

ESSAY

NOERR-PENNINGTON IMMUNITY AND THE ALIEN TORT STATUTE

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To what extent should a court risk chilling the right to petition the government by allowing evidence of unpopular petitioning to prove the violation of customary international law? In two recent lower court cases, plaintiffs alleging human rights abuses brought suit in federal court under the Alien Tort Statute (“ATS”) based on petitioning activity, using such activity to show the connection to U.S. territory required for an ATS claim to go forward.

This Essay argues that courts should not allow the use of evidence of First Amendment-protected petitioning to support a claim for which the ATS provides jurisdiction. Courts can accomplish this shift by extending the Noerr-Pennington doctrine, originally developed in antitrust law. Despite the potential to restrict a remedy for serious human rights abuses, this proposed doctrinal shift will safeguard constitutionally protected activity, keep faith with the Supreme Court’s command that the scope of ATS claims be kept narrow, and help police the Supreme Court’s recent announcement that the ATS doesn’t give rise to liability for extraterritorial conduct.

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* Copyright © 2015 by Aaron P. Brecher, Attorney, Lane Powell PC, Seattle, Washington. Disclosure: I was clerking for the U.S. Court of Appeals for the Ninth Circuit when it decided *Doe I v. Nestle USA, Inc.*, but I did not work on the case and my discussion here is drawn from the public record. The views expressed are my own. I am grateful to Wendy Wang for helpful comments. I also thank Shelina Kurwa, Evan Shepherd, Susan Smelcer, Angela Wu, and the entire staff of the *New York University Law Review* for their invaluable aid in getting this Essay ready for publication.

INTRODUCTION

To what extent should a court risk chilling the right to petition the government by allowing evidence of unpopular petitioning to prove the violation of customary international law?

In *Doe I v. Nestle USA, Inc.*, three former child slaves brought suit in federal court under the Alien Tort Statute (“ATS”),¹ accusing chocolate manufacturers and distributors of aiding and abetting child slavery in the Ivory Coast.² The *Doe* plaintiffs allege that, as children, they were forced to work fourteen-hour days six days per week on Ivorian cocoa plantations, were frequently beaten, and observed horrific torture inflicted on attempted escapees.³ The district court dismissed the claims, but the U.S. Court of Appeals for the Ninth Circuit concluded that violating the prohibition against slavery is a claim for which the ATS provides jurisdiction and that the *Doe* plaintiffs plausibly alleged the state of mind necessary for the defendants to have aided and abetted child slavery.⁴ The court allowed the plaintiffs to replead their claims in a way that complies with the U.S. Supreme Court’s requirement that to overcome the presumption against extraterritorial application, conduct underlying ATS claims sufficiently “touch and concern” U.S. territory.⁵ According to the court, one reason that the claims against the defendants are plausible is that the defendants lobbied against congressional passage of a slavery labeling law for chocolate importers.⁶

In *Sexual Minorities Uganda v. Lively*, a group seeking fair treatment for lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) people in Uganda brought suit under the ATS against an American minister for aiding and abetting a crime against humanity by trying “to foment . . . an atmosphere of harsh and frightening

¹ For a quick overview of the ATS, see *infra* Part I.

² 766 F.3d 1013, 1016 (9th Cir. 2014), *reh’g en banc denied*, 788 F.3d 946 (9th Cir. 2015).

³ *Id.* at 1017.

⁴ See *id.* at 1022, 1026 (holding that “the prohibition against slavery is universal and may be asserted against the . . . defendants” and that the “allegations are sufficient to satisfy the *mens rea* required” of their claim).

⁵ See *id.* at 1027–28 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013)) (“Rather than attempt to apply the amorphous touch and concern test on the record currently before us, we conclude that the plaintiffs should have the opportunity to amend their complaint in light of [an intervening Supreme Court decision].”).

⁶ See *id.* at 1017, 1025 (discussing defendant’s lobbying efforts and the corresponding intent shown by these and other actions).

repression against LGBTI people” in that country.⁷ Denying the minister’s motion to dismiss, the district court ruled that there was a sufficient connection to U.S. territory because the defendant is a U.S. citizen and because much of his repressive conduct—including the publication of two nauseatingly homophobic books and developing strategies to seek passage of a draconian anti-LGBTI law in Uganda—occurred in the United States.⁸

Both *Doe* and *Sexual Minorities Uganda* seek to impose liability on defendants engaged in petitioning activity, using such activity to show the connection to U.S. territory required for an ATS claim to go forward. This Essay argues that courts should not allow the use of evidence of First Amendment-protected petitioning to support a claim for which the ATS provides jurisdiction. Courts can accomplish this shift by extending the *Noerr-Pennington* doctrine, originally developed in antitrust law.⁹ Despite the potential to restrict a remedy for serious human rights abuses, this proposed doctrinal shift will safeguard constitutionally protected activity, keep faith with the Supreme Court’s command that the scope of ATS claims be kept narrow, and help police the Supreme Court’s recent announcement that the ATS doesn’t give rise to liability for extraterritorial conduct.

I

THE ATS, COMMON LAW CLAIMS, AND EXTRATERRITORIALITY

The ATS’s original meaning and purpose could charitably be called unsettled. Judge Friendly described the ATS as “a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came.”¹⁰ The ATS gives federal courts “jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹¹ While the statute is purely jurisdictional, the Supreme Court held in *Sosa v. Alvarez-Machain* that federal common law creates private rights of action that can be pursued under the ATS even absent a separate statute or treaty.¹² The Court sharply limited those circumstances, however, ruling that the common law

⁷ 960 F. Supp. 2d 304, 309 (D. Mass. 2013).

⁸ See *id.* at 312–13, 321–22 (detailing defendant’s conduct, a substantial part of which is alleged to have occurred within the United States).

⁹ For a brief overview of this doctrine, see *infra* Part II.

¹⁰ *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.), *abrogated by* *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

¹¹ 28 U.S.C. § 1350 (2012).

¹² See 542 U.S. 692, 724–25 (2004) (expressing the belief that the common law would provide the basis for liability under ATS jurisdiction).

claims for which the ATS gives jurisdiction exist only for violations of clearly established customary international norms.¹³ Moreover, in *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court held that the ATS covers only those common law claims that sufficiently “touch and concern” U.S. territory.¹⁴ This rule against extraterritorial application of common law claims brought under the ATS stems from a general presumption against reading statutes to have extraterritorial reach.¹⁵ *Kiobel* rejected claims brought by Nigerian nationals who accused foreign oil companies of aiding and abetting atrocities committed by the Nigerian government.¹⁶ The presumption against extraterritoriality barred the claims because “all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption”¹⁷ As the concurring opinions in *Kiobel* made clear, determining what it means for conduct to “touch and concern” U.S. territory, such that the presumption against extraterritorial application may be overcome, will continue to be litigated.¹⁸

Because of the typical pre-*Kiobel* use of the ATS in recent decades to seek compensation for wrongs committed outside the United States,¹⁹ ATS plaintiffs will understandably look for any hint that the activities for which they seek relief touch and concern U.S. territory. Possible activities include decisions made in corporate boardrooms in the United States, such as the decision to lobby the U.S. government. But to the extent that lobbying activities are the sole—or at least the strongest—tie to U.S. territory, there is an outsized risk that protected, even if controversial or unpopular,

¹³ See *id.* at 725 (stating that to be recognized as a claim under the ATS, a customary international norm must be “accepted by the civilized world and defined with a specificity comparable to” three paradigmatic eighteenth-century norms identified by the Court).

¹⁴ 133 S. Ct. 1659, 1669 (2013).

¹⁵ See *id.* at 1664, 1669 (citing *Morrison*, 561 U.S. at 265) (noting the purpose of the presumption against extraterritoriality).

¹⁶ See *id.* at 1662–63 (detailing plaintiff’s allegations of abuse connected to silencing ongoing environmental protest).

¹⁷ *Id.* at 1669.

¹⁸ See *id.* at 1669 (Kennedy, J., concurring) (“The opinion for the Court is careful to leave open a number of significant questions about the reach and interpretation of the Alien Tort Statute.”); *id.* at 1669 (Alito, J., concurring) (stating that the Court’s test for displacing the presumption against extraterritoriality “leaves much unanswered”).

¹⁹ Before *Kiobel* established that the presumption against extraterritoriality applied to claims brought under the ATS, the leading modern ATS case gave relief to a Paraguayan family whose son had been tortured by police in Paraguay. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (reversing dismissal of the complaint and remanding for further proceedings).

activity will be used to circumvent *Kiobel* and make out a claim which, in reality, the ATS does not give federal courts jurisdiction to hear. That's where *Noerr-Pennington* immunity comes in.

II

THE *NOERR-PENNINGTON* DOCTRINE CAN EXCLUDE EVIDENCE OF PETITIONING

The Supreme Court has ruled that efforts to petition the government, even if undertaken for anticompetitive purposes and with anticompetitive effects, lie beyond the reach of the antitrust laws.²⁰ The *Noerr-Pennington* doctrine, named for the cases that first described it, has been used to reject “attempt[s] to base a Sherman Act conspiracy on evidence consisting entirely of activities of competitors seeking to influence public officials”²¹ and avoids transgressing First Amendment petitioning rights by extending immunity from antitrust liability to genuine efforts to influence any branch of government.²²

So far, so good.

But here's where things get a bit tricky for my theory. *Pennington* itself says that evidence of petitioning activities, “which . . . are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.”²³ Moreover, the Supreme Court ruled in *Wisconsin v. Mitchell* that the First Amendment “does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.”²⁴

Where, however, there is little evidence of an antitrust violation other than efforts to petition some branch of government, lower courts have sometimes concluded such evidence should be excluded.²⁵

²⁰ *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (“*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.”); see *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135–41 (1961) (rejecting the claim that efforts to petition the government could be proscribed under the Sherman Act, because imposing liability would both hamper government’s ability to regulate trade and raise a serious First Amendment question).

²¹ *Pennington*, 381 U.S. at 669.

²² See Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 *RUTGERS L. REV.* 965, 965–66 (2003) (commenting on the meaning of *Noerr* as originally conceived). The First Amendment protects the right of the people “to petition the government for a redress of grievances.” U.S. CONST. amend. I.

²³ *Pennington*, 381 U.S. at 670 n.3 (citations omitted).

²⁴ 508 U.S. 476, 489 (1993) (holding that a sentencing enhancement for violence motivated by racial animus does not violate the First Amendment).

²⁵ See Michael E. Lewyn, *The Admissibility of Evidence Protected by Noerr-Pennington*, 3 *ANTITRUST* 28, 28 (Spring 1989) (discussing when evidence is likely

For example, in a class action alleging price-fixing of credit card interest rates among banks, the only evidence of a conspiracy other than the parallel interest rates was that the defendants had hired a lobbyist who had successfully pushed for legislation approving increased interest rates.²⁶ The Seventh Circuit upheld the district court's grant of summary judgment to the defendants and its refusal to consider the lobbying evidence, reasoning that the evidence was far more suggestive of petitioning immune from liability than conspiratorial intent.²⁷ The Tenth Circuit also upheld summary judgment for an ambulance service accused of monopolizing the county ambulance market.²⁸ There, the only evidence of market power was the company's market share, yet most of the company's business came from a city-granted franchise.²⁹ The court held that evidence of market share derived from the defendant's lobbying to acquire and maintain the franchise with the city could not therefore be considered.³⁰ In addition, a district court concluded that "the exclusion of 'purpose and character' evidence consisting of conduct clearly embraced by *Noerr-Pennington* should be the rule rather than the exception in an antitrust case."³¹ It's this use of *Noerr-Pennington* to exclude evidence that most interests me.

III

NOERR-PENNINGTON SHOULD BE EXTENDED TO ATS CLAIMS

Other legal areas have already incorporated First Amendment avoidance doctrines, whether *Noerr-Pennington* or something similar.

inadmissible under *Noerr* doctrine); see also FED. R. EVID. 403 (permitting courts to exclude relevant evidence if its probative value is substantially outweighed by a danger of undue prejudice or confusing the issues).

²⁶ See *Weit v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 641 F.2d 457, 458, 461–66 (7th Cir. 1981) (holding that summary judgment was appropriate because there was no significant evidence of a conspiracy among the banks to fix interest rates).

²⁷ See *id.* at 466–67 (expressing belief that the district court correctly excluded evidence of the concerted lobbying effort).

²⁸ See *Bright v. Moss Ambulance Serv., Inc.*, 824 F.2d 819, 820–21 (10th Cir. 1987) (holding that there was insufficient evidence for trial of monopolization and attempted monopolization by defendant ambulance service).

²⁹ See *id.* at 824 (noting plaintiffs advance no indicia of monopolization beyond market share).

³⁰ See *id.* at 823 (affirming the district court's decision to exclude lobbying evidence); see also Lewyn, *supra* note 25, at 28–29 (discussing *Bright*, 824 F.2d 819, and *Weit*, 641 F.2d 457).

³¹ *U.S. Football League v. Nat'l Football League*, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988) (granting summary judgment to defendants where a newly established football league and some of its member franchises brought antitrust claims against an established football league and some of its member franchises).

Extending *Noerr-Pennington* immunity as an evidentiary bar to ATS claims serves two major functions: (1) it supports the Supreme Court's requirements—narrow construction and imposing liability only for conduct that touches and concerns U.S. territory—for ATS claims; and (2) it guards against chilling First Amendment freedoms.

Noerr-Pennington has already been extended beyond the antitrust context. Other areas in which the doctrine has been held to preclude liability for petitioning activity include civil RICO³² and tortious interference with business relations.³³ And at least one scholar has suggested that it might apply to ATS claims.³⁴ *Noerr-Pennington*'s restrictions on certain uses of evidence, which lower courts have recognized, can be applied to ATS claims as well.

But just because courts can expand the doctrine, should they? For starters, a narrow, cautious approach to recognizing those federal common law claims for which the ATS provides jurisdiction is consistent with the Supreme Court's rulings in *Sosa v. Alvarez-Machain* and *Kiobel*. For violations of customary international norms, federal common law creates the substantive underlying claim brought under the ATS.³⁵ The Court is increasingly skeptical of judicial creativity in expanding rights of action through federal common law, even in the foreign affairs realm, once an area where federal common law had flourished.³⁶ Indeed, antitrust law is itself governed largely by

³² See *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 934–36 (9th Cir. 2006) (affirming the dismissal of a civil RICO claim and holding that the *Noerr-Pennington* doctrine requires courts to, if possible, construe federal statutes so as not to reach activity that arguably falls under the First Amendment's Petition Clause).

³³ See *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 645, 649–50 (7th Cir. 1983) (affirming, based in part on *Noerr-Pennington*, grant of summary judgment to defendants on claims of tortious interference with prospective business advantage and deliberate interference in the plaintiff's public offering).

³⁴ See Eugene Kontorovich, *The Cross-Cutting Politics of the ATS and Universal Jurisdiction*, THE VOLOKH CONSPIRACY (Apr. 6, 2012, 11:45 AM), <http://volokh.com/2012/04/06/the-cross-cutting-politics-of-the-ats-and-universal-jurisdiction/> (“An interesting question this case raises is whether the *Noerr-Pennington* doctrine applies to the ATS generally, and whether it applies extraterritorially. . . . *Noerr-Pennington* has been extended to a variety of torts and to RICO actions, why not ATS?”).

³⁵ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (accepting the notion that ATS jurisdiction includes the implicit sanction to hear a limited category of cases defined by international norms and recognized at common law).

³⁶ See Bradford R. Clark, *Tel-Oren, Filartiga, and the Meaning of the Alien Tort Statute*, 80 U. CHI. L. REV. DIALOGUE 177, 186–87 (2013), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Clark_Online.pdf (describing the *Sosa v. Alvarez-Machain* Court's reasoning that the dominant understanding of the common law had changed over time and that a restrained approach to the judicial recognition of private rights of action was appropriate); Aaron P. Brecher, Book Note, *Some Kind of Judge: Henry Friendly and the Law of Federal Courts*, 112 MICH. L. REV. 1179, 1185–86 (2014) (explaining that the Supreme Court “has moved from

federal common law,³⁷ and *Noerr-Pennington* is a judge-made constitutional avoidance doctrine limiting its reach. Specifically, applying *Noerr-Pennington* to ATS claims is consistent with *Sosa v. Alvarez-Machain*'s instruction that courts be cautious in recognizing claims under the ATS, an instruction rooted in concerns about judge-made law and especially in apprehension about interfering with foreign relations without guidance from the elected branches.³⁸ In ruling that the presumption against extraterritoriality applies to ATS claims, *Kiobel* similarly expressed concern about clashes with other countries' interests absent a clear command from Congress.³⁹ Expanding the *Noerr-Pennington* doctrine, which would preclude liability for certain conduct and prevent the introduction of evidence about similar conduct, would advance the interests in narrowing the recognition of ATS claims that the Supreme Court emphasized.

Second, expanding *Noerr-Pennington* immunity to ATS claims will guard against chilling activity protected by the First Amendment. An otherwise unobjectionable regulation may impermissibly deter expression protected under the First Amendment.⁴⁰ Chilling effect reasoning cuts across several procedural and substantive aspects of First Amendment doctrine. Procedurally, the chilling effect doctrine loosens normal standing rules by allowing claims to sometimes move forward based only on a fear of future government speech restriction, rather than the concrete injury usually required for federal courts to hear cases.⁴¹ Substantively, courts are "tolerant of a certain degree of imprecision in legislative line drawing . . . [and] normally [accepting of] some overdeterrence as the inevitable result of lawmaking"

a position fairly solicitous of private rights of action to one that is more restrictive," and that courts are now more reluctant to create common law rules in the foreign affairs realm, which had "traditionally [been] an uncontroversial domain of judicial lawmaking" (footnote omitted)).

³⁷ See Thomas A. Piraino, Jr., *An Antitrust Common Law for the Twenty-First Century*, 2009 UTAH L. REV. 635, 637 ("When Congress enacted the principal federal antitrust statutes, it allowed the courts considerable leeway to devise a federal common law of competition.").

³⁸ See *Alvarez-Machain*, 542 U.S. at 725–28 (noting the decline in judicial willingness to create federal common law and expressing wariness of entering a ruling that could affect foreign relations and intrude into an area best governed by the elected branches).

³⁹ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (noting that Congress should clearly express its will before the courts interfere in the foreign relations of the United States).

⁴⁰ See Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1649–51 (2013) (detailing instances where traditional principles were displaced when there were First Amendment chilling concerns).

⁴¹ See Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1483 (2013) (discussing instances where procedural requirements are diminished in First Amendment context).

outside the First Amendment context.⁴² But where the First Amendment is concerned, overdeterrence becomes more problematic. Where some categories of speech are not entitled to any—or receive little—constitutional protection, “courts have used chilling effect-based reasoning to insist that such categorical distinctions be bounded by bright lines in order to prevent spillover effects on protected speech.”⁴³ Because expression of political views, including asking government officials to enact policies consistent with the speaker or petitioner’s preferences, is critical to democratic government,⁴⁴ extending a judicial doctrine cognizant of this to limit the ATS is appropriate. *Noerr-Pennington* evidence, “which by its very nature chills the exercise of First Amendment rights, is properly viewed as presumptively prejudicial.”⁴⁵

The *Doe* plaintiffs allege that by purchasing cocoa from the Ivorian plantations that use child slaves, giving training and equipment to plantation owners, and lobbying against federal child-slavery labeling legislation—all with knowledge of child slavery in the Ivory Coast—the defendant companies aided and abetted child slavery.⁴⁶ The decisions to take those actions may have been made in the United States, but because the slavery and the defendants’ training for the cocoa farmers occurred abroad, and the equipment was used abroad, the plaintiffs face an uphill battle to overcome *Kiobel’s* presumption against extraterritoriality. The Ninth Circuit let the plaintiffs replead their claims to show that the defendants gave the slavers substantial assistance in the commission of a crime, but it is unclear what, if any, additional conduct might be alleged.⁴⁷ Regardless of what the plaintiffs allege in their amended complaint to prove the defendants’ intent, or to show that the defendants’ actions touch and concern U.S. territory, the evidence of the defendants’ lobbying should not be considered. The defendants’ lobbying against

⁴² *Id.* at 1483–84.

⁴³ *Id.* at 1484.

⁴⁴ See generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (5th prtg. 2007) (1948) (arguing that the most robust protection of speech on matters of public concern is necessary for a self-governing people to choose the best policies).

⁴⁵ U.S. Football League v. Nat’l Football League, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986), *aff’d*, 842 F.2d 1335 (2d Cir. 1988) (commenting that *Noerr-Pennington* evidence excluded under Rule 403, for its prejudicial effect, is by its nature chilling to First Amendment rights).

⁴⁶ See *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1017–18 (9th Cir. 2014), *reh’g en banc denied*, 788 F.3d 946 (9th Cir. 2015) (reciting plaintiff’s allegations).

⁴⁷ See *id.* at 1026–28 (describing the actus reus an aiding and abetting claim cognizable under the ATS and noting that the court is unable to conclude, at this point, that any attempt at amending the complaint would be futile).

proposed slavery-labeling legislation was used to show the plausibility of alleging that the defendants acted purposely, rather than as proof of substantive wrongdoing.⁴⁸ While using evidence of lobbying to show intent does not violate the First Amendment under *Mitchell*, it may nevertheless discourage protected activity and threatens to confuse the issues. The optics of opposing child-slavery labeling requirements are less than stellar, and that evidence is much more likely to inflame a factfinder than to shed light on whether the defendants violated a well-established international legal norm.

As for *Sexual Minorities Uganda*, it's possible that the defendant's conduct in writing homophobic books and giving similarly-themed speeches will be held protected from liability under the First Amendment itself in a later stage of the proceedings. In terms of lobbying the Ugandan government, the result under my theory would depend on how completely courts import *Noerr-Pennington* from the antitrust context: While some courts have extended *Noerr-Pennington* immunity to petitioning aimed at foreign governments,⁴⁹ the First Amendment's Petition Clause does not protect petitioning foreign governments.⁵⁰ On the one hand, immunizing all lobbying activities from liability under ATS claims is consistent with First Amendment values, including its protections for speech generally. On the other hand, because such an extension is not strictly necessary to avoid constitutional concerns about the Petition Clause, there may be good reasons for confining *Noerr-Pennington's* protections for foreign lobbying to the realm of antitrust law.⁵¹

I don't necessarily agree with everything the Supreme Court has said in interpreting the ATS. The Court's ruling in *Kiobel* risks turning the United States into "a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."⁵² And I readily acknowledge that there are serious human costs to further restricting an already narrow avenue of relief for

⁴⁸ See *id.* at 1025 ("The defendants' alleged lobbying efforts also corroborate the inference of purpose.").

⁴⁹ See, e.g., *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1364-73 (5th Cir. 1983) (applying *Noerr-Pennington* immunity to allegedly anticompetitive litigation brought by a defendant in foreign court concerning the defendant's interest in oil in Libya).

⁵⁰ See *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 329-30, 329 n.11 (D. Mass. 2013) ("It is well-established . . . that the Petition Clause does not immunize . . . interactions with foreign governments.").

⁵¹ Addressing this question is an essay unto itself, and I'm generally agnostic as to the answer.

⁵² See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring in the judgment) (detailing reasons to not invoke the presumption against extraterritoriality).

human rights abuses.⁵³ But lobbying Congress for an expanded right of action or persuading the Supreme Court that its view in *Kiobel* was mistaken are preferable to circumventing *Kiobel* by relying on activity that lies at the First Amendment's core and is likely to confuse a factfinder about what a case is really about: whether defendants have actually violated customary international law, or merely advocated for government policies the factfinder thinks unseemly.

CONCLUSION

There will continue to be questions about which claims based on customary international law may go forward under the ATS. This Essay suggests that evidence of petitioning the government should typically be barred from consideration in such claims under an extension of *Noerr-Pennington* immunity. This will help limit the scope of common law claims cognizable under the ATS, and help ensure that the territoriality requirement is not circumvented. It will also prevent the undue chilling of constitutionally protected activity.

⁵³ For example, would-be plaintiffs might face genuine danger to life and limb if they litigate controversial cases abroad. See Sarah S. Kilborne, *Hate on Trial: What the Case Against Scott Lively Really Means*, SLATE: OUTWARD (Dec. 16, 2014, 3:19 PM), http://www.slate.com/blogs/outward/2014/12/16/scott_lively_alien_tort_statute_means_lgbt_ugandans_can_sue_him_in_america.html.