

The Constitution and Slavery Overseas

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INTRODUCTION

From the beginning, American slavery was essentially international, a product of the Atlantic slave trade; and so, too, was the abolitionist movement, with its roots in Great Britain. It therefore comes as a surprise that the Thirteenth Amendment is jurisdictionally restricted to abolishing slavery “within the United States, or any place subject to their jurisdiction.”¹ The self-executing provisions of the Amendment, found in Sec-

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1. U.S. CONST. amend. XIII, § 1.

tion 1, do not extend overseas.² That leaves the possibility that the enforcement provisions in Section 2, giving Congress the “power to enforce this article by appropriate legislation,” authorize extraterritorial legislation.³ Yet this conclusion by no means follows from the language of the Amendment, which authorizes legislation under Section 2 as a means for achieving the ends defined in Section 1. How can the geographical scope of enforcement possibly exceed the prohibition to be enforced?⁴ This question involves more than explicating the text of two clauses in the Constitution. And it requires approaches more persuasive than simply updating the Constitution by editing out disturbing language with modern interpretive techniques.

Congress might decide to regulate or punish slavery overseas for a number of reasons, and it has enacted surprisingly broad prohibitions to this effect. Because of competition with domestic products and services, slavery overseas could undermine the entire regime of free labor that the Thirteenth Amendment sought to constitutionalize. Slave labor in other countries has the potential to drive employers of free labor in this country out of business. Free labor in the United States also faces the threat of competition from slave labor brought into this country through human trafficking. International enforcement of prohibitions against slavery and trafficking remains, practically and morally, a necessary condition of safeguarding free labor in this country. This is not to say that national abolition must await worldwide abolition, which remains a disturbingly distant goal. Nonetheless, neither the transnational effects of the global economy, nor the universal imperatives of human rights—of which freedom from slavery constitutes the most salient example—can be ignored.

This Article examines the resources available under American law to address the issues raised by extraterritorial enforcement of one of the most widely recognized human rights—to be free from physical coercion and the loss of liberty. Part I reviews the history of adoption, interpretation, and enforcement of the Thirteenth Amendment. The scope of the Amendment gradually expanded through the joint efforts of Congress and the Supreme Court, resulting in a prohibition that now goes beyond involuntary servitude to all forms of peonage, whether supported by state or private action. Part II then looks to other sources of congressional power—the Commerce Clause, the Define and Punish Clause, and the Treaty Power—and analyzes how these clauses interact with the power

2. *Id.*

3. *Id.* § 2.

4. For an attempt to directly expand the interpreted scope of the Thirteenth Amendment, see Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002).

to enforce the Thirteenth Amendment. These sources of congressional power are subject, at most, to the minimal constraint that any resulting law regulate activity that has something to do with the United States—that American law have something to do with actions or effects within this country, as seemingly required by the Due Process Clause of the Fifth Amendment. Taken together, the powers of Congress give it ample scope to enact any law realistically designed to prevent or remedy slavery overseas. Part III then looks at slavery in the modern world and examines how far it extends beyond historic forms of chattel slavery to other coercive and oppressive conditions of employment. As periodic reports by international organizations make clear, these now include a variety of forms of forced labor and human trafficking.⁵ Whether prohibitions against slavery should extend further to reach labor conditions that would not be tolerated in this country turns out to be a practical question of law enforcement and foreign relations, rather than a question of congressional power. The Article concludes with a brief discussion of the choice between narrower and broader efforts to enforce prohibitions against slavery overseas.

I. ENACTMENT AND INTERPRETATION OF THE THIRTEENTH AMENDMENT

The geographical limit expressed in the Thirteenth Amendment derives, as does the Amendment itself, from the Northwest Ordinance. The ordinance dates from the founding era, when it was enacted by the Continental Congress and then reenacted by the First Congress under the Constitution. It provided that “[t]here shall be neither slavery nor involuntary servitude in the said territory,” referring to the Northwest Territory comprising what are now the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.⁶ Later legislation, such as the Missouri Compromise⁷ and the Kansas-Nebraska Act,⁸ also incorporated geographical restrictions as a result of compromises between the free states and the slave states. The same pattern continued during the Civil War in statutes prohibiting slavery within the District of Columbia and in the Territories.⁹ The Emancipation Proclamation also had geographical restrictions, mainly designed to maintain the allegiance of the border states.¹⁰ Those restrictions derived from the exigencies of war and the related limits on the power of the President as Commander in Chief,

5. *See infra* Part III.C.

6. An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, July 13, 1787, art. VI, reenacted by Act of Aug. 7, 1789, 1 Stat. 50, 53.

7. Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548 (repealed 1854).

8. Act of May 30, 1854, ch. 59, § 14, 10 Stat. 277, 283.

9. Act of Apr. 16, 1862, ch. 54, § 1, 12 Stat. 376; Act of June 19, 1862, ch. 111, 12 Stat. 432.

10. Proclamation No. 17 (Emancipation Proclamation), 12 Stat. 1268, 1269 (1863).

which meant that abolition could only be achieved in areas of the South controlled by the Union Army.¹¹

As the Civil War came to a close, the Thirteenth Amendment came up for consideration by Congress, which deliberately chose to model the Amendment on the terms of the Northwest Ordinance. Congress simply substituted the phrase “within the United States, or any place subject to their jurisdiction” for the phrase in the ordinance, “within said territory.” Confining the geographical scope of the Amendment fit the temper of the times and prevailing notions of sovereignty. Nation states with exclusive territorial jurisdiction formed the unquestioned basis for international law and raised few problems in foreign relations. The leading treatise on private international law, Joseph Story’s *Commentaries on the Conflict of Laws*, took as fundamental the mutually exclusive territorial allocation of national power.¹² As paraphrased in the well-known decision in *Penny-er v. Neff*,¹³ handed down only a few years after ratification of the Thirteenth Amendment, “the laws of one State have no operation outside of its territory, except so far as is allowed by comity.”¹⁴ Over the course of the twentieth century, the principle of exclusive territorial sovereignty steadily eroded as protection for human rights expanded. Other grounds for asserting extraterritorial jurisdiction expanded at the same time, such as “passive personality jurisdiction” over crimes against state citizens committed overseas.¹⁵ Nations assumed obligations under international law to their own citizens, which made them vulnerable to enforcement actions by other nations or by international institutions.¹⁶ The question before us in the twenty-first century is how strictly we should follow the principle of territorial sovereignty from the nineteenth century.

In other respects, the Thirteenth Amendment has received expansive interpretations endorsed by both Congress and the Supreme Court, which might also support expanded geographical coverage. Beginning with the Civil Rights Act of 1866,¹⁷ Congress interpreted its powers under Section 2 of the Amendment to extend well beyond imposing penalties for slavery. The Act purported to confer citizenship on the newly freed slaves and to give them the same civil rights as “enjoyed by white

11. For a summary of these developments, see George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1371–76 (2008).

12. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 450–51 (1834).

13. 95 U.S. 714 (1877).

14. *Id.* at 722.

15. ANDREW CLAPHAM, BRIERLY’S LAW OF NATIONS 247–55 (7th ed. 2012).

16. *Id.* at 120–27.

17. Act of Apr. 9, 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2012)).

citizens.”¹⁸ Although the constitutionality of this Act came into question, the issue was resolved by passage of the Fourteenth Amendment, which followed the Act in granting citizenship to former slaves and protecting the civil rights of citizens.¹⁹ In the Peonage Act of 1867,²⁰ Congress accomplished a similar, but less dramatic, extension of the Thirteenth Amendment. While the Amendment prohibits only slavery and involuntary servitude, the Peonage Act prohibits voluntary as well as involuntary servitude, putting an end to the practice of indentures for a term of years in repayment for a debt or other obligation.²¹ The Peonage Act also prohibits any form of debt bondage—in the sense of an obligation to work until a debt has been paid off—without the option of quitting and leaving the debt unpaid.²²

The line of cases upholding the Peonage Act confirmed a second extension of the Thirteenth Amendment, from public action to private action. Individual justices had reached this conclusion in decisions on circuit,²³ and the Supreme Court had endorsed it in dictum in the *Civil Rights Cases*.²⁴ The first holding to this effect came in a peonage prosecution brought against private individuals without any involvement by the state.²⁵ This decision confirmed that the “state action” doctrine under the Fourteenth Amendment had no inherent restraining influence on the Thirteenth Amendment or on legislation passed to enforce its terms.²⁶ For this reason, the Supreme Court interpreted the Civil Rights Act of 1866 as a statute enacted under the Thirteenth Amendment, despite its convergence with the Fourteenth Amendment, in order to cover private discrimination on the basis of race.²⁷

The expansion of the Thirteenth Amendment along these two dimensions—beyond slavery and involuntary servitude and beyond state action—suggests that it might also extend beyond the territorial boundaries of the United States. Although Section 1 only abolishes slavery “within the United States, or any place subject to their jurisdiction,” the

18. *Id.* § 1.

19. U.S. CONST. amend. XIV, § 1. For a summary of these developments, see George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 55 SUP. CT. REV. 303, 307–17 (2003).

20. Act of Mar. 2, 1867, ch. 187, 14 Stat. 546 (codified as amended at 18 U.S.C. § 1581 (2012)).

21. 42 U.S.C. § 1994 (2012).

22. *Bailey v. Alabama*, 219 U.S. 219, 242 (1911).

23. *In re Turner*, 24 F. Cas. 337 (Chase, Circuit Justice, C.C.D. Md. 1867) (No. 14,247); *Arthur v. Oakes*, 63 F. 310, 318 (Harlan, Circuit Justice, 7th Cir. 1894).

24. 109 U.S. 3, 20 (1883).

25. *Clyatt v. United States*, 197 U.S. 207 (1905).

26. *Id.* at 216–18.

27. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

enforcement provisions of Section 2 contain no explicit territorial limit. Can Congress legislate against slavery overseas? As will become clear in the next Part of this Article, Congress need not rely only on Section 2 to achieve this objective. But neither can it ignore the terms of Section 1. The great antislavery principles of the Thirteenth Amendment must be implemented consistently with the territorial restrictions expressed in the Amendment and widely accepted at the time. Those restrictions may be dismaying today and subject to exploitation—as was the exception for convict labor—but they must be taken seriously nonetheless.

The geographical restriction in Section 1 contrasts oddly with the arguments offered for passage of the Thirteenth Amendment, which were based on natural law. These arguments began from the premise that slavery could exist only as the creature of positive law, enacted by a state or nation. Stephen Douglas took this position in the Lincoln-Douglas Debates,²⁸ and it can be traced back to Roman law. Under the influence of Stoic philosophy, the Romans distinguished between *ius naturale* (natural law), which prohibited slavery, and *ius gentium* (the prevailing law of people everywhere), which permitted slavery.²⁹ All sides seemed to agree that what could be established by positive law could be repealed by positive law—abolitionists because the slavery could exist only if regulated by positive law, and their opponents because it was a local issue to be resolved by each state.³⁰ Supporters of the Amendment, like other abolitionists before them, took this argument one step further and denied the validity of any enacted law that contradicted natural law. As Representative Farnsworth, a Republican from Illinois, argued in the debates over the Amendment: “‘Property!’ What is property? That is property which the Almighty made property. When at the creation He gave man dominion over things animate and inanimate, He established property. Nowhere do you read that He gave man dominion over another man.”³¹ The universal moral argument against slavery, once accepted, seemed to dictate universal coverage of the Thirteenth Amendment. If slavery was always and everywhere immoral, then the prohibition against slavery should be equally broad.

Universal abolition did not, however, come to fruition. Instead, the historical precedents of abolitionist legislation and the dominant territorial conceptions of sovereignty determined the coverage of the Thirteenth

28. DAVID ZAREFSKY, *LINCOLN, DOUGLAS, AND SLAVERY: IN THE CRUCIBLE OF PUBLIC DEBATE* 120 (1990).

29. BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 55 (1962).

30. GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866*, at 35–36 (2013).

31. CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865); *see also* CONG. GLOBE, 38th Cong., 1st Sess. 1437–38 (1864) (remarks of Sen. Harlan); *id.* at 1481 (remarks of Sen. Sumner).

Amendment. Section 1 imposes explicit territorial limits on the scope of the Amendment. Section 2 is not quite so clear, but it is limited to enforcement of “this article.” Conceivably, that might justify extension of coverage to the high seas and to individuals held in bondage for transit to the United States. Statutes prohibiting slavery in these circumstances might be classified as “appropriate legislation,” in the sense of a permissible means to the legitimate end of preventing slavery in this country. Imaginative reconstruction of the Amendment along these lines, however, gradually shifts the focus of argument to other clauses in the Constitution, such as the Commerce Clause. The force of the Thirteenth Amendment, as an independent source of congressional power, gives way to interpretation of other sources of power in light of the Amendment. The antislavery principles embodied in the Amendment exert influence beyond the literal terms of the Amendment itself.

The text of the Amendment does not purport to limit Congress in its exercise of other powers for abolitionist ends. Nor does anything in the Amendment’s history suggest a similar limitation. Like the other Reconstruction amendments, the Thirteenth Amendment attracted criticism only for the opposite reason: that it greatly expanded the power of the federal government at the expense of the states.³² Nor has the Supreme Court generally accepted the argument that restraints on one grant of congressional power support similar restrictions on another.³³ Any effort to extend the territorial restrictions in the Thirteenth Amendment comes up against the absence of any such restrictions in other clauses. The clauses most likely to support legislation against slavery expressly or impliedly contemplate the possibility of federal law reaching overseas: the Commerce Power, insofar as it authorizes regulation of “Commerce with foreign Nations”; the Define and Punish Clause, which extends to “Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”; and the Treaty Power, which inherently involves foreign nations.³⁴ The Thirteenth Amendment bears on interpretation of these clauses in a wholly positive way, by making the abolition of slavery a legitimate end of appropriate federal legislation.³⁵ The next Part of this Article turns specifically to these clauses.

32. Rutherglen, *supra* note 11, at 1380–82.

33. See Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 280–318 (2004). Only one decision, invalidating legislation under the Commerce Clause that violated the uniformity requirement of the Bankruptcy Clause, imports restrictions from one power granted to Congress in the Constitution to another power. *Ry. Labor Execs. Ass’n v. Gibbons*, 455 U.S. 457 (1982).

34. U.S. CONST. art. I, § 8, cl. 3, cl. 10; U.S. CONST. art. II, § 2, cl. 2.

35. See *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

II. COMMERCE, TREATIES, AND VIOLATIONS OF INTERNATIONAL LAW

A. The Power to Regulate “Commerce with Foreign Nations”

Long before the nearly plenary power of Congress to regulate commerce became accepted as constitutional in the New Deal—in fact, long before the Thirteenth Amendment became part of the Constitution—Congress regulated the slave trade as a form of international commerce. At the earliest possible moment, Congress prohibited the international slave trade in terms that reached all the way to the shores of Africa. In a provision that could not itself be amended, the original Constitution prohibited any legislation against the importation of slaves before 1808.³⁶ By prohibiting any earlier legislation, the Constitution tacitly admitted the power of Congress to pass later legislation. When it did so in the Act of March 2, 1807,³⁷ the prohibitions took effect on January 1, 1808. Although most sections of the Act were concerned with the slave trade to the United States, one section prohibited vessels from taking on board any “negro, mulatto, or person of colour” for transport “to any port or place whatsoever, for the purpose of selling or disposing of the same as a slave, or with intent that the same may be sold or disposed of to be held to service or labour.”³⁸

Although this legislation encountered strident opposition from southern legislators, their objections focused on congressional power over the interstate slave trade, exactly the opposite of the current disputes over the extraterritorial application of federal law on other subjects. To this day, federal laws against slavery and peonage assert universal jurisdiction to stamp out these practices. For example, federal criminal law contains a prohibition that applies worldwide to “[w]hoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held.”³⁹ The territorial restriction in the second clause, concerned with importation of slaves into the United States, implies the absence of any such restriction on the first clause, concerned with holding and selling slaves. Congress confirmed this conclusion in 2008 with legislation specifically addressing extraterritorial jurisdiction over criminal prosecutions for violation of this and other prohibitions against slavery and peonage.⁴⁰

36. U.S. CONST. art. I, § 9; U.S. CONST. art. V.

37. Act of Mar. 2, 1807, ch. 22, 2 Stat. 426.

38. *Id.* § 8.

39. 18 U.S.C. § 1584 (2012).

40. *Id.* § 1596.

Extraterritorial legislation against slavery dates back to the eighteenth century, based on congressional power to prohibit American participation in the slave trade between other countries or in the export of slaves from this country.⁴¹ This legislation fell outside the 1808 Clause, which applied only to the importation of slaves. In an opinion by Chief Justice Taney, the Supreme Court upheld a conviction under this statute of an American captain of an American slave-trading vessel seized on its outward voyage to Africa to pick up slaves for transport to a third country.⁴² Like the debate over the 1807 Act, this decision has the ironic implication that the fewer the contacts of the case with the United States, the more likely it was presumed to be constitutional. In *Morris*, the Supreme Court expressed no doubt about the constitutionality of the prohibition and its extraterritorial reach.⁴³ The Court took the same view of the cases, collectively known as *The Slavers*,⁴⁴ decided during the Civil War. Those cases concerned the seizure of American vessels outfitted for the slave trade, again between third countries, and again decided without questioning the constitutionality of the underlying statutes.

A few modern decisions have taken this extra step and expressed doubt about the extraterritorial application of the laws against slavery, but only insofar as they support private rights of action. In *John Roe I v. Bridgestone Corp.*,⁴⁵ the district court held that the prohibition against forced labor in 18 U.S.C. § 1589 did not reach conditions of employment in Liberia. Although framed in nominally universal terms, the statute did not expressly apply overseas, unlike several related prohibitions against slavery.⁴⁶ Another district court reached a similar conclusion, denying a private right of action for violations of § 1589 and related provisions.⁴⁷ The enactment of § 1596⁴⁸ undermines both decisions because it explicitly extends criminal jurisdiction to overseas violations of § 1589, but no similar provision extends civil jurisdiction to private actions. International law has long recognized universal jurisdiction to punish crimes “generally accepted as an attack upon the international order,” such as piracy

41. Act of Mar. 22, 1794, ch. 11, 1 Stat. 347; Act of May 10, 1800, ch. 51, 2 Stat. 70.

42. *United States v. Morris*, 39 U.S. 464, 474 (1840).

43. *Id.* at 474–77.

44. *The Slavers (Kate)*, 69 U.S. (2 Wall.) 350 (1864); *The Slavers (Sarah)*, 69 U.S. (2 Wall.) 366 (1864); *The Slavers (Weathergale)*, 69 U.S. (2 Wall.) 375 (1864); *The Slavers (Reindeer)*, 69 U.S. (2 Wall.) 383 (1864).

45. 492 F. Supp. 2d 988 (S.D. Ind. 2007), *aff'd on other grounds*, 643 F.3d 1013 (7th Cir. 2011).

46. *Id.* at 1002–03.

47. *Nattah v. Bush*, 541 F. Supp. 2d 223, 234–35 (D.D.C. 2008), *aff'd in relevant part*, 605 F.3d 1052 (D.C. Cir. 2010).

48. 18 U.S.C. § 1596 (2012).

and slavery.⁴⁹ Civil jurisdiction has proven to be more controversial and few states recognize it, with the notable exception of the United States in the Alien Tort Statute.⁵⁰

Whether or not this distinction between criminal and civil jurisdiction holds up in international law, it does not fit well with constitutional decisions on the scope of congressional power. Since the New Deal, the Commerce Clause has received an exceedingly broad interpretation, interrupted only by the occasional decision imposing some limits on congressional power. Most recently, five Justices in *National Federation of Independent Business v. Sebelius*⁵¹ opined that the Commerce Clause did not extend to coercing private parties to engage in commerce, in the form of forcing them to buy health insurance. But because that case largely upheld the Affordable Care Act on other grounds, the opinion of these Justices could be dismissed as dicta. Whether or not it is, this limitation on the Commerce Clause has few implications for extraterritorial application of the prohibitions against slavery. The same is true of other limiting decisions under the Commerce Clause. These decisions cover such topics as regulating handguns near schools, whether or not they have been shipped in interstate commerce, and providing a civil remedy for violence against women, regardless of its relationship to commerce.⁵² Even these decisions affirm the power of Congress to regulate the channels of commerce, the instrumentalities of commerce, and “activities that substantially affect interstate commerce.”⁵³

Constraints on extraterritorial coverage, such as they are, derive from principles of statutory interpretation rather than the Constitution itself, primarily in the form of the presumption against extraterritoriality. If anything, the power of Congress over international commerce exceeds its power over interstate commerce. The Supreme Court has twice made statements to this effect, although not as part of an explicit holding. In *Champion v. Ames*,⁵⁴ the Supreme Court distinguished the two forms of congressional power over commerce based on the absence of a reserved power of the states over international commerce. The Court reasoned:

[The Commerce Clause] clothed Congress with that power over international commerce, pertaining to a sovereign nation in its inter-

49. JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 467–68 (8th ed. 2012) (internal quotation marks omitted); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES § 404 (1986).

50. 28 U.S.C. § 1350 (2012); CRAWFORD, *supra* note 49, at 475–76.

51. 132 S. Ct. 2566 (2012).

52. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

53. *Lopez*, 514 U.S. at 559.

54. 188 U.S. 321 (1903).

course with foreign nations, and subject, generally speaking, to no implied or reserved power in the states. The laws which would be necessary and proper in the one case would not be necessary or proper in the other.⁵⁵

The Court has more recently opined that, as compared to the power over interstate commerce, “there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.”⁵⁶ Lower courts have occasionally taken up this reasoning.⁵⁷ But it need not be pressed to its limits to support application of a nearly universal scope to laws against slavery and the slave trade. Other sources of congressional power, to be discussed shortly, can fill the gaps left by the Commerce Clause.⁵⁸

Those gaps arise from the difficulty of ascertaining, in the abstract, the effects that labor practices in other countries have on American commerce, either with that country or within this country. Those practices might have either isolated or pervasive effects. The longstanding prohibitions against commerce in goods produced by slave labor focus upon articles in interstate or international commerce, which have an independent basis in Commerce Clause doctrine.⁵⁹ Prohibiting slavery in other countries because of its effects on American commerce does not stand on the same secure footing. Slavery in other countries must “substantially affect” American commerce,⁶⁰ which depends on the nature of the goods or services produced by slave labor. Forced prostitution in rural villages in Asia, for instance, does not have any obvious effects on commerce outside that country, while forced prostitution in Bangkok, which has been a center of “sex tourism,” has a much stronger connection to American commerce.⁶¹ The chain of causal connections might be long or short, but it must result in an overall probability of a significant effect on American commerce. The argument for extraterritorial coverage under the Commerce Clause turns on the facts of each case, and therefore reinforces the practical incentive to limit prosecution to cases with stronger

55. *Id.* at 373.

56. *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434, 448 (1979).

57. Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 967–68 (2010).

58. See *infra* Parts II.B–C.

59. Ashurst–Sumners Act, Pub. L. No. 74-215, 49 Stat. 494 (1935) (codified at 18 U.S.C. §§ 1761–1762 (2012)).

60. *Lopez*, 514 U.S. at 563.

61. See Sara K. Andrews, Comment, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 J. CRIM. L. & CRIMINOLOGY 415 (2004).

ties to the United States. Other sources of congressional power, while different in theory, have much the same effect in practice.

B. The Power “To Make Treaties”

The Constitution confers on the President the power, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”⁶² This clause contains no inherent limit on the subject of a treaty, or on legislation that might be passed to implement it under the Necessary and Proper Clause. The absence of express limits on the Treaty Power has led some to conclude that it has no limits. The Supreme Court, for instance, has never struck down a treaty on the ground that it exceeds congressional power. Justice Holmes might have taken this view in his opinion for the Court in *Missouri v. Holland*,⁶³ which upheld legislation to implement the Migratory Bird Treaty Act of 1918. He pointed out that “[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”⁶⁴ But the Tenth Amendment—which reserves to the states powers not granted to the federal government—did not come into play because the states themselves were powerless to protect migratory birds that only temporarily came within their boundaries.

Justice Holmes’s reasoning suggests the existence of additional limits on the Treaty Power based on general concerns of federalism and state sovereignty. Those limits, whatever they are, look inward rather than outward, however. They do not support constraints on the Treaty Power insofar as it operates outside, rather than inside, this country. The recent decision in *Bond v. United States*⁶⁵ expresses such concerns, but as a matter of statutory interpretation rather than constitutional limits. That case arose from a prosecution for using “chemical weapons” in violation of federal legislation implementing the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.⁶⁶ The Court narrowly interpreted the phrase “chemical weapon” so that it did not include the chemical used by the defendant, which was not a chemical weapon within the ordinary mean-

62. U.S. CONST. art. II, § 2, cl. 2.

63. 252 U.S. 416 (1920).

64. *Id.* at 433–34.

65. 134 S. Ct. 2077 (2014).

66. Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317.

ing of the term.⁶⁷ The Court expressed reluctance to make “a federal case” out of these events, all of which occurred as part of a marital dispute in a small suburb of Philadelphia.⁶⁸ To hold otherwise, the Court reasoned, would intrude too deeply into state control over routine criminal law enforcement, in the absence of “a clear indication that Congress meant to reach purely local crimes.”⁶⁹

By this means, the Court therefore avoided the constitutional question in the case, not whether the convention was a valid treaty—all sides conceded that it was—but whether the implementing statute was valid. That question divided the majority from the dissenters. The latter would have held that the statute clearly prohibited the conduct in question, but they nevertheless concluded that the statute was invalid under the Necessary and Proper Clause because it did not aid in making the treaty but only in implementing it.⁷⁰ The dissenters rejected the line from *Missouri v. Holland*, which Justice Holmes made almost in passing: “If the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.”⁷¹ For the dissenters, any implementing legislation had to find a source in some other power granted to Congress. They worried that without this restriction, the Necessary and Proper Clause could operate with the Treaty Power to confer plenary power on the federal government at the expense of the states.⁷²

On the facts of the case, those worries made some sense, as evidenced by the majority’s willingness to artificially narrow the statute to avoid assessing its constitutionality. In an extraterritorial case, the dissenters would also force Congress to seek authority in other clauses of the Constitution for legislation prohibiting the possession or use of chemical weapons. The clauses relating to the armed forces would be sufficient to justify legislation regulating the federal government’s own use of chemical weapons, but prohibitions against third parties would have their most plausible sources in the Commerce Clause and the Define and Punish Clause. Under the former, transport of chemical weapons in commerce or their effects on commerce could be subject to prohibition. Under the latter, the convention itself could be taken to be part of the “Law of Nations” and the use and possession of chemical weapons “Offences”

67. *Bond*, 134 S. Ct. at 2091.

68. *Id.* at 2094.

69. *Id.* at 2090.

70. *Id.* at 2099 (Scalia, J., concurring); *id.* at 2102–03 (Thomas, J., concurring).

71. *Missouri v. Holland*, 252 U.S. 416, 432 (1920). For a recent defense of this position, see Saikrishna B. Prakash, *The Boundless Treaty Power Within a Bounded Constitution*, 90 NOTRE DAME L. REV. 1499 (2015).

72. *Bond*, 134 S. Ct. at 2100 (Scalia, J., concurring); *id.* at 2102–03 (Thomas, J., concurring).

that could be punished by Congress. Such a search for other sources in the Constitution, rather than in international law, seems to take the long way around for justifying implementing legislation.⁷³ If anything, the dissenters invert the relationship between the treaty power and appropriate legislation, requiring the former to supplement the latter as means to an end specified in some other power in the Constitution. The dissenters do, however, tacitly concede that the powers conferred on Congress are mutually supporting. Where one power might be doubted, another usually can be invoked in its place. One power can supplement another in more subtle ways, not by “invisible radiation,” to use Holmes’s phrase,⁷⁴ but by legitimating the ends that a statute serves or obviating objections to its terms.

Federalism objections to legislation over slavery lost their force after ratification of the Thirteenth Amendment. The same holds true of objections to the treaties against slavery, to which the United States became a party over the course of the twentieth century. With a single exception, the United States has ratified all the major international agreements on slavery and trafficking: the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926;⁷⁵ the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956;⁷⁶ and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000.⁷⁷ Only one comparably broad prohibition against slavery, the Rome Statute of the International Criminal Court,⁷⁸ has failed to be ratified by the United States. That treaty established the International Criminal Court, which elicited strong objections on other grounds based on the court’s potential jurisdiction over American military personnel serving overseas.

73. See, e.g., Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 *YALE L.J.* 2202, 2272–76 (2015).

74. *Holland*, 252 U.S. at 434.

75. Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, 263 [hereinafter Slavery Convention]. The United States also voted in favor of the U.N. Universal Declaration of Human Rights of 1948, which contains a prohibition against slavery. G.A. Res. 217A (III), U.N. Doc. A/819, at 71 (1948). For more detailed discussion of these treaties, see *infra* notes 124–135 and accompanying text.

76. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3.

77. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13,127, 2237 U.N.T.S. 319 [hereinafter Protocol].

78. Rome Statute of the International Criminal Court art. 7, para. 1(c), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002); Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10* (July 17, 1998).

The treaties that the United States has ratified reinforce the overseas coverage of the federal prohibitions against slavery as necessary implementing legislation. Any challenge to such legislation would have to recognize the inability of the states to address this problem themselves, because the states are forbidden from entering into treaties.⁷⁹ The states cannot coordinate their actions with foreign nations in the absence of an international agreement made by the federal government. Just as in *Missouri v. Holland*, federal action is necessary because state action is impossible; either it is too narrow to be effective or too broad to be valid on its own. Federal action against slavery also has the historical pedigree of federal legislation against the slave trade dating back to the eighteenth century. Because American slavery began as a transnational problem, it has to be addressed as one. Initially, Congress did so as part of its power to regulate the channels and instrumentalities of commerce. It can do so with more certain authority under the Treaty Power.

C. “To Define and Punish”

From the beginning, the Constitution granted Congress the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”⁸⁰ The first part of the clause overlaps and coincides with federal subject matter jurisdiction over “all Cases of admiralty and maritime Jurisdiction.”⁸¹ The high seas, by definition, exclude state territorial waters. Under current law, the high seas generally begin twelve nautical miles from American shores and end twelve nautical miles away from foreign shores.⁸² Congressional power might well go further under the Necessary and Proper Clause, and statutes prohibiting slavery have historically reached into the territorial waters of American states and foreign nations, as has admiralty jurisdiction. Section 4 of the 1807 Act, for instance, makes it illegal for any citizen or resident of the United States to “take on board, receive or transport from any of the coasts or kingdoms of Africa, or from any other foreign kingdom, place, or country, any negro, mulatto, or person of colour, in any ship or vessel” in order to be sold or to serve as a slave in the United States.⁸³ The statute’s coverage goes right up to the coastline of Africa. Presumably it did so to facilitate enforcement because vessels could

79. U.S. CONST. art. I, § 10.

80. *Id.* art. I, § 8, cl. 10.

81. *Id.* art. III, § 2.

82. United Nations Convention on the Law of the Sea art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397; see *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) (recognizing this feature of the treaty as customary international law recognized by the United States).

83. Act of Mar. 2, 1807, ch.22, § 4, 2 Stat. 427.

more easily be seized, and perpetrators more easily prosecuted, while the vessels were in port.

The remainder of the Define and Punish Clause covers “Offences against the Law of Nations.” This provision has no geographical restrictions, which might reflect the Framers’ focus on the deficiencies of state law in protecting foreign officials, citizens, and subjects.⁸⁴ Accepted territorial conceptions of sovereignty at the time might well have excluded extraterritorial coverage from consideration, as they did with the Thirteenth Amendment and its express territorial limits. The altered conceptions of sovereignty today, particularly to accommodate the growing recognition of human rights, have made international law a more powerful force for imposing obligations upon a sovereign within its own borders. So, too, has the increasing acceptance of universal jurisdiction over crimes such as terrorism and genocide. An interpretation of the Define and Punish Clause that takes account of these developments could readily justify extraterritorial legislation.

The course of judicial decisions, however, has been far more grudging. The Supreme Court’s only decision on what constitutes “Offences against the Law of Nations” upheld a conviction for counterfeiting foreign currency within this country. In *United States v. Arjona*,⁸⁵ the Court reasoned that international law “requires every national government to use ‘due diligence’ to prevent a wrong being done within its own dominion to another nation with which it is at peace.”⁸⁶ In the single modern case in which the United States relied upon the clause to give extraterritorial effect to legislation, it failed. In *United States v. Bellaizac-Hurtado*,⁸⁷ the Eleventh Circuit reversed a conviction for drug trafficking in the territorial waters of Panama. The court construed the “Law of Nations” to include only customary international law and found no consensus against drug trafficking in the actual practice of other nations.⁸⁸ The court discounted the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,⁸⁹ despite the fact that it had been ratified by 188 nations, including the United States. Enforcement of antidrug laws, the court found, has been highly uneven.⁹⁰

True though that may be, such reasoning neglects the force of the political judgment behind the acceptance of the U.N. Convention. In the

84. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715–18 (2004).

85. 120 U.S. 479 (1887).

86. *Id.* at 484.

87. 700 F.3d 1245 (11th Cir. 2012).

88. *Id.* at 1249–58.

89. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95, 28 I.L.M. 493.

90. *Bellaizac-Hurtado*, 700 F.3d at 1255.

United States, as in most nations, accession to a treaty represents the political recognition of an obligation, even if it is observed frequently in the breach. If the “Law of Nations” cannot be shaped by international agreements, it has little capacity to develop in a fashion acceptable to the politically responsible branches of government, here and abroad, that negotiate and ratify such agreements.⁹¹ The court in *Bellaizac-Hurtado* seemed motivated less by a considered judgment about the content of international law than by the desire to find some limit—any limit—on the Define and Punish Clause. Panama had agreed to the American prosecution of the offender, so that the case presented no risk of offense to a foreign government. The court apparently was troubled not by what happened in this case, but by what might happen in the next case, or in a prosecution under another statute. The desire to rein in the Define and Punish Clause cannot, by itself, justify the court’s decision, but it does explain the very few cases, and still fewer statutes, whose authority rests solely on this clause.⁹² For the moment, the theoretical reach of the clause far exceeds its actual use.

D. “Due Process of Law”

Despite its significance for issues of jurisdiction and choice-of-law, the Due Process Clause of the Fifth Amendment seldom figures in analysis of the reach of federal statutes overseas. The Due Process Clause of the Fourteenth Amendment imposes restraints on the scope of state law, especially insofar as the state purports to act extraterritorially.⁹³ Its counterpart in the Fifth Amendment plays no such prominent role. In recent years, the Supreme Court has only assumed, but not decided, that the Fifth Amendment imposes such constraints.⁹⁴ And the Court held, over a century ago, the power of Congress to regulate commerce with foreign nations was not subject to the Due Process Clause insofar as it protected vested rights.⁹⁵ Nevertheless, by analogy to state cases and to federal cases on personal jurisdiction, some form of minimum contacts with the United States might still be necessary. The analogy depends both on limits on the scope of state law and on the personal jurisdiction of the feder-

91. For a sustained argument that the Define and Punish Clause should include offenses in violation of treaties, see Cleveland & Dodge, *supra* note 73.

92. See J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 861–72 (2007).

93. *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930).

94. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 619–20 (1992) (reserving the question of whether a foreign nation is a person protected by the Fifth Amendment).

95. *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904) (holding that “a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution”).

al courts, yielding the conclusion that federal law can reach outside the borders of this country and into the borders of another only when a case has sufficient contacts with the United States.⁹⁶

Decisions on the scope of state law require that a relevant part of the activity giving rise to the claim occurs in the state whose law is to be applied. The Supreme Court has taken a progressively more lenient view of relevance, but it has always insisted on some relevant contact. Thus in *Home Insurance Co. v. Dick*, the Court refused to allow Texas to apply its own law to a claim on an insurance policy where “nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas.”⁹⁷ In *Allstate Insurance Co. v. Hague*,⁹⁸ another insurance case, the plaintiff’s claim had only attenuated contacts with the forum. A plurality of Justices nevertheless concluded that the forum state could apply its own law because “a significant contact or significant aggregation of contacts, creat[ed] state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”⁹⁹ The Court interpreted the implications of this requirement to reach the opposite conclusion in *Phillips Petroleum Co. v. Shutts*, holding that the forum state could not apply its own law.¹⁰⁰ In that case, Kansas sought to apply its own law to determine interest payments on oil and gas leases in other states. The Court held that, with respect to parties from out of state, those leases had insufficient contacts with Kansas. Forum law could be applied only to parties who had some relevant contact with the forum before suit was filed there.¹⁰¹

These decisions taken together and extended to the federal government would result in a similar limitation on federal law: the law must be supported by some relevant contact with the United States. The Court has suggested that the same principle applies to the exercise of personal jurisdiction by federal courts based on a federal statute or rule: the defendant must have some relevant contact with the United States as a whole. As the plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro* noted: “For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State.”¹⁰² Strictly speaking, no decision by the Supreme Court has held that the Fifth Amendment requires minimum contacts with the Unit-

96. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992).

97. *Dick*, 281 U.S. at 408.

98. 449 U.S. 302 (1981).

99. *Id.* at 313 (opinion of Brennan, J.).

100. 472 U.S. 797, 819–23 (1985).

101. *Id.* at 821–22.

102. 131 S. Ct. 2780, 2789 (2011) (opinion of Kennedy, J.).

ed States, but that is partly because the standard of minimum contacts with the entire United States can be easily satisfied in most cases, so the issue rarely comes up.

The Court has not reached the corresponding holding with respect to choice of federal law for an additional reason. It has invoked the presumption against extraterritorial application of federal statutes to narrow their scope. As the Court has framed the presumption, “When a statute gives no clear indication of an extraterritorial application, it has none.”¹⁰³ This presumption derives from intertwined arguments based on separation of powers and international law, all aimed at preventing embarrassment to the political branches of government that might arise from unintended conflict between federal law and foreign law.¹⁰⁴ Together, these considerations allow the Supreme Court to avoid the constitutional question of the scope of federal power, and in clearer terms than a contacts analysis, restrain the scope of federal law.

Only when Congress has overcome the presumption against extraterritoriality with a clear statement does the constitutional question under the Fifth Amendment come up. The presumption bears a striking similarity to international law, at least as seen through the eyes of the Restatement (Third) of Foreign Relations Law, which requires contacts with the United States and an overall judgment that application of American law is not “unreasonable.”¹⁰⁵ The single exception in the Restatement is for universal jurisdiction, which does not require any contacts with the United States.¹⁰⁶ The entire burden of extending the scope of domestic law in these cases rests on the small number of heinous crimes covered by universal jurisdiction. The Restatement includes the slave trade among them, recognizing the distinctive condemnation that it has received in international law.¹⁰⁷

Whether or not this exception—and the loosely framed standards that it qualifies—should be brought into constitutional law, these provisions of the Restatement already accord with the reasons underlying the presumption against extraterritoriality.¹⁰⁸ Some limits, even if not precisely specified, should restrain the scope of federal law, but not in all

103. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

104. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

105. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES §§ 402, 403 (1987); Brilmayer & Norchi, *supra* note 96, at 1260–61.

106. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES § 404 (1987).

107. *Id.*

108. *Kiobel*, 133 S. Ct. at 1669 (“[W]here the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”).

cases. For a small number of crimes, the risk of conflict with foreign law remains small, especially if, like slavery and the slave trade, they are universally condemned by all the nations of the world. Moreover, in many of the federal prohibitions directed towards these activities, Congress has made the extraterritorial scope of federal law clear, satisfying the requirements of the presumption against extraterritoriality. If any exception to a minimum contacts analysis has to be made, it has to include slavery and the slave trade.

The problems arise when the prohibitions extend from slavery—narrowly defined as the complete dominion by force of one person over another—to other coercive conditions of employment. The international conventions against slavery and trafficking have gradually made this extension, as has federal law. But the broader the prohibition—extending from historical slavery, to peonage, to coerced labor, and then to harsh conditions of employment—the weaker the case for universal jurisdiction. Thus, how far the extension should go remains an open question. Part III considers the problems of policy, principle, and enforcement of this extension.

III. SLAVERY AND LABOR RIGHTS

A. Federal Law

The increasing breadth of the prohibitions against slavery has a long history. As recounted in Part I, the Thirteenth Amendment itself prohibits only “slavery and involuntary servitude.” Implementing legislation soon extended this prohibition to “peonage,” and the Supreme Court, although otherwise skeptical, recognized that Congress could prohibit the “badges and incidents of slavery.”¹⁰⁹ In the same opinion, the Court warned against “running the slavery argument into the ground” and actually held that the Thirteenth Amendment could not justify a prohibition against discrimination in public accommodations.¹¹⁰ Since then, however, the Thirteenth Amendment has supported civil rights legislation and gradually expanded prohibitions against coercive labor conditions. The latter are the most likely to be extended overseas.

The last significant expansion of these laws occurred in response to *United States v. Kozminski*,¹¹¹ which interpreted the statutory prohibition against slavery in 18 U.S.C. § 1584 to prohibit only physical coercion.¹¹² Congress responded with amendments to the laws against slavery and

109. Civil Rights Cases, 109 U.S. 3, 18, 20 (1883).

110. *Id.* at 24.

111. 487 U.S. 931 (1988).

112. *Id.* at 942–48.

trafficking to prohibit psychological coercion as well. Among these laws is 18 U.S.C. § 1589, which prohibits “forced labor.” This term covers anyone who “knowingly provides or obtains the labor or services of any person” by means of force, serious harm, abuse of law, threats to do any of the foregoing, or schemes to induce a belief that serious harm would follow. The statute defines the prohibited means in some detail, with an entire subsection elaborating on the definition of “serious harm”:

The term “serious harm” means any harm, whether physical or non-physical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.¹¹³

The coverage of nonphysical harm supersedes the decision in *Kozminski*. It also opens up a wide range of losses, real or threatened, that can support a finding of coercion: “psychological, financial, or reputational harm.”¹¹⁴

Related provisions in the same chapter of the criminal code make clear that § 1589 applies extraterritorially and supports a private right of action. Section 1596 grants federal courts “extra-territorial jurisdiction over any offense” in violation of cross-referenced sections, including § 1589.¹¹⁵ Exactly how judicial jurisdiction relates to coverage of the statute, or what is called “prescriptive jurisdiction,” can become a complicated issue.¹¹⁶ At a minimum, a federal court has subject matter jurisdiction over any claim that has a reasonable basis in federal law.¹¹⁷ Section 1596 seems to accomplish something more: it constitutes a clear statement that overcomes the presumption against extraterritoriality. By operation of this section, the cross-referenced sections prohibit conduct in other countries so long as the defendant meets certain requirements establishing contacts with the United States. The defendant must be either a national of the United States, admitted for permanent residence here, or found here.¹¹⁸ As a matter of personal jurisdiction, presence of the defendant in the United States is needed for any criminal prosecution

113. 18 U.S.C. § 1589(c)(2) (2012).

114. *Id.*

115. *Id.* § 1596(a).

116. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255–57 (2010).

117. *Bell v. Hood*, 327 U.S. 678, 683–84 (1946).

118. 18 U.S.C. § 1596(a) (2012). Other statutes also base criminal jurisdiction over serious human rights violations on the defendant’s presence in the United States, regardless of where the violations occurred. *Id.* §§ 1091(e)(2)(D) (genocide), 2332b(a)(1) (terrorism transcending national boundaries), 2340A(a), (b)(2) (torture), 2441(a) (war crimes).

to go forward.¹¹⁹ Thus, a defendant must be found in the United States or brought here to be prosecuted. Expanding subject matter jurisdiction, as § 1596 literally does, would accomplish nothing if it did not also expand prescriptive jurisdiction. The court would have jurisdiction over the prosecution, but the government would have nothing to prosecute. The more likely interpretation of the provision takes the reference to “jurisdiction” to include both “adjudicative jurisdiction”—the power of the court to hear the case—and “prescriptive jurisdiction”—the power exercised by Congress to extend the coverage of the underlying prohibition. This interpretation gives content to the statute and recognizes the intimate connection between these forms of jurisdiction, particularly in criminal cases.

In deference to foreign nations, the statute prevents a second prosecution if a foreign nation has already commenced one, unless the Attorney General or Deputy Attorney General certifies otherwise.¹²⁰ This provision, and the reference only to “criminal jurisdiction” in § 1596, contrasts with the creation of a private cause of action in § 1595. The private cause of action also reaches violations of § 1589, but it makes no reference to extraterritorial coverage. The provision confers a civil action on any “individual who is a victim of a violation of this chapter” and it runs “against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter).”¹²¹ So far as these provisions go, they override any concern about implying a private right of action or imposing liability on someone not directly engaged in employing forced labor.

If combined with § 1596, the private action in § 1595 would reach all the way around the world. Although the civil remedy must be stayed pending the outcome of criminal proceedings, presumably foreign as well as domestic,¹²² it does not remain within the control of the Department of Justice. Consequently, no coordination between our government and a foreign government restrains access to the private civil remedy. Only the presumption against extraterritorial coverage of federal statutes stands in the way of the statute as a general remedy for forced labor wherever it may occur. The two decisions discussed earlier in Part II.C rejected this conclusion,¹²³ but could not take into account the language

119. FED. R. CRIM. P. 43.

120. 18 U.S.C. § 1596(b).

121. *Id.* at § 1595(a).

122. *Id.* at § 1595(b), (c).

123. *See* United States v. Arjona, 120 U.S. 479, 483–84 (1887); United States v. Bellaizac-Hurtado, 700 F.3d 1245 (11th Cir. 2012); *supra* text accompanying notes 85–90.

of the statutes as they currently read because of amendments made after the decisions came down. If the presumption against extraterritoriality requires a clear statement by Congress, the fact that the statutes have to be read together to overcome the presumption might deprive them of the needed clarity to do so. Section 1596 bears on the interpretation of § 1589 (and other substantive prohibitions in the same chapter), which in turn influences the scope of the civil remedy in § 1595.

The purely textual aspects of this issue implicate fundamental differences in perspective between the moral imperative of ending forced labor and the pragmatic need to maintain comity with other countries, the force of the law as it exists today and its ability to adapt to expanding protection of human rights, and the capability of the courts to make the needed adjustments and the desirability of support from the political branches of government. Fitful progress through a checkerboard of treaties, legislation, and claims has marked the development of human rights over the last several decades. Who can confidently assert that the traditional evils of slavery deserve subordinate consideration and less-than-complete remedies when weighed against countervailing policies? We saw in Part II how constitutional law adds another layer of uncertainty to this question through the indistinct limits on congressional power. International law does much the same. In the absence of principled limits on what litigation can achieve, practical concerns over what it actually accomplishes should take priority. The next section examines those concerns, both for eliminating slavery in the narrow, historical sense and preventing forced labor in a broader sense.

B. International Law

Like federal law, international law contains a variety of prohibitions against slavery and the slave trade. As these laws have grown progressively stricter, the gap between formal prohibitions and effective enforcement has grown wider as well. The problem is not too little international law, but too little enforcement.

The Slavery Convention of 1926 codified the definition of slavery in the narrow sense as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”¹²⁴ This Convention did not prohibit “forced labor” but distinguished it from slavery and evidently presumed that it was the lesser of two evils. The Convention allowed forced labor for “public purposes,” but signatory states had to “prevent compulsory or forced labour from

124. Slavery Convention, *supra* note 75, art. 1(1).

developing into conditions analogous to slavery.”¹²⁵ The Convention did require signatory states “[t]o bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms,” but left indefinite exactly what all those forms were.¹²⁶

The Supplementary Convention on the Abolition of Slavery of 1956 expanded the range of prohibited practices, both broadening the definition of slavery and making it easier to find and prosecute the core instances of slavery.¹²⁷ Slaveholders would naturally seek to evade any prohibition by altering labor arrangements to slightly less apparent forms of coercive labor. As under American law, the substantive international prohibitions expanded in response to reach voluntary servitude, bonded labor, and peonage.¹²⁸ An expanded prohibition makes it easier to detect and eliminate the worst forms of coerced labor, which can be prosecuted without proving all of the elements of traditional slavery. At the same time, an expanded prohibition opens the door to finding less coercive forms of labor to be wrong in and of themselves.

The Supplementary Convention of 1956 takes these steps through an intricate definition of “Institutions and Practices Similar to Slavery.”¹²⁹ It has four parts, addressed respectively as “debt bondage,” “serfdom,” trafficking in women, and trafficking in children. Debt bondage corresponds to the American definition of peonage, requiring continued labor to pay off a debt that can never be satisfied. “Serfdom” binds the laborer to land owned by someone else. Trafficking in women, in its broadest form, involves the transfer of a woman “to another person for value received or otherwise.”¹³⁰ Trafficking in children occurs when “a child or young person under the age of 18 years, is delivered . . . to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”¹³¹ Both forms of trafficking focus on transfers by the person’s family, seeking to cut off the initial stage of transactions that amount to slave trading.

A variety of other treaties prohibit trafficking in women and children, including the White Slavery Convention of 1910.¹³² The most re-

125. *Id.* at art. 5.

126. *Id.* at art. 2(b).

127. *See generally* Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3 [hereinafter Supplementary Convention].

128. *See supra* Part I.

129. Supplementary Convention, *supra* note 127, § 1, art. I.

130. *Id.* art. I(c)(ii).

131. *Id.* art. I(d).

132. International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 98 U.N.T.S. 101 (amended May 4, 1949); *see* KEVIN BALES, UNDERSTANDING GLOBAL SLAVERY 62–68 (2005).

cent of these is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.¹³³ As the title of the protocol indicates, it covers all forms of trafficking with the special emphasis on women and children derived from two interrelated factors: the relative physical weakness of these victims of trafficking, making them less able to resist violence and coercion, and the historical prevalence of these forms of trafficking in the sex trade and in child labor. The protocol both expands and focuses prohibitions against slavery and the slave trade. The protocol defines “trafficking” in very broad terms, making sexual exploitation equivalent to slavery and making any transaction with respect to children equivalent to coercion:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.¹³⁴

The protocol, like the conventions that preceded it, requires signatory countries to enact implementing legislation.¹³⁵ Decisions over implementation and enforcement remain at the national level, depending on statutes like the federal Victims of Trafficking and Violence Protection Act of 2000.¹³⁶

133. Protocol, *supra* note 77.

134. *Id.* art. 3.

135. *Id.* art. 5.

136. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (with amending and reauthorizing legislation in 2003, 2005, 2008, 2013).

This dependence on national enforcement preserves national sovereignty and, with it, the comity that one nation owes another. But it also raises concerns over how far the extended and strengthened prohibitions against slavery actually go when they cross national boundaries. Federal law, as we have seen, defers to other nations when they have initiated criminal prosecutions for slavery-related activities within their territory. As the range of prohibited conduct increases, for example, in legislation enacted under the protocol, the argument for deference becomes stronger as well. Prostitution and child labor pose enforcement problems for every nation. When does trafficking related to these practices justify intervention by another nation? The protocol leaves these matters for negotiation, and if not subject to a reservation, arbitration between signatory states.¹³⁷ The protocol exhorts states to do more in the exercise of their sovereign powers, but it does not provide for foreign interference when a state does less than what the protocol requires.

C. Actual Effects and Pragmatic Constraints

Working out the extraterritorial effects of legislation against slavery, trafficking, and coerced labor requires a more concrete level of analysis than that offered by the formal requirements of federal law and international law. The need for more concrete analysis leaves the opposition between human rights and national sovereignty largely unresolved. In fact, enforcement efforts inevitably take any attempt to resolve the opposition in a more pragmatic direction, concerned with how the law actually is enforced rather than how it is literally framed. Just the mechanics of litigation presuppose a significant sovereign presence in the vicinity of the alleged wrongful conduct. “Boots on the ground,” so to speak, are needed to make effective enforcement possible. Detecting whether or how a crime or tort was committed, assembling the parties and evidence necessary to bring a case, and enforcing any resulting judgment all require the mechanisms of local law enforcement and assurances that it is not complicit in the underlying wrongs. Only by extensive international cooperation, or conceivably by coincidence, could all these elements be assembled in country outside the place of the wrong. Default judgments and trial in absentia might work as a formal matter, but these expedients result in an enforceable judgment only if power can somehow be acquired over the defendant and exercised over its assets. These hurdles to effective enforcement became apparent with the first efforts in the

137. Protocol, *supra* note 77, art. 15. This provision accords with the Vienna Convention on the Law of Treaties art. 29, May 23, 1969, 1155 U.N.T.S. 331, which presumptively extends treaty obligations throughout the “entire territory” of a signatory nation.

early nineteenth century to eliminate the slave trade.¹³⁸ The hegemony of Great Britain upon the high seas, and its determined efforts to seize slave-trading vessels under various national flags, eventually brought an end to the slave trade. Even so, British enforcement depended upon the agreement of other nations and succeeded only after the American Civil War started decades later.¹³⁹

The same hurdles have resulted in the tragic persistence of slavery in the modern world. Estimates place the number of slaves today in range of twenty to thirty-six million people, far more than the four million slaves who were emancipated in the United States by the Civil War and the Thirteenth Amendment.¹⁴⁰ Slavery now persists in poor societies where it has traditionally been accepted and in remote locations where the rule of law is weak or corrupt, as well as in modern cities where it can be hidden as domestic service or voluntary prostitution.¹⁴¹ Long-distance litigation over human rights abuses cannot bring these modern forms of slavery to an end. At most, it can give greater visibility to the worst abuses—of which there seems to be no shortage—and the complicity of established institutions in allowing slavery to persist. Litigation cannot, however, be conducted at the scale or intensity that would be required to effectively eliminate slavery. It is one tool among others. The federal anti-trafficking legislation therefore relies on a variety of other devices: conditions on federal contracts; assistance to foreign nations; aid to victims of trafficking; reports, surveillance, and international cooperation.¹⁴²

Against the background of these multiple options, extraterritorial slavery legislation looks increasingly like a legal puzzle with few real consequences. Like litigation as an enforcement strategy, extraterritorial coverage appears to have more symbolic significance than immediate impact. That does not make it negligible in importance, but it changes the dimensions along which it must be evaluated. Making a statement in favor of universal jurisdiction to eradicate slavery may become more important than following through on it by regularly exercising jurisdiction. The threat of enforcement, instead of standing alone, becomes a bargain-

138. JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 67–113 (2012).

139. MARTINEZ, *supra* note 138, at 124–33.

140. BALES, *supra* note 132, at 17 (giving an estimate of 27 million); INTERNATIONAL LABOUR ORGANIZATION, *GLOBAL ESTIMATE OF FORCED LABOUR* (2012) (20.9 million); *THE GLOBAL SLAVERY INDEX I* (2014) (35.8 million).

141. See KEVIN BALES, *ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES* 5–20 (2007).

142. 22 U.S.C. §§ 7101–7113 (West 2012); see also BALES, *supra* note 141, at 203–12. For an account of contractual mechanisms that impose similar constraints on corporations through the supply chain, see Kishanthi Parella, *Procedural Fairness by the Corporation*, 56 VA. J. INT'L L. 28–36 (forthcoming 2016).

ing chip in negotiations in commerce and foreign relations with other countries and with private firms. It also figures in the assessment of enforcement priorities, which naturally gravitate towards the most egregious forms of abuse, those most easily proved, and those with the greatest connection to the United States.

All of these factors typically make the problem of extraterritoriality less severe. The problem tends to solve itself in light of the practicalities of enforcement, which depend upon traditional notions of sovereignty and international relations. The same holds true of the two issues that animate many discussions of international law related to slavery in American courts: the existence of private rights of action and the extent of prohibited labor practices. Neither of these issues can be addressed in isolation from the wider context of optimal enforcement and prevention. A nuanced approach to each would keep developing law in harmony with overall goals. Across-the-board recognition of private actions to address coercive labor relations wherever they may be found in the world does not seem to be a promising strategy. They would leave other nations, which depend less on private civil litigation, puzzling over the direction of American law and policy.¹⁴³ Such actions would also stretch enforcement resources too thinly across a range of labor practices, only some of which closely resemble traditional slavery.

At the opposite extreme, denying any civil remedy at all would send the baffling signal that victims of slavery have suffered no legally compensable harm. The challenge is not to decry extravagant civil remedies, or to insist on none at all, but to fashion them in a way that works consistently with other remedies and strategies. The current provision in § 1595(b) takes a step in the right direction by staying civil actions pending the resolution of criminal proceedings.¹⁴⁴ A further step would require notice to the Department of Justice of any such suit, with a view to allowing the Department to initiate criminal proceedings itself or allowing a foreign country to do so. In that way, enforcement through the executive branch could be coordinated with civil actions. Here, as elsewhere in international civil litigation, participation by the political branches of government can assure that foreign policy objectives do not get lost in the immediate incentives of parties in private litigation.

The ultimate goal of eliminating slavery in all its forms presents a moving target. On the optimistic side, the range of acceptable labor practices narrowed over the course of the twentieth century. Twelve hours is no longer the measure of the standard working day. For similar reasons,

143. As the Supreme Court noted in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

144. 18 U.S.C. § 1595(b) (2012).

the prohibitions against slavery have expanded in both international and domestic law. On the pessimistic side, slavery has not stood still, but has adapted to escape detection and abolition. Traffickers have devised new means of moving migrants to countries and places where slavery can flourish undetected, and of moving the products of slave labor into the mainstream of commerce.

Extreme destitution can lead people to choose slavery as the lesser of two evils for themselves and, still more tragically, for their children. Slavery can at least provide them with the minimal conditions for survival. Millions of people live in such dire conditions, providing ample opportunity for traffickers to entice them into forced labor and then hide them in the margins or interstices of civilized society. For this reason, estimates of the number of slaves in the world today vary over a wide range, reaching as high as twenty to thirty-six million slaves.¹⁴⁵ Even ten times fewer would still be a large number in absolute terms, although in relative terms, the highest estimates represent only a tiny fraction of the approximate 7.2 billion people in the world, amounting to one half of one percent of the worldwide population. On any view of the numbers, slavery has a great moral impact despite the small effect on ordinary labor and product markets. As Kevin Bales, a noted antislavery researcher and campaigner, explained: “[A] lot of commodities and products have a *little* bit of slavery in them.”¹⁴⁶ That calculation does not account for the great human cost borne by the victims of slavery, but it puts in perspective the need to focus enforcement efforts and to avoid dissipating resources on reforming labor practices objectionable on other grounds, such as low wages and dangerous conditions of work.¹⁴⁷ The latter reforms require a different agenda, different institutions, and different enforcement efforts.

Just the goal of bringing the incidence of slavery down to insignificant levels, let alone eliminating it entirely, requires strategies that go well beyond simple changes in legal doctrine. Absolute abolition of slavery probably requires a drastic reduction in world poverty. That requires a far more ambitious agenda than legal abolition, which has already been achieved in international law and in the law of virtually all the nations in the world. The problem is not legal doctrine but legal enforcement. Prosecution of slaveholders and traffickers represents a necessary first step in effective abolition, but enforcement requires local efforts that go far beyond legal proceedings. Finding, freeing, and rehabilitating the victims

145. See sources cited *supra* note 140.

146. BALES, *supra* note 141, at 181.

147. JOEL QUIRK, UNFINISHED BUSINESS: A COMPARATIVE SURVEY OF HISTORICAL AND CONTEMPORARY SLAVERY 32 (2009).

of slavery, and putting in place economic, political, and social structures that prevent them from being reenslaved must also be priorities.¹⁴⁸ These steps do not make the legal issues go away, but they lead to a new appreciation of how they can develop into effective enforcement, which must be nuanced and attentive to context. To paraphrase Eric Foner's account of Lincoln's attitude towards emancipation, it must demonstrate "the capacity for growth."¹⁴⁹ Cutting off any access to court also cuts off the capacity for growth.

The basic challenge lies in developing a workable compromise that recognizes the need for legal remedies against slavery without undue affront to the sovereignty of foreign nations. As Kevin Bales has also pointed out: "Countries are touchy about sovereignty, especially countries that were once under the colonial thumb."¹⁵⁰ American law has made a start to solving this problem, as noted earlier,¹⁵¹ in the provision for staying American prosecutions and civil actions if criminal proceedings have been commenced in another country more directly concerned. These provisions follow the terms of human rights treaties that require exhaustion of local remedies, forging a compromise between protecting human rights and recognizing territorial sovereignty.¹⁵² A compromise along these lines does not solve all the problems of human rights litigation, but it indicates the correct direction to take. Civil actions, in particular, might not reflect the complexities of devising foreign policy in a world of legally coequal sovereigns. Public prosecution, conversely, might devalue the individual interest in prevention and compensation. As David Engstrom has suggested, the choice between the two regimes of enforcement is not all-or-nothing.¹⁵³ Combining the two regimes might yield better results than each one separately.

In antislavery legislation, the federal government could be given a gatekeeping role to decide which private actions should go forward. If the government takes the heat for denying a remedy to deserving victims of slavery, then the resulting publicity could be used to give antislavery efforts a higher priority on the public agenda. If the government allowed the action to go forward, it would signal to foreign countries that they

148. See BALES, *supra* note 141, at 61–90, 123–26.

149. ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 336 (2010).

150. BALES, *supra* note 141, at 194.

151. See *supra* Part III.A.

152. Christopher McCrudden, *Human Rights Histories*, 35 OXFORD J. LEGAL STUD. 179, 194 (2015).

153. David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1998–2005 (2014); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 660–63 (2013).

had not done enough to stand by their international commitments. The scope of gatekeeping authority could also be tailored to the case's connection to the United States, so that it increased as the contacts of the case with this country became more attenuated. Wholly domestic cases could be left free of public control, while those that were entirely foreign would be given the greatest gatekeeping scrutiny. The pragmatic imperatives that limit the effective scope of even the broadest prohibition could, in this way, be brought to bear on decisions whether to prosecute individual cases. The resulting patchwork of enforcement efforts might not be intrinsically desirable, but it is characteristic of the developing law of human rights. Universal declarations remain subject to the vicissitudes of creating and implementing actual remedies.

CONCLUSION

The Thirteenth Amendment does not purport to apply beyond "the United States, or any place subject to their jurisdiction."¹⁵⁴ Read with other clauses in the Constitution, it nevertheless gives the federal government nearly plenary power to address the international dimensions of slavery. This power has roots that go back to the beginning of the Republic, as do the evils of slavery itself. There is no need to read the geographical restrictions out of the self-enforcing provisions of the Thirteenth Amendment to reach the conclusion that they do not encumber independent powers conferred on the federal government.

What is far more difficult is to read the established territorial limits on the power of the modern nation-state out of federal legislation and federal enforcement efforts. The modern history of international human rights has revealed how episodic the erosion of these limits has been. A snapshot of the current state of the law presents a puzzling pattern of prohibitions and remedies of different scope. A look at trends in the law does not make the picture any simpler, but complicates it by taking the analysis back through different historical eras. Gradual and uneven though the trends may be, it has favored expansion of coverage and expansion of remedies. Fulfilling the promise of the Thirteenth Amendment, beyond its literal terms, requires that there is no going back.

154. U.S. CONST. amend. XIII, § 1.