In Rem Actions Under U.S. Admiralty Jurisdiction as an Effective Means of Obtaining Thirteenth Amendment Relief to Combat Modern Slavery

Jeffrey E. Zinsmeister†

INTRODUCTION

The United States must develop new legal approaches to the problem of "modern slavery," which continues to grow in scope and severity despite sweeping federal legislation and a plethora of bilateral and multilateral conventions aimed at its elimination. Using U.S. admiralty courts to

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† J.D., 2004, School of Law, University of California, Berkeley (Boalt Hall), clerk to the Honorable Rosemary Barkett, Eleventh Circuit U.S. Court of Appeals, 2004-2005. I would like to thank everyone who has helped me turn a passing thought into this Comment. In particular, many thanks to Professor Thomas Barnes of Boalt Hall, whose deep knowledge of law and history were indispensable in fleshing out my ideas. I also thank my mother and father, Dorothy and Philip Zinsmeister, for supporting my education both financially and emotionally. I am especially grateful to Jennie Wang, who not only spent many, many hours editing this piece, but also displayed almost inexplicable patience with its often-irritable author. Finally, I thank the Honorable Rosemary Barkett, under whose tutelage I have grown tremendously as a writer, editor, and lawyer.

1. Modern slavery is "the total control of one person by another for the purpose of economic exploitation," regardless of whether the slaveholder has any legal property interest in the enslaved individual. KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 5-6 (1999).

2. See, e.g., Bales, supra note 1, at 20-21 ("Slavery is not a horror safely consigned to the past; it continues to exist throughout the world, even in developed countries like France and the United States."); U.S. Dep't of State, TRAFFICKING IN PERSONS REP. 5 (2003), available at http://www.state.gov/documents/organization/21555.pdf (last visited May 24, 2004) ("Human trafficking [a form of modern slavery] not only continues, but appears to be on the rise worldwide.").


attack instrumentalities of the modern slave trade could be an effective first step toward dismantling this enterprise.

As litigation over modern slavery has arrived in U.S. courts, scholars have examined the Thirteenth Amendment as a potential legal solution. These scholars contend that traditional legal approaches, such as those under the Fair Labor Standards Act ("FLSA"), the Alien Tort Claims Act ("ATCA"), or state tort laws, insufficiently compensate victims and fail to deter future offenders. Relying on traditional legal approaches also bases enforcement of human rights on Congress’s commerce power, whose reach has been curtailed in the last decade.

Scholars also level particularly harsh criticism at the inability of traditional approaches to deter U.S. corporate involvement with modern slavery practices abroad. As examples, they point to mining and drilling operations in Burma, the garment, carpet, and brick manufacturing industries in India and Pakistan, agricultural industries, and the cocoa industry. Most

5. See, e.g., Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir.), reh’g granted en banc; 395 F.3d 987 (9th Cir. 2003), dismissed by parties’ stipulation, 403 F.3d 708 (9th Cir. 2005) (addressing the Myanmar government’s alleged use of forced labor to construct a gas pipeline, in conjunction with Unocal); United States v. Kil Soo Lee, 159 F. Supp. 2d 1241 (D. Haw. 2001) (addressing criminal prosecution of sweatshop and forced labor conditions at Daewoosa Samoa’s American Samoa factory).

6. See Baher Azmy, Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda, 71 FORDHAM L. REV. 981, 1060 (2002) (arguing for a Bivens private right of action for damages under the Thirteenth Amendment); Samantha C. Halem, Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry, 36 SAN DIEGO L. REV. 397, 416-21 (1999); Tobias Barrington Wolff, The Thirteenth Amendment and Slavery in the Global Economy, 102 COLUM. L. REV. 973, 978 (2002) (advocating expanding the definition of "slavery" for Thirteenth Amendment purposes to include slave trade participation by U.S. citizens, as well as suggesting that courts could construe the Amendment as having extraterritorial application).


9. Azmy, supra note 6, at 1038 (suggesting that state law torts may provide adequate damages, but neither "vindicate the important federal values enshrined by the Thirteenth Amendment" nor "communicate the appropriate level of moral condemnation required by the Amendment’s prohibition on such conduct"). Cf. Wolff, supra note 6 (arguing that state law tort remedies would not reach slave labor supported by U.S. entities abroad).

10. Human trafficking and other forms of modern slavery are extremely profitable and therefore difficult to deter. See, e.g., BALES, supra note 1, at 4; Wolff, supra note 6.

11. Azmy, supra note 6, at 1044-47 (describing rights based on the Commerce Clause as more susceptible to curtailment on federalism grounds than those grounded in the Reconstruction Amendments); see also United States v. Lopez, 514 U.S. 549, 558-59 (1995) (limiting Congressional power to legislate under the Commerce Clause to "three broad categories of activity"—the use of the channels of interstate commerce, the instrumentalities of interstate commerce or persons or things in interstate commerce, and activities that "substantially affect," rather than merely "affect," state commerce).

12. See, e.g., BALES, supra note 1, at 20-21; Wolff, supra note 6, at 985-92.

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common law and statutory schemes related to modern slave labor cannot punish those responsible for these practices because the enslaved individuals reside outside U.S. territorial jurisdiction. Federal law generally does not regulate conduct outside of U.S. territory.\(^\text{14}\) The recent strengthening of the presumption against applying federal statutes extraterritorially further prevents courts from implying extraterritorial jurisdiction in the absence of explicit authorizing language in the statute.\(^\text{15}\) Additionally, widespread corruption and lack of resources prevent victims from seeking relief in foreign courts, because slave labor practices generally occur in impoverished nations controlled by corrupt and illegitimate governments.\(^\text{16}\) Courts in these nations are often extremely slow to process cases or suffer from bias against less powerful litigants,\(^\text{17}\) rendering victims' lawsuits futile.

In response, some academics argue that the text of the Thirteenth Amendment specifically contemplates an extraterritorial reach, prohibiting slavery and involuntary servitude “within the jurisdiction of the United States,” which could be construed to include nationality jurisdiction.\(^\text{18}\) Further, they believe that, as a legal provision specifically promulgated to fight slavery, the Thirteenth Amendment will prove less susceptible to curtailment on grounds unrelated to civil rights, such as the paring down of congressional Commerce Clause power.\(^\text{19}\)

Recent scholarship suggesting that a private right of action under the Thirteenth Amendment could be a powerful tool in fighting modern slavery and that legal authority may support its recognition is persuasive. Yet, the approach most likely to succeed in federal courts consists of creating this right of action under the in rem jurisdiction of U.S. admiralty courts. An in rem cause of action would allow relief for acts of slavery or involuntary servitude that occur aboard vessels within the admiralty and “aircraft jurisdiction”\(^\text{20}\) of the United States.\(^\text{21}\)

15. See id. at 248-50 (elevating a presumption against extraterritorial application of federal statutes to a clear statement rule).
16. See TRAFFICKING IN PERSONS REP. (2003), supra note 2, at 8 (“Sudden political change, economic collapse, civil unrest, internal armed conflict, and natural disasters greatly increase the likelihood that a country will become a source of trafficking); TVPA § 102(b)(16) (finding that “in some countries, enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by official participation in trafficking”).
17. See, e.g., RENESLAER W. LEE III, TRANSNATIONAL ORGANIZED CRIME: AN OVERVIEW, IN TRANSNATIONAL CRIME IN THE AMERICAS 6-7 (Tom Farer ed., 1999).
18. See infra note 51 and accompanying text.
19. See, e.g., Azmy, supra note 6, at 1042-43.
20. This Comment uses this term to include U.S. “special aircraft jurisdiction” under 18 U.S.C. § 46501, all parts of U.S. “special territorial and maritime jurisdiction” as defined by 18 U.S.C. § 7(5), and any residual admiralty and maritime jurisdiction applying to aircraft that survived the codification of aircraft jurisdiction of the mid-20th century and the “nexus” test created in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 264-70 (1972).
Professor Tobias Barrington Wolff’s proposal would hold entire corporate entities liable instead of the mere instrumentalities used in enslavement. Nonetheless, an in rem approach may still hamper U.S. corporate involvement in modern slave labor abroad and raise the effective price of participation. In rem actions against vessels implicated in the trade could provide victims with monetary damages, avoid the problem of establishing personal liability plaguing current ATCA litigation, and discourage U.S. corporations from investing money in such activities for fear of losing their assets.

Furthermore, I believe that admiralty law—traditionally extraterritorial with courts sitting as arbiters of the law of nations—supports this private right of action more than any other area of jurisprudence. Consequently this Comment will discuss several reasons why an in rem claim under the Thirteenth Amendment is more likely to succeed.

While this approach might not directly end U.S. corporate use of modern slave labor abroad, increased civil litigation costs would discourage use of slave labor relative to free labor.

Part I of this Comment briefly summarizes the modern slavery problem and argues that scholars increasingly turn to unilateral solutions because systemic problems disfavor bilateral and multilateral action. Part II outlines the strategy of Professor Wolff’s notable argument for extraterritorial application and “rehabilitation” of the Thirteenth Amendment as a unilateral solution. Part III explores the in rem approach in the context of the Thirteenth Amendment. Additionally, it responds to Professor Wolff’s vision, arguing that in rem Thirteenth Amendment actions against acts of slavery or involuntary servitude within U.S. admiralty and aircraft jurisdiction is a more effective initial litigation strategy. Part IV describes the scope of admiralty and “aircraft jurisdiction” from both historical and modern perspectives, illustrating an aggressive application of the Thirteenth Amendment. Part V analyzes the Thirteenth Amendment’s application to the concept of in rem admiralty jurisdiction. Finally, this Comment concludes that admiralty courts would provide an appropriate venue to combat the modern slave trade.

22. Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).
I
THE ARGUMENT FOR A UNILATERAL SOLUTION TO PARTICIPATION OF
U.S. ENTITIES IN THE MODERN SLAVE TRADE

A. Current Trends in Modern Slavery

Modern slavery is already a significant problem, and it continues to
grow. 24 An influential private study estimated that approximately 27 mil-
lion people were enslaved worldwide in 1999 alone. 25 Statistics docu-
menting human trafficking, an integral part of modern slavery, corroborate
the study’s claim. The U.S. government estimates that between 700,000 and 4
million persons are trafficked per year worldwide, 26 with 18,000 to 20,000
of those victims entering the United States. 27

If information about human trafficking is accurate, the number of
modern slaves appears to be remaining constant or increasing. Data from
the United Nations Educational, Scientific and Cultural Organization
(UNESCO), though incomplete, show a slight overall increase in the num-
ber of trafficked individuals from 2000 to 2002. 28 Although the U.S.
Department of State reduced the upper limit on its worldwide estimates of
persons trafficked from 4 million persons to 900,000 persons from 2002 to
2003, the lower limit of its estimate rose from 700,000 to 800,000 persons
during that same period. 29 This may suggest that the problem is gradually
on the rise, and that the decline of the upper estimate resulted from more
accurate fact-finding by the State Department. Worse, U.S. corporations
are actively using slave labor or are indirectly reaping its benefits through
foreign subsidiaries. 30

24. See generally TRAFFICKING IN PERSONS REP. (2003), supra note 2, at 5 (“Human trafficking
not only continues but appears to be on the rise worldwide.”).
25. BALEs, supra note 1, at 8-9.
http://www.state.gov/documents/organization/4107.pdf (last visited Apr. 3, 2004); U.S. Dept’ t of State,
documents/organization/10815.pdf (last visited May 27, 2004); TRAFFICKING IN PERSONS REP. (2003),
supra note 2, at 7.
27. TRAFFICKING IN PERSONS REP. (2003), supra note 2, at 7.
28. UNESCO, FACTSHEET No. 1. WORLDWIDE TRAFFICKING ESTIMATES, available at
29. TRAFFICKING IN PERSONS REPORT (2001), supra note 26, at 1; TRAFFICKING IN PERSONS
REPORT (2003), supra note 2, at 8.
30. See, e.g., BALEs, supra note 1; Wolff, supra note 6, at 973, 985-92.
B. Causes of Modern Slavery and How They Confound Responses to the Problem

The myriad of multilateral and bilateral approaches to modern slavery do not appear to be particularly effective given the continuing growth of the problem. Congress and some commentators have argued that international organizations' cooperative approaches, absent judicial intervention, may not adequately counteract the economic forces driving the rising tide of modern slavery.

Political economy scholarship corroborates these fears of ineffective multilateral and bilateral approaches and suggests that the factors creating modern slavery also hinder its eradication. Kevin Bales's groundbreaking study of modern slavery lists three significant causal factors: a population explosion, a boom in landless rural workers, and the elimination of traditional social mores and structures through technology and rapid social change. These factors primarily affect the less-developed world and create unstable governments, unstable economies, and divided political loyalties. Such instability in turn encourages trafficking, other forms of modern slavery, and a host of other problems including drug trafficking, arms trade, and terrorism. These problems then further undermine the stability and legitimacy of affected countries' governments, thereby perpetuating and aggravating the cycle.


32. See, e.g., TVPA, supra note 3, § 102(b)(16) (finding that "in some countries, enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by official participation in trafficking."); Bales, supra note 1, at 244-52.

33. Bales, supra note 1, at 12-14, 232-40.

34. See TRAFFICKING IN PERSONS REP. (2003), supra note 2, at 8.


36. TRAFFICKING IN PERSONS REP. (2003), supra note 2, at 8.

Rapid increases in population and the number of landless rural laborers can create severe internal migration problems and a low-income underclass. An underclass of this nature may significantly hinder capital accumulation and economic development. It may also politically, economically, and socially alienate elites from the rest of society. Instead of participating in national politics and capital investment, elites tend to be politically aloof and engage in greater consumption. These factors foster another vicious cycle of economic underdevelopment and political instability.

Economic stagnation and widespread social alienation severely diminishes the legitimacy of popular governments. As elites withdraw from the rest of society, elected governments may cease to reflect the values of the people they claim to represent. With a lack of capital accumulation by both the impoverished underclass and the conspicuously consuming elites, government leaders are unable to remedy the cycle of poverty and dependence on foreign capital. These conditions therefore create an impetus for state-controlled economies aimed at rapid development as citizens lose faith in representative and free-market solutions. However, state-planned economic policies often result in widespread physical and economic displacement of persons and encourage the development of parallel power structures that compete with the state for legitimacy. These legitimacy problems keep the government weak, which prevents it from fighting the very forces that enfeeble it, including modern slavery.

Such self-reinforcing legitimacy crises in areas affected by modern slavery hamper international efforts to control the problem. Changes in domestic and international law are far less effective when nations cannot guarantee large-scale compliance with such changes. Incentives for corrupt behavior also render ineffective bilateral efforts aimed at eliminating modern slavery, such as withholding U.S. foreign aid from nations unwilling to crack down.

41. Janos, supra note 35, at 333-34.
42. See Alexander Gerschenkron, Economic Backwardness in Historical Perspective, supra note 35, at 27-29; Janos, supra note 35.
44. The TVPA requires the United States to levy penalties upon nations that are not in compliance with certain minimum anti-trafficking standards and "are not making significant efforts to bring themselves into compliance with the minimum standards." Trafficking in Persons Rep. (2003), supra note 2, at 13; TVPA, supra note 2, § 108 (defining minimum standards); id. § 110 (defining
Perhaps sensing this problem, some academics suggest that unilateral U.S. legal action would be more effective in reining in modern slavery.\(^\text{45}\) In particular, Professor Wolff argues for the extraterritorial application of the Thirteenth Amendment by U.S. courts as a solution in his article, *The Thirteenth Amendment and Slavery in the Global Economy.*\(^\text{46}\)

\section{II}

**Professor Wolff's Extraterritorial Application of the Thirteenth Amendment**

Professor Wolff offers two proposals for reinterpreting the Thirteenth Amendment's scope to address U.S. participation in modern slavery abroad. First and foremost, he argues for widening the proscriptive power of the Amendment's prohibition of "slavery . . . within the United States" to include the knowing use of slave labor by U.S.-based entities in their foreign operations.\(^\text{47}\) Second, he suggests broadening the Amendment's proscriptive power to include nationality jurisdiction over U.S. citizens and residents outside the United States.\(^\text{48}\) This Comment primarily addresses the latter argument, given that courts are unlikely to widen the Thirteenth Amendment's proscriptive power as Wolff suggests.\(^\text{49}\)

\subsection{A. Professor Wolff's Extraterritoriality Argument}

Wolff's concept of the Thirteenth Amendment's extraterritorial application is that prescriptive jurisdiction should extend to all violative acts by U.S. citizens, residents, and entities, wherever such acts might be undertaken.\(^\text{50}\) Such broad jurisdiction would be possible under the theory of nationality jurisdiction, which bases prescriptive jurisdiction on the nationality of the offender.\(^\text{51}\) However, Wolff concedes that nationality jurisdiction is exceptional and would provide very weak support for
extraterritorial prescriptive application of the Thirteenth Amendment in U.S. courts.  

Consequently, Wolff presses for the Amendment's extraterritorial prescriptive application under the "traditional doctrine of extraterritoriality." This doctrine presumes that constitutional provisions' and federal statutes' territorial jurisdictional scopes may be overstepped in certain circumstances. He argues that the Thirteenth Amendment's text and history demand its application to U.S. citizens abroad.

However, Wolff has little caselaw or academic commentary on his side; he is largely breaking new ground. No clear interpretive benchmarks guide the determination of the extraterritorial nature of constitutional provisions. Unlike interpreting federal statutes, such a constitutional analysis demands provision-by-provision consideration. Further, beyond dicta in the Supreme Court plurality opinion of Downes v. Bidwell, Wolff finds no caselaw interpreting the Thirteenth Amendment's jurisdictional clause.

B. Textual and Doctrinal Interpretations of the Thirteenth Amendment's Jurisdictional Reach

In this interpretational void, Wolff makes a twofold textual argument. First, he compares the Thirteenth Amendment's text to that of other constitutional amendments with extraterritorial scope and argues that its language supports an even wider extraterritorial application. Whereas most constitutional provisions with extraterritorial scope restrict application of the federal government's power to certain persons, the Thirteenth Amendment outlaws a social and economic practice including, but not limited to, the U.S. government.

Consistent with this distinction, Wolff claims that the federal courts have analyzed constitutional amendments' extraterritorial reach by examining their text and identifying who holds the right against the government.

52. Wolff, supra note 6, at 1039 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 cmt. b (1986) (“Territoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction.”).
53. Id. at 1039-40.
54. Id.
56. 182 U.S. 244, 251 (1901) (plurality opinion) (arguing in dicta that the “Thirteenth Amendment to the Constitution . . . is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union”).
57. Wolff, supra note 6, at 1042-43.
58. Id. at 1039-40.
59. Id. at 980-81.
60. Id. at 1041-43.
For example, the Supreme Court has held that the term "the people" in the Fourth Amendment has a narrower prescriptive scope that the term "any person" in the Fifth Amendment. The Court based its holding on the notion that "the people" referred to a national community, whereas "any person" refers to individuals more generally, including U.S. citizens abroad. The Court has made a similar distinction between "the people" as referenced in the Fifth Amendment and the Sixth Amendment's protection of the "accused," holding that "accused" refers to criminal defendants without reference to their membership in a national community. In contrast, the Thirteenth Amendment does not refer to a group of persons at all. Instead it refers to practices: "slavery [and] involuntary servitude." Wolff argues that reference to a practice instead of a group of people extends the scope of the Thirteenth Amendment beyond even the reach of the Fifth Amendment's "any person" and thus beyond U.S. borders.

Wolff cites to dictum in the Downes v. Bidwell plurality opinion as the only Supreme Court declaration directly addressing the Thirteenth Amendment's jurisdictional scope. The Downes Court, interpreting the revenue clauses of the Constitution, held that the clauses did not restrain congressional power to levy unequal duties to goods from Puerto Rico, a U.S. territory. The power to levy duties on Puerto Rico therefore rested on Congress's "general right of sovereignty which exists in the [federal] government," which also permits Congress to create territorial courts outside the scope of Article III's judicial power clause. In defining congressional limitations, the plurality distinguished the revenue clauses from the Thirteenth Amendment. The plurality and concurrence stated that the Thirteenth Amendment's jurisdictional clause, proscribing slavery "within the United States, or any place subject to its jurisdiction," contrasts and extends beyond the scope of the revenue clauses, which only extends to the States comprising the Union.

62. Id.
63. Id. at 269.
64. See Reid v. Covert, 354 U.S. 1, 7-8 (1957).
65. Verdugo-Urquidez, 494 U.S at 265-66 (plurality opinion).
67. Wolff, supra note 6, at 1042.
68. Downes v. Bidwell, 182 U.S. 244, 261 (1901) (plurality opinion).
69. See id. at 251 (plurality opinion).
70. Id. at 249 (plurality opinion).
71. Id. at 287 (plurality opinion).
72. Id. at 266 (plurality opinion); U.S. Const. art. III, §2; Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 546 (1828) (Marshall, C.J., writing for the court).
73. Downes, 182 U.S. at 251 (plurality opinion).
74. Id. at 251 (plurality opinion); id. at 336-37 (White, J., concurring). But see id. at 358 (Fuller, C.J., dissenting) (stating that the phrase "or any place subject to their jurisdiction" was added "out of abundant caution . . . [and] carries little weight").
C. Professor Wolff’s Purposive Analysis of the Thirteenth Amendment’s Jurisdictional Reach

Wolff states that *Downes* is “equivocal” as to whether the Amendment’s text extends beyond U.S. territory, but admits that it is a weak foundation for his own arguments.75 He then analyzes the drafters’ original intent, arguing that it is consistent with his interpretation of the Amendment’s text. To illustrate this original intent, he points to an 1871 House Bill entitled, “A bill to carry into effect article thirteen of [the amendments to] the Constitution of the United States, and to prohibit the owning or dealing in slaves by American citizens in foreign countries.”76 The bill criminalized direct or indirect ownership of slaves or persons held in involuntary servitude “as lessor or lessee, mortgagor or mortgagee, assignor or assignee, or otherwise.”77 Later, it died in committee.78 Wolff argues that this demonstrates that the drafters of the Amendment “understood that slavery could not be eradicated from American society and industry without reaching all the slave activities of U.S. citizens, both at home and abroad.”79 However, he cites no further support for this view in the records of the Amendment’s promulgation and early history.80

Although Wolff’s extraterritorial analysis claims to consider only the Amendment’s text and underlying intent, its main argument, buried in its textual discussion, is purposive. Wolff claims that the jurisdictional clause’s text shows that “the drafters of the Amendment sought to extirpate the practice of slavery from the United States, root and branch, and they chose language that would reach all of its multiple layers.”81 The “multiple layers” refer to Wolff’s earlier analysis of the term “slavery” for Thirteenth Amendment purposes—the social relationship between slave and master, the necessary institutions that support slavery, and the economic forces that benefit from slavery and create a market for slave labor.82 If courts are not convinced that the Thirteenth Amendment’s concept of “slavery” proscribes these relationships, Wolff argues alternatively that the same interpretive evidence used to analyze the meaning of the term demonstrates that the purpose of the Thirteenth Amendment’s text was to eliminate these forms of slavery.83 Thus, even if a court read “slavery” narrowly, Wolff asserts that the Amendment’s purpose argues for interpreting its jurisdictional clause to allow extraterritorial application prohibiting these forms of

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75. Wolff, *supra* note 6, at 1043-44.
76. *Id.* at 1047. The bill can be found at H.R. 490, 42d Cong. (1871).
77. Wolff, *supra* note 6, at 1047-49.
78. *Id.*
79. *Id.* at 1048.
80. *Id.*
81. *Id.* at 1042.
82. *Id.* at 978-79.
83. *Id.*
slavery—essentially exercising prescriptive jurisdiction under nationality jurisdiction.

III
DERIVING A PRIVATE RIGHT OF ACTION FROM THE THIRTEENTH AMENDMENT'S TEXT

This Comment proposes an alternative approach that creates an in rem private right of action under the Thirteenth Amendment for acts occurring within U.S. admiralty and aircraft jurisdiction. While not exclusive of Professor Wolff's thesis, it provides an immediately available litigation strategy that could open the door to his more expansive proposal and greater potential for relief. This Part first addresses why the Thirteenth Amendment creates a private right of action.

A. Current Lack of Judicial Guidance About the Existence of a Private Right of Action Under the Thirteenth Amendment

Like Professor Wolff, I argue that an independent private right of action should exist under the Thirteenth Amendment for some type of relief. Unfortunately, the U.S. courts have yet to consider this issue seriously. Although a host of lower court decisions purport to resolve whether a private right of action for damages exists under the Thirteenth Amendment, none of them actually analyzes the issue in requisite detail. Instead, they summarily resolve Thirteenth Amendment claims without analysis or citation to precedent, or even citation to dicta discussing the existence of private rights of action. Furthermore, what little analysis the courts have attempted has erroneously focused on private rights of action created under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics. Academic discussions, including Professor Wolff's, have not

84. Wolff, supra note 6, at 980 n.30.
87. However, one federal district court has allowed a private right of action under 18 U.S.C. § 1584, using the Borak doctrine, under which a federal court may imply a private right of action from a federal criminal statute. Manliguez v. Joseph, 226 F. Supp. 2d 377, 383-84 (E.D.N.Y. 2002) (citing
fared much better, pointing out *Bivens*’ incompatibility with the Thirteenth Amendment while failing to offer alternative approaches.\(^8\)

### B. Unsuitability of Bivens for Determining Whether Relief Directly Under the Thirteenth Amendment is Appropriate

The *Bivens* rationale is wholly unsuited for interpreting private rights of action under the Thirteenth Amendment. The *Bivens* line of jurisprudence focuses on private rights of action for money damages against state actors who violate constitutional rights.\(^9\) Its underlying rationale and considerations limiting its application turn upon two factors: the appropriateness of allowing damage suits against federal officers,\(^9\) and concern over judicial usurpation of congressional power to determine remedies for constitutional violations.\(^9\) In contrast, the Thirteenth Amendment primarily regulates behavior of private actors toward one another, rendering *Bivens* peculiarly inapplicable.

Legal, rather than equitable, relief seems the appropriate remedy in the Thirteenth Amendment context.\(^9\) However, in a case between private actors, injunctive relief might intrude far more on private conduct. This seems particularly likely in the business context because injunctive relief requires public supervision of private action. In contrast, injunctions against public officials involve the judiciary, rather than the executive or the legislature, playing the role of supervisor—a shift in authority but not an undesirable intrusion by the public sphere into private affairs. This rationale is consistent with the traditional common law aversion to injunctive relief.\(^9\) In the Thirteenth Amendment context, the actions of a few individuals could lead to injunctive relief against corporate entities, which could paralyze entire departments of corporate activity. And in cases where

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\(^9\) See Wolff, supra note 6, at 980-81 n.30.


\(^91\) Id. at 400-02 (Harlan, J., concurring) ("Therefore, the question of judicial power to grant *Bivens* damages is not a problem of the ‘source’ of the ‘right’; instead, the question is whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress’ hands.").

\(^92\) Id. at 400 (Harlan, J., concurring) (noting "the presumed availability of federal equitable relief, if a proper showing can be made in terms of the ordinary principles governing equitable remedies") (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)). Of course, somewhat stringent standing requirements bind federal equitable relief. *See* e.g., *Los Angeles v. Lyons*, 461 U.S. 95, 101-05 (1983); O’*Shea v. Littleton*, 414 U.S. 488, 493-99 (1974).

\(^93\) *Bivens*, 403 U.S. at 395 ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").
a court grants preliminary injunctive relief, such intrusion could occur before a hearing on the case’s merits. Conversely, damages provide direct relief to those harmed without unduly affecting legitimate activities of the entity subject to judgment. Therefore, applying the *Bivens* preference for injunctive relief for constitutional torts to the Thirteenth Amendment would be unwise.

Concern over the federal judiciary usurping congressional power to determine remedies for constitutional violations is also less applicable in the Thirteenth Amendment context. Such concerns seem justifiable in the context of the broad language of the Bill of Rights or Articles I through VI of the Constitution, but not with respect to the Thirteenth Amendment. Many constitutional provisions are rather vague and lack the precision of a code of laws.94 Thus, opponents of direct causes of action under constitutional provisions argue that crafting specific remedies for violations of individual rights justly fall to Congress.95 However, the Thirteenth Amendment reads more like a statute than some other constitutional provisions. It outlaws a specific practice, by any actor within U.S. jurisdiction, whereas most constitutional provisions only apply to state actors.96 Further, as the *Bivens* majority notes regarding the Fourth Amendment, Congress couched most of the Bill of Rights’ provisions in terms presuming the existence of an enumerated right.97 Such language differs from legislation, which frequently “creates” prohibitions on specific actions. The Thirteenth Amendment follows a legislative model—Congress drafted it to prohibit a well-established practice.98 Thus, the separation of powers concerns noted in *Bivens* are muted in the Thirteenth Amendment context by the Amendment’s more statutory purpose and form.

C. *Inapplicability of Limitations on Relief in Bivens to Thirteenth Amendment Claims*

Relying on *Bivens* to analyze the validity of claims brought directly under the Thirteenth Amendment is inappropriate. *Bivens* restricts suits for money damages because of concerns that permitting such suits against federal officers will interfere with the operation of the federal government, whereas most conceivable Thirteenth Amendment litigation involves

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94. McCulloch v. Maryland, 17 U.S. 316, 407 (1819) notes: [A constitution’s nature] requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.

95. *Bivens*, 403 U.S. at 406 (Harlan, J., concurring).

96. Wolff, supra note 6, at 980.

97. *Bivens*, 403 U.S. at 400-01 n.3 ("[T]he authors of the Bill of Rights...opt[ed] for language which presumes the existence of a fundamental interest in liberty").

private actors. *Bivens* and its successor cases limit or bar *Bivens* actions when so-called "special factors counseling hesitation" are present.\(^9\) These "special factors" essentially encompass competing federal policies manifested in federal legislation,\(^10\) such as laws concerning federal employees,\(^10^1\) soldiers,\(^10^2\) and private entities equivalent to federal agencies.\(^10^3\) Subsequent caselaw interpreting these limitations essentially limits *Bivens* relief to two circumstances: (1) "to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally[;]\(^10^4\) or (2) "to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct."\(^10^5\)

However, rationales for *Bivens* suits and their progeny bear no relevance to most conceivable Thirteenth Amendment litigation. Such litigation typically involves private actions, not the federal or federally-related conduct contemplated in the "special factors counseling hesitation."\(^10^6\)

Because the rationale and limitations on *Bivens* bear little relationship to the Thirteenth Amendment, the case is a poor foundation for analyzing the existence of a private right of action. It should therefore carry little weight beyond emphasizing the importance of judicially created constitutional remedies in the absence of effective legislation or contrary statements by Congress.

Despite the need for detailed analyses of the efficacy of allowing private rights of action under the Thirteenth Amendment, this Comment presumes that at least some type of private right of action exists, be it equitable or legal.\(^10^7\) As discussed next in Part IV, this argument is even stronger in the context of admiralty jurisdiction, where the Constitution recognizes a long history of judicial preeminence and judicially created rights and remedies.

\(^9\) *Bivens*, 403 U.S. at 396-97.
\(^10\) Id.
\(^10^3\) Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 n.2 (2001) (holding that private entities that are "equivalent" to public federal agencies are not liable under *Bivens*).
\(^10^4\) Id. at 70 ("In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer’s unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens* . . . .").
\(^10^5\) Id. at 70.
\(^10^7\) See id. at 404-06 (Harlan, J., concurring) (stating that the ease for a federal implied right of action under constitutional provisions for some form of relief is secure so long as Congress has granted jurisdiction to the federal courts).
IV
ADMIRALTY JURISDICTION'S BROAD REACH OVER THE MODERN SLAVE TRADE

This Part explains why admiralty jurisdiction, which has long involved suppression of the slave trade, represents a historically broad, unique body of international substantive law and procedure. It goes on to explore why admiralty law's international character and connection to slave trade suppression make admiralty courts well-suited for hearing Thirteenth Amendment claims.

A. The Broad Scope of Admiralty Jurisdiction

1. The Federal Government's Constitutional Powers over Admiralty Jurisdiction

The Thirteenth Amendment prohibits slavery "within the United States, or any place subject to their jurisdiction." United States jurisdiction includes federal admiralty and maritime jurisdiction, granted to the federal judiciary under Article III. Unlike many other areas of federal law, admiralty jurisdiction is a uniquely judicial creature. Its core principles are constitutionally independent of congressional control and developed primarily through judicial decisions based on the civil law tradition of the Laws of Oléron, which the Constitution adopted unchanged into U.S. law. While admiralty law may be altered, qualified, or supplemented by Congress, its autonomous foundation prevents Congress from statutorily modifying its core doctrines or principles. Also, more than with other bodies of federal law, federal courts continue to develop admiralty law.

110. See Panama R.R. v. Johnson, 264 U.S. 375, 386 (1924) ("[T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without.").
111. The Laws of Oléron are a twelfth century French maritime code that served as a foundation for English and American admiralty law. Bartholomew v. Crowley Marine Servs., 337 F.3d 1083, 1085 & n.5 (9th Cir. 2003) (citing Timothy J. Runyan, The Rolls of Oléron and the Admiralty Court in Fourteenth Century England, 19 AM. J. LEGAL Hist. 95 (1975)). The twentieth century Supreme Court still considered the Laws relevant to its interpretation of admiralty law. See, e.g., Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 725, 730 n.6, 732 n.16, 733 nn.17-18 (1943) (relying in part on provisions of the Laws of Oléron to hold that "a shipowner is liable for wages and maintenance and cure to a seaman who, having left his vessel on authorized shore leave, is injured while traversing the only available route between the moored ship and a public street").
112. See U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations").
113. See supra note 110.
114. See, e.g., California v. Deep Sea Research, Inc., 523 U.S. 491, 501-04 (1998) (noting that while early U.S. case law held that the Eleventh Amendment had "little application in in rem admiralty proceedings," subsequent decisions determined that "admiralty and maritime jurisdiction is not wholly
2. **Admiralty’s Historic Breadth in England and the United States**

The admiralty jurisdiction granted by Article III is very broad with respect to the power it confers, both legislatively to proscribe behavior within its limits and judicially to adjudicate offenses. At its inception in England, admiralty jurisdiction was broad and has expanded considerably in the United States. Early English maritime law exercised jurisdiction over torts, injuries, and offenses in ports within the “ebb and flow of the tide,” on the British seas, and on the high seas. The “ebb and flow of the tide” initially included areas along coastlines and in marshlands when covered by water and later incorporated “great streams below the first bridges.” However, common law courts were hostile to the broad jurisdiction of admiralty courts and constantly sought to curtail admiralty’s jurisdiction, with considerable success. Lord Coke regarded admiralty courts’ jurisdiction with jealousy, if not outright “enmity.” Consequently, by the time of the American Revolution, common law courts had considerably restricted admiralty courts’ jurisdiction.

However, the United States adopted English admiralty jurisdiction in its original breadth. The nineteenth century federal courts further expanded admiralty jurisdiction to fit the American context. In *The Genesee Chief v. Fitzhugh*, the Supreme Court discarded the English limit on admiralty jurisdiction to “ebb and flow of the tide” in favor of including all navigable waters. Advances in maritime technology also prompted U.S. courts to extend admiralty jurisdiction to newer types of vessels and shore installations. By the mid-twentieth century, U.S. admiralty and exempt from the operation of the Eleventh Amendment”); Kaiser Aetna v. United States, 444 U.S. 180-84 (1979) (Blackmun, J., dissenting) (arguing for the continued viability of the “ebb and flow” of the tide criterion for identifying navigable waters in some contexts); United States v. Flores, 289 U.S. 137, 154 n.7 (1933); *Ex parte Boyer*, 109 U.S. 629, 631 (1884) (extending admiralty jurisdiction to a wholly artificial canal connecting the Mississippi River with Lake Michigan); *Genesee Chief v. Fitzhugh*, 53 U.S. 443, 447, 454-57 (1852) (exemplifying this common law development by holding that U.S. admiralty jurisdiction extends to all navigable waters and not to the traditional English limits of the “ebb and flow of the tide,” principally because in England almost all navigable waters are tidal); *DeLovio v. Boit*, 7 F. Cas. 418, 418 (C.C. Mass. 1815).

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115. *Flores*, 289 U.S. at 151-52; *DeLovio*, 7 F. Cas. at 421.
116. *See DeLovio*, 7 F. Cas. at 421.
117. *Id.* at 423.
118. *Id.* at 426.
119. *Id.* at 421-22.
120. *Id.* (quoting *Smart v. Wolffe*, 3 Term. R. 348 (Buller, J.)).
121. *Id.* at 442.
123. 53 U.S. 443, 453-57 (1852); *see also Flores*, 289 U.S. at 154, n.7.
124. *See, e.g., Crawford Bros. No. 2*, 215 F. 269, 270 (W.D. Wash. 1914) (“Familiar instances of the growth or evolution of the admiralty jurisdiction are pointed out: The adoption of navigability as the test of jurisdiction, rather than confining it to the ebb and flow of the tide; its extension to include steam vessels upon their advent, holding floating elevators, dry docks, rafts, and submarine vessels subject to the jurisdiction; the giving of a maritime lien for personal injuries, as well as one to the stevedore.”).
maritime jurisdiction over offenses and torts extended to all U.S. vessels in any navigable waters within the United States, in foreign jurisdictions, or on the high seas.\textsuperscript{126}

Because of this breadth, laws and matters involving U.S. admiralty jurisdiction wield a certain privilege in regards to extraterritorial applicability. The Supreme Court has held that Congress may circumvent the presumption that U.S. criminal jurisdiction is based on a territorial principle by merely incorporating the Article III grant of admiralty jurisdiction into statutes.\textsuperscript{127} This automatically satisfies the presumption against extraterritorial application.\textsuperscript{128} Even when Arabian American Oil Co. established a clear statement rule for extraterritorial application of federal statutes, the Court recognized the exceptional nature of statutes invoking U.S. admiralty jurisdiction.\textsuperscript{129} In dicta, the Court suggested either that the holding does not apply to statutes extending the law to admiralty and maritime jurisdiction, or that statutory language explicitly extending to U.S. admiralty and maritime jurisdiction satisfies the clear statement rule.\textsuperscript{130}

The longstanding maritime tradition of considering U.S.-registered vessels as U.S. territory, even when in foreign jurisdictions’ navigable waters, further supports this deviation from the traditional rules against extraterritoriality.\textsuperscript{131} As the next Part describes, support for this legal fiction of maritime “territoriality” continues to expand.\textsuperscript{132}

3. \textit{Further Expansion of U.S. Jurisdiction over Vessels and Aircraft}

The law governing aircraft is very similar to admiralty law in many respects,\textsuperscript{133} although it has developed as an entirely separate area of law. Aircraft jurisdiction relies upon basic principles of admiralty law designed

\textsuperscript{126} Flores, 289 U.S. at 153-54, 154 n.7 (citing The Queen v. Anderson [1868] L.R. 1 C.C.R. 161; Rex v. Allen [1837] 1 Moody’s C.C. 494).

\textsuperscript{127} Flores, 289 U.S. at 155. Arabian American renders the strength of this holding uncertain, but an argument could be made that direct incorporation of the constitutional language in Art. III, § 2 satisfies the “clear statement rule” to establish extraterritoriality. See Arabian American, 499 U.S. at 258-59.

\textsuperscript{128} Flores, 289 U.S. at 155.


\textsuperscript{130} Id. (“Congress’[s] awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute). See, [sic] e.g., . . . Coast Guard Act, 14 U.S.C. § 89(a) (Coast Guard searches and seizures upon the high seas); 18 U.S.C. § 7 (Criminal Code extends to high seas); 19 U.S.C. § 1701 (Customs enforcement on the high seas).[.]”)

\textsuperscript{131} Flores, 289 U.S. at 155-56 (citing U.S. v. Rodgers, 150 U.S. 249 (1893); Thomas v. Lane, 2 Sumner 1; The Queen v. Anderson [1868], L.R. 1 C.C.R. 161; The Queen v. Carr & Wilson [1882], 10 Q.B.D. 76; Rex v. Allen [1837], 1 Moody’s C.C. 494).

\textsuperscript{132} In fact, the Restatement now considers it an independent basis for jurisdiction. \textit{Restatement (Third) of the Foreign Relations Law of the United States} §402 cmt. b, Reporters’ Notes 4 (1986).

to regulate highly mobile vessels engaged in international traffic. Furthermore, aircraft jurisdiction, particularly over crimes of a peculiarly international nature, has applied notions of nationality and universal jurisdiction more broadly than admiralty law itself.

In the early days of aviation, prior to the 1944 promulgation of the Convention on International Civil Aviation in Chicago (the "Chicago Convention"), the law of jurisdiction over acts occurring aboard aircraft was unsettled and seldom discussed, because aircraft resembled seagoing vessels but were primarily *sui generis*. Like ocean-going ships, though, aircraft are highly mobile, permit international travel and commerce that simultaneously affect the rights of many parties and nations, and generate tremendous public benefits.

Initially, courts appear to have reacted to cases involving aircraft by applying the "ancient doctrine that ownership of the surface of the earth carries with it ownership to the center of the earth beneath, and to the heavens above"—simple territorial jurisdiction. However, four factors weighed against application of this "ancient doctrine" to aircraft, in much the same fashion as maritime law rejects strict territorial jurisdiction on the seas. First, as with seagoing vessels, the nation upon whose territory an act is committed may have no control over the aircraft and therefore may not be able to apply its theoretical jurisdiction in fact. Second, the nation with territorial jurisdiction typically has no notice of an act's occurrence until the aircraft has left its territory, making the exercise of jurisdiction very difficult. Third, the doctrine poses a predictability problem—actors aboard an aircraft often cannot know which jurisdiction they are over. Fourth, the nation where the aircraft is registered has an interest in actions taken aboard, much as in admiralty law.

Applying admiralty law to govern air traffic by analogy was ineffective. The substantive and procedural provisions of admiralty law are grounded in the specific needs and problems of seaborne travel, such as seaworthiness, maritime contracts, and piracy. Admiralty courts therefore restrict their jurisdiction to localities where seaborne vessels may

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137. *See*, e.g., Crail, *supra* note 135, at 484.
138. *See*, e.g., *id.* at 485.
travel\textsuperscript{142} and to acts affecting maritime commerce.\textsuperscript{143} Direct application of maritime jurisdiction under a territorial concept to any event occurring aboard an aircraft above navigable waters could generate haphazard results.\textsuperscript{144} Application of admiralty jurisdiction and its peculiar procedures and substance to actions on aircraft would depend on whether events happened over land or water, rather than for any of the reasons for which the long history of admiralty law developed specific rights and remedies.\textsuperscript{145} Despite certain similarities, admiralty law today generally does not extend to aircraft except by statute or in special instances where acts aboard aircraft affect maritime commerce and navigation.\textsuperscript{146}

The United States acceded to the Chicago Convention, which marked the inception of a unique, international standard for jurisdiction over aircraft. It was elaborated in the Convention on Offences and Certain Other Acts Committed on Board Aircraft (the "Tokyo Convention"),\textsuperscript{147} the Convention for the Suppression of Unlawful Seizure of Aircraft (the "Hague Convention"),\textsuperscript{148} and the Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation (the "Montreal Convention").\textsuperscript{149} The new conventions displaced the earlier practice of applying a crude copy of admiralty jurisdiction to the skies. Consequently, U.S. courts have prohibited aircraft owners from relying on the admiralty doctrine of limited of liability\textsuperscript{150} and have held that criminal statutes punishing acts on the high seas under admiralty jurisdiction did not reach crimes committed aboard aircraft over international waters.\textsuperscript{151} Congress also expressly exempted aircraft from U.S. shipping and navigation laws, an event the Supreme Court later characterized as supporting admiralty jurisdiction's requirement of a nexus between torts committed on navigable waters and maritime commerce or navigation.\textsuperscript{152}

\begin{itemizethebibliography}
\item[142.] Id.; see also Genesee Chief, 53 U.S. 443, 457 (1852); DeLovio, 7 F. Cas. at 421.
\item[143.] See DeLovio, 7 F. Cas. at 436 n.37.
\item[144.] See Executive Jet Aviation, Inc., 409 U.S. at 267-68.
\item[145.] See, e.g., Northwest Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 97 n.39 (1981) (stating that "the tradition of division of damages was unique to admiralty").
\item[146.] Crawford Bros. No. 2, 215 F. at 271 and accompanying text.
\end{itemizethebibliography}
The Chicago Convention and its progeny established international standards for jurisdiction over acts aboard aircraft. Although more specific rules, outlined in the Tokyo, Hague, and Montreal Conventions, pertained to certain crimes committed aboard aircraft, the Chicago Convention reaffirmed national sovereignty over its territorial airspace.\textsuperscript{153} It also established a system of aircraft registration similar to that under maritime law\textsuperscript{154} and suggested that an aircraft’s country of registration retained some jurisdiction over the plane as well.\textsuperscript{155}

Twenty-five years later, the Tokyo Convention greatly clarified and widened the scope of criminal jurisdiction over offenses committed in flight, on the high seas, or outside the territory of any state.\textsuperscript{156} Extending to all offenses under municipal penal law and certain other actions jeopardizing aircraft or crew safety,\textsuperscript{157} the Convention significantly broadened jurisdiction over criminal offenses. While clearly favoring jurisdiction of an aircraft’s state of registration, it also permitted other contracting nations to “interfere with an aircraft in flight”\textsuperscript{158} to exercise jurisdiction based on an act’s effect,\textsuperscript{159} the nationality principle,\textsuperscript{160} the passive personality principle,\textsuperscript{161} and the protective principle.\textsuperscript{162} Oddly, it also established jurisdiction according to the territorial principle, but only for offenses involving the navigation and flight of the aircraft.\textsuperscript{163}

Under these jurisdictional principles, states may theoretically interfere with aircraft in flight wherever such aircraft are located, even in the territorial airspace of another state. Four considerations support this conclusion. First, the clauses permitting jurisdiction do not limit the locations of such “interference[s]” in their text.\textsuperscript{164} Second, the Article 4 jurisdictional

\begin{itemize}
  \item \textsuperscript{153} Chicago Convention, \textit{supra} note 134, art. 1 ("The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.").
  \item \textsuperscript{154} \textit{Id.} art. 17 ("Aircraft have the nationality of the State in which they are registered."); \textit{id.} art. 18 ("An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.").
  \item \textsuperscript{155} \textit{See} \textit{id.} art. 12 ("Each contracting State undertakes to adopt measures to insure that . . . every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force.").
  \item \textsuperscript{156} Tokyo Convention, \textit{supra} note 147, art. 1, § 2.
  \item \textsuperscript{157} \textit{Id.} art. 1, § 1.
  \item \textsuperscript{158} \textit{Id.} art. 4 (providing exceptions to the rule that “[a] Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board . . .”).
  \item \textsuperscript{159} \textit{Id.} art. 4(a) ("the offense has effect on the territory of such State").
  \item \textsuperscript{160} \textit{Id.} art. 4(b) ("the offence has been committed by . . . a national or permanent resident of such State").
  \item \textsuperscript{161} \textit{Id.} art. 4(b) ("the offence has been committed . . . against a national or permanent resident of such State").
  \item \textsuperscript{162} \textit{Id.} art. 4(c) ("the offence is against the security of such State").
  \item \textsuperscript{163} \textit{See} \textit{id.} art. 4(d) ("the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State").
  \item \textsuperscript{164} \textit{Id.} art. 4.
\end{itemize}
principles are by nature extraterritorial, so limiting the application of these provisions by territorial principles makes little sense. Third, it would violate a core purpose of the Tokyo Convention: to encourage nations to broaden their criminal jurisdictions over offenses committed aboard aircraft.\(^\text{165}\) Finally, Article 4, if read literally, may specifically restrict the territorial jurisdiction of a non-registration state to certain offenses,\(^\text{166}\) implying by way of \textit{expressio unius est exclusio alterius}\(^\text{167}\) that the territorial jurisdiction of those states does not extend to certain offenses. Therefore, a state must rely on other jurisdictional theories to reach foreign-registered aircraft present over its territory.\(^\text{168}\)

The Hague and Montreal Conventions introduced more specific criminal guidelines for the unlawful seizure of aircraft and for certain other violent acts jeopardizing the safety of aircraft, respectively.\(^\text{169}\) The Hague Convention mandates similarly broad exercise of jurisdiction over criminal offenders by: (1) the state in which the aircraft is registered; (2) any state where the plane lands and the offender is aboard, under the territorial principle; and (3) the state of the lessee’s principal place of business if the offense occurs aboard an aircraft leased without a crew, or the state where the lessee has permanent residence if the lessee has no principal place of business.\(^\text{170}\) It also allows universal jurisdiction by any state party over a defendant found in that state’s territory who violates the Convention, provided that the state does not extradite the defendant.\(^\text{171}\) Similarly, the Montreal Convention permits jurisdiction under similar principles as the Hague Convention (providing jurisdiction under the same principles as the Hague Convention, and also providing jurisdiction to the nation in whose territory the offense is committed).\(^\text{172}\)

Congress broadened U.S. admiralty jurisdiction by statute in anticipation of and in response to the Tokyo, Hague, and Montreal Conventions. In 1952, Congress amended admiralty’s criminal jurisdiction by creating a

\(^{165}\) \textit{See} United States v. Georgescu, 723 F. Supp. 912, 915 (E.D.N.Y. 1989) ("The purpose of the Tokyo Convention was in part to encourage countries to punish crimes and certain non-criminal acts committed aboard aircraft.").

\(^{166}\) \textit{See} Allan I. Mendelsohn, \textit{In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention}, 53 Va. L. Rev. 509, 518 n.21 (1967) ("It could be argued that under its literal terms article 4 would also permit a contracting state other than the subjacent state to interfere with an aircraft in flight [in some circumstances].").

\(^{167}\) \textit{William N. Eskridge Jr. \textit{et al.}, Cases and Materials on Legislation: Statutes and the Creation of Public Policy} 824-25 (3d ed. 2001) ("inclusion of one thing indicates exclusion of the other").

\(^{168}\) However, one commentator has argued that a subjacent state has exclusive jurisdiction over the flight of an aircraft above its territory when it has a basis for jurisdiction enumerated in Article 4. \textit{See} Mendelsohn, \textit{supra} note 166, at 518 n.21.

\(^{169}\) \textit{Hague Convention, supra} note 148, art. 1; \textit{Montreal Convention, supra} note 149, arts. 1-2.

\(^{170}\) \textit{Id.} art. 4(1).

\(^{171}\) \textit{Id.} art. 4(2).

\(^{172}\) \textit{Montreal Convention, supra} note 149, art. 5.
“special maritime and territorial jurisdiction.’\textsuperscript{173} This extended traditional U.S. admiralty jurisdiction to certain aircraft with respect to criminal activities.\textsuperscript{174} Later, in 1961, Congress amended the Federal Aviation Act to establish criminal jurisdiction aboard “aircraft in flight in air commerce.’\textsuperscript{175} In 1970, one year after the Senate ratified the Tokyo Convention, Congress passed implementing legislation creating a “special aircraft jurisdiction,’\textsuperscript{176} which it later modified to conform with the Hague and Montreal Conventions.\textsuperscript{177} These statutes remain in force today.

The U.S. Congress and federal courts also began to extend maritime tort actions to acts occurring aboard aircraft not in flight, generally involving crashes on the high seas.\textsuperscript{178} In 1972, the Supreme Court allowed suits based on certain torts aboard aircraft within admiralty jurisdiction when the injury occurred over an area also subject to admiralty jurisdiction. The Court required that the tort have a “nexus” with maritime activities.\textsuperscript{179} Further, a 1988 district court case, \textit{United States v. Yunis}, suggested that certain statutes expanding jurisdiction to combat crimes against aircraft and aircraft facilities could extend to all aircraft in flight with some undefined physical or operational link to the United States, regardless of planes’ physical locations.\textsuperscript{180}

\begin{footnotes}
\item[174.] \textit{See} 18 U.S.C. § 7(5) (2004) (“Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.”).
\item[178.] \textit{See}, e.g., \textit{Trihey v. Transocean Air Lines}, 255 F.2d 824, 827 (9th Cir. 1958) (assuming, without deciding, that the Federal Death on the High Seas Act applied to an airplane crash over the Pacific Ocean); \textit{Kropp v. Douglas Aircraft Co.}, 329 F. Supp. 447, 455 (E.D.N.Y. 1971) (stating that the Federal Death on the High Seas Act applies “whether the tort is deemed to have occurred in the airspace over the high seas... or on the high seas...”); \textit{Blumenthal v. United States}, 189 F. Supp. 439, 445 (E.D. Pa. 1960) (holding that cause of action lay under Federal Death on the High Seas Act for death of man who died, presumably from drowning, after parachuting from damaged plane into the high seas), \textit{aff’d}, 306 F.2d 16 (3d Cir. 1962); \textit{Lacey v. L.W. Wiggins Airways, Inc.}, 95 F. Supp. 916, 918 (D. Mass. 1951) (applying the Federal Death on the High Seas Act to an airplane crash on the high seas).
\end{footnotes}
Influential Anglo-American jurists have referred to admiralty courts as "court[s] of the law of nations." This characterization is probably due to foreign nations’ significant interests in the outcomes of admiralty cases and the strong ties between admiralty law and international law. Under Justice John Marshall’s leadership, the Supreme Court had such respect for admiralty’s international importance that it relied on admiralty to allow the federal government to restrict state power.

Admiralty’s international significance stems in part from the common interests nations have in waterborne activity. This common interest has resulted in a grant of broad, concurrent jurisdiction over navigable waters to admiralty courts, wherever situated, to address problems peculiar to maritime affairs. For example, most navigable waters are difficult to monitor and control. Thus, a broad, concurrent jurisdiction allows the international community to cooperatively regulate maritime commerce.

Concurrent jurisdiction also permits the best-situated court—often where a vessel of interest is located—to investigate and adjudicate matters through in rem jurisdiction. Such breadth and concurrence vindicate the critical role that seagoing commerce plays in nations’ economies, and increasingly, their security. Finally, only an internationally recognized set of rules can adequately regulate the characteristically international community of seagoing persons. Maritime commerce links many nations together via ships and crews from around the world and has long been a critical facilitator of international relations. Therefore, a unified body of admiralty law encourages predictability and comity among nations participating in maritime commerce.

This international character is particularly apparent with respect to U.S. admiralty courts’ in rem jurisdiction, which takes a different form than such jurisdiction in common law courts. All in rem proceedings adjudicate rights in property before a court. However, whereas in common law courts property is reached through the parties’ titles, admiralty courts’ control reaches the property itself. Furthermore, while a common law court proceeding in rem can only dispose of the title to the property, an admiralty court can dispose of the property itself. Therefore, judgments

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181. See, e.g., Waring v. Clarke, 46 U.S. 441, 441 n.1 (1847) (“A court of admiralty is a court of the law of nations”); DeLovio, 7 F. Cas. at 443.
182. See Martin v. Hunter’s Lessee, 14 U.S. 304, 335 (1816).
184. See DeLovio, 7 F. Cas. at 443.
186. Id.
187. Id.
on the res in admiralty are considered binding against all potential claimants and are not subject to attack in another court. However, facts established by an admiralty court exercising in rem jurisdiction may still be attacked in other courts; it is the judgment and disposition of the property itself that remains immune from collateral attack. To protect interested parties from such binding effects, admiralty law permits any interested party to file a claim in such cases and charges courts to act as guardians of potentially unrepresented interests. Thus, the law assumes that all potential claimants are placed on notice by an admiralty action in rem.

Admiralty jurisdiction was also one origin of the principle that forfeiture proceedings could be brought directly against a res without first convicting the owner of a felony or applicable crime triggering the forfeiture, as was required at common law. This ability in admiralty appears to be founded upon the need to punish crimes of an international nature on the high seas—such as piracy, slave trading, or smuggling—for which offenders' physical location made the exercise of personal jurisdiction difficult.

Admiralty courts assume an even more international and universal character when exercising jurisdiction over universally recognized and condemned acts. This is particularly true when a court sits in prize. When an admiralty court of any nation renders judgment against a vessel in prize cases, its judgment is immune from direct or collateral attack in any other court, domestic or foreign. Admiralty courts apply the law of

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188. See, e.g., The Moses Taylor, 71 U.S. at 427; Moran v. Sturges, 154 U.S. 256, 282 (1894) (regarding a maritime lien); Cushing v. Laird, 107 U.S. 69, 80 (1882) ("The proceedings of a prize court being in rem, its decree, as is now universally admitted, is conclusive, against all the world, as to all matters decided and within its jurisdiction.").
189. See, e.g., Becher v. Contoure Labs., 279 U.S. 388, 391 (1929); Cushing, 107 U.S. at 80.
190. Additional Note on the Principles and Practice in Prize Causes, in Appendix 1 to 15 U.S. Reports (1817) (citing The Maria Francaise, 6 Rob. 282 (establishing the duty of the court to take notice of all interests in the res before it, and to act as the guardian of all unrepresented in the res)).
191. Id.
194. See, e.g., S. Pac. Co. v. Jensen, 244 U.S. 229 (1917) (Pitney, J., dissenting) ("It was held in England that the question of prize or no prize, and other questions arising out of it, were exclusively cognizable in the admiralty, because that court took jurisdiction owing to the fact of possession of a prize of war, and the controversy turned upon belligerent rights and was determinable by the law of nations, and not the particular municipal law of any country."); Paquete Habana, 175 U.S. 677, 708 (1900).
195. Prize law is broadly defined as "[t]he system of laws applicable to the capture of prize at sea, dealing with such matters as the rights of captors and the distribution of the proceeds." BLACK'S LAW DICTIONARY 1218-19 (Deluxe 7th ed. 1999). "Prize," in turn, refers to "[a] vessel or cargo captured at sea or seized in port by the forces of a nation at war, and therefore liable to being condemned or appropriated as enemy property." Id. at 1218.
nations when adjudicating cases of piracy, even for criminal offenses charged under a U.S. statute, and the Supreme Court has suggested that the same holds true for cases involving smuggling and embargoed vessels as well. As commercial and passenger air travel have become as ubiquitous as their marine counterparts, courts have exported this doctrine to universally condemned crimes related to aircraft.

In the early 1800s, the slave trade faced increasing international condemnation, and English and American admiralty courts began expanding their admiralty and maritime jurisdictions over vessels involved in the slave trade. English admiralty courts led this trend. In the first two decades of the nineteenth century, they applied prize jurisdiction to captured slave trading vessels, even when the vessels were registered in a foreign sovereign or were neither belligerents nor otherwise involved in conduct forbidden by the laws of war.

Such treatment of foreign vessels was novel because it potentially disturbed two previously settled admiralty principles. First, prize jurisdiction did not ordinarily extend to vessels operating outside a theater of war, where the law of nations was traditionally most applicable. Second, applying purely English prohibitions against the slave trade to foreign vessels clearly did not fall within admiralty's traditional jurisdiction. To apply such laws to foreign nationals aboard foreign vessels either involved a brash disregard of foreign sovereignty or, as advocates of this practice then argued, an understanding that the slave trade prohibition had become part of the law of nations. Early English cases supported the latter view, creating a presumption that the slave trade was prima facie illegal under English admiralty law and placing the burden of proof on parties claiming human property to show legality under applicable foreign law.

However, both U.S. and English admiralty courts slowed the doctrine's development as the abolition of slavery met with international

197. Malek Adhel, 43 U.S. 210, 233 (1844) (stating that the admiralty law acts under the law of nations when it treats a piratical vessel as an offender under criminal laws punishing piracy).
198. Id.
199. United States v. Georgescu, 723 F. Supp. 912, 919 (E.D.N.Y. 1989) ("Many crimes committed aboard aircraft are considered both by the United States and the international community to be "Offenses against the Law of Nations."); see also United States v. Batre, 69 F.2d 673, 675-76 (9th Cir. 1934) (applying the principle from Malek Adhel that admiralty courts are courts of the law of nations in cases involving internationally condemned conduct to cases involving an in rem action against an airplane under Congressionally created statutory jurisdiction).
202. Id.
203. Id.
204. See, e.g., The Fortuna [1811] 1 Dods. 81; The Amedie, [1810] 1 Acton's Rep. 251; The Anne, [1810], 2 Acton's Rep. 6; The Donna Mariana, [1812] 1 Dods. 92. But see The Diana [1813], 2 Dods. 95.
resistance. English courts ultimately refused to extend the law of nations to include the slave trade in 1817. Eight years later, the U.S. Supreme Court reached the same conclusion in its confusing 1825 opinion, *The Antelope*, refusing to include the slave trade within the scope of "the law of nations" or "piracy." 

*The Antelope* concerned property rights in slaves captured from three ships—one American, one Spanish, and one Portuguese. The slaves were taken by a privateer operating under a commission of Uruguayan revolutionary José Artigas, who was leading a rebellion against Spain and the then-sovereign government of Buenos Aires during the late 1810s. However, the Artegan privateer, named the *Colombia*, had violated U.S. law by outfitting itself in Baltimore, in violation of U.S. law. After the *Colombia* left Baltimore, it captured the slaves from the three ships off the coast of Africa and took the *Antelope* as a prize for its return voyage across the Atlantic. The commander of a U.S. vessel brought the *Antelope* to Savannah for investigation, suspecting the ship of violating U.S. laws prohibiting the slave trade.

When the case finally reached the Supreme Court five years later, the only legal question remaining was what rights the Spanish and Portuguese owners had in the slaves found aboard the *Antelope*. Three difficult legal issues presented themselves: (1) whether the slave trade was contrary to the law of nations; (2) if it constituted "piracy" as understood by the law of nations; and (3) what property rights in humans vested in their possessors.

Unfortunately, Chief Justice Marshall’s majority opinion gave muddled answers to all but the final question. It disposed of the slaves—returning the Spanish slaves to their owners but refusing to release those claimed by the Portuguese—after crafting a well-defined burden of proof for individuals claiming rights to humans based on possession alone. In spite of the opinion’s confusing nature, two broad conclusions relating the slave trade to the law of nations are clear. First, consistent with the laws of the United States and other industrialized nations, the Court held that the

205. These difficulties were particularly apparent in Lord Castlereagh’s failure to convince other nations at the Congress of Aix-la-Chapelle in 1818 that the slave trade violated the law of nations. See 6 Brit. & Foreign St. Papers 77, 79 (1818-19).
207. 23 U.S. 66, 118 (1825).
211. NOONAN, *supra* note 208, at 3.
212. See *id* at 114-16.
213. See generally NOONAN, *supra* note 208.
The moral prohibition on the slave trade was not part of the law of nations. Second, it also found that the slave trade was not piracy under international and admiralty law. While U.S. statutes could label the slave trade as piracy, they could not widen the traditional definition of piracy under admiralty law.

The Court based these two conclusions upon two principles. First, it pointed out that the right of visitation and search was strictly a belligerent right and did not apply in peacetime. Because pirates are the enemies of all mankind, and all nations are obliged to war against them, admiralty law had granted this right to all nations’ vessels with respect to suspected pirates. The same logic was not applied to slave ships, which, unlike pirates, did not “renounc[e] . . . and ravag[e] every country,” confining their depredations instead to the bodies of those they bought and sold. A right of visitation and search of these ships could not be universal as with pirate ships, since not all nations were at war with them. The Court considered this distinction significant and distinguished the slave trade from piracy.

Second, the Court reasoned that the universal consent of nations was required to make a prohibition against slavery part of the law of nations. Because the law of nations derives its legitimacy from unanimous international support and the nations of the world had historically supported slavery, Marshall argued, slavery would be consistent with the law of nations until all nations otherwise consented. Some nations, including the United States and some African countries, permitted slavery at the time, so he concluded that the law of nations still permitted the practice.

Given these two broad principles, the holding remains unclear. The case could stand for the narrow proposition that a nation cannot invoke its

216. See United States v. Flores, 289 U.S. 137, 148-49 n.4 (1933) (discussing congressional powerlessness to modify core principles of admiralty law under Article III).
217. Id. at 118 (citing The Le Louis, 2 Dods. 238).
218. Id. at 120-23.
219. Id. at 122-23.
220. Id. at 122.
221. Id. at 120-23.
222. Id. at 122 (“No principle of general law is more universally acknowledged than the perfect equality of nations. . . . A right, then, which is vested in all by the consent of all, can be devested only by consent . . . .”).
223. Id. at 120 (“[F]rom the earliest times war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity[, a right conferred by war was] that the victor might enslave the vanquished.”).
224. Id. at 122.
225. Id. at 121 (“Throughout the whole extent of [Africa], so far as we know its history, it is still the law of nations, that prisoners are slaves.”)
226. Id. at 122-23.
own statutes to deny restitution of slaves captured by its vessels. This interpretation would theoretically permit shifting the burden of proof to the claimants of slaves in in rem admiralty actions. Alternatively, it could be read broadly to require admiralty courts to treat human cargo in the same manner as inanimate cargo. Unfortunately, the Court did not define its holding’s scope, instead presuming that the issue was settled:

It follows, that a foreign vessel engaged in the African slave trade, captured on the high-seas, in time of peace, by an American cruiser, and brought in for adjudication, would be restored. The general question being disposed of, it remains to examine the circumstances of the particular case.

Regardless of how narrowly one construes the opinion, however, two principles of maritime law seem certain. First, if participation in the slave trade is considered piracy, then absent a treaty or statute to the contrary the United States, exercising jurisdiction over the piratically captured res, would have a superior interest in the res than the apparent owner. Second, if the slave trade did not violate the law of nations, it could not be piracy, and the U.S. court could not deny restitution of the slaves on that ground.

Even given the Court’s imprecise holding, a foreign slave trading vessel captured by an American cruiser on the high seas might not be restored judicially. For example, under contemporary U.S. law a foreign slaver with U.S. citizens aboard is subject to capture and forfeiture on the high seas, a result directly contrary to the Court’s language. Further, the Court’s holding affected not only restitutionary rights, but also an American commander’s asserted salvage rights to slaves lost at sea and the prize claim asserted by the Spanish captain of The Antelope. Without more guidance from the Court, the holding only necessarily prevents a U.S. admiralty court from conclusively deciding prize, salvage, and restitution rights on the basis of a claimant’s participation in the slave trade alone.

Reversal of the holding in The Antelope could allow U.S. admiralty courts to consider the slave trade under the law of nations when deciding

228. The Antelope, 23 U.S. at 123.
229. Under the Act of Mar. 3, 1819, § 4, 3 Stat. 510, a vessel engaged in piracy was subject to condemnation by a U.S. court.
230. The law of nations informed the definition of piracy for the purposes of the applicable forfeiture statute. Id.; see also United States v. Smith, 18 U.S. 153, 159-61 (1820). Thus, were the slave trade contrary to the law of nations, it might fairly have been deemed piratical, and thus subject to the forfeiture statute and belligerent capture. The Antelope, 23 U.S. at 122 (“If [the slave trade] is consistent with the law of nations, it cannot of itself be piracy.”).
232. It is unclear whether this claim was appealed, but the Supreme Court’s holding clearly affects any adjudication of prize with respect to captured slaves.
issues of prize, salvage, and restitution. The subsequent 175 years having already eviscerated the force and rationale of its holding, the decision seems ripe for reversal. From its publication, the decision was of dubious authority; it was the first equally divided opinion ever rendered by the Supreme Court.\(^\text{233}\) Since then, changes in international norms have largely undermined the two foundations for the Court’s holding with respect to the slave trade—the lack of a right of visitation upon vessels and the lack of a universally recognized prohibition of the trade—and condemned the Court’s outcome in *The Antelope*.\(^\text{234}\)

First, most nations recognized a right of visitation and search of foreign vessels suspected of engaging in the slave trade beginning in the mid-twentieth century, under either the Convention on the High Seas\(^\text{235}\) or the United Nations Convention on the Law of the Sea ("UNCLOS").\(^\text{236}\) One hundred fifty-seven nations now recognize such a right.\(^\text{237}\) United States caselaw also asserts that this right of visitation and search has become the international legal standard and is not, as *The Antelope* maintained, a departure from accepted practice.\(^\text{238}\)

Second, the slave trade is now universally condemned,\(^\text{239}\) and U.S. courts widely accept its prohibition as part of the law of nations.\(^\text{240}\) This change fulfills the universal consent required by *The Antelope*.\(^\text{241}\)

\(^{233}\) Noonan, supra note 208, at 32-33 ("And whether, in such a case, restitution ought to be decreed at all, was a question on which the Court was equally divided. Where the Court is equally divided, the decree of the Court below is of course affirmed, so far as the point of division goes."); Neil v. Biggers, 409 U.S. 188, 191-92 (1972).

\(^{234}\) See United States v. Matta-Ballesteros, 71 F. 3d 754, 764 n.5 (7th Cir. 2001) (stating that slavery violates *jus cogens* norms); Samson v. Fed. Republic of Germany & Claims Conf., 250 F. 3d 1145, 1154 n.5 ("[S]ome *jus cogens* norms are beyond question, such as the norm against slavery . . . ").


\(^{237}\) Id. art. 110(b); as of December 23, 2003, 157 nations had signed the instrument, 145 of which had also ratified it. See http://www.un.org/Depts/los/reference_files/status2005.pdf. Given that there are 192 members of the United Nations (including the Vatican), see List of Member States, United Nations, available at http://www.un.org/Overview/unmember.html (list current as of Apr. 24, 2003) (last visited July 4, 2004), over 81% of nations have given their formal approval of Article 110(b). If one disregards the non-participation of the 10 landlocked nations, given a presumed lesser interest in a convention on the law of the sea, over 86% of interested nations have signed.


\(^{239}\) Supra note 4 (listing numerous widely recognized international instruments denouncing the slave trade, including the Universal Declaration of Human Rights).

\(^{240}\) Supra note 4; see also Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

\(^{241}\) *The Antelope*, 23 U.S. 66, 122 (1825); see also Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765-66 (2004) (suggesting that slave traders are *hostis humani generis* and that slave trading violates
If the split nature of the decision in *The Antelope* and its subsequent narrowing by *The Amistad* did not call its holding into question in the mid-1800s, the disappearance of its logical underpinnings exposes an indefensible opinion in need of reversal. Given the effective demise of *The Antelope*, Thirteenth Amendment claims brought under U.S. admiralty and “aircraft jurisdiction” to combat modern slavery should also implicate admiralty’s full powers as a court of the law of nations, supporting a broad jurisdictional scope.

C. Why Modern Slave Traders are Hostis Humani Generis and How that Fact Supports Broadened Jurisdiction over Their Activities

After the September 11, 2001 attacks on the Pentagon and the World Trade Center, many scholars advocated adding terrorists to the definition of *hostis humani generis* (the enemies of all mankind) alongside pirates. These scholars also argued for extending universal jurisdiction over terrorists through U.S. courts. The newfound importance of apprehending and prosecuting persons acting outside the traditional social organizations of nation-states has brought the issue of U.S. courts as courts of the law of nations back into the spotlight. Despite some scholars labeling terrorists as *hostis humani generis*, most articles undertake only a superficial analysis of the nature of terrorism, generally referencing the great danger it poses to humanity. Perhaps more convincing are the many international conventions enacted to combat terrorism, creating various forms of universal jurisdiction over enumerated offenses. Yet even these do not clearly define terrorism or systematically place it within the legal context of *hostis humani generis*.
Many scholars have neglected to carefully analyze the law of piracy, preferring to make superficial comparisons of terrorists to pirates based on their perceived statelessness and the danger they pose. But the legal comparison is not so straightforward. If terrorists bear enough resemblance to pirates in order to merit consideration as *hostis humani generis*, then surely the similarities would be strongest between pirates and maritime terrorists. Yet in the words of one Canadian scholar, “*Maritime terrorism does not fall comfortably within the legal meaning of piracy.*” Maritime terrorism does not typically fit two of the UNCLOS requirements of a piratical offense: (1) that the offense involve at least two vessels; and (2) that the act be for private ends. Maritime terrorists, most notably the *Achille Lauro* hijackers, generally operate aboard the vessel they are terrorizing and act for political ends. Pirates, in contrast, are generally not affiliated with political causes. Admittedly, the emergence of “stateless” terrorist groups such as Al-Qaida blur this distinction somewhat, as it is often unclear whose ends they are pursuing and whether they have formal connections to a nation-state.

Still, in contrast with the heyday of *The Antelope*, the debate over terrorism’s place within *hostis humani generis* shows just how accepted placement of slave traders within that category has become. Even Robert Bork, famously skeptical of all things international, clearly labeled slave traders “men without nations,” in contrast to terrorists and akin to pirates. The increasing problem of stateless terrorist organizations may prompt courts to endorse principles of universal jurisdiction, in turn bolstering the scope of private rights of action under the Thirteenth Amendment.

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250. UNCLOS, *supra* note 236; *see also Mellor, supra* note 183, at 378-79. But *see Documents Concerning the Achille Lauro Affair and Cooperation in Combating International Terrorism, 24* I.L.M. 1509, 1554-57 (1985) (demonstrating that the U.S. Justice Department obtained warrants for the arrest of the Achille Lauro terrorists for “piracy on the high seas”).
252. Tel-Oren *v. Libyan Arab Republic, 726 F.2d 774, 826 n.5 (D.C. Cir. 1984) (Bork, J., concurring); see also Rubin, THE LAW OF PIRACY (1988).*
253. *See Tel-Oren, 726 F.2d at 826 n.5 (Bork, J., concurring) (stating that “the crucial distinction is that the pirate and slave trader were men without nations, while the torturer (and terrorist) are frequently pawns, and well controlled ones, in international politics”).*
ADimiralty and the Thirteenth Amendment

V

Applying the Thirteenth Amendment in the Context of in Rem Admiralty Jurisdiction

A. Historical Precedent for Causes of Action Against the International Slave Trade Through U.S. Admiralty Jurisdiction

History also supports using U.S. admiralty jurisdiction to fight current U.S. participation in the slave trade abroad. Under circumstances startlingly similar to those created by modern slavery today, the U.S. Executive used such an approach when fighting American participation in the Brazilian slave trade during the 1840-1850s.

At the time, much of the Western Hemisphere prohibited the importation of slaves from Africa even though slavery itself was still permitted by two of the largest nations, Brazil and the United States. As is true today, however, the illicit slave trade was tremendously profitable and very difficult to detect, and the smuggling of slaves thus proliferated. Brazil, suffering from severe internal corruption, had been facilitating the illicit trans-Atlantic slave trade by turning a blind eye to the participation of its citizens and foreigners, including Americans. Although the Brazilian government officially condemned the practice, high-ranking government officials worked to frustrate U.S. and British efforts to suppress the trade by refusing to extradite or prosecute offenders.

Sensing the failure of bilateral and multilateral efforts to suppress the trade, U.S. Ministers to Brazil attempted to halt U.S. actors' participation through unilateral action. In at least two instances, they expanded the traditional scope of admiralty jurisdiction to pursue slave traders who evaded U.S. laws behind the shroud of Brazilian sovereignty.

In 1845, the U.S. Minister permitted the U.S. Navy to seize a U.S. vessel, the Porpoise, suspected of participating in the slave trade while anchored at Rio de Janeiro. Six years later, the U.S. Attorney General

254. By 1850, slavery had been abolished in Haiti (1804), Chile (1823), Central America (1824), Mexico (1829), Bolivia (1831), British colonies (1838), Uruguay (1842), and French and Danish colonies (1848). Anti-Slavery International, Emancipation Timeline, available at http://www.antislavery.org/breakingthesilence/main/PickandMix/06_Emanicipa_Timeline.doc (last visited May 27, 2005). “Gradual emancipation” programs had also been adopted in Argentina (1813) and Colombia (1814). Id. The United States and Brazil did not abolish slavery until 1865 and 1888, respectively. Id.


256. Id. at 43-47.

257. Id.

258. A series of letters from the principal players describe the Porpoise affair in great detail. See generally H.R. Ex. Doc. 30-61 (1849). The United States later tried the captain of the vessel for piracy, see U.S. v. Libby, 26 F. Cas. 928 (C.C. Me. 1846) (deciding questions of law before the case reached the jury), and filed a libel of information against the vessel, see The Porpoise, 19 F. Cas. 1064 (C.C. Mass. 1855). The ship was ultimately condemned, see id., but Libby was acquitted. Howard, supra note 255, at 225 (citing Fed. Cas. # 15,597).
recommended a federal indictment against a U.S. citizen for violation of U.S. anti-slave trade laws under U.S. admiralty jurisdiction.\textsuperscript{259} The accused had orchestrated numerous slave trading voyages completely from within Rio de Janeiro.\textsuperscript{260} By stretching the scope of U.S. admiralty jurisdiction's proscriptive and enforcement powers to slave traders clearly beyond its traditional limits, the U.S. Executive sought to overcome bilateral and multilateral failures to control a problem affecting the United States. Given that this problem was widely understood when the Thirteenth Amendment was drafted,\textsuperscript{261} it is reasonable to believe that Congress foresaw its use in combating the slave trade in this manner.

B. Recognizing Private Causes of Action for Thirteenth Amendment Claims to Combat Modern Slavery

Because the Thirteenth Amendment applies "within the United States, or any place subject to its jurisdiction," it prohibits involuntary servitude or slavery within U.S. admiralty and aircraft jurisdiction. The broad scope of this jurisdictional grant, interpreted in the context of the special policies supporting its expansion when addressing "universally recognized and condemned crimes," is useful for combating U.S. participation in slave labor abroad without necessitating the sea change in Thirteenth Amendment jurisprudence that some have advocated.

As discussed in Part III, the scope of a private right of action under the Thirteenth Amendment remains murky and undefined due to the inadequacy of jurisprudential recognition of the Amendment's special context. Consequently, a prospective litigant considering a new Thirteenth Amendment suit would wisely pursue the course least likely to offend constitutional and equitable considerations that restrain creating private rights of action under constitutional provisions.

However, unlike Professor Wolff, I believe the remedy pursued should be damages, not injunctive relief. As noted earlier, the \textit{Bivens} analysis, preferring injunctive relief to damages in private causes of action

\textsuperscript{259} See \textit{Op. Att'y. Gen.} 454 (1851). The accused, Joshua Clapp, was a notorious slave trader who had built a small commercial empire in Rio de Janeiro. \textit{See Howard, supra} note 255, at 45-46.

\textsuperscript{260} See Letter No. 90 from U.S. Minister to Brazil Daniel Tom to U.S. Secretary of State Daniel Webster, containing the deposition of William Anderson (June 11, 1851), \textit{microformed on The U.S. National Archives and Records Service, Despatches from United States Ministers to Brazil, vol. 18 (January 12, 1850 - November 9, 1851), in File Microcopies of Records in the National Archives: No. 121, Roll 20 (1951)}; Letter No. 93 from U.S. Minister to Brazil Daniel Tom to U.S. Secretary of State Daniel Webster (July 31, 1851), \textit{microformed on The U.S. National Archives and Records Service, Despatches from United States Ministers to Brazil, vol. 18 (January 12, 1850 - November 9, 1851), in File Microcopies of Records in the National Archives: No. 121, Roll 20 (1951)}.

\textsuperscript{261} \textit{See Howard, supra} note 255, at 44 (1963) ("American officials at Rio . . . came close to pushing the United States into war with Brazil over the brig Porpoise."). It is difficult to believe that drafters of the Thirteenth Amendment would not have heard of this episode and the lengthy struggle by the Executive to contain the international slave trade.
brought under constitutional provisions, is entirely unsuited for Thirteenth Amendment claims. Given the Amendment’s special role in regulating private actors, contract and tort law preferences for damages are more appropriate for proscribing private actions violating the Thirteenth Amendment.

Given the limited yet universal nature of admiralty’s in rem jurisdiction, a Thirteenth Amendment action in rem against the vessel or aircraft for damages is more likely to survive a constitutional challenge. Proceeding under the admiralty principle that a vessel represents its owners and masters, Thirteenth Amendment claims could be argued as if subject vessels were the defendants. Courts could award damages from the sale of the res in each case. This approach would avoid both the danger of excessive judicial interference with Congress’s power to make law, as noted in Bivens, and the administrative difficulties associated with equitable relief when enforced against private actors.

What behavior would subject a vessel to an in rem proceeding is unclear. The Thirteenth Amendment prohibits “slavery and involuntary servitude.” This language clearly extends to “condition[s] of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.” The Trafficking Victims Protection Act unmistakably includes “cases in which persons are held in a condition of servitude through nonviolent coercion,” encompassing psychological coercion commonly used in modern trafficking schemes. Most modern slave labor schemes fit into either interpretation.

Federal statutes criminalizing the slave trade under U.S. admiralty and maritime jurisdiction predate the Thirteenth Amendment. This suggests that the Thirteenth Amendment prohibits these activities because Congress had already outlawed them at the time of its promulgation. Such an interpretation might permit suit directly under the Thirteenth Amendment rather than under the criminal statutes themselves, as contemplated in the now-disfavored Borak line of cases. Because U.S. admiralty jurisdiction includes vessels in foreign ports, such suits could reach ships or aircraft worldwide.


263. TVPA, supra note 2, § 102(b)(7) (“Traffickers often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape. Such representations can have the same coercive effects on victims as direct threats to inflict such harm.”).


CONCLUSION

Unilateral policing of the modern slave trade in U.S. admiralty courts could be an effective first step toward halting the practice. Instead of relegating enforcement efforts to a multilateral, diplomatic process encumbered by bureaucracy and corruption, litigants could take advantage of U.S. courts. Moreover, Congress has recently passed legislation pursuant to the Thirteenth Amendment to combat modern slavery. For victims from poor, corrupt nations, U.S. courts may be the only forum that can offer any sort of relief.

United States federal courts sitting in admiralty are the most appropriate venue for these actions. Admiralty courts were one of the first international tribunals, applying international standards to one of the first global social phenomena—maritime commerce. Consequently, admiralty courts are appropriate, legitimate venues in which to recognize a broader application of U.S. law that both directly affects foreign interests and coincides with international law. Using admiralty jurisdiction would also allow foreign admiralty courts to join the legal discourse concerning the modern slave trade, given the significant weight that admiralty law places upon foreign jurisprudence. Although this approach is more modest and incremental than others, it also seems more likely to provide victims with immediate relief and allow greater discussion and further expansion of Thirteenth Amendment jurisprudence.