} Id. at 436. Despite the ambitious trend of combining per se rules and the rule of reason, this case has been interpreted as an assurance to lower courts that per se analysis can be applied to classic restraints of trade. \textit{See} Stephen Calkins, \textit{The October 1989 Supreme Court Term and Antitrust: Power, Access and Legitimacy}, \textit{59 Antitrust L.J.} 339, 343-45 (1991). In \textit{Indiana Federation of Dentists} the Court refused to require the FTC to define a relevant market and instead evaluated the dentists' market power in light of direct record evidence of adverse competitive effects. 476 U.S. at 461 n.5; cf. \textit{Capital Imaging Assoc. v. Mohawk Valley Medical Assoc.}, 996 F.2d 537, 546 (D.C. Cir. 1993) (stating that in rule of reason analysis, plaintiff must show actual detrimental effects or establish that defendant has market power).

\textsuperscript{31} 15 U.S.C. §§ 1-7 (1994); see M.B. Gorrie, \textit{Per Se Can You See? The Superior Court Trial Lawyers and Their Perilous Fight}, \textit{24 Colum. J.L. & Soc. Probs.} 203 (1991); cf. Metro Indus., Inc. v. Sammi Corp., 82 F.3d 899, 845 (9th Cir. 1996) (refusing to apply the per se doctrine to alleged anticompetitive activities taking place in and primarily affecting foreign venues). Unlike in \textit{Sammi}, where the extraterritorial application of the Sherman Act addressed activities outside the United States, the anticompetitive activities discussed in this Article are specifically directed at the United States. The anticompetitive activities that involve consideration of the \textit{Niem} doctrine are threats of group boycott in retaliation for the possible application of punitive tariffs.


\textsuperscript{33} \textit{See} Friedman, \textit{supra} note 1, at A1, D2; \textit{U.S. Auto Industry Representatives Urge Tough Stand Against Japan}, \textit{12 Int'l Trade Rep. (BNA)} No. 20, at 892 (May 17, 1995).
industry in Japan, the industry's group refusal to purchase lower-priced, foreign-manufactured automobile parts revealed a clear likelihood of anticompetitive effects, while the possibility of countervailing procompetitive effects seemed remote at best.34

Further analysis of the structure and operation of the Japanese automobile market reveals a high degree of indirect integration and dependence between the Japanese automobile manufacturers and the Japanese automobile parts manufacturers.35 These relationships have facilitated the exclusion of foreign entrants.36 The Japanese government has done little to deter this interdependence.37 Indeed, the government appears to have used the relationships to assist in ensuring "full employment" in Japan.38 The Japanese government's policy of a "social contract"39 between industry and workers, combined with the automobile manufacturers' power over domestic part suppliers, provides a benefit to the automobile manufacturers that apparently outweighs the economic advantages of using lower-priced foreign automobile parts.40

34. See FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986) (finding that because the dentists' refusal to deal "impair[ed] the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them," the defendants had the burden of proof that the conduct had "countervailing procompetitive virtues"); see also Outer Tail Power Co. v. United States, 410 U.S. 966 (1973) (addressing monopolist's use of anticompetitive practices to influence government actions in order to preserve its monopoly).


36. Id. at 384.

37. See Henry P. Allesio, OEMs Could've, Should've Invested, 105 AFTERMARKET BUS. 32 (1996) (reporting that the Japanese are at fault for their complex cultural barriers to trade, making it difficult for foreigners to invest in Japanese automotive markets); see also John O. Haley, Competition and Trade Policy: Antitrust Enforcement: Do Differences Matter?, 4 PAC. RIM L. & POL'Y J. 303, 307 (1995) (suggesting that "Japan's failure to enforce legal prohibitions against private restraints of competition has hindered foreign firm entry into national or regional consumer and industrial markets").

38. See James Flanigan, U.S.-Japan Trade Accord and Now To The Hard Work Ahead, L.A. TIMES, June 29, 1995, at D1, D3 (suggesting that the Japanese system of exporting goods to other countries, while importing few goods, is designed to provide full employment).

39. In corporate Japan a social contract represents a job for life in return for perpetual loyalty. William Dawkins, Costly Burden of Tradition, FIN. TIMES, Dec. 1, 1993, at 10, see also Horst Brand, Book Review, MONTHLY LABOR REV., Feb. 1994, at 43, 43-44 (arguing that in Japan, where social contract is based on cooperative labor management relations, the presumption is that employment is permanent).

Legal analysis for anticompetitive actions affecting U.S. companies should not be altered simply because a group boycott is threatened by foreign rather than domestic parties. In *Hartford Fire Insurance Co. v. California*, the Supreme Court upheld the exercise of extraterritorial jurisdiction by Congress and the courts in an antitrust case where the plaintiff demonstrated that the foreign party's activity had a substantial effect on the United States. *Hartford* involved an alleged conspiracy between U.S. insurers and British reinsurers to restrict certain terms of insurance coverage. The British reinsurers threatened a group boycott of U.S. insurance companies if the U.S. companies continued to offer certain coverage in their policies. The case focused on whether federal antitrust law applied to the foreign parties' threatened group boycott. Justice Souter noted that even though the British reinsurers never entered the United States, Congress had the power to exercise prescriptive extraterritorial jurisdiction under the Sherman Act. Further, he stated that extraterritorial jurisdiction was appropriate unless a "true conflict" with foreign law arose such that the foreign party would be subject to competing commands by two sovereigns.

The group boycott threatened by the Japanese auto manufacturers was a private action sanctioned by the Japanese government. In fact, throughout the trade negotiations the Japanese government maintained that the disagreement was a private matter between the Japanese auto industry and the U.S. government and/

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42. *Hartford*, 509 U.S. at 796; see also United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945) (assuming that the "[Sherman] Act does not cover agreements, even though intended to affect imports or exports, unless its [sic] performance is shown actually to have had some effect upon them"). It is important to distinguish between the exercise of extraterritorial jurisdiction for the alleged anticompetitive exclusionary practices in Japan, and the group boycott threat examined in this Article. In the context of business practices overseas, the former involves serious issues of comity as to "foreign conduct." See Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 846 (9th Cir. 1996). Although *Hartford* dealt with harm to U.S. "consumers," the "effects doctrine" will most likely permit the same application of extraterritorial jurisdiction in "exporter" situations. See Michael P. Waxman, *Extraterritorial Application of U.S. Antitrust Law After Hartford: The Exporter's Case*, 28 KOREA U. L. REV. 19 (1994).


44. *Id.*

45. *Id.* at 780-84.

46. *Id.* at 796 n.22.

47. *Id.* at 798-99.

48. See Friedman, *supra* note 1, at D2.
or the U.S. auto parts industry.\textsuperscript{49} No "true conflict" with foreign law existed. Assuming successful service of process, a plaintiff should be able to meet the "effects test" and satisfy comity concerns. Under the \textit{Hartford} rationale, therefore, foreign parties who threaten group boycotts against U.S. companies may be subject to the Sherman Act unless their actions are protected under the \textit{Noerr} doctrine.\textsuperscript{50}

\section{First Amendment}

The \textit{Noerr} doctrine is a judicially created "immunity" from or "exception" to the application of U.S. antitrust law. In \textit{Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.}, the Supreme Court stated that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."\textsuperscript{51} Subject to limitations,\textsuperscript{52} the \textit{Noerr} doctrine removes "lob-

\begin{footnotesize}
49. \textit{Japan Auto Official Blasts USTR; JAMA Prepares Voluntary Import Plan}, 11 Intl Trade Rep. (BNA) No. 12, at 452 (Mar. 23, 1994). If the Japanese government had ordered the group boycott, the activity would have been protected under other laws and legal doctrines. \textit{See supra} note 5. Under the recently passed Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act), for example, the United States has threatened foreign private parties with denial of visas if they traffic in U.S. goods confiscated in Cuba. 22 U.S.C.A. \textsection{6091(a)(2) (West Supp. 1997). In response to this threat, some foreign sovereigns have ordered businesses not to comply with the Helms-Burton Act. \textit{See Barbara Amiel, The Cult of Having Stolen Goods: Ottawa Responded to Helms-Burton Like Any Mafia Gang Faced with a Determined District Attorney; It Used Extortion,} Maclean's, Apr. 14, 1997, at 9, 9. Such a response is presumably protected under the act of state doctrine, the foreign sovereign compulsion doctrine, or the Foreign Sovereign Immunities Act. \textit{See supra} note 5. On the other hand, the Federal Election Campaign Act makes it illegal for foreign parties to provide campaign contributions to U.S. government officials. 2 U.S.C. \textsection{441(e) (1994). The current controversy over foreign sources of contributions to the reelection campaign of President Clinton and the Democratic National Committee, on behalf of foreign private parties (and indirectly, foreign governments) reflects the significance Congress places on restricting foreign campaign contributions and the "lobbying" they represent. \textit{See Kenneth T. Walsh, No Shame and Lots to Gain: Everybody Shakes the Money Tree While Urging Campaign Reform}, U.S. News \& World Rep., Mar. 3, 1997, at 32, 32-34.


52. \textit{See infra} notes 112-121 and accompanying text.
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bying” of the legislative and executive branches,58 and adjudication before courts and administrative agencies54 from the scope of antitrust law.

The Supreme Court and lower courts cite two related but separate bases for the Noerr doctrine. First, the Sherman Act was intended to address economic activity, not political activity.55 Second, the First Amendment to the Constitution, which grants the “freedom of speech”56 and “the right to petition the government,”57 prohibits an otherwise appropriate application of the Sherman Act.58 Although the Court’s assertion of these different bases fosters erudite discussions about which rationale actually underlies the Noerr doctrine,59 the choice of a particular basis

53. See Noerr, 365 U.S. at 156; see also United Mine Workers v. Pennington, 381 U.S. 657, 669 (1965) (interpreting Noerr as holding that the Sherman Act does not apply to activities of competitors seeking to influence public officials).


55. See Noerr, 365 U.S. at 157-58 (explaining that 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”); Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696, 702 (D. Colo. 1975).

56. U.S. CONST. amend. I.

57. Id.

58. See City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991); Noerr, 365 U.S. at 137-38; Coastal States Mkts., Inc. v. Hunt, 694 F.2d 1358, 1364-65 & n.24 (5th Cir. 1983). Limits do exist on First Amendment protection, however. See, e.g., George F. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir. 1970) (noting that the First Amendment does not provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion).

makes little difference when the doctrine's application includes U.S. entities acting within the United States.}\(^60\)

Conversely, an analysis of the different bases of the Noerr doctrine is helpful to determine whether the doctrine applies to U.S. parties lobbying foreign governments\(^61\) and to foreign parties lobbying the U.S. government.\(^62\) Indeed, if the First Amendment stops at the border, then U.S. or foreign parties lobbying foreign governments and foreign parties trying to affect U.S. policy may not use Noerr as a defense. On the other hand, the First Amendment may provide protection to U.S. parties acting overseas, but have no bearing on the activities of foreign parties directed toward the United States.\(^63\)

Unfortunately, few cases address whether Noerr immunity applies to U.S. parties lobbying foreign governments, or to foreign parties attempting to influence U.S. policy. In the term following the Noerr decision, however, the Supreme Court commented on the Noerr doctrine and its application outside the borders of the United States. In Continental Ore Co. v. Union Carbide & Carbon Corp.,\(^64\) the Court addressed an alleged conspiracy between Electro Met of Canada, a wholly owned subsidiary of Union Carbide incorporated in Canada, and several American parties (some of whom were subsidiaries of Union Carbide).\(^65\) The plaintiff alleged that the defendant sought to monopolize the U.S. and Canadian markets for ferrovanadium and vanadium oxide.\(^66\) Although the conspiracy as

\(^{60}\) See Davis, supra note 41, at 396. But cf. Calkins, supra note 59, at 329-31 (arguing that the Court’s failure to articulate the conceptual basis of the Noerr doctrine leads to uncertainty).

\(^{61}\) See American Bar Association Section of Antitrust Law, Monograph No. 19, The Noerr-Pennington Doctrine 52-56 (1993) [hereinafter Monograph No. 19]; American Bar Association Section of Antitrust Law, Monograph No. 20, Special Defenses in International Antitrust Litigation 114-31 (1995) [hereinafter Monograph No. 20]; see also Davis, supra note 41, at 399 (arguing that the Noerr doctrine should be extended to cover solicitation of foreign governments); Comment, Corporate Lobbyists Abroad. The Extraterritorial Application of Noerr-Pennington Antitrust immunity, 61 Cal. L. Rev. 1254, 1255, 1264 n.68 (1973) (considering whether the Noerr doctrine “should be expanded to include the foreign activities of both domestic and foreign corporations”).

\(^{62}\) See Sims & Scott, supra note 8, at 588.

\(^{63}\) See Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696, 702 (D. Colo. 1975) (stating that “[s]ome conduct may not be the subject of a Sherman Act suit even though it is not conduct protected by the First Amendment”) (emphasis in original). But cf. Feminist Women’s Health Ctr., Inc. v. Mohammed, 586 F.2d 530, 542 (5th Cir. 1978) (“Although the Court’s Noerr opinion suggested that petitioning activity is exempt because the Sherman Act was simply not designed to reach such conduct, it is now clear that the doctrine is rooted in the first amendment’s guarantee of the right to petition.”).

\(^{64}\) Continental Ore Co. v. Union Carbide & Carbon Corp., 570 U.S. 690 (1962).

\(^{65}\) Id. at 692-93.

\(^{66}\) Id.
to the Canadian market occurred outside the United States, and involved the assistance of Electro Met of Canada (an agent of the Canadian government). The Court refused to apply the *Noerr* doctrine. The Court found that the conspirators' actions did not reflect a genuine purpose to influence the Canadian government because they were seeking to subvert the administration of the Canadian rationing program, rather than attempting to effect a change in the Canadian government's policy. Although the Court asserted that "constitutionally protected freedoms" are the basis of *Noerr*, the Court did not discuss or apply the First Amendment's limitations on the Sherman Act.

For more than thirty years following the Supreme Court's decision in *Continental Ore*, a raft of cases, law review articles,
monographs, and U.S. government guidelines have considered and continue to consider the application of the *Noerr* doctrine to U.S. persons lobbying foreign governments. There are deep divisions among the parties analyzing the applicability of the *Noerr* doctrine, including dispute over broad issues such as whether U.S. persons acting abroad have any First Amendment protection at all. Despite these divisions, none of the courts, commentators, or government pronouncements have addressed the extent to which foreign parties are protected by First Amendment rights when their lobbying is directed towards the United States.

At least one U.S. court, however, has provided *Noerr* immunity to foreign parties lobbying in the United States without discussing the First Amendment's application to foreigners. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.* involved a mammoth antitrust dispute, heard by numerous judges, addressing an alleged conspiracy by Japanese television manufacturers to drive U.S. television manufacturers out of business and monopolize the U.S. television market. Part of the case involved foreign television manufacturers and their foreign trade associations' lobbying of the U.S. government. The district court noted that the parties were foreign and briefly reviewed the First Amendment foundation for *Noerr*. However, the court applied the *Noerr* doctrine and granted immunity without

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Constitution is inapplicable to foreign countries); The "City of Panama," 101 U.S. 453, 460 (1879) (finding that the Constitution extends no further than the political jurisdiction of the United States).


73. MONOGRAPH No. 19, supra note 61; MONOGRAPH No. 20, supra note 61.


77. *Id.* at 1155-57. Although the foreign trade association in the Japanese automobile lobbying matter (JAMA) is registered to operate in the United States, some of the trade associations involved in the *Zenith* case were not then and are not now registered to operate in the United States.

78. *Id.* at 1157.
even addressing the foreign character of the lobbying parties.\textsuperscript{79} Despite the numerous issues appealed in the \textit{Zeni\textsuperscript{th}} case, this issue was neither the subject of an appeal nor reviewed by any of the appellate courts in subsequent trials and appeals. It is easy to see, in retrospect, that the district court's failure to examine the constitutional rationale for \textit{Noerr} immunity, as it applied to foreign parties, led to a questionable, if not incorrect result.

\textit{Laker Airways, Ltd. v. Pan American World Airways, Inc.}\textsuperscript{80} was an antitrust action brought against four U.S. and four foreign airlines. In \textit{Laker} the court discussed what, if any, U.S. constitutional protection aliens residing elsewhere may draw upon when affected by U.S. government action.\textsuperscript{81} The court observed that "no court has held . . . that a United States tribunal is compelled by the First Amendment to protect an alien's desire to speak in a foreign country or to petition the governmental authorities of a foreign nation."\textsuperscript{82} The court stated that "[b]y doing business here, defendants voluntarily made themselves subject to United States jurisdiction and to the application of United States domestic law and, as parties before the Court, they are entitled to the protection of that law—nothing less but also nothing more."\textsuperscript{83} By contrast, the Japanese auto makers appeared to have intentionally chosen not to enter the United States. Instead, they set up wholly owned or controlled subsidiaries to avoid the jurisdiction of U.S. courts.\textsuperscript{84} These actions could easily be interpreted as an overt rejection of any interest in U.S. constitutional protection.

Obviously the ability of foreign parties to assert First Amendment rights in \textit{Noerr} cases is vitally important. Unfortunately for foreign parties, however, their lack of constitutional protection was made clear in \textit{United States v. Verdugo-Urquidez}.\textsuperscript{85} Rene Martin Verdugo-Urquidez was a Mexican citizen and resident suspected of being a leader of an organization that smuggled narcotics from Mexico into the United States.\textsuperscript{86} After the Mexican police appre-

\textsuperscript{79} Matsushita Electric and other corporate defendants had wholly owned or controlled U.S. subsidiaries. \textit{Id.} at 1159.


\textsuperscript{81} \textit{Id.} at 287.

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.} at 287 n.21.

\textsuperscript{84} See Reich, \textit{supra} note 4.

\textsuperscript{85} \textit{United States v. Verdugo-Urquidez}, 494 U.S. 259 (1990); \textit{see also} The "City of Panama," 101 U.S. 433, 460 (1879) (stating that the Constitution extends no further than the political jurisdiction of the United States).

\textsuperscript{86} \textit{Verdugo}, 494 U.S. at 262.
hended Verduco-Urquidez and transported him to the U.S. border for arrest by U.S. marshals, U.S. Drug Enforcement Administration (DEA) agents, working with Mexican officials, searched Verduco-Urquidez’s Mexican homes and seized certain documents.\textsuperscript{87} Verduco-Urquidez asserted that the DEA raid violated his Fourth Amendment “right” against unreasonable search and seizure.\textsuperscript{88}

Chief Justice Rehnquist, writing for the Court, found that Verduco-Urquidez had no “rights” under the Fourth Amendment because he did not have a “sufficient connection” with the United States to be considered part of the national community.\textsuperscript{89} The Court determined that the drafters of the Constitution used the term of art “the people” in the Fourth Amendment to describe a class of persons who are part of the U.S. national community or who have otherwise developed sufficient connection with the country to be considered part of that community.\textsuperscript{90} Moreover, the Court noted that the Fourth Amendment term “the people” also appeared in the First, Second, Ninth and Tenth Amendments,\textsuperscript{91} while by contrast, the term “person” or “accused” appeared in the Fifth and Sixth Amendments.\textsuperscript{92} The Court found that the drafters of the Constitution distinguished between persons with “sufficient connection” to the United States—who are covered by the First, Second, Fourth, Ninth and Tenth Amendments—and the broader reach of “persons”—who are protected under the Fifth and Sixth Amendments.\textsuperscript{93}

The Verduco majority’s analysis is consistent with the reasoning used to deny First Amendment rights to excludable aliens in \textit{United States ex rel. Turner v. Williams}.\textsuperscript{94} \textit{Turner} declared that an excludable alien is not entitled to First Amendment rights because “[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law.”\textsuperscript{95} This language is echoed in Verduco.\textsuperscript{96}

\textsuperscript{87.} \textit{Id.}
\textsuperscript{88.} \textit{Id.} at 263.
\textsuperscript{89.} \textit{Id.} at 265, 274-75.
\textsuperscript{90.} \textit{Id.} at 265. The Court noted, however, that “this textual exegesis is by no means conclusive.” \textit{Id.}
\textsuperscript{91.} \textit{Id.}
\textsuperscript{92.} \textit{Id.} at 265-66.
\textsuperscript{93.} \textit{Id.} at 264-66.


\textsuperscript{95.} \textit{Turner}, 194 U.S. at 292 (emphasis added).

\textsuperscript{96.} Verduco, 494 U.S. at 265.
For foreign parties in *Noerr*-type situations, the implications of the *Verdugo* analysis are significant. Applying the *Verdugo* “sufficient connection” test to the First Amendment removes First Amendment protection from foreign parties acting overseas. This is particularly true because the *Noerr* Court's analysis of the underlying rationale for the immunity relies heavily on the term “the people.”

In a representative democracy such as this, [the legislative and executive] 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. 97

Further, considering that *Verdugo* and the cases following it involved criminal actions, the predominantly civil nature of U.S. antitrust law makes it harder to establish a case for First Amendment protection. Justice Brennan's dissent in *Verdugo* asserts that the “sufficient connection” test is met, at a minimum, when the U.S. government reaches its hands across its borders to grab foreign parties under U.S. criminal laws. 98 This extension of the sufficient connection doctrine is still inapplicable when dealing with Super 301 punitive tariffs. Super 301 punitive tariffs are governmental civil actions that apply only after the goods enter the United States. 99 Additionally, the punitive tariffs are paid by those purchasing the goods in the United States and only indirectly affect those outside the United States. 100

Subsequent lower court cases have attempted to clarify the distinction between people with and people without sufficient connection to the United States. 101 Furthermore, numerous


98. See *Verdugo*, 494 U.S. at 282-84 (Brennan, J., dissenting). But see id. at 271-72 (holding that “lawful but involuntary [presence] is not of the sort to indicate any substantial connection with our country”). An interesting corollary to this analysis is the criminal power present under the antitrust laws, and the Supreme Court’s approval of the government exercise of extraterritorial jurisdiction in *Hartford*. See *supra* notes 41-47 and accompanying text.


100. See id.

101. See *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995); see also *United States v. Lileikis*, 899 F. Supp. 802, 806 (D. Mass. 1995) (noting “the indisputable fact that the United States Constitution has never been purported to be of global application”).
Commentators have strongly disagreed with the "sufficient connection" test and its supporting analysis in criminal cases. Neither the courts nor the commentators, however, have addressed the First Amendment application to, and analysis of, the "sufficient connection" test, or the potential application of this standard to civil cases.

III. Threatened Group Boycott by Domestic Parties to Effect Government Action

A. Genuineness and Appropriate Actions

In \textit{Noerr}, the Court protected lobbying by joint action of competitors. The Court made this determination despite the lobbying parties' obvious economic self-interest in the ultimate governmental action and their intention to eliminate competition. The Court concluded that as long as the purpose of the joint lobbying activity was to pressure the legislature, the ethical or unethical nature of the actions was irrelevant to Sherman Act analysis. The \textit{Noerr} Court, however, distinguished between genuine lobbying to influence the government and sham petitioning as a pretense for unfair trade practices. Subsequent decisions have maintained this distinction, finding that anticompetitive petitioning activities "ostensibly directed toward influencing governmental action, [that are] a mere sham to cover . . . an attempt to interfere directly" with a rival's business relationships, will not receive \textit{Noerr} immunity.

For a long time, sham activities were virtually the only exception to \textit{Noerr} immunity. Within the last decade, however, courts have begun to question whether other types of lobbying activities are

\begin{footnotesize}
103. \textit{But see} Lamont \textit{v. Woods}, 948 F.2d 825, 834 (2d Cir. 1991) (applying the sufficient connection test to the Establishment Clause).
104. \textit{See supra} note 53 and accompanying text.
105. The Court provided as follows:
A construction of the Sherman Act that would disqualify people from taking public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.
\end{footnotesize}
inappropriate for Noerr immunity despite a genuine intent to influence government action. In Allied Tube & Conduit Corp. v. Indian Head, Inc., the Court stated that the Noerr doctrine does not extend to “every concerted effort that is genuinely intended to influence government action.”109 The scope of Noerr immunity depends upon “the source, context and nature of the anticompetitive restraint at issue.”110 The Noerr doctrine protects genuine attempts to obtain government action.111 Under certain conditions, however, lobbying that is ordinarily protected by Noerr may be unprotected because of unacceptable lobbying techniques.112 Noerr’s protective shield, for example, is removed in cases of illegal or unethical

109. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503 (1988); see also Coastal States Mkrg., Inc. v. Hunt, 694 F.2d 1358, 1371 n.42 (5th Cir. 1983) (stating that good faith litigation “brought in furtherance of an overall scheme to violate antitrust law is not entitled to immunity”); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1263 (9th Cir. 1982) (holding that when lobbying activity “is but a part of a larger overall scheme to restrain trade” Noerr immunity is not available).
110. Allied Tube, 486 U.S. at 499.
111. See Noerr, 365 U.S. at 144.
112. Allied Tube, 486 U.S. at 503-04.
behavior,113 commercial practices,114 and threats of boycott or retaliation against the government or third parties.115

113. Attempts to influence the government through bribery, fraud, or other illegal means do not merit Noerr protection. Allied Tube, 486 U.S. at 504; California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 513 (1972); Instructional Sys. Dev. Corp. v. Aetna Casualty & Sur. Co., 817 F.2d 659, 650 (10th Cir. 1987); Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733, 746 (8th Cir. 1982); Bieter Co. v. Blomquist, 1990-1 Trade Cas. (CCH) ¶ 69,083, at 63,659 (D. Minn. 1990); Central Telecommunications, Inc. v. City of Jefferson City, 589 F. Supp. 85, 89-90 (W.D. Mo. 1984); see Sacramento Coca-Cola Bottling Co. v. Local 150, Int’l Bhd. of Teamsters, 440 F.2d 1096, 1099 (9th Cir. 1971); see also Calkins, supra note 59, at 340, 352-56 (arguing that Noerr immunity “should not extend to unethical conduct such as misrepresentation, bribery and conspiracy”); Franklin A. Gevurtz, Politics, Corruption, and the Sherman Act After City of Columbia’s Blighted View, 27 U.C. Davis L. Rev. 141, 180 (1993) (arguing that bribery to obtain government action violates the Sherman Act if the “result is monopoly power in a relevant market”). But see City of Columbia v. Omni Outdoor Advertising, Inc., 489 U.S. 365, 381-88 (1991) (rejecting the “conspiracy” exception and finding that conduct disrupting a competitor’s business relationships did not fall within the “sham” exception to the Noerr doctrine); Mylan Lab., Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1063-64 (D. Md. 1991) (applying Omna); Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696, 704 (D. Colo. 1975) (no evidence of co-conspiracy). Additionally, unethical conduct and deceptive practices may constitute abuses not protected by Noerr immunity. Allied Tube, 486 U.S. at 499-500 (discussing unethical campaign conduct); Missouri v. National Org. for Women, Inc., 620 F.2d 1301, 1311-16 (8th Cir. 1980) (distinguishing between a publicity-boycott with legitimate social goals and a publicity-boycott that was “unethical and harmful”); Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1298 (5th Cir. 1971) (discussing abuse of administrative process). But see St. Joseph’s Hosp., Inc. v. Hospital Corp. of Am., 795 F.2d 948, 955 (11th Cir. 1986) (finding that Noerr shielded defendants’ delay tactics).

114. See Allied Tube, 486 U.S. at 507-08 & n.10 (finding that the standard-setting process of an unofficial private association is not a “quasi-legislative” activity but a commercial one); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-08 (1962) (denying Noerr immunity to a party “engaged in private commercial activity” when it sought to influence the Canadian government’s metal purchases); Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 462-68 (9th Cir. 1987), vacated, 487 U.S. 1213 (1988); Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 225 (7th Cir. 1975); Israel v. Baxter Lab., Inc., 466 F.2d 272, 278-79 (D.C. Cir. 1972); Woods Exploration & Prod. Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1298 (5th Cir. 1971); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir. 1970); TEC Cogeneration, Inc. v. Florida Power & Light Co., 1994-1 Trade Cas. (CCH) ¶ 70,564, at 72,075 (S.D. Fla. 1994), rev’d, 76 F.3d 1560 (11th Cir. 1996), modified, 86 F.3d 1028 (11th Cir. 1996); Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168, 176-79 (D. Del. 1979); Calkins, supra note 59, at 340. But see Total Benefit Serv., Inc. v. Group Ins. Admin., Inc., 875 F. Supp. 1228, 1241-42 (E.D. La. 1995) (holding that competitor’s attempt to influence mayor and school board were protected under Noerr).

115. See, e.g., FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 424-25 (1990) (denying Noerr protection to a boycott by court-appointed counsel); Sandy River Nursing Care v. Aetna Casualty, 985 F.2d 1138, 1142 (1st Cir. 1993) (concluding that Noerr does not immunize an economic boycott and price fixing conspiracy conducted by workers’ compensation insurers); Sacramento Coca-Cola Bottling Co. v. Local 150, Int’l Bhd. of Teamsters, 440 F.2d 1096, 1099 (9th Cir. 1971) (stating that Noerr immunity does not extend to threats and other coercive measures); Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891, 896-98 (W.D. Mo. 1985) (declining to extend Noerr immunity to defendants’ threats to government officials), aff’d, 800 F.2d 711, 717-25 (8th Cir. 1986);
The inappropriateness of using Noerr immunity to protect lobbying by threat was first raised in *Sacramento Coca-Cola Bottling Co. v. Local 150, International Brotherhood of Teamsters*. The *Sacramento Coca-Cola* court stated that a line must be drawn between acceptable lobbying activities of the type used in Noerr and Pennington, and lobbying activities that use threats of anticompetitive activities as a means to influence governmental action. The court stated that "there can be little reason to extend the special immunity of Noerr and Pennington to a type of 'communication' which includes threats and other coercive measures. There is no room for such tactics in a democratic system." Over the past decade, the courts have examined several cases in which parties have threatened the government and, indirectly, third parties with anticompetitive conduct. These courts have drawn a line between the use of techniques to obtain governmental action present in Noerr and Pennington, and the use of threats as part of the lobbying itself.

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Osborn v. Pennsylvania-Delaware Serv. Station Dealers' Ass'n, 499 F. Supp. 553, 558 (D. Del. 1980) (stating that Noerr immunity did not apply where a boycott produced anticompetitive effects); see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 205 (Supp. 1996) (analyzing unnecessarily harmful political activity); Fischel, supra note 59, at 81 (discussing the limits of Noerr immunity). But see Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1366-67 (5th Cir. 1983) (interpreting Noerr to protect legitimate publicity and threats of litigation); Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612, 620-21 (6th Cir. 1982) (finding that defendants' lobbying efforts to prevent changes in state law were not prohibited by the Sherman Act); Alexander v. National Farmers Org., 687 F.2d 1175, 1200-03 (8th Cir. 1982) (finding that defendants' legal claims contained genuine disputes and were not actionable as antitrust violations); Federal Prescription Serv., Inc. v. American Pharm. Ass'n, 663 F.2d 253, 262-63 (D.C. Cir. 1981) (stating that lobbying directed at state boards of pharmacy is "securely within the protection of Noerr"); Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759, 769 (M.D. Pa. 1980) (finding Noerr doctrine protected gasoline retailers' boycott intended only to express dissatisfaction with Department of Energy policy), rev'd on other grounds, 634 F.2d 127 (3d Cir. 1980).


118. *Sacramento Coca-Cola*, 440 F.2d at 1099.

119. Id.

120. See, e.g., Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1245-47 (9th Cir. 1982) (where defendant used sham protests to prevent plaintiff from lowering rates); Mylan Lab., Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1058 (D. Md. 1991) (where defendant drug manufacturers paid gratuities to the Food and Drug Administration in order to accelerate approval of their drug applications).

121. *Clipper Exxpress*, 690 F.2d at 1253-54; *Mylan Lab.*, 770 F. Supp. at 1063; see supra note 109 and accompanying text.
B. Political/Economic Dichotomy

The political/economic dichotomy is reflected by the Noerr Court in the following statement:

To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people can not 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.122

As previously noted, the Court in Noerr identified two rationales for immunizing political activity: (1) Because of the right of the people to approach their government (and the need for the government to collect information from those who approach it), Congress never intended the Sherman Act to address political lobbying activities; and (2) even if Congress had intended such coverage, the First Amendment would likely preclude the application of the Sherman Act to political lobbying activities.

The Noerr doctrine established that genuine lobbying by association of two or more competitors, to obtain through governmental action, benefits otherwise prohibited by the antitrust laws, was protected political rather than economic activity.123 A primary consideration in that analysis, however, is the degree of economic self-interest exhibited in the nature of the lobbying activity itself.124 Noerr immunity is preserved where there is indirect economic self-interest, as in civil rights and freedom of expression cases such as NAACP v. Claiborne Hardware Co.,125 or where there is “incidental” economic effect on competitors and third parties.126 Significant

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122. Noerr, 365 U.S. at 137.
124. See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 510 n.13 (stating that Noerr immunity does not apply where an “economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants”) (emphasis in original).
125. NAACP v. Claiborne Hardware Co., 458 U.S. 866, 914 (1982); see also Missouri v. National Org. for Women, Inc., 690 F.2d 1301, 1311-12 (8th Cir. 1980) (holding that the National Organization for Women’s effort to organize a convention boycott of states that had not ratified the Equal Rights Amendment was beyond the scope of the Sherman Act and was protected by the First Amendment).
126. Allied Tube, 486 U.S. at 499.
economic self-interest expressed through anticompetitive lobbying techniques, however, is not immune, despite the existence of a genuine intent to obtain legislative or executive branch action, and even though government legislative activity may provide the imprimatur of government action.

Since horizontal group boycotts of competitors, suppliers, and buyers are inherently economic activities, the courts have historically limited Noerr immunity to those boycott activities that are clearly "political" in nature. The political/economic dichotomy, as applied to the lobbying activity in group boycott situations, was examined by the Supreme Court most recently in SCLTA. In SCLTA, a group of attorneys, regularly appointed by the District of Columbia to represent indigents before its courts, organized a group boycott in an attempt to obtain an increase in the fees paid to the appointed lawyers. By doing so they would raise their incomes and arguably increase the number of lawyers willing to represent indigents.

The Supreme Court observed that Noerr does not protect an inherently anticompetitive activity. "[I]n the Noerr case the alleged restraint of trade was the intended consequence of public action; in this case the boycott was the means by which respondents

127. See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424-25 (1990); Sandy River Nursing Care v. Acta Casualty, 985 F.2d 1138, 1142 (1st Cir. 1993); see also Allied Tube, 486 U.S. at 503-04 (holding that the scope of Noerr immunity depends on the context and nature of the anticompetitive restraint at issue); Otter Tail Power Co. v. United States, 410 U.S. 366, 379-80 (1973) (holding that power company that engaged in anticompetitive activities for the purpose of preserving its dominant position in the market is not insulated from antitrust regulation); Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, 814 F.2d 558, 375-76 (7th Cir. 1987) (stating that "[w]hen private parties help themselves to a reduction in competition, the antitrust laws apply"); Cow Palace Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696, 702 (D. Colo. 1975) (indicating that "one does not escape Sherman Act proscriptions by camouflaging true antitrust violations with the plume of 'political activity'"). But cf. Missouri v. National Org. for Women, Inc., 620 F.2d 1301, 1311-12 (finding that the social motivation behind boycott activity designed to gather support for the Equal Rights Amendment does not equate to an economic interest); Osborn v. Pennsylvania-Delaware Serv. Station Dealers' Ass'n, 499 F. Supp. 553, 556 (D. Del. 1980) (upholding Noerr exemption irrespective of economic interest because "the scope of the Noerr exemption is properly defined by reference to the scope of protection afforded by the First Amendment").

128. See, e.g., Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076, 1079-81 (1976) (holding that the "self-interested plea of one competitor that another should be denied a permit" is immune from antitrust liability); cf. Allied Int'l, Inc., v. International Longshoremen's Ass'n, 640 F.2d 1568, 1380-81 (stating that a labor union's limited refusal to handle goods was a political protest outside the reach of the Sherman Act).


130. Id. at 414-16.

131. See id. at 424-25.
sought to obtain favorable legislation." The Court reiterated its language in *Allied Tube* that *Noerr* does not extend to every concerted activity "genuinely intended to influence governmental action." The Court refused to immunize "boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action." The Court also reiterated its distinction between political and economic activity in the application of *Noerr* immunity. Due to the pervasive anticompetitive effects of boycotts, the Court stated that *Noerr* immunity will not be allowed in cases where "a clear objective of the boycott is to economically advantage the participants." The Court restated that group boycott lobbying is immune under *Noerr* where the group's economic interest is indirect, or where the economic impact on competitors or other third parties is incidental. The Court refused, however, to grant immunity to boycotters who receive a direct economic benefit from the lobbying activity. The *SCTLA* defendants claimed their speech was political because they were attempting to secure increased access to legal representation for indigent parties through the increase in pay to attorneys. The Court noted, however, "it is undisputed that their immediate objective was to increase the price they would be paid for their services."

The Court also declined to limit the per se application of the Sherman Act because of the boycott's "expressive" attributes. The Court concluded under the test it enunciated in *United States v. O'Brien* that the significance of the alleged "expressive component" in the boycott was exaggerated. The Court noted that every lobbying activity has some expressive (as opposed to economic) component and that the overwhelming weight of the activities present in *SCTLA* was economic in purpose and warranted the government's regulation of the "nonspeech" component. The Court found that despite the association's genuine attempt to

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132. *Id.* (emphasis in original).
133. *Id.* at 425 (quoting *Allied Tube*, 486 U.S. at 503).
134. *Id.* (citing *Allied Tube*, 486 U.S. at 503).
135. *Id.* at 425-31.
136. *Id.* at 428.
137. *Id.* at 425-28.
138. *Id.* at 428.
139. *Id.* at 427.
140. *Id.* at 430-31.
142. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 430.
143. *Id.*
“lobby” the District of Columbia government, its lobbying activities were a blatantly illegal, per se horizontal group boycott.\textsuperscript{144} The Court stated that the association’s boycott was intended to provide direct economic benefit from the lobbying itself, rather than traditional lobbying to obtain government action.\textsuperscript{145} For this reason the group boycott was not protected by \textit{Noerr} immunity.\textsuperscript{146}

The only significant decision occurring after \textit{SCTLA} and applying the \textit{Noerr} doctrine is \textit{Sandy River Nursing Care v. Aetna Casualty}.\textsuperscript{147} In \textit{Sandy River}, the court addressed the political/economic dichotomy and the use of threats as part of anticompetitive “lobbying” activity, both directly against the government and indirectly against third parties.\textsuperscript{148} The plaintiffs alleged that a group of insurance companies in Maine conspired to fix prices, and threatened to conduct a group boycott by withdrawing from the workers’ compensation market.\textsuperscript{149} The plaintiffs further alleged that the companies’ intent was to coerce the Maine legislature into passing legislation that would permit higher rates for workers’ compensation insurance.\textsuperscript{150}

First, the insurance companies refused to insure employers voluntarily, thereby forcing the employers to obtain workers’ compensation insurance through the statutorily structured “residual” or “involuntary” system.\textsuperscript{151} Second, the insurers threatened to withdraw all workers’ compensation coverage from the state if higher rates were not approved.\textsuperscript{152} This action proved effective. The legislature averted the crisis by approving the increase in rates.\textsuperscript{153} Subsequently, the governor enacted a law raising the rates for workers’ compensation insurance. Of course, the indirect effect of this “lobbying,” and the direct effect of the legislation, was an increase in insurance premiums for employers.

Citing and applying \textit{SCTLA}, the First Circuit held that the group boycott was an economic (as opposed to political) activity that constituted a per se violation of the Sherman Act.\textsuperscript{154} The court

\begin{itemize}
  \item \textsuperscript{144} \textit{Id}. at 436.
  \item \textsuperscript{145} \textit{Id}. at 436 n.19.
  \item \textsuperscript{146} \textit{Id}. at 436.
  \item \textsuperscript{147} \textit{Sandy River Nursing Care v. Aetna Casualty}, 985 F.2d 1138 (1st Cir. 1993) (affirming summary judgment in the district court).
  \item \textsuperscript{148} \textit{Id}.
  \item \textsuperscript{149} \textit{Id}. at 1140.
  \item \textsuperscript{150} \textit{Id}.
  \item \textsuperscript{151} \textit{Id}.
  \item \textsuperscript{152} \textit{Id}.
  \item \textsuperscript{153} \textit{Id}.
  \item \textsuperscript{154} \textit{Id}. at 1147.
\end{itemize}
observed that these anticompetitive activities did not fall within the Noerr doctrine because they were attempts to influence the legislature through an economic boycott that directly affected the marketplace.\textsuperscript{155} Unlike SCLTA, the anticompetitive conspiracy was not intended to harm the government as a commercial participant in the marketplace, but to prompt it to pass legislation favoring the conspirators.\textsuperscript{156} The court emphasized that the test for Noerr’s applicability is whether the boycott has a direct effect on the marketplace.\textsuperscript{157} The test does not turn on whether the government is a market participant.

IV. THE THREATENED GROUP BOYCOTT BY FOREIGN PARTIES TO EFFECT U.S. GOVERNMENT ACTIONS

A. The First Amendment

As the preceding analysis reveals, it is difficult for foreign parties without “sufficient connection” to the United States to claim Noerr immunity as a shield against application of the Sherman Act.\textsuperscript{158} In Verdugo, the Supreme Court determined that a person must have a “sufficient connection” with the United States to be classified as part of “the people” in order to gain rights under the Fourth Amendment (and, by implication, the First Amendment).\textsuperscript{159} “The people” is defined as a class of persons who are part of the U.S. national community or who have otherwise developed sufficient connection with this country to be considered part of the community.\textsuperscript{160}

As the Noerr decision is replete with references to “the people,”\textsuperscript{161} the analysis in Verdugo is particularly salient. Foreign parties that intentionally remain beyond the borders of the United States to avoid its jurisdiction indicate an overt rejection of any interest in the protection of the U.S. Constitution.

\textsuperscript{155} Id. at 1143.

\textsuperscript{156} Id. A significant distinction can be drawn between the “lobbying” of the District of Columbia government in Superior Court Trial Lawyers Association and the “lobbying” in Sandy River. In the former case, the government set the hourly rate of compensation it would pay for legal services and was the direct object of the lobbying. Conversely, in Sandy River the government was operating as a rate setter for third parties. This distinction is not significant in the context of this Article. The importance of the decisions in Superior Court Trial Lawyers Association and Sandy River is that, in each case, the court saw the anticompetitive group boycott as lobbying activity unworthy of Noerr immunity.

\textsuperscript{157} Id.


\textsuperscript{159} Id.

\textsuperscript{160} Id.

Even advocates who believe that foreign parties should be treated equally with domestic parties under the \textit{Noerr} doctrine must acknowledge that foreign entities have the ability to hide behind a legal structure that places them outside U.S. jurisdiction. Although there is a superficial equality in treating foreign entities in the same manner as domestic entities, especially in the case where foreign parties are responding to activities and threats emanating from the U.S. government, the efforts by those foreign parties to avoid the jurisdiction of the United States should exclude their “lobbying” activities from the constitutional underpinnings of the \textit{Noerr} doctrine.\textsuperscript{162} Of course, foreign parties may use surrogate speakers (such as their wholly owned or controlled U.S. subsidiaries or registered U.S. trade associations) to accomplish the same end, and receive \textit{Noerr} immunity to the same extent as all other domestic parties. Delegation of lobbying to these subsidiaries, however, may result in destruction of the corporate shield between the subsidiary and the parent companies. By “piercing the corporate veil,”\textsuperscript{163} or through the application of the “unitary” theory,\textsuperscript{164} courts may be able to punish the foreign party for failing to respect the corporate form. This would be a very high price to pay to secure \textit{Noerr} immunity.

On the other hand, the \textit{Noerr} Court also spoke about the government’s need to be freely informed of the wishes of its people.\textsuperscript{165} The failure to provide \textit{Noerr} immunity to foreign persons does not remove the opportunity to lobby the government legally; it merely removes the opportunity to act with impunity in a manner which would otherwise violate the Sherman Act. Since the purpose of the \textit{Noerr} doctrine is to ensure that “the people” have protected access

\textsuperscript{162} See \textit{id.} at 137-38 (stating that the right to petition is one of the freedoms protected by the Bill of Rights, allowing “the people” to make their wishes known to their representatives).


\textsuperscript{164} See generally \textit{Phillip I. Blumberg, The Multinational Challenge to Corporation Law} 95-100 (1995) (discussing the unitary tax cases).

\textsuperscript{165} Noerr, 365 U.S. at 137-38.
to "their" government, foreign entities that set up domestic subsidiaries to limit their exposure to U.S. laws should not be allowed to claim the need, much less the right, of protected access.

B. The Political/Economic Dichotomy

Even if a court finds that Noerr immunity protects lobbying activities of foreign parties in the same manner as it protects U.S. parties, it is still unclear whether the threatened group boycott by the Japanese automobile companies and their trade association is protected as lobbying under the Noerr doctrine.166

The Japanese lobbying focused on preventing the executive branch of the U.S. government from exercising its political power to apply punitive tariffs in response to the alleged foreign anticompetitive practices.167 Although the activity threatened by the Japanese automobile companies and their trade association was a genuine attempt to deter U.S. government action, the clear economic self-interest of the lobbying parties removes this activity from the "political" boycott protection set forth in Claiborne Hardware.168 Further, despite the genuineness of the lobbyist's goal, Noerr and its progeny drew a distinction between competitors acting together in an attempt to persuade the government to take particular action, and competitors using group boycotts or threats of boycott as means to influence governmental actions.169 The lobbying activity by the Japanese automobile makers seems uncomfortably close to the group boycott lobbying activity left unprotected by the courts in the SCTLA and Sandy River decisions.170

Direct boycotting threats to the government, and indirect threats to third parties were held to be improper methods of lobbying and undeserving of Noerr protection.171 Threatening a group boycott was expressly held to be "unprotected" activity.172 Although the impetus for the threatened boycott was retaliation for the U.S. gov-

166. See Sims & Scott, supra note 8, at 588-89; Gorrie, supra note 31, at 265 (observing that as national boundaries shift, and the global economy grows increasingly interdependent, it has become clear that political rights and economic rights cannot be easily segregated); Kindred, supra note 14.

167. Nothing in this lobbying effort would deny the opportunity for the executive branch or private parties to litigate the underlying claims of alleged extraterritorial anticompetitive activities via the Sherman Act and under Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993).


169. Noerr, 365 U.S. at 137.

170. See supra notes 127-134 and accompanying text.

171. See Sandy River Nursing Care v. Aetna Casualty, 985 F.2d 1138, 1142-43 (1st Cir. 1993).

ernment's threat to impose punitive tariffs, there was a clear economic motivation for the foreign parties to fight the tariffs. Rather than being "incidental," the motivation for this lobbying activity comported with the economic self-interest that formed the basis of the SCTLA and Sandy River holdings.\footnote{See id; Sandy River, 985 F.2d at 1142-43.}

In the Japanese automakers case, the economic self-interest is apparent not only in attempting to avoid the imposition of punitive tariffs, an activity arguably protected by the Noerr doctrine, but also in coercing the U.S. government to protect the economic benefits currently being received by the foreign boycotters. These lobbying practices fit far better into the threat and boycott lobbying categories condemned in SCTLA and Sandy River, than into the lobbying focused on government action approved in Noerr.

V. CONCLUSION

As U.S. companies become more sophisticated and concerned about economic barriers hindering competition overseas, the U.S. government will increasingly threaten to impose punitive tariffs on the importation of goods from countries whose informal or government sanctioned system of trade barriers prevents access to U.S. goods and services. Concomitantly, foreign companies will be tempted to threaten retaliatory action outside the United States to coerce the U.S. government to relent.

The potential for a successful antitrust challenge in the United States to the threatened retaliatory activity will vary depending on the nature of the activity and the extent of the foreign industry's market power. Foreign parties may discover that their attempts to retaliate against the U.S. government are vulnerable to attack under the Sherman Act. Those foreign entities that intentionally isolate themselves from the reach of U.S. law and U.S. courts may not be qualified persons under the constitutional rationale for Noerr immunity. Even if they are qualified, the "lobbying" activity may not fit into the type of lobbying protected under the Noerr doctrine. Consequently, it is imperative that foreign companies consider the possible illegalities of their "lobbying" plans before using anticompetitive measures to challenge the imposition of U.S. punitive tariffs.

\footnote{See id; Sandy River, 985 F.2d at 1142-43.}