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## INTERNATIONAL COURTS AND THE U.S. CONSTITUTION: REEXAMINING THE HISTORY

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*Does the United States Constitution pose an insurmountable barrier to the United States' participation in international courts and tribunals? In a recent article, The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals, Professor Eugene Kontorovich argues that the United States' participation in the International Criminal Court would violate the U.S. Constitution, both as an unconstitutional delegation of federal judicial power to a court not created in accordance with Article III of the Constitution and as a violation of the Bill of Rights's protections attendant to criminal trials in the United States. Kontorovich bases his argument primarily on history, specifically the opposition of some members of the U.S. government to membership in international courts that enforced laws prohibiting the slave trade in the nineteenth century. In response, I argue that Kontorovich has misread this bit of history. First, Kontorovich overstates the significance and sincerity of the constitutional objections. Second, contrary to Kontorovich's assertions, the international slave-trade tribunals did not exercise criminal jurisdiction, but rather a type of civil in rem jurisdiction. This type of civil jurisdiction was well recognized in American admiralty law in the early nineteenth century and was extensively used in U.S. court cases involving the forfeiture of ships under domestic laws prohibiting the slave trade. Third, and most fundamentally, Kontorovich mis-*

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*understands the nature of the constitutional objections to membership in the international courts. When examining the sources more carefully, one sees that the individuals making these objections expressed concern about subjecting Americans to trial for violations of American law in foreign courts, a concern that they expressly stated would not be present in trials for violations of international law. The problem, in their view, was that the general law of nations still allowed the slave trade. As these men understood the law of nations, the actions of one or even two countries could not change the general law of nations. The United States was free to prohibit the slave trade for its citizens as a matter of its domestic law, but then the source of the legal prohibition would be domestic law, and it would be constitutionally suspect to delegate the power to enforce that law to an international tribunal. That—and not the supposedly criminal nature of the courts—was the key distinction between the proposed slave-trade tribunals and the other international arbitration bodies, which were seen as having been charged with implementing law-of-nations obligations, rather than municipal law. By the time the United States eventually ratified the treaty for the slave-trade courts in 1862, however, the general law of nations prohibited the slave trade. No one raised serious constitutional objections at that time. Thus, if anything, the slave-trade tribunals stand alongside the rest of the nineteenth-century arbitration commissions in which the United States participated. The tribunals thus serve as a precedent for the constitutionality of participation in international courts and tribunals as a means for interpreting and enforcing widely recognized norms of international law.*

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## INTRODUCTION

While the United States is increasingly pursuing a policy of positive engagement with the International Criminal Court (ICC), no one expects the United States to join the court anytime soon. There are too many political barriers and uncertainties about the court's operations. But if the United States *someday* decided it wanted to join the ICC, would membership be constitutional?

In a recent article, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, Professor Eugene Kontorovich argues that participation in the ICC would violate the U.S. Constitution, both as an unconstitutional delegation of federal judicial power to courts not created in accordance with Article III and as a violation of the Bill of Rights's protections attendant to criminal trials in the United States.<sup>1</sup> Kontorovich bases his argument primarily on history, specifically the initial opposition of some members of the U.S. government to membership in international courts adjudicating cases involving the suppression of the slave trade in the nineteenth century.<sup>2</sup> Kontorovich characterizes the nineteenth-century slave-trade tribunals as criminal, rather than civil, in nature.<sup>3</sup> He argues that their criminal nature distinguished these courts in constitutionally significant ways from other international tribunals in which the United States participated, without constitutional qualms, in the early decades of the United States' existence; participation in these courts has been used to argue that U.S. participation in modern international courts would also be constitutional.<sup>4</sup> Kontorovich concludes that

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<sup>1</sup> Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. PA. L. REV. 39, 75-81 (2009).

<sup>2</sup> *Id.* at 75-77.

<sup>3</sup> *See id.* at 75 ("The criminal jurisdiction of the slave-trade courts made nineteenth-century statesmen decide to treat them differently . . ."); *see also id.* at 83-86 (describing reasons why one could see the tribunals as criminal in nature).

<sup>4</sup> *See, e.g.*, Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 842 (2007) (arguing that international trade tribunals "raise no serious problems under Article III" because they are "only a recent instantiation of an age-old practice: the use of arbitration to resolve disputes by American nationals against foreign states and their nationals"); *see also* AM. SOC'Y OF INT'L LAW, U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT 41-44 (2009), available at <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf> (explaining that the United States has participated in modern international tribunals

“[t]he evidence . . . suggests that giving an international criminal court jurisdiction over certain offenses within the ICC’s charter would generally be unconstitutional.”<sup>5</sup> In this Article, I argue that Kontorovich has misread this bit of history. A more accurate reading of this episode does not lend support to the argument that U.S. participation in the ICC would be unconstitutional in the ways Kontorovich suggests.

As I have previously described, and as other scholars had largely forgotten, between 1817 and 1871, a series of British bilateral treaties with various nations banning the transatlantic slave trade also provided for international courts to help enforce the ban.<sup>6</sup> “[O]ver the treaties’ lifespan, the courts heard more than 600 cases and freed almost 80,000 slaves found aboard illegal slave trading vessels.”<sup>7</sup> The United States initially declined to participate in the treaties that created the courts, though it eventually joined the system in the midst of the Civil War in 1862 under President Lincoln’s Administration.<sup>8</sup> While no cases were ever actually heard under the 1862 U.S. treaty, the lack of cases reflected the success, rather than the failure, of the treaty regime; the signing of the treaty basically extinguished the last remaining branch of the slave trade.<sup>9</sup> In fact, by the mid-1860s, there were almost no ships engaged in the transatlantic slave trade.<sup>10</sup>

The United States offered several reasons for its initial reluctance to join the anti-slave-trade treaties and the tribunals they created. Kontorovich attaches great weight to statements by certain members of President James Monroe’s Cabinet that U.S. participation in the international slave-trade courts would violate the Constitution.<sup>11</sup> But Kontorovich misunderstands both the nature of these constitutional objections and the context in which they were made.

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without constitutional concerns); David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 1033 (2008) (arguing that since the Define and Punish Clause allows the United States to create military tribunals and participate in surrender arrangements with the International Criminal Tribunals for Rwanda and the former Yugoslavia, it should also sanction U.S. participation in the ICC).

<sup>5</sup> Kontorovich, *supra* note 1, at 43.

<sup>6</sup> Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 552 (2008).

<sup>7</sup> *Id.* at 553.

<sup>8</sup> *See id.* at 628.

<sup>9</sup> *See id.* at 629 (“[N]o slave ships were willing to use the American flag once the treaty was signed.”).

<sup>10</sup> *See id.* at 628-29.

<sup>11</sup> Kontorovich, *supra* note 1, at 63-64; *see also id.* at 75-79 (discussing Attorney General Wirt’s and Secretary of State Adams’s objections in depth).

First, Kontorovich overstates the significance of the constitutional objections to U.S. participation in the international tribunals. Viewed in the context of other diplomatic and legal controversies of this time period, the United States' main objection involved the right of maritime search that the treaties conferred on the British government. The constitutional objections were primarily raised in cabinet meetings and diplomatic negotiations between 1818 and 1824, and those objections were never tested or even fully explored in any public or judicial forum.<sup>12</sup> As I explain below in Section II.A, they seem to have been used strategically in negotiations with the British as an unanswerable way to end the unwelcome conversation.<sup>13</sup> This historical clarification does not totally negate Kontorovich's argument, but it diminishes the value of the episode as a precedent shedding light on the meaning of the Constitution.

Second, contrary to Kontorovich's assertions, the international slave-trade tribunals did not exercise criminal jurisdiction, but rather a type of civil in rem jurisdiction that American admiralty law in the early nineteenth century recognized and that U.S. courts used extensively in cases involving the forfeiture of ships under domestic laws prohibiting the slave trade.<sup>14</sup> Kontorovich views the supposedly criminal nature of the slave-trade courts as pivotal, arguing that it was "the criminal jurisdiction of the slave-trade courts" that distinguished them from other nineteenth-century international courts.<sup>15</sup> But as I show in Section II.B, it was well established by the 1820s that there was no jury-trial right for slave-trade forfeiture cases in American courts, and no competent nineteenth-century American lawyer—let alone the members of Monroe's Cabinet, who would have been familiar with many of the American cases—could have failed to appreciate that fact.<sup>16</sup>

Third, and most fundamentally, I explain in Section II.C that Kontorovich misunderstands the nature of the constitutional objections because he fails to situate those objections in the context of the conceptions of the law of nations and the nature of jurisdiction that pre-

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<sup>12</sup> See *infra* Sections I.C and II.A.

<sup>13</sup> See *infra* Section II.A (documenting the formulation of U.S. constitutional objections to the international slave-trade tribunals in the context of negotiations with Britain over joining these tribunals).

<sup>14</sup> See *infra* Section II.B (arguing that proceedings held by the slave-trade tribunals were civil, not criminal).

<sup>15</sup> Kontorovich, *supra* note 1, at 75.

<sup>16</sup> See *infra* Section II.B.

vailed in early to mid-nineteenth-century America.<sup>17</sup> To the extent that members of Monroe's Cabinet expressed constitutional concerns about the exercise of jurisdiction by the slave-trade courts, these objections reflected the fact that the slave trade was not then illegal under the general law of nations but only under the law of individual countries, including the United States. When one more carefully examines the language the members of Monroe's Cabinet used, one sees that these individuals expressed concern about making Americans susceptible to trial in foreign courts for violations of *American* law, a concern that Cabinet members expressly stated would not be present for trials involving violations of *international* law.

That concern, and not the supposedly criminal nature of the courts, was the key distinction for members of Monroe's Cabinet between the proposed slave-trade tribunals and the other international arbitration bodies, which Cabinet members saw as implementing the law of nations, rather than municipal law. As these Cabinet members understood it, the actions of one or even two countries could not change the general law of nations, and no nation had jurisdiction to prescribe rules of conduct for noncitizens outside its own territory. Thus, the United States was free to prohibit the slave trade for its citizens as a matter of its own domestic law—but then the source of the legal prohibition would only be *domestic* law, which would make it constitutionally suspect to delegate the power to enforce that law to an international tribunal. By the time the United States eventually ratified the treaty for the slave-trade courts in 1862, however, the general law of nations *did* prohibit the slave trade. No serious constitutional objections were raised at that time. Thus, if anything, the slave-trade tribunals stand alongside the rest of the nineteenth-century arbitration commissions in which the United States participated as a precedent for the constitutionality of participation in international courts and tribunals that interpret and enforce widely recognized norms of international law.

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<sup>17</sup> See *infra* Section II.C.

## I. INTERNATIONAL COURTS AND TRIBUNALS IN THE EIGHTEENTH AND NINETEENTH CENTURIES

### A. *Arbitration Tribunals*

One of the main arguments marshaled in favor of the constitutionality of U.S. participation in various modern international courts and tribunals is that the United States has participated in international tribunals since the founding era.<sup>18</sup> Although international adjudication can be traced from ancient times,<sup>19</sup> almost every account of modern international adjudication begins with the Jay Treaty of 1794, in which Britain and the United States agreed to set up arbitration commissions to resolve boundary disputes and claims by British and American citizens whose property had been damaged or seized during the War of Independence.<sup>20</sup> The most significant commissions were those created under Article VII of the treaty;<sup>21</sup> they were charged with deciding the property claims of American citizens “according to the merits of the

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<sup>18</sup> See, e.g., Scheffer & Cox, *supra* note 4, at 1030-33 (arguing that the Define and Punish Clause supports U.S. involvement in international tribunals); see also Monaghan, *supra* note 4, at 851 (“Since the Jay Treaty of 1794, it has been clear that claims of American nationals . . . against foreign sovereigns could be adjudicated by state-state mixed arbitration commissions.”).

<sup>19</sup> Records of international arbitrations can be traced back to before the ancient Greek city-states. See I INTERNATIONAL ADJUDICATIONS, at xii (John Bassett Moore ed., 1929) (describing the Germanic Empire’s practice of settling disputes between states and principalities through peaceful means); MARCUS NIEBUHR TOD, INTERNATIONAL ARBITRATION AMONGST THE GREEKS 170-74 (1913) (providing examples of international arbitrations in ancient times that led to the ancient Greeks’ arbitration system); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 118 (1999) (noting that several ad hoc and specialized international arbitration forums preceded the twentieth-century international courts).

<sup>20</sup> See, e.g., PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 20 (7th rev. ed. 1997) (stating that the modern history of arbitration began with the Jay Treaty, while earlier concepts of peaceful settlement originated with the Peace of Westphalia); Charney, *supra* note 19, at 118 (“The Jay Treaty of 1794 marked the beginning of modern international arbitrations.”).

<sup>21</sup> Opponents of the Jay Treaty raised constitutional objections to it at the time of its ratification. They claimed that the foreign commissioners’ appointments deviated from the procedures and protections in Article III of the Constitution for judicial appointments and, therefore, allowing the commissioners to resolve cases was an impermissible delegation of Article III authority to a non-Article III tribunal. The Senate did not find these objections persuasive and ratified the treaty. See generally David Golove, *The New Confederatism: Treaty Delegations of Legislative, Executive, and Judicial Power*, 55 STAN. L. REV. 1697, 1745-46 (2003) (detailing the constitutional objections to the Jay Treaty).

several cases, and to justice, equity, and the laws of nations.”<sup>22</sup> The commission made over five hundred awards between 1798 and 1804.<sup>23</sup>

Following the Jay Treaty’s model, ad hoc arbitrations were common throughout the nineteenth century.<sup>24</sup> The peace treaty between Great Britain and France in 1815, at the end of the Napoleonic Wars, for example, included a provision for arbitration of public and private claims related to the conflict.<sup>25</sup> The United States was party to many of these nineteenth-century arbitrations.<sup>26</sup> Two significant instances are the arbitration of claims by the United States against Britain arising from alleged violations of neutrality during the American Civil War<sup>27</sup>

<sup>22</sup> Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. VII, Nov. 19, 1794, 8 Stat. 116.

<sup>23</sup> Kontorovich dismissively suggests that “[t]he commission established by Article VI of the Jay Treaty is certainly a very discouraging precedent. It had only one ignoble session, in which it decided nothing.” Kontorovich, *supra* note 1, at 57 n.72 (citing SAMUEL FLAGG BEMIS, JAY’S TREATY app. V at 318 (1923)). But the Article VI commission (established to decide claims by British merchants for debts incurred by U.S. citizens) was only one of three arbitral commissions the treaty set up. See Charles H. Brower, II, *The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 DUKE J. COMP. & INT’L L. 259, 267-69 (2008) (providing an account of the commissions’ activities after the treaty went into effect). Although that commission failed after a quarrel between its commissioners, and the claims that were to have been arbitrated were eventually resolved diplomatically, the other commissions were more successful. *Id.* at 268. The commission established by Article V of the treaty unanimously determined the northeast boundary of the United States. *Id.* at 267. Moreover, the Article VII commission was charged with resolving claims by U.S. citizens for losses resulting from British interference with shipping from the United States to France. See *id.* at 268-69. Despite some initial troubles, over the course of eight years, that commission eventually rendered more than five hundred awards, totaling over \$11 million in compensation, in favor of U.S. claimants. *Id.* at 269.

<sup>24</sup> See Charney, *supra* note 19, at 118-19.

<sup>25</sup> See Convention Relative to the Claims of the Subjects of the Allied Powers upon France, Nov. 20, 1815, art. V, 3 B.S.P. 315 (1815-16) (stating that the parties will “appoint Commissions of Liquidation . . . in the examination of the Claims; and also Commissions of Arbitration”); see also Memorandum of the British Government (explaining the jurisdiction and composition of the commission for adjudicating private claims and noting its similarities to those in a previous convention between Great Britain and France), enclosed in Letter from Viscount Castlereagh to the Duke de Richelieu (Oct. 27, 1818), in 6 B.S.P. 59, 60 (1818-19).

<sup>26</sup> See generally SURVEY OF INTERNATIONAL ARBITRATIONS 1794-1989, at 9-236 (A.M. Stuyt ed., 3d ed. 1990) (summarizing the international arbitrations that took place in the nineteenth century).

<sup>27</sup> See ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 218-19 (rev. ed. 1954) (examining the 1872 arbitration between Great Britain and the United States regarding the building of the ship *Alabama* in English shipyards to be used by the Confederacy, which was regarded as proof that arbitration was a viable option for resolving controversial disputes).



and the settlement of more than 2000 claims under the United States and Mexico Mixed Commission of 1868.<sup>28</sup>

The twentieth century saw the further proliferation of international courts and tribunals, which today number in the dozens.<sup>29</sup> The Permanent Court of Arbitration was created in 1899,<sup>30</sup> followed by the Permanent Court of International Justice (PCIJ) under the League of Nations.<sup>31</sup> Although the United States did not join the League of Nations, it cooperated with the PCIJ by sending judges and personnel.<sup>32</sup> The PCIJ was the precursor to the current International Court of Justice (ICJ), which was established under the United Nations Charter following World War II.<sup>33</sup> The United States has participated in proceedings before the ICJ as both a claimant and a respondent.<sup>34</sup> Although it does not currently accept the court's jurisdiction on a blanket basis, as of 2008 the United States was a party to some seventy-odd treaties under which it agreed to submit particular kinds of disputes to the ICJ.<sup>35</sup>

A great deal of recent debate has focused on the U.S. courts' enforcement (or lack thereof) of several judgments against the United States in the ICJ. These cases concerned violations of the Vienna

<sup>28</sup> See *id.* at 218 (describing the commission's successful arbitration of claims as one of the most important examples of the Jay Treaty in action).

<sup>29</sup> See *About PICT*, PROJECT ON INT'L CTS. & TRIBUNALS, <http://www.pict-pecti.org/about/about.html> (last visited Jan. 15, 2011) (stating that there are more than ninety international institutions with at least quasi-judicial functions).

<sup>30</sup> See Convention on the Pacific Settlement of International Disputes art. 20, July 29, 1899, 32 Stat. 1779 ("[T]he Signatory Powers undertake to organize a permanent Court of Arbitration . . .").

<sup>31</sup> League of Nations Covenant art. 14 ("The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice.").

<sup>32</sup> See, e.g., Philippe J. Sands, *The Future of International Adjudication*, 14 CONN. J. INT'L L. 1, 4 (1999) ("Although it was not a member of the League of Nations, the United States had judges at the Permanent Court of International Justice who played a very active role in the establishment of that body, including its rules of procedure.").

<sup>33</sup> U.N. Charter art. 7, para. 1 ("There [is] established as [a] principal organ[] of the United Nations . . . an International Court of Justice . . .").

<sup>34</sup> See, e.g., *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 44-45 (May 24) (holding that Iran was in violation of international law and must release all U.S. nationals detained in the U.S. embassy in Tehran); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 146-47 (June 27) (holding that the United States violated the international law of not intervening in the affairs of another state by supplying and financing the Contra forces in Nicaragua).

<sup>35</sup> See *Medellín v. Texas*, 552 U.S. 491, 520 (2008) (noting the dissent's worry that the decision casts doubt on the treaties under which the United States is subject to the ICJ's jurisdiction); *id.* at 552-53 (Breyer, J., dissenting) ("[T]he United States has ratified approximately 70 treaties with ICJ dispute resolution provisions . . .").

Convention on Consular Relations with regard to death penalty cases involving foreign nationals.<sup>36</sup> Beginning in the late 1990s, several countries including Paraguay, Germany, and Mexico sued the United States in the ICJ on the grounds that the United States had failed to notify those countries' nationals of their right to contact their respective consulates upon arrest, as required under Article 36 of the Vienna Convention on Consular Relations.<sup>37</sup> The countries argued that these failures deprived the foreign nationals of legal assistance from their respective governments that might have changed the outcomes of their trials.<sup>38</sup> The Optional Protocol to the Vienna Convention, to which the United States was a party until 2005, provides that disputes under the treaty should be resolved by the ICJ.<sup>39</sup> However, in a series of controversial decisions, the U.S. Supreme Court declined to implement the ICJ's decision that the United States had violated the treaty.<sup>40</sup> The Supreme Court explained that, in its view, it was not obligated to follow the ICJ's interpretation of the treaty obligation.

Under our Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. That

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<sup>36</sup> See *id.* at 497-98 (majority opinion) (discussing the ICJ's determination that the United States had violated the Vienna Convention and the subsequent domestic cases finding that the ICJ's decision was nonbinding).

<sup>37</sup> The treaty requires that

authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph . . .

Vienna Convention on Consular Relations art. 36(1)(b), *done* Apr. 24, 1963, 21 U.S.T. 77.

<sup>38</sup> See, e.g., *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 17-19 (Mar. 31) (describing Mexico's claim that the United States violated the Vienna Convention).

<sup>39</sup> See Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, *done* Apr. 24, 1963, 21 U.S.T. 325 ("Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice . . ."); see also Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1 (describing the United States' withdrawal from the Optional Protocol on March 7, 2005).

<sup>40</sup> See *Medellin*, 552 U.S. at 532 (holding that an ICJ decision concerning the Vienna Convention "is not domestic law" and accordingly is not directly enforceable in U.S. courts); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006) (holding that claims arising out of Article 36 of the Vienna Convention are subject to otherwise applicable domestic procedural default rules).

“judicial Power . . . extend[s] to . . . Treaties.” *Id.*, § 2. And, as Chief Justice Marshall famously explained, that judicial power includes the duty “to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803). If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law “is emphatically the province and duty of the judicial department,” headed by the “one supreme Court” established by the Constitution. *Ibid.* . . .

. . . .

Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.<sup>41</sup>

In a subsequent case, the Supreme Court went on to explain that the ICJ’s judgment was not binding on U.S. courts because the treaty provisions involved were not “self-executing,” meaning that the provisions would require further implementing legislation from Congress to be judicially enforceable.<sup>42</sup> The Court also noted that

[o]ur holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements. Indeed, we agree with Medellín that, as a general matter, “an agreement to abide by the result” of an international adjudication—or what he really means, an agreement to give the result of such adjudication domestic legal effect—can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution.<sup>43</sup>

In reaction, a number of commentators have reached varying conclusions as to the meaning and constitutional implications of the Supreme Court’s pronouncements.<sup>44</sup>

Some commentators have also discussed whether participation in the ICC would be constitutional.<sup>45</sup> However, because U.S. ratification

<sup>41</sup> *Sanchez-Llamas*, 548 U.S. at 353-54 (alterations in original).

<sup>42</sup> See *Medellín*, 552 U.S. at 519 (“We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments—only that the U.N. Charter, the Optional Protocol, and the ICJ Statute do not do so.”).

<sup>43</sup> *Id.* at 519-20.

<sup>44</sup> See John O. McGinnis, *Medellín and the Future of International Delegation*, 118 YALE L.J. 1712, 1742-47 (2009) (citing works by numerous scholars debating the proper avenue for treaty implementation).

<sup>45</sup> See AM. SOC’Y OF INT’L LAW, *supra* note 4, at 41 (finding that constitutional concerns would “not present any insurmountable obstacles to joining the Court”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 270 (2d ed. 1996) (“If the proposed permanent International Criminal Court came into existence and the United States adhered to it, United States participation would not be constitutionally troublesome.”); Scheffer & Cox, *supra* note 4, at 985 (“[C]oncerns about compliance with the U.S. Constitution were the United States to ratify the Rome Statute are largely without merit.”); Ruth Wedgwood, *The Constitution and the ICC* (“[T]here is no forbidding constitutional obstacle to U.S. participation in the treaty.”), in THE

of the ICC treaty is a distant prospect at best, relatively less attention has been focused on this issue. Even assuming that any meaningful conclusions can be drawn from the Supreme Court's vague pronouncements in the Vienna Convention cases about preserving the Court's power to declare "what the law is," it is unclear how these pronouncements would extend to the ICC. Unlike the ICJ decisions concerning the Vienna Convention, a case before the ICC typically would not involve the question of enforcing the court's decisions within the U.S. legal system, except perhaps to the extent that the ICC sought cooperation in the arrest and surrender of a suspect for trial or cooperation in obtaining evidence or witnesses.<sup>46</sup> Most commentators who have examined the question have concluded that it would be constitutional for the United States to participate in the ICC.<sup>47</sup>

### B. *The Slave-Trade Courts*

As I have described elsewhere in greater detail, international courts also played an important, but now largely forgotten, role in the suppression of the transatlantic slave trade in the nineteenth century.<sup>48</sup>

At the beginning of the nineteenth century, the slave trade was not only a lawful practice, but also the cornerstone of the Atlantic economy.<sup>49</sup> But the antislavery views of religious-revival movements and the secular Enlightenment philosophers caused a growing number of people on both sides of the Atlantic to question whether slavery

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UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 119, 121 (Sarah B. Sewall & Carl Kaysen eds., 2000). *But see* Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 841-42 (2002) (arguing that joining the ICC would abrogate American citizens' rights to such an extent that it would violate the Constitution).

<sup>46</sup> See Rome Statute of the International Criminal Court art. 63, July 17, 1998, 2187 U.N.T.S. 90 ("The accused shall be present during the trial."); *id.* art. 89 (addressing "[s]urrender of persons to the Court"); *id.* art. 93 (explicating "[o]ther forms of cooperation" required for participation in the court).

<sup>47</sup> See sources cited *supra* note 45.

<sup>48</sup> See Jenny S. Martinez, *The Slave Trade on Trial: Lessons of a Great Human-Rights Law Success*, BOSTON REV., Sept.-Oct. 2007, at 12, 15 (finding that the United States' anti-slave-trade treaty with Great Britain provided the means to end the transatlantic slave trade). See generally Martinez, *supra* note 6 (discussing the legacy of antislavery courts as the first international human rights courts). The summary that follows above is based on both of these articles.

<sup>49</sup> Cf. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 132 (2007) ("Much of Atlantic civilization in the nineteenth century was built on the back of the enslaved field hand.").

should continue.<sup>50</sup> In 1807, both the United Kingdom and the United States passed landmark legislation banning participation in the slave trade by their citizens.<sup>51</sup> Because the slave trade was an international enterprise, international cooperation was required to suppress it. Slave merchants could avoid British and American interdiction by flying French, Spanish, or Portuguese flags instead.<sup>52</sup> Further, banning the trade put Britain at an economic disadvantage: other nations continued to profit from the slave trade and the continued flow of slave labor to their plantation economies.<sup>53</sup>

For a variety of reasons, anti-slave-trade factions were more politically powerful in Britain than in the United States. Britain became the global leader in the suppression of the slave trade,<sup>54</sup> a feature it emphasized as a cornerstone of its foreign policy for several decades.<sup>55</sup> Initially, Britain acted mostly on its own.<sup>56</sup> During the Napoleonic Wars, from 1804 to 1815, Britain took advantage of a law-of-nations rule that permitted during wartime the search and capture not only of enemy ships, but also of neutral vessels on the high seas to determine whether they were breaching the laws of neutrality by, for example, carrying illicit cargo for the benefit of a belligerent nation.<sup>57</sup> British admiralty courts could condemn enemy ships and neutral ships that

<sup>50</sup> See Martinez, *supra* note 48, at 12 (discussing work of various historians on causes of abolitionism).

<sup>51</sup> See Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, c. 36 (U.K.). The United States also enacted legislation banning the slave trade in 1807, but the law did not take effect until the following year. See Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (prohibiting the importation of slaves).

<sup>52</sup> See Martinez, *supra* note 6, at 586 (“Quite often—and in violation of the law of nations—slave ships carried more than one flag and set of papers, with the hope of deploying whichever seemed most expedient to avoid seizure and condemnation.”).

<sup>53</sup> See *id.* at 563-64 (indicating that British colonies were economically disadvantaged because they were prohibited from receiving “infusions of new slaves”).

<sup>54</sup> See *id.* at 557-58 (noting that Britain was the “main advocate” of banning the slave trade and devoted significant resources to suppressing it).

<sup>55</sup> See *id.* at 563-79 (detailing British foreign policy with regard to eliminating the slave trade).

<sup>56</sup> See *id.* at 563-69 (discussing other nations’ reluctance to ban slavery outside the European mainland).

<sup>57</sup> Cf. Tara Helfman, Note, *The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade*, 115 YALE L.J. 1122, 1151-52 (2006) (describing the nineteenth-century case of *Le Louis*, (1817) 165 Eng. Rep. 1464 (High Ct. Admlty), as holding that “[w]ith the exception of the rights of war that permit belligerents to search neutral ships during wartime, no state could claim the right to interrupt foreign navigation” (footnote omitted)).

were violating the law of nations as prizes, with the profits split between the naval officers of the capturing ship and the government treasury.<sup>58</sup>

In 1808, a British warship invoked this law-of-nations rule as grounds for searching the *Amedie*, a slave ship sailing under the “neutral” American flag.<sup>59</sup> The British appeals court upheld the seizure. The court acknowledged that the general law of nations did not prohibit the slave trade, noting that

we cannot legislate for other countries; nor has this country a right to controul any foreign legislature that may think proper to dissent from this doctrine and give permission to its subjects to prosecute this trade. We cannot, certainly, compel the subjects of other nations to observe any other than the first and generally received principles of universal law.<sup>60</sup>

Nevertheless, the court held that the trade was so contrary to natural law and justice that it was presumptively illegal in the absence of proof that the laws of the ship’s own nation allowed it.<sup>61</sup> Since U.S. law prohibited the trade, American shipowners had no legitimate claim that the British seizure was violating their property rights.<sup>62</sup> Between 1807 and 1815, British courts relied on similar reasoning to condemn dozens of American, French, Spanish, and Portuguese slave ships.<sup>63</sup> In each case the courts liberated the slaves on board and ordered the ship and its remaining cargo auctioned. The government and the capturing crew split the prize money.<sup>64</sup>

Great Britain’s military victory over France and its allies made Great Britain the dominant maritime superpower, but the end of the Napoleonic Wars also meant the end of Great Britain’s ability to police other nations’ ships.<sup>65</sup> The law of nations permitted no peacetime

<sup>58</sup> See Martinez, *supra* note 6, at 565 (“Ships found carrying cargoes of slaves were brought into British vice admiralty courts around the Atlantic for condemnation as prizes under the law of nations.”).

<sup>59</sup> *Amedie*, (1810) 12 Eng. Rep. 92 (P.C.) 92.

<sup>60</sup> *Id.* at 96.

<sup>61</sup> *Id.* at 96-97.

<sup>62</sup> *Cf.* Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (banning the slave trade in the United States).

<sup>63</sup> See Martinez, *supra* note 6, at 566-67, 567 tbl.1. For similar cases, see, for example, *Donna Marianna*, (1812) 165 Eng. Rep. 1244 (High Ct. Admlty), *Fortuna*, (1811) 165 Eng. Rep. 1240 (High Ct. Admlty), *Africa*, (1810) 12 Eng. Rep. 156 (P.C.), and *Anne*, (1810) 12 Eng. Rep. 158 (P.C.).

<sup>64</sup> See *supra* note 58 and accompanying text.

<sup>65</sup> See Martinez, *supra* note 6, at 568 (noting that with Great Britain’s victory in the war, “Britain’s unilateral actions became more suspect”).

searches of a foreign nation's ships except on suspicion of piracy.<sup>66</sup> While some countries would eventually declare the slave trade a form of piracy, slave trading did not yet have that status under the general law of nations.<sup>67</sup> The British courts began to invalidate the captures of foreign-flagged slave ships.<sup>68</sup> In 1817, a British court overturned the seizure of the French slave ship *Le Louis*.<sup>69</sup> The court emphasized that the law of nations generally prohibited peacetime searches and concluded that Britain could not search or seize a French ship unless the ship was engaged in piracy or some treaty with France authorized the search.<sup>70</sup> The court found that the slave trade was not piracy under the law of nations and that no treaty authorized the search.<sup>71</sup> Accordingly, the court concluded that, even though French law prohibited the slave trade, the search and subsequent seizure were not authorized and the ship had to be released.<sup>72</sup>

With this avenue of unilateral action foreclosed, Britain shifted to diplomacy.<sup>73</sup> Largely due to British lobbying, the European nations participating in the Congress of Vienna agreed in 1815 to condemn the slave trade as "repugnant to the principles of humanity and universal morality."<sup>74</sup> But their agreement did not include a timeline for the abolition of the trade and provided no means for enforcement.<sup>75</sup> The previous year, a similar clause had been included in the Treaty of Ghent, which settled the War of 1812 between the United States and the United Kingdom, but it was equally aspirational.<sup>76</sup>

<sup>66</sup> See DAVID ELTIS, *ECONOMIC GROWTH AND THE ENDING OF THE TRANSATLANTIC SLAVE TRADE* 109 (1987) ("British rights had lapsed with hostilities . . .").

<sup>67</sup> Cf. *Le Louis*, (1817) 165 Eng. Rep. 1464 (High Ct. Admlty) 1471 (holding that the slave trade was not piracy—and therefore was not unlawful—under the general law of nations).

<sup>68</sup> See Martinez, *supra* note 6, at 568 ("[Beginning in 1817,] British courts began invalidating seizures of slave ships, starting with the case of *Le Louis* . . .").

<sup>69</sup> See *Le Louis*, 165 Eng. Rep. at 1473.

<sup>70</sup> See *id.* at 1476.

<sup>71</sup> See *id.* at 1477, 1482.

<sup>72</sup> See *id.* at 1477-78.

<sup>73</sup> See Martinez, *supra* note 6, at 569-79 (describing British diplomatic efforts after the Napoleonic Wars with regard to banning the slave trade).

<sup>74</sup> Declaration of the Powers on the Abolition of the Slave Trade, 32 PARL. DEB., H.C. (1st ser.) (1815) 200-01 (U.K.).

<sup>75</sup> See Martinez, *supra* note 6, at 573-75 ("[N]o permanent international legal structures were created as a result of either the Congress of Vienna or the subsequent meetings between the great European powers . . .").

<sup>76</sup> See *id.* at 571-72 (explaining that the treaty parties agreed to abolish the slave trade, but the treaty did not provide any means to accomplish that goal); see also Treaty

Anti-slave-trade advocates realized these toothless treaties would make little difference and sought stronger agreements. In 1817 and 1818, Britain persuaded Spain, Portugal, and the Netherlands to enter into stronger bilateral treaties, though it had to mix moral arguments with threats and cash bribes to secure their agreement.<sup>77</sup> These treaties banned slave trading by nationals of these countries, with certain limitations as to time and geography. The treaties provided for enforcement of the ban through a mutual right to search one another's ships.<sup>78</sup> Even more significantly, these treaties created international courts to implement the ban.<sup>79</sup> Each country would appoint a judge, and in the event of disagreement, a lottery would select an arbitrator from one of the countries to cast the deciding vote.<sup>80</sup> For example, a British warship could capture a slave vessel sailing under the Spanish flag and bring the ship in front of a court consisting of a Spanish and an English judge, with a Spanish or English arbitrator to be selected by lottery to break any ties. If the judges concluded that the ship was illegally engaged in the slave trade, they would free the slaves and the ship would be sold, with the proceeds divided among the governments and the crew of the ship that had made the capture.<sup>81</sup> The mixed courts had no jurisdiction to punish the slave ship's crew members, but the crew members could be sent to their own nation's courts for criminal trial.<sup>82</sup>

Over the course of the mid-nineteenth century, these mixed courts heard more than 600 cases.<sup>83</sup> During the peak years of the courts' operation, in the 1830s and 1840s, as many as one in every five or six ships involved in the transatlantic slave trade ended up in the international

of Peace and Amity Between His Britannic Majesty and the United States of America, U.S.-Gr. Brit., art. X, Dec. 24, 1814, 8 Stat. 218.

<sup>77</sup> See Martinez, *supra* note 6, at 576-78 (describing Great Britain's respective agreements with Spain, Portugal, and the Netherlands).

<sup>78</sup> See *id.* at 578 (observing that the new treaties were not "cheap talk" because they all contained "robust enforcement mechanisms").

<sup>79</sup> See *id.* (citing Treaty for the Abolition of the Slave Trade, Sept. 23, 1817, Gr. Brit.-Spain, art. XII, 4 B.S.P. 33 (1816-17), and Regulation for the Mixed Commissions, Which Are to Reside on the Coast of Africa, and in a Colonial Possession of His Catholic Majesty, Treaty for the Abolition of the Slave Trade, Sept. 23, 1817, Gr. Brit.-Spain, art. I, 4 B.S.P. 51 (1816-17) [hereinafter Regulation for the Mixed Commissions]).

<sup>80</sup> See Martinez *supra* note 6, at 579-95 (providing an overview of the operations of the mixed courts).

<sup>81</sup> Regulation for the Mixed Commissions, *supra* note 79, art. VII.

<sup>82</sup> See Martinez, *supra* note 6, at 591 n.180 (citing correspondence that describes the slave ships' crews facing criminal trials in their own countries).

<sup>83</sup> Leslie Bethell, *The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century*, 7 J. AFR. HIST. 79, 79 (1966).



courts, and the vast majority of them were condemned.<sup>84</sup> The courts freed almost 80,000 slaves, and an unknown number of other slave-trading voyages were deterred or interrupted because of the courts.<sup>85</sup>

The international slave-trade courts faced numerous practical challenges, ranging from disagreements among judges based on differences in language and national legal customs, to the death of judges from tropical diseases.<sup>86</sup> Loopholes in the treaties—clauses about where slave ships were sailing and whether the ships actually had slaves on board at the time of capture—also impeded the courts' work.<sup>87</sup> Moreover, local officials in the major slave-importing centers of Cuba and Brazil often tolerated the sale of illegally imported slaves.<sup>88</sup> Finally, the reluctance of France and the United States to sign treaties with Britain allowed slave traders to elude capture by switching from the Spanish, Portuguese, or Brazilian flag to the American or French flag whenever they spotted British cruisers.<sup>89</sup> Despite these challenges, the international courts eventually played an important role in the suppression of the transatlantic slave trade, which was squelched by the mid-1860s.<sup>90</sup>

But in 1818, when Britain first approached the United States about participating in the international-courts regime, the eventual path toward abolition was not yet clear. The slave trade, and slavery itself, were still flourishing. It is against this backdrop that the negotiations must be understood.

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<sup>84</sup> See *id.* at 83-84, 89-93 (listing the distribution of cases among the various mixed courts from 1819 to 1845 and discussing how after 1839, the British vice-admiralty courts took an increasingly prominent role in adjudicating the cases of foreign slave ships); see also Martinez, *supra* note 6, at 596-97 (referencing calculations from the revised TRANS-ATLANTIC SLAVE TRADE DATABASE, <http://www.slavevoyages.org> (last visited Jan. 15, 2011)).

<sup>85</sup> Bethell, *supra* note 83, at 79; see also Martinez, *supra* note 6, at 602 (arguing that “regardless of whether or not the mixed courts were ‘successful’ in terms of their impact on the overall transatlantic slave trade,” the “lives [of individuals saved from slavery] were made at least a little bit better because of the efforts to enforce the international treaties against the slave trade”).

<sup>86</sup> See, e.g., Martinez, *supra* note 6, at 580 n.133 (citing correspondence reporting the deaths of court officials).

<sup>87</sup> See *id.* at 610-14 (pointing out significant loopholes in the antislavery treaties).

<sup>88</sup> See *id.* at 616 (discussing complaints of British officials vis-à-vis “supineness and outright corruption of local authorities” in Cuba and Brazil).

<sup>89</sup> Martinez, *supra* note 48, at 15.

<sup>90</sup> See Martinez, *supra* note 6, at 621-29 (explaining that a series of British acts authorized the capture of vessels sailing without a flag or under the flag of uncooperative nations, such as Brazil, Spain, and Cuba).

C. *Kontorovich's Argument About the Slave-Trade Tribunals*

Professor Kontorovich's article focuses on the debate that occurred between 1818 and 1824 in the Cabinet of President James Monroe, which culminated in the submission of a bilateral British and American slave-trade treaty to the U.S. Senate for ratification in 1824.<sup>91</sup> The 1824 treaty did not include mixed courts, but instead provided that a ship would be taken to its own country's national courts for trial.<sup>92</sup> The treaty failed when the Senate amended it in several ways—such as by prohibiting British patrols off the coast of the United States—that proved unacceptable to the British.<sup>93</sup> Following the failure of the 1824 treaty, negotiations continued sporadically over the next decades until the United States finally ratified a mixed-courts treaty with the British in 1862.<sup>94</sup>

As Kontorovich notes, in the negotiations leading up to the 1824 treaty, most of “[t]he discussion focused on the right of search,” which was “political dynamite in America because of its association with impressment . . . over which the War of 1812 had just been fought.”<sup>95</sup> Indeed, Kontorovich acknowledges that “at the [first] Cabinet meeting and subsequently, the search proposal dominated all discussions of the proposed treaty.”<sup>96</sup> However, as I noted in an earlier article,<sup>97</sup> and as Kontorovich explains in great detail, the opponents of the treaties also raised objections based on the U.S. Constitution.<sup>98</sup> It is on the

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<sup>91</sup> See Kontorovich, *supra* note 1, at 58-60 (emphasizing the negotiations between Britain and the United States in discussing the diplomatic history of the United States' refusal to join antislavery treaties).

<sup>92</sup> See Letter from Albert Gallatin to John Quincy Adams (Jan. 18, 1823), in 2 THE WRITINGS OF ALBERT GALLATIN 264, 264-65 (Henry Adams ed., Philadelphia, J.B. Lippincott & Co. 1879).

<sup>93</sup> See Kontorovich, *supra* note 1, at 72 (positing that the British viewed this truncated version of the treaty as a rejection); see also Letter from John Quincy Adams to Richard Rush (May 29, 1824), in 5 AMERICAN STATE PAPERS: FOREIGN RELATIONS 362, 362-63 (Asbury Dickins & James C. Allen eds., Washington, D.C., Gales & Seaton 1858).

<sup>94</sup> Treaty for the Suppression of the Slave Trade, U.S.-Gr. Brit., Apr. 7, 1862, 12 Stat. 1225.

<sup>95</sup> Kontorovich, *supra* note 1, at 63.

<sup>96</sup> *Id.*

<sup>97</sup> Martinez, *supra* note 6, at 603-04 (noting that President Monroe “objected to the mixed courts as ‘incompatible’ with the Constitution and to the right of mutual search for an offense that was ‘not piratical’ as ‘repugnant to the feelings of the nation’” (quoting Letter from President James Monroe to the U.S. Senate (May 21, 1824), in THE POLITICAL WRITINGS OF JAMES MONROE 328, 330 (James P. Lucier ed., 2001))).

<sup>98</sup> See, e.g., Kontorovich, *supra* note 1, at 111-13 (discussing the various constitutional objections raised in Cabinet meetings and diplomatic correspondence).

authority of these arguments that Kontorovich claims that the debates over slave-trade treaty proposals demonstrate the unconstitutionality of contemporary international criminal courts like the ICC.<sup>99</sup>

The constitutional objections to the slave-trade tribunals were sometimes vague and changed over time, but as Kontorovich breaks them down, several distinct strands of argument emerge, including the impermissible delegation of Article III judicial power to a court outside the constitutional framework for federal courts; the foreign nationality of some of the judges; the extraterritorial location of the courts; the nonimpeachability of the judges; the lack of review of the court's decisions by the U.S. Supreme Court; and the court's potential violation of individual rights protections in the Constitution, including the right to jury trial and grand jury indictment.<sup>100</sup> Kontorovich argues that the constitutional objections were genuine and sincere<sup>101</sup> and that they are entitled to significant weight in contemporary debates—in no small part because they took place shortly after the Constitution was written.<sup>102</sup> I question these conclusions in Section II.A.

Furthermore, Kontorovich contends that these arguments, to the extent they were valid, turned on the differences between the slave-trade tribunals and other international commissions in which the United States participated without constitutional qualms. For example, the Jay Treaty commissions also involved foreign and unimpeachable judges, were not subject to review by the Supreme Court, and did not afford jury trials. Kontorovich argues that the key distinction was that the slave-trade tribunals were criminal.<sup>103</sup> As I explain below in Section II.B, this is simply wrong. U.S. courts understood the forfeiture proceedings the slave-trade tribunals carried out in this time period to be civil, not criminal.

More fundamentally, Kontorovich has misunderstood the nature of the constitutional objections to these tribunals as distinguished from other international tribunals in which the United States partici-

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<sup>99</sup> *See id.* at 62-64.

<sup>100</sup> *See id.* at 74-79 (listing Attorney General Wirt's and Secretary of State Adams's structural constitutional objections, as well as those objections under the Bill of Rights).

<sup>101</sup> *See id.* at 88-89 (suggesting sincerity because of a lack of ulterior motives in the delegates' private papers, the Monroe Administration's willingness to maintain its objections at high cost, and the fact that no counterarguments were made that the mixed commissions were constitutional).

<sup>102</sup> *See id.* at 46-47.

<sup>103</sup> *See id.* at 82-85 ("The slave-court condemnation would have the key characteristic of a criminal proceeding in that it determined the blameworthiness of the owners and crew.").

pated, as I explain below in Section II.C. The distinction that the members of Monroe's Cabinet perceived between the Jay Treaty tribunals and the slave-trade tribunals was not their supposedly criminal nature, but rather the source of their legal authority. Because Americans in the 1820s viewed the slave trade as lawful under the general law of nations, which they believed neither the United States nor Great Britain had the power to change unilaterally, the Cabinet members saw any prohibition of the slave trade as emanating from domestic U.S. law, and it was on this basis that the Americans were concerned about an unconstitutional delegation of U.S. judicial power.

To the extent that one can draw any limitation on crimes properly subject to international jurisdiction from these debates, that limitation relates more closely to whether the criminal acts are prohibited only by domestic law or whether they are genuinely prohibited by customary international law or a broadly ratified multilateral treaty (the best modern equivalent to the components of the law of nations in the 1820s).

## II. THE UNITED STATES AND THE SLAVE-TRADE TRIBUNALS: REEXAMINING THE EVIDENCE

### A. *The Weight and Sincerity of the Constitutional Objections*

As I explain in this Section, there are a variety of reasons to be skeptical about affording great precedential weight to the constitutional arguments against the slave-trade tribunals. These factors alone are not my main response to Kontorovich, for I believe there are more fundamental flaws in his analysis (including his misunderstanding of the nature of the constitutional objections), but it is worth setting those factors out at some length, in part because it is important to understand the political and legal context in which these debates occurred.

One must first consider why and how this episode is relevant to interpreting the Constitution. Even Kontorovich acknowledges that events between 1818 and 1824 cannot really be taken as indicating the original understanding of those who ratified the Constitution some thirty years earlier.<sup>104</sup> At best, Kontorovich admits, the events he focuses on took place “at the last twilight of the founding generation.”<sup>105</sup> He tries to bolster the originalist credentials of his evidence by noting that President Monroe had fought in the Revolutionary War and at-

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<sup>104</sup> *Id.* at 47 n.20 (“These events are too far from the Framing to be direct originalist evidence.”).

<sup>105</sup> *Id.* at 47.

tended the Virginia Ratifying Convention.<sup>106</sup> Moreover, Kontorovich argues that then-Secretary of State John Quincy Adams was an “honorary or quasi-member of the founding generation”<sup>107</sup> and notes that George Washington favored Adams so much that he appointed Adams to diplomatic posts when Adams was still in his mid-twenties.<sup>108</sup> Having been well liked by George Washington is not, however, enough to make one’s understanding of the Constitution legally significant. Kontorovich’s argument is not an originalist one.

Nevertheless, widely accepted methods of constitutional interpretation in the United States rely heavily on history and precedent, including historical episodes well after the founding period.<sup>109</sup> And although almost all of the arguments on which Kontorovich focuses were never tested in the courts, most lawyers believe debates about the Constitution within the legislative and executive branches provide an interesting and potentially relevant historical gloss on the document’s meaning. I certainly do. But private diplomatic correspondence and the Secretary of State’s diary entries about discussions in cabinet meetings are less compelling evidence of the Constitution’s accepted meaning than arguments that were fully aired in some official, public forum.

Given that the constitutional objections were mostly raised in private meetings and diplomatic correspondence, were never adjudicated in any court, and were never fully debated by Congress or by the interested public,<sup>110</sup> it seems fair in evaluating the proper weight of those objections to ask about the motivations of the objectors. Were the objectors really concerned about the Constitution, or were they using the language of legal discourse to distract from their true policy motivations in opposing the British treaties? Deploying legal and constitutional objections against a measure one opposes on policy grounds is, after all, a standard rhetorical move. Even Kontorovich seems concerned about this.<sup>111</sup> He acknowledges that the constitutional arguments were evolving and not always clear, but he concludes that they had a fixed core of legitimate concern and were sincere. He

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<sup>106</sup> *Id.* at 47 n.21.

<sup>107</sup> *Id.* at 47.

<sup>108</sup> *Id.* at 47 n.22.

<sup>109</sup> See, e.g., Larry Kramer, *Fidelity to History—and Through It*, 65 *FORDHAM L. REV.* 1627, 1628-29 (1997) (noting the relevance of history beyond the founding era for purposes of constitutional interpretation).

<sup>110</sup> Kontorovich, *supra* note 1, at 90 (noting that “there was no opportunity for the Senate to debate the matter” and “no formal public discussion of the idea occurred”).

<sup>111</sup> See *id.* at 87-90 (discussing the sincerity of the objections and concluding that “[a] number of other circumstances suggest that the constitutional arguments were sincere”).

notes that, in light of U.S. participation in other international tribunals beginning with the Jay Treaty and continuing throughout the relevant time period, the “Cabinet was either shamelessly hypocritical, or it saw some substantial difference between the slave-trade mixed commission and the other courts and international commissions with which the country had experience.”<sup>112</sup>

As I explain below, my reading of the historical record suggests that the members of Monroe’s Cabinet who made the constitutional arguments were not consciously insincere, but they were also not principally motivated by the constitutional objections. Rather, their objection to the British proposals was primarily based on policy and political concerns.

What were those policy concerns? I do not believe that the main policy concern was support for the slave trade. Nevertheless, it is worth noting that Kontorovich overstates the antislavery credentials of participants in the debate and underestimates the degree to which views on the broader question of slavery influenced the debate when he argues that “one cannot consider the proposed courts victims of the Slave Power.”<sup>113</sup> Kontorovich correctly notes that “[t]he issue of the transatlantic slave trade was quite distinct from the issue of domestic slavery.”<sup>114</sup> He argues that “[b]y 1815, a majority of Americans had come to regard slavery as evil, though many still thought it necessary or feared the social dislocations that emancipation could cause” and yet simultaneously contends that “[a]bolition did not emerge as a significant movement until the 1830s.”<sup>115</sup> He further suggests that “Southerners only began to perceive a connection between the movement against the slave trade and abolition more generally in the 1840s or 1850s.”<sup>116</sup> These statements indicate a serious underestimation of the degree to which debates over slavery already weighed on the minds of national politicians in the early 1820s.

It is true that slavery and the slave trade were viewed as two separate issues, and even proponents of the former often opposed the latter.<sup>117</sup> Nevertheless, Kontorovich takes the complex interrelationship

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<sup>112</sup> *Id.* at 74.

<sup>113</sup> *Id.* at 61.

<sup>114</sup> *Id.* at 60.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 61.

<sup>117</sup> For example, the Constitution of the Confederate States of America included a provision banning the slave trade. See CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA of 1861, art. I, § 9, cl. 1 (“The importation of negroes of the African race,

of the issues too lightly. The problematic nature of slavery in a country ostensibly founded on liberty was obvious and widely discussed at the time of the Revolution.<sup>118</sup> Slavery had existed and had even been widespread in some of the Northern states, and those states had begun abolishing it in the 1770s and 1780s.<sup>119</sup> Moreover, early abolitionists saw a link between ending the slave trade and ending slavery itself. James Wilson suggested at the Pennsylvania Ratifying Convention that the abolition of the slave trade would lay “the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind [of] gradual change [for the whole nation] which was pursued in Pennsylvania.”<sup>120</sup> Antislavery societies in the Upper South were extremely active even before the turn of the nineteenth century, bringing freedom suits in Virginia and Maryland courts and lobbying for private manumission laws.<sup>121</sup> Moreover, the formation of the American Colonization Society in 1816 reflected the concern that freed African Americans should be resettled outside the country.<sup>122</sup> While it is true that many Southern slaveholders vigorously advocated banning the international slave trade—knowing that restrictions on imports were likely to make their own human property more valuable<sup>123</sup>—it would be a mistake to think that by the 1820s, debates over suppression of the slave trade were not at all tinged by differences in views about slavery itself. Indeed, it was obvious to Adams, even in 1820, that the “bargain between freedom and slavery contained in the Constitution of the United States”<sup>124</sup> was a ticking time bomb.

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from any foreign country other than the slaveholding States or Territories of the United States of America is hereby forbidden . . .”).

<sup>118</sup> See GORDON WOOD, *EMPIRE OF LIBERTY* 517-19 (2009) (discussing reactions to slavery at the time of the Revolution).

<sup>119</sup> See *id.* at 519-20 (noting statutes and court decisions in Connecticut, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont that worked to abolish slavery). See generally EARLY AMERICAN ABOLITIONISTS: A COLLECTION OF ANTI-SLAVERY WRITINGS 1760-1820 (James G. Basker et al. eds., 2005) (discussing fifteen antislavery texts from across New England).

<sup>120</sup> WOOD, *supra* note 118, at 520 (alterations in original) (quoting James Wilson, Pennsylvania Convention Debates (Dec. 3, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 457, 463 (Merrill Jensen ed., 1976)).

<sup>121</sup> *Id.* at 522.

<sup>122</sup> *Id.* at 541.

<sup>123</sup> See *id.* at 524 (arguing that many Upper South planters supported banning the slave trade because they had a surplus of slaves).

<sup>124</sup> Diary Entry of John Quincy Adams (Mar. 3, 1820), in 5 MEMOIRS OF JOHN QUINCY ADAMS 3, 11 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875).

Adams mused in his diary, "If the Union must be dissolved, slavery is precisely the question upon which it ought to break."<sup>125</sup>

Moreover, contentious and highly publicized debates in 1820 over the Missouri Compromise brought the issue of slavery to the forefront of politicians' minds as Congress debated whether new territories admitted to the Union should allow or prohibit slavery.<sup>126</sup>

As Kontorovich notes, Attorney General William Wirt was the main proponent of constitutional arguments against the treaties.<sup>127</sup> Wirt was a prominent and successful lawyer and is widely viewed as having increased the power and prestige of the office of Attorney General.<sup>128</sup> In some respects, however, his behavior was not always disinterested or exemplary. As Secretary of State John Quincy Adams noted in his diary, "Wirt appeared to think more about his salary, or what he called bread and meat for his children, than of any other subject."<sup>129</sup> In 1823 and 1824, for instance, he argued almost as many cases for private parties in the U.S. Supreme Court as he argued for the United States government.<sup>130</sup>

Kontorovich further overplays his hand when he argues that "the most prominent opponents of mixed courts were figures with impeccable antislavery credentials."<sup>131</sup> Attorney General Wirt, for example, was a slaveholder and more generally a defender of slavery. In the debate over the Missouri Compromise in 1820, Wirt argued in Cabinet debates that Congress lacked the "power to prohibit slavery" in territories and states proposed for admission to the Union.<sup>132</sup> As Adams described,

neither Crawford, Calhoun, nor Wirt could find any express power [of Congress to prohibit slavery in territories]; and Wirt declared himself

<sup>125</sup> *Id.* at 12.

<sup>126</sup> See HOWE, *supra* note 49, at 147-54 (summarizing debates on the Missouri Compromise); see also Charles Sumner, Final Suppression of the Slave-Trade: Speech in the Senate, on the Treaty with Great Britain (Apr. 24, 1862) (describing the vote on the 1824 treaty as having been influenced by a "growing sentiment for Slavery, which the debates on the Missouri Compromise had quickened"), in 6 THE WORKS OF CHARLES SUMNER 474, 480 (Boston, Lee and Shepard 1872).

<sup>127</sup> Kontorovich, *supra* note 1, at 64.

<sup>128</sup> See generally Henry M. Dowling, *William Wirt*, 10 GREEN BAG 453, 456-57 (1898).

<sup>129</sup> Diary Entry of John Quincy Adams (Apr. 28, 1818), in 4 MEMOIRS OF JOHN QUINCY ADAMS 82, 82 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875).

<sup>130</sup> See JOHN T. NOONAN, JR., THE ANTELOPE 85 (1977) (explaining that Wirt argued thirteen cases in the Supreme Court on behalf of the United States and eight cases in the Supreme Court as private counsel during these years).

<sup>131</sup> Kontorovich, *supra* note 1, at 61.

<sup>132</sup> NOONAN, *supra* note 130, at 22.



very decidedly against the admission of any implied powers. The progress of this discussion has so totally merged in passion all the reasoning faculties of the slave-holders, that these gentlemen, in the simplicity of their hearts, had come to a conclusion in direct opposition to their premises . . . They insisted upon it that the clause in the Constitution, which gives Congress power to dispose of and make all *needful* rules and regulations respecting the territory and other property of the United States, had reference to it only as land, and conferred no authority to make rules binding upon its inhabitants; and Wirt added the notable Virginian objection, that Congress could make only *needful* rules and regulations, and that a prohibition of slavery was not *needful*.<sup>133</sup>

Wirt's argument was in some sense vindicated when the Supreme Court held in *Dred Scott* that the Missouri Compromise was unconstitutional,<sup>134</sup> though few would suggest that congruence with the *Dred Scott* majority is the hallmark of a great constitutional lawyer.<sup>135</sup> What this context shows is that, at a minimum, Wirt's support for slavery sometimes influenced his views of constitutional law.

While Secretary of State John Quincy Adams *was* an opponent of slavery—and eventually defended the Africans on board the slave ship *Amistad* in the Supreme Court, in the twilight of his life, in 1841<sup>136</sup>—he was also an ambitious man who was sensitive to political circumstances. Indeed, in a letter home to his government, the British negotiator Stratford Canning suggested that Adams's political ambitions impeded the conclusion of a slave-trade treaty.<sup>137</sup> Adams ultimately prevailed in the four-way presidential election of 1824 over rivals Senator Andrew Jackson, Treasury Secretary William H. Crawford, and Speaker of the House Henry Clay, but the election was extraordinarily close (indeed, it was ultimately decided in the House of Representatives).<sup>138</sup> Throughout the negotiations over the slave-trade treaty, Adams undoubtedly had his political future in mind.

<sup>133</sup> Diary Entry of John Quincy Adams (Mar. 3, 1820), in 5 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 124, at 3, 5.

<sup>134</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>135</sup> See generally Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 271-72 (1997) (describing the unanimity in commentary characterizing *Dred Scott* as the Supreme Court's worst decision).

<sup>136</sup> HOWE, *supra* note 49, at 521-22.

<sup>137</sup> See NOONAN, *supra* note 130, at 86 (referring to a June 6, 1823, letter from Stratford Canning to his cousin, George Canning).

<sup>138</sup> See HOWE, *supra* note 49, at 207-11 (summarizing the circumstances surrounding and public response to the 1824 election).

More fundamentally, viewing the full context of the negotiations between the British and the Americans, it is clear that the United States' main objection was to the right of maritime search that the treaties conferred on the British government. Adams's initial reaction to Wirt's constitutional arguments against participation in the slave-trade tribunals was that Wirt's objections were groundless and that participation in the courts would be constitutional, though perhaps bad policy. It appears that Adams nonetheless used the constitutional arguments strategically in negotiations with the British to avoid the more sensitive topic of impressment.

Britain had the world's most powerful navy at the time,<sup>139</sup> and the United States feared that British dominance of the high seas would interfere with U.S. commercial interests and trade.<sup>140</sup> In the early decades of U.S. independence, British cruisers engaged in a practice of searching American ships and impressing sailors that they unilaterally deemed British citizens subject to military draft; these sailors would be taken off of American ships and forced to serve in the British navy.<sup>141</sup> The United States rightly viewed this practice as an affront to its sovereignty and a threat to its economic viability as a trading nation.<sup>142</sup> Tension over British search and impressment was one of the major causes of the War of 1812.<sup>143</sup> Even after the war, the issue persisted as a thorn in British-American relations for decades. As Adams noted in his diary, the Americans viewed the British proposals related to the slave trade as a "barefaced and impudent attempt of the British to obtain in time of peace that right of searching and seizing the ships of other nations which they have so outrageously abused during war."<sup>144</sup> It is thus not surprising that the most consistent American objection, offered over many years, to the international anti-slave-trade regime that the British sought to create was not based on any constitutional objection to the slave-trade tribunals, but rather on the right-to-search issue.

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<sup>139</sup> See WOOD, *supra* note 118, at 659 (describing the relative weakness of the United States Navy at the time).

<sup>140</sup> *Id.* at 635 (mentioning American fears of British domination of naval commerce).

<sup>141</sup> *Id.* at 641-44 (discussing the British practice of, and American reaction to, impressment of sailors).

<sup>142</sup> *Id.* at 640-41.

<sup>143</sup> *Id.* at 659.

<sup>144</sup> Diary Entry of John Quincy Adams (June 6, 1817), in 3 MEMOIRS OF JOHN QUINCY ADAMS 556, 557 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1874).

The first Cabinet meeting at which the British proposals for a new slave-trade treaty were discussed took place on October 29, 1818.<sup>145</sup> On that date, the Cabinet met to discuss what instructions to give to the American diplomats negotiating with the British on the topics of impressment and the slave trade.<sup>146</sup> The British had rejected an American proposal for a treaty restricting the right of search and impressment, and a British negotiator had suggested a modified proposal with which some of the Americans were dissatisfied.<sup>147</sup> The heated discussion of search and impressment continued for the entire afternoon and resumed the following day.<sup>148</sup> The members of the Cabinet viewed this as a highly politically sensitive issue. Monroe noted that impressment was a cause of the recently ended war and stated that “[t]here was a deep anxiety in [the public] minds, from an apprehension that it would again give rise to war.”<sup>149</sup> At one point, in discussing Speaker of the House Henry Clay’s reaction to the proposals, Secretary of War John C. Calhoun joked, “[W]hat will the Kentucky and Western country newspapers say of them?”<sup>150</sup> This question, Adams described, “occasioned a general laugh” as “[w]e all knew that Clay would think well of anything which might excite dissatisfaction with the Administration.”<sup>151</sup> Calhoun noted that the British proposal allowing for search “would allow a British officer to muster and pass under inspection the crew of every American vessel boarded by him. It would give rise to altercations, and expose the American master to the insolence of the British officer, scarcely less galling than the injury of impressment itself.”<sup>152</sup> This would, Calhoun suggested, “give great dissatisfaction to the nation, and would be used as a weapon against the Administration.”<sup>153</sup>

When the conversation finally turned from impressment to the slave trade, the Cabinet was not in a generous mood toward Britain. Attorney General Wirt argued against the British proposal of a mixed-courts treaty, citing Article III, Section 1 of the Constitution and sug-

<sup>145</sup> See Diary Entry of John Quincy Adams (Oct. 29, 1818) (recounting the Cabinet meeting), in 4 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 129, at 146, 146-48.

<sup>146</sup> *Id.*

<sup>147</sup> See *id.* (noting objections to the modified proposal from Adams and Calhoun).

<sup>148</sup> *Id.* at 148; see also Diary Entry of John Quincy Adams (Oct. 30, 1818) (detailing continued discussions at the next day’s Cabinet meeting that lasted until “[a]bout nine in the evening”), in 4 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 129, at 148, 148-52.

<sup>149</sup> *Id.* at 149.

<sup>150</sup> Diary Entry of John Quincy Adams, *supra* note 145, at 148.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

gesting that “there was no constitutional authority in the Government of the United States to establish a Court, partly consisting of foreigners, to sit without the bounds of the United States, and not amenable to impeachment for corruption.”<sup>154</sup>

Adams responded that he “thought there was sufficient authority by the Constitution, and likened it to the joint commissions which we have had by treaties with Great Britain and Spain, and to the Courts of Admiralty which it has been proposed to establish at Naples.”<sup>155</sup> Wirt “pointed out distinctions between the two cases—between Courts constituted under the laws of nations and Courts to carry into effect our municipal and penal statutes.”<sup>156</sup> Adams maintained that “as the power of making treaties is without limitation in the Constitution, and treaties are declared to be the supreme law of the land, I still hold to the opinion that there is no constitutional difficulty in the way.”<sup>157</sup> Notwithstanding Adams’s initial rejection of Wirt’s argument, which alone is somewhat significant, it is important to note the gist of Wirt’s initial objection at this meeting. At its core, Wirt’s objection contains an important nuance that Kontorovich fails to recognize—that Wirt viewed the key distinction between the Jay Treaty tribunals and the slave-trade tribunals as being not between civil and criminal courts, but instead “between Courts constituted under the *laws of nations* and Courts to carry into effect *our* municipal and penal statutes.”<sup>158</sup>

The other objections raised in this initial meeting were equally telling. As Adams recounts, it was argued

[t]hat we have suffered so much from the practice of foreign officers to search our vessels in time of war, particularly by its connection with a British doctrine that after an officer has entered for one purpose he may proceed to search for another, that we ought to be specially cautious not to admit of the right of search in time of peace.<sup>159</sup>

It was this objection to the right of search—so closely related to the issue of impressment—that surfaced time and time again and dominated U.S. opposition to slave-trade treaties with the British.

Kontorovich notes that a number of historians writing about this period refer to the United States’ refusal to join the mixed commis-

<sup>154</sup> Diary Entry of John Quincy Adams, *supra* note 148, at 151.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (emphasis added). I will return to this in Section II.C.

<sup>159</sup> *Id.* at 151-52.

sions, and he criticizes these historians for failing to discuss the “nature or merits of the constitutional objections.”<sup>160</sup> While Kontorovich sees this as a shortcoming in the historiography, another possible explanation is that these historians correctly recognize that the constitutional objections were mere straw men and that the United States’ main objections were, instead, to the right of search.<sup>161</sup>

Adams’s diary suggests again and again that the U.S. government’s real objection was to the right of search and that the constitutional arguments he initially viewed as dubious were raised at various times as a way of deflecting the British proposals. In his diary entry for April 14, 1819, for example, Adams records that Richard Rush, the American negotiator, had been instructed to reject the British mixed-courts proposal for two reasons. “One was, that the United States, having no Colony or possession in Africa, had no territory where the joint Court could hold their sessions, and the other, that the Constitution of the United States admitted no appointment of Judges who would not be amenable to impeachment . . . .”<sup>162</sup>

But Adams went on to say that “[t]here was a third reason which had been mentioned to Mr. Rush, but which he had not been desired to urge, if the others should appear to be entirely satisfactory to the British Government.”<sup>163</sup> In an informal conversation with the British minister in Washington, Sir Charles Bagot, Adams “thought it well to come directly to the point of our difficulty by stating” this third objection, namely that “the United States ought on no consideration whatever to listen to any proposal for admitting a right of search in their merchant vessels by the commanders of foreign armed vessels so long as the question remains open between them and Great Britain concerning impressment for men.”<sup>164</sup> Tellingly, Adams explained to Bagot, “we had no wish to stir this question unnecessarily, or to awaken the feelings connected with it, when it can be avoided, we had scarcely

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<sup>160</sup> Kontorovich, *supra* note 1, at 45 n.12.

<sup>161</sup> *Cf. id.* (citing HOWE, *supra* note 49; HOWARD JONES & DONALD A. RAKESTRAW, PROLOGUE TO MANIFEST DESTINY: ANGLO-AMERICAN RELATIONS IN THE 1840S, at 72-81 (1997); BRADFORD PERKINS, CASTLEREAGH AND ADAMS: ENGLAND AND THE UNITED STATES, 1812-1823 (1964); JAMES A. RAWLEY WITH STEPHEN D. BEHRENDT, THE TRANS-ATLANTIC SLAVE TRADE (rev. ed. 2005); Hugh G. Soulsby, *The Right of Search and the Slave Trade in Anglo-American Relations, 1814-1862*, at 60-62, in 51 THE JOHNS HOPKINS STUDIES IN HISTORICAL AND POLITICAL SCIENCE 115, 174-76 (1933)).

<sup>162</sup> Diary Entry of John Quincy Adams (Apr. 14, 1819), in 4 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 129, at 333, 335.

<sup>163</sup> *Id.* at 335-36.

<sup>164</sup> *Id.* at 336.

mentioned it in regular communications to the British Government” and that he thought it best to mention it only in an “informal manner.”<sup>165</sup> In other words, the Americans were hoping that the British would accept the constitutional objection so that they would not have to discuss the troublesome issues of search and impressment.

Similarly, in an October 1820 meeting with the British diplomat Stratford Canning, Adams again argued that there was a “want of Constitutional authority to establish such a Court,” and objected to the right of search in peacetime.<sup>166</sup> But Adams went on to say that there were other reasons, “which it was best in candor to mention” in this private meeting.<sup>167</sup> The first was “the general extra-European policy of the United States.”<sup>168</sup> The second was that “[w]e had had one war with Great Britain for exercising what she alone claims of all the nations of the earth as a right—search of neutral vessels in time of war to take out men.”<sup>169</sup> The two nations had labored to reach agreement on this issue since the War of 1812, and “[i]t was a point upon which, more than any other, not only the people but the Government of the United States were sensitive, and which would fix us in the determination in no case to yield the right of search in time of peace.”<sup>170</sup> Canning argued that the right of search would be mutual and limited, and therefore unlikely to be abused, but to no avail.<sup>171</sup>

When Canning returned to speak with Adams again a few weeks later, on October 20, Adams returned to the constitutional arguments.<sup>172</sup> When Adams brought up the issue of impressment in that discussion, Canning “hint[ed] some regret that we should even harbor the sentiment that there was any analogy between” the right of search in the slave-trade treaties and the issue of impressment.<sup>173</sup> The constitutional objections, however, evoked no such emotional response. Canning returned on October 26 to lobby Adams again for “two hours or more upon the subject of the slave-trade,” bringing with him a “long written paper” summarizing and responding to the vari-

<sup>165</sup> *Id.*

<sup>166</sup> Diary Entry of John Quincy Adams (Oct. 2, 1820), in 5 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 124, at 181, 182.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 183.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See Diary Entry of John Quincy Adams (Oct. 20, 1820), in 5 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 124, at 189, 189-91.

<sup>173</sup> *Id.* at 190.

ous American objections.<sup>174</sup> Adams immediately fell back on a new version of the constitutional argument, this time based on the Fifth Amendment, which Adams asserted “amount[ed] to an express prohibition to subjecting any citizen of the United States to trial before such a tribunal.”<sup>175</sup> But after this constitutional detour, the conversation inevitably turned back to impressment, frustrating both participants. “We went over the whole ground of impressment, and, as usual, to no purpose.”<sup>176</sup> Adams recounted in his diary, “I told him that it was not my wish to debate the point,” continuing that “[w]e had more than once exhausted the argument with his Government.”<sup>177</sup>

Two years later, the same two men were still going at it; in June 1822, Adams recounted another meeting with Canning during which they debated search and impressment, noting that “[w]e went over this ground again, as we had often done before, repeating on both sides the same arguments as before.”<sup>178</sup> But when it came time for public statements, Canning and Adams seemed loath to focus on impressment. Indeed, Adams recounts in his diary that when he told Canning that his latest response to the British proposal was before the President for review, Canning “appeared to be uneasy at the idea that in my reply the subject of impressment would be discussed, and said he hoped, in the disposition between the two Governments so strongly tending towards conciliation, whatever was of an irritating character

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<sup>174</sup> Diary Entry of John Quincy Adams (Oct. 26, 1820), in 5 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 124, at 191, 191-92.

<sup>175</sup> *Id.* at 192. It is not clear from this diary entry which clause of the Fifth Amendment Adams thought was relevant.

<sup>176</sup> *Id.* at 193.

<sup>177</sup> *Id.* at 192-93. Kontorovich also cites this part of Adams’s diary, suggesting that Adams was exhausted with rehashing the constitutional arguments. See Kontorovich, *supra* note 1, at 65 & n.117 (“The constitutional arguments were rehashed repeatedly, to the point of straining Adams’s patience.” (citing Diary Entry of John Quincy Adams, *supra* note 174, at 192-93)). But in context, it is quite clear that Adams was actually impatient with the argument about impressment. Following Adams’s recitation of an objection based on the Fifth Amendment to the Constitution, Adams mentioned impressment and Canning launched into a discussion of that topic. That discussion occasioned Adams’s lament that he did not wish to debate that topic again, in a paragraph focused entirely on arguments about impressment, which ends, “We went over the whole ground of impressment, and, as usual, to no purpose.” Diary Entry of John Quincy Adams, *supra* note 174, at 192-93.

<sup>178</sup> Diary Entry of John Quincy Adams (June 29, 1822), in 6 MEMOIRS OF JOHN QUINCY ADAMS 35, 37 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875).

might be avoided.”<sup>179</sup> In other words, even the British preferred the Americans to bring up constitutional objections, rather than the sensitive subject of impressment.

Adams was not alone in his concern about impressment, which came up repeatedly in Administration statements. President James Monroe, for example, noted in an 1821 letter, “We should be guarded, in the pursuit of this object [of suppressing the slave trade], to give no countenance by any act of ours to the right of search, which may be applied to other purposes” and cautioned against any policy that “might give some countenance to the practice of impressment.”<sup>180</sup>

Given that the United States’ main objection seems to have been to the right of search, rather than to the constitutionality of the mixed courts, it may seem odd that the 1824 treaty submitted to the Senate *allowed* a right of search but did not provide for mixed courts, instead providing for trials in the courts of each nation.<sup>181</sup> That the 1824 treaty included a right of search without a provision for mixed courts is probably the strongest piece of evidence supporting the argument that the constitutional objections were sincere.

Closer examination of the debates, however, suggests that policy concerns about impressment and the scope of the right to search drove the decision to assign jurisdiction to national courts. As Secretary of the Navy Richard W. Thompson explained in one Cabinet meeting, if “arrangement could be so made that vessels under our flag should be brought for trial into our own jurisdiction and tried by our own Courts,” there was little chance it “would give any countenance to the British practice of impressing men from our merchant vessels in time of war.”<sup>182</sup> Adams likewise explained that

[t]he objections to the right of search, as incident to the right of detention and capture, are also in a very considerable degree removed by the introduction of the principle that neither of them should be exercised, but under the responsibility of the captor, to the tribunals of the cap-

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<sup>179</sup> Diary Entry of John Quincy Adams (June 17, 1823), in 6 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 178, at 146, 147.

<sup>180</sup> Letter from James Monroe to Daniel Brent (Sept. 17, 1821), in THE POLITICAL WRITINGS OF JAMES MONROE, *supra* note 97, at 322, 323.

<sup>181</sup> See *supra* note 92 and accompanying text.

<sup>182</sup> Diary Entry of John Quincy Adams (Dec. 23, 1820), in 5 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 124, at 216, 217.



tured party in damages and costs. This guard against the abuses of a power so liable to abuse would be indispensable . . . .<sup>183</sup>

Because American ships would have to be brought before American courts, which would have the power to award damages against British naval crews who had abused the right of search, there would be a strong deterrent against British misbehavior.

How important is it that policy concerns about the right of search and impressment, and not the constitutional objections, were the main drivers of the American position in the negotiations? It is certainly not dispositive. The constitutional objections might still have been valid. But it undermines the episode's precedential value.

### B. *Criminal or Civil?*

Another flaw in Kontorovich's article is its assertion that the slave-trade tribunals exercised criminal jurisdiction.<sup>184</sup> He views their supposedly criminal jurisdiction as critical to his argument about why the slave-trade tribunals differed from the Jay Treaty tribunals.<sup>185</sup> But the slave-trade courts the British treaties created did not actually exercise criminal jurisdiction; indeed, the lack of criminal sanctions was one of their major shortcomings.<sup>186</sup> The courts could not actually punish individuals involved in the illegal slave trade. Instead, the courts exercised only a form of *in rem* admiralty jurisdiction over the ships and their cargo. It was only in the 1840s that any serious effort was made to prosecute the crews of the ships when, under a new treaty between Portugal and the United Kingdom, the mixed court could keep crew

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<sup>183</sup> Letter from John Quincy Adams to Stratford Canning (June 24, 1823), in 7 WRITINGS OF JOHN QUINCY ADAMS 498, 502 (Worthington Chancey Ford ed., 1917).

<sup>184</sup> Cf. Kontorovich, *supra* note 1, at 82-86 (explaining that the mixed courts appeared to exercise criminal jurisdiction).

<sup>185</sup> *Id.* at 75 (“[T]he criminal jurisdiction of the slave-trade courts made nineteenth-century statesmen decide to treat them differently from other bodies [like the Jay Treaty tribunals].”).

<sup>186</sup> See SELECT COMMITTEE ON SLAVE TRADE, FIRST REPORT, 1847-48, H.C. 272, at 5 (U.K.) (testimony of Viscount Palmerston) (“[S]o many persons are interested in the carrying on of [the slave] trade . . . that no effort is made to carry their law into execution.”); *id.* at 34-35 (testimony of Captain Joseph Denman) (“[U]pon all the principles upon which the law of nations is founded, slave trade is piracy, although the world for a long time chose to commit the crime by common consent.”); *id.* at 122 (testimony of John Carr, Chief Justice of Sierra Leone) (observing that although it was illegal for a vessel to sail without a flag, “hitherto the individuals have not been punished”); *id.* at 166 (testimony of Commander Thomas Francis Birch) (arguing that enforcement of personal sanctions against crews would “very soon put a stop to” the slave trades).

members in custody until they could be turned over to their respective national governments for trial.<sup>187</sup>

Kontorovich acknowledges that “[t]he matter is somewhat obscure”<sup>188</sup> but asserts that the U.S. government “seemed to think of them as criminal.”<sup>189</sup> He further asserts that the proceedings “would have been regarded as criminal under U.S. law” because “[c]ondemnation of a vessel, while nominally in rem, can be criminal when done to punish the owner.”<sup>190</sup>

But in nineteenth-century America, cases involving the condemnation of ships in admiralty were considered civil rather than criminal, even when based on alleged criminal wrongdoing such as piracy. The case law is unambiguous on this point. The principle was established as early as 1796, when in *United States v. La Vengeance*, the U.S. Supreme Court held that there was no entitlement to a jury trial for forfeiture under admiralty jurisdiction.<sup>191</sup> The case concerned the condemnation of a ship that was allegedly fitted out as a privateer within American waters in violation of American neutrality laws.<sup>192</sup> Having lost below, Attorney General Charles Lee argued before the Supreme Court that the case was a criminal matter and thus was entitled to a jury trial.<sup>193</sup> Lee cited the Judiciary Act,<sup>194</sup> which provided that juries were to decide issues of fact in all cases “except civil causes of admiralty and maritime jurisdiction.”<sup>195</sup> Even if the case were civil rather than criminal, Lee contended that the prosecution of a privateer for illegal arms exportation was not an action in admiralty.<sup>196</sup> Thus, he argued that the

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<sup>187</sup> See Letter from Ildefonso Leopoldo Bayard to Alfredo Duprat, Portuguese Comm’r (May 22, 1847) (discussing procedures for transporting and trying slave traders), in CLASS A. CORRESPONDENCE WITH THE BRITISH COMMISSIONERS AT SIERRA LEONE, HAVANA, RIO DE JANEIRO, SURINAM, CAPE OF GOOD HOPE, JAMAICA, LOANDA, AND BOA VISTA, PROCEEDINGS OF BRITISH VICE-ADMIRALTY COURTS, AND REPORTS OF NAVAL OFFICERS, RELATING TO THE SLAVE TRADE. FROM JANUARY 1, 1847, TO MARCH 31, 1848, 1848, C. 975, at 129 (U.K.) [hereinafter CORRESPONDENCE WITH THE BRITISH COMMISSIONERS]; Letter from George Frere & Frederic R. Surtees, Comm’rs of the Cape of Good Hope, to Viscount Palmerston (Oct. 31, 1846) (discussing adoption of detention procedures for slave traders), in CORRESPONDENCE WITH THE BRITISH COMMISSIONERS, *supra*, at 113.

<sup>188</sup> Kontorovich, *supra* note 1, at 82.

<sup>189</sup> *Id.* at 83.

<sup>190</sup> *Id.* at 84.

<sup>191</sup> 3 U.S. (3 Dall.) 297, 301 (1796).

<sup>192</sup> *Id.* at 297-98.

<sup>193</sup> *Id.* at 299.

<sup>194</sup> *Id.* at 299-300.

<sup>195</sup> Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

<sup>196</sup> *La Vengeance*, 3 U.S. (3 Dall.) at 300-01.

case should be remanded to the district court for a new trial in front of a jury.<sup>197</sup> The Supreme Court rejected these arguments, holding that the condemnation of *La Vengeance* for illegal arms exportation was a civil admiralty action not triable by jury:

we are unanimously of opinion, that it is a civil cause: It is a process of the nature of a libel *in rem*; and does not, in any degree, touch the person of the offender.

In this view of the subject, it follows, of course that no jury was necessary, as it was a civil cause; and that the appeal to the Circuit Court was regular, as it was a cause of Admiralty and Maritime jurisdiction.<sup>198</sup>

In the 1805 case, *Schooner Sally*,<sup>199</sup> the Court cited *La Vengeance* to hold that forfeiture of a vessel under the Slave Trade Act of 1794<sup>200</sup> likewise fell within admiralty, rather than common law, jurisdiction.<sup>201</sup> The holding of *Schooner Sally* has been repeatedly cited by the Supreme Court and has never been overruled or even questioned.<sup>202</sup> The Court reaffirmed the civil nature of forfeiture proceedings in the 1808 case of *The Schooner Betsey and Charlotte*, in which Chief Justice Marshall explained, “The Court considers the law as completely settled by the case of the *Vengeance*.”<sup>203</sup> “[T]he clause of the Constitution respecting the trial by jury” was, the Court held, inapplicable to cases of seizures on navigable waters.<sup>204</sup> Chief Justice Marshall reaffirmed this proposition yet again in the 1823 case of *The Sarah*.<sup>205</sup> Even when the underlying

<sup>197</sup> *Id.* at 301.

<sup>198</sup> *Id.*

<sup>199</sup> United States v. Schooner Sally, 6 U.S. (2 Cranch) 406 (1805).

<sup>200</sup> Ch. 11, 1 Stat. 347. This statute prohibited Americans from engaging in the trade to foreign countries; the importation of slaves to the United States could not constitutionally be banned until 1808.

<sup>201</sup> *Schooner Sally*, 6 U.S. (2 Cranch) at 406.

<sup>202</sup> See, e.g., Waring v. Clarke, 46 U.S. (5 How.) 441, 458 (1847) (noting *Schooner Sally*’s holding “that the forfeiture of a vessel, under the [Slave Trade Act of 1794], was a case of admiralty and maritime jurisdiction, and not of common law”); Anonymous, 1 Gall. 22, 24, 1 F. Cas. 996, 997 (C.C.D. Mass. 1812) (No. 444) (“[I]t is not true, that informations *in rem* are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings.” (citing *Schooner Sally*, 6 U.S. (2 Cranch) at 406, and *La Vengeance*, 3 U.S. (3 Dall.) at 301)).

<sup>203</sup> United States v. The Schooner Betsey and Charlotte, 8 U.S. (4 Cranch) 443, 452 (1807).

<sup>204</sup> *Id.*

<sup>205</sup> *The Sarah*, 21 U.S. (8 Wheat.) 391, 394 (1823) (“In cases of seizure made on waters navigable by vessels of ten tons burthen and upwards, the Court sits as a Court of Admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of the *Vengeance*, the *Sally*, and the *Betsy and Charlotte*, that the trial is to be by the Court.” (citations omitted)); see also

conduct on which condemnation cases were based might also be criminal, it did not disrupt the consistent finding that the condemnation proceedings were noncriminal, in rem admiralty actions.

One of the more extended discussions of the issue appears in Justice Story's opinion in the 1827 case of *The Palmyra*,<sup>206</sup> which involved the condemnation of a ship allegedly engaged in piracy. The case had been brought under the Act of March 3, 1819, entitled, "An Act to protect the commerce of the United States, and punish the crime of piracy."<sup>207</sup> The issue in the case was whether the *Palmyra*, which had engaged in acts of aggression against U.S. ships, was an unlawful pirate or a lawful privateer.<sup>208</sup> Among other things, the shipowners claimed that there could be no forfeiture of the ship both because the libel against it was too vague to satisfy the standards of the criminal law and because there had been no conviction in personam for piracy.<sup>209</sup> Justice Story, writing for the Court, explained as to the first objection that "[t]he strict rules of the common law as to criminal prosecutions, have never been supposed by this Court to be required in informations of seizure in the Admiralty for forfeitures, which are deemed to be civil proceedings *in rem*."<sup>210</sup> As to the second question, Story characterized it as "of a far more important and difficult nature."<sup>211</sup>

It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction.<sup>212</sup>

Justice Story went on to explain:

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United States v. Winchester, 99 U.S. 372, 374 (1878) (noting that "cases in admiralty are tried without a jury"); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47 (1830) (noting that the Seventh Amendment jury-trial right does not extend to admiralty cases).

<sup>206</sup> 25 U.S. (12 Wheat.) 1, 12-13 (1827); *accord* *Friedenstein v. United States*, 125 U.S. 224, 231-32 (1888) ("[I]n admiralty and maritime jurisdiction . . . seizure cases are regarded as civil suits.").

<sup>207</sup> Ch. 77, 3 Stat. 510.

<sup>208</sup> *The Palmyra*, 25 U.S. (12 Wheat.) at 2.

<sup>209</sup> *Id.* at 7.

<sup>210</sup> *Id.* at 12-13.

<sup>211</sup> *Id.* at 14.

<sup>212</sup> *Id.*

But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist, where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this Court understand [sic] the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, the jurisdiction over proceedings *in rem*, is usually vested in different Courts from those exercising criminal jurisdiction.<sup>213</sup>

This strand of cases continued unbroken throughout the nineteenth century where, in cases like the 1886 decision of *Coffey v. United States*, the Court continued to distinguish *in rem* forfeiture proceedings, which it categorized as civil, from actions imposing a fine or imprisonment, which it classified as criminal.<sup>214</sup>

Modern civil forfeiture cases such as *United States v. Bajakajian*<sup>215</sup> and *United States v. Ursery*<sup>216</sup> continue to describe the condemnation proceedings in cases like *The Palmyra* as “nonpunitive” civil *in rem* forfeitures, notwithstanding that the civil condemnation was related to underlying criminal acts.<sup>217</sup> Indeed, it is the very fact that civil *in rem* forfeiture was

<sup>213</sup> *Id.* at 14-15.

<sup>214</sup> 116 U.S. 436, 443 (1886) (“[P]roceeding to enforce the forfeiture . . . must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding . . .”), *overruled in part on other grounds by* *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *accord* *Origet v. United States*, 125 U.S. 240, 247 (1888) (“In the case of *Coffey v. United States*, . . . this court held . . . that the forfeiture was to be enforced by a civil suit *in rem* . . .”).

<sup>215</sup> *See* 524 U.S. 321, 329-30 (1998) (discussing the Court’s historical treatment of forfeiture proceedings as civil in nature).

<sup>216</sup> *See* 518 U.S. 267, 274 (1996) (distinguishing a civil *in rem* forfeiture action from a “personal penalty” (citing *The Palmyra*, 36 U.S. (12 Wheat.) at 14-15)).

<sup>217</sup> Justice Story also expounded at length on this point in *The Brig Malek Adhel*:

The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of Congress) from which such piratical aggression, &c., shall have been first attempted or made shall be condemned. Nor is there any thing new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender,

imposed for reasons relating to crime that makes nineteenth-century cases like *The Palmyra* salient in affirming as noncriminal the modern civil forfeiture of cars, boats, and houses used in drug crimes.<sup>218</sup> While the Court has held that civil forfeiture has a sufficiently penal character to be subject to the Excessive Fines Clause of the Eighth Amendment,<sup>219</sup> it has also held that the Double Jeopardy Clause generally does not apply to such proceedings because they do not “impose[] punishment”;<sup>220</sup> nor does the due process requirement that the government’s case be proved beyond a reasonable doubt apply in forfeiture proceedings, as it must in criminal trials.<sup>221</sup>

Failing to grapple with the details of this case law, Kontorovich simply asserts that “[t]he slave-court condemnation [proposed by the British treaties] would have the key characteristic of a criminal proceeding in that it determined the blameworthiness of the owners and crew.”<sup>222</sup> This statement is simply unsupported by the Supreme Court’s decisions from *La Vengeance* through *The Palmyra*, none of which Kontorovich discusses in meaningful detail. Even *The Emily and the Caroline*<sup>223</sup>—the case he cites as “particularly strong evidence” that the slave-trade tribunals were criminal<sup>224</sup>—supports the opposite conclusion. That case, like *Schooner Sally*, was based on the Slave Trade Act of 1794, as well as on the Act of March 2, 1807, both prohibiting the slave trade.<sup>225</sup> Despite the Supreme Court’s use of the words “penal” and “criminally” in dicta,<sup>226</sup> on which Kontorovich seizes, there is no indi-

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without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.

Harmony v. United States (The Brig Malek Adhel), 43 U.S. (2 How.) 210, 233 (1844).

<sup>218</sup> See *Ursery*, 518 U.S. at 271-72 (discussing a proceeding against a house used to process and distribute marijuana and money to be used to purchase a car or boat for an illegal narcotics transaction in a consolidated civil forfeiture action).

<sup>219</sup> See, e.g., *Austin v. United States*, 509 U.S. 602, 618, 622 (1993) (concluding that because forfeiture “serves, at least in part, to punish the owner,” it is subject to the Eighth Amendment’s prohibition against excessive fines).

<sup>220</sup> *Id.* at 608 n.4, 614 (“The Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could be characterized as remedial.”).

<sup>221</sup> See *id.* at 608 n.4.

<sup>222</sup> Kontorovich, *supra* note 1, at 84.

<sup>223</sup> 22 U.S. (9 Wheat.) 381 (1824).

<sup>224</sup> Kontorovich, *supra* note 1, at 84 n.210.

<sup>225</sup> *The Emily and the Caroline*, 22 U.S. (9 Wheat.) at 381.

<sup>226</sup> *Id.* at 388-89.

cation whatsoever that the cases appealed in *The Emily and the Caroline* were tried to a criminal jury. Instead, the Court consistently described the cases as admiralty actions.<sup>227</sup> It was argued in an earlier appeal of these cases that an “information in rem, may be amended by leave of the Court.”<sup>228</sup> The Supreme Court accepted this argument in its order remanding the case to the circuit court with instructions to allow the information to be amended.<sup>229</sup> A description of the lower court proceedings, to which counsel agreed, indicates that

[h]is honor the Circuit Judge, upon the ground of sufficient evidence having been adduced of intention to carry on the slave trade, either abroad or at home, and a consequent violation either of the act of 1794, or of the act of 1807, decreed that the *Caroline* should be condemned as forfeited to the United States.<sup>230</sup>

Every indication given by this procedural history is that a judge in admiralty, rather than a criminal jury, tried these cases based on a libel in rem. Other cases that Kontorovich cites as demonstrating that “[f]orfeiture was clearly criminal in slave-trading cases”<sup>231</sup> likewise seem to have involved civil in rem admiralty proceedings not tried before juries.<sup>232</sup>

Indeed, numerous Supreme Court cases involving forfeitures under U.S. statutes prohibiting the slave trade seem to have been treated as nonjury, in rem admiralty actions.<sup>233</sup> None that I can uncover

<sup>227</sup> *Id.* at 386, 388.

<sup>228</sup> *Brig Caroline v. United States*, 11 U.S. (7 Cranch) 496, 496 (1813) (reporter’s gloss).

<sup>229</sup> *Id.* at 500.

<sup>230</sup> *Id.* at 498-99.

<sup>231</sup> Kontorovich, *supra* note 1, at 85.

<sup>232</sup> For example, Kontorovich cites *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40 (1826), for the proposition that “losing a ship was regarded as an extremely severe sanction.” Kontorovich, *supra* note 1, at 85 & n.216. But the Court in the case upheld the introduction of a new count while the case was on appeal because such amendments were allowed in *admiralty* actions. 24 U.S. (11 Wheat.) at 38. This would not have been allowed in a criminal trial.

<sup>233</sup> *See, e.g.*, *The Slavers (Reindeer)*, 69 U.S. (2 Wall.) 383, 393, 403 (1864) (rejecting a jurisdictional challenge on the grounds that “libels *in rem* may be prosecuted in any district where the property is found” in a proceeding for condemnation of a ship “founded upon various provisions in the several acts of Congress, prohibiting the slave-trade”); *The Slavers (Kate)*, 69 U.S. (2 Wall.) 350, 366 (1864) (affirming a district judge’s condemnation of a ship outfitted for the slave trade); *The Josefa Segunda*, 23 U.S. (10 Wheat.) 312, 322 (1825) (noting, in subsequent proceeding of a case under the 1807 slave-trade act, that “the District Court has jurisdiction over seizures made under the . . . act. The principal proceedings are certainly to be against the vessel, and the goods and effects found on board”); *The Mary Ann*, 21 U.S. (8 Wheat.) 380, 390

treated forfeitures as criminal proceedings, in contrast to the criminal prosecutions of individual persons for participation in the slave trade, which were separate proceedings. One illustration of the separate handling of criminal trials and in rem admiralty proceedings is *The Antelope*, which eventually reached the Supreme Court in 1825.<sup>234</sup> The United States revenue cutter *Dallas* captured the *Antelope* in June 1820 with more than 280 slaves on board and carried it to Savannah for trial on suspicion of being illegally engaged in the slave trade.<sup>235</sup> Both John Quincy Adams and William Wirt were extensively involved in decisions about the litigation of the case from 1820 until the Supreme Court finally decided it;<sup>236</sup> it is thus inconceivable that they would not have been aware that the forfeiture of the ship and slaves was being tried as an in rem admiralty action.

Moreover, the captain of the ship, John Smith, was indicted in a *separate* criminal proceeding and tried for piracy based on the allegation that he had stolen the *Antelope* from its true Spanish and Portuguese owners.<sup>237</sup> Since the American statute declaring the slave trade to be piracy had only just been enacted on May 15, 1820, it was not employed in the case.<sup>238</sup> His defense was that he was operating not as an unlawful pirate, but as a lawful privateer under a commission from a revolutionary South American government (the predecessor to modern-day Uruguay).<sup>239</sup> At Smith's criminal trial, the jury acquitted him.<sup>240</sup> Smith then entered the parallel civil proceeding in admiralty as a claimant,<sup>241</sup> seeking return of the *Antelope* and its cargo as against the competing claims of the captain of the *Dallas* and the Portuguese and Spanish claimants on behalf of the ship's original owners.<sup>242</sup> The district judge, sitting in admiralty, eventually rendered an opinion re-

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(1823) (reversing "the sentence of the District Court of Louisiana" in a slave-trade case "for these defects in the libel; but as there is much reason to believe, that the offence for which the forfeiture is claimed has been committed, the cause is remanded to the District Court of Louisiana, with directions to permit the libel to be amended"); *The Josefa Segunda*, 18 U.S. (5 Wheat.) 338, 343 (1820) (describing the district court's condemnation of a brig under the slave-trade acts).

<sup>234</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 122-23 (1825).

<sup>235</sup> *Id.* at 68.

<sup>236</sup> See NOONAN, *supra* note 130, at 1.

<sup>237</sup> *Id.* at 51.

<sup>238</sup> *Id.* at 52-53.

<sup>239</sup> *Id.* at 51.

<sup>240</sup> *Id.* at 53.

<sup>241</sup> *Id.*

<sup>242</sup> See *id.* at 41, 53 ("[A] suit in admiralty was a request that the federal judge, William Davies, decide a claim for compensation arising at sea.").



turning the ship to the Spanish, dividing the slaves between the Spanish and Portuguese claimants, and awarding bounty and salvage to the captain of the *Dallas*.<sup>243</sup> There was no jury.

The case then reached the Sixth Circuit, which described the suit as having been brought “on behalf of the United States and officers and crew of the cutter *Dallas* who claim the vessel and cargo as forfeited under the act of the 20th April, 1808, or under the modern law of nations on the subject of the slave trade.”<sup>244</sup> Like the Supreme Court, the Sixth Circuit held that the U.S. statutes prohibiting the slave trade were not applicable to foreign-flagged ships, and since the law of nations still allowed the slave trade, the ship and its cargo had to be returned to its original owners.<sup>245</sup>

It is not impossible that, as Kontorovich hypothesizes, the members of Monroe’s Cabinet were somehow confused or paranoid about the international courts<sup>246</sup> and thought that the slave-trade tribunals would have had the authority to go beyond in rem forfeiture and impose criminal punishment on the individual persons involved. But this does not completely explain their reaction. Although Kontorovich attaches significance to the fact that members of the Cabinet referred to the slave-trade tribunals as “penal” at various times,<sup>247</sup> these statements do not clearly indicate that those Cabinet members viewed

<sup>243</sup> *Id.* at 59. A small group of the slaves, whom the *Antelope* had taken from an American ship illegally engaged in the slave trade, was assigned to the government of the United States. *Id.*

<sup>244</sup> NOONAN, *supra* note 130, at 62 (quoting Case of the Antelope Otherwise the Ramirez and Cargo (6th Cir. 1821), *microformed on* Minutes of the U.S. Circuit Court for the District of Georgia, 1790–1842, and Index to Plaintiffs and Defendants in the Circuit Courts, 1790–1860, Microfilm M1184, Roll 2, at 192 (Nat’l Archives Microfilm Publ’ns) [hereinafter Minutes of the U.S. Circuit Court for the District of Georgia]).

<sup>245</sup> *See id.* at 63 (describing the court’s holding that the slave trade was legal under international law, which required the return of slaves to the Portuguese and Spanish, “[h]owever revolting to humanity” (quoting Case of the Antelope Otherwise the Ramirez and Cargo (6th Cir. 1821), *microformed on* Minutes of the U.S. Circuit Court for the District of Georgia, *supra* note 244, at 195).

<sup>246</sup> *See* Kontorovich, *supra* note 1, at 83 & n.206 (suggesting that “[t]he imprecision in the British proposal may have led the Administration to assume the worst” and noting that those skeptical of the ICC also “entertain the worst-case scenarios” about its jurisdiction, “which supporters of the court dismiss as unlikely”).

<sup>247</sup> *See, e.g.*, Diary Entry of John Quincy Adams (Oct. 20, 1820) (objecting to the “establishment of any tribunal before whom citizens of the Union should be amenable upon penal statutes”), in 5 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 124, at 189, 189.

the proceedings as *criminal*.<sup>248</sup> What Kontorovich misses is that the words “criminal” and “penal” were not (and are not) equivalent.<sup>249</sup>

The term “penal” seems to have arisen in civil forfeiture proceedings most frequently as part of the canon of statutory construction that “penal statutes” should be construed narrowly, a doctrine that is regularly applied outside the criminal context.<sup>250</sup> As the Supreme Court explained in the 1892 case of *Huntington v. Attrill*, “there is danger of being misled by the different shades of meaning allowed to the word ‘penal’ in our language.”<sup>251</sup> The term “penal” does not exclusively refer to criminal penalties in Anglo-American law:

In the municipal law of England and America, the words “penal” and “penalty” have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offence against its laws. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the “penal sum” or “penalty” of a bond.<sup>252</sup>

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<sup>248</sup> To be sure, a few statements do seem to reflect a concern about trial rights in criminal proceedings. See, e.g., Letter from John Quincy Adams to Stratford Canning (Dec. 30, 1820) (expressing concerns about judicial courts in which Americans would be “called to answer for any penal offence without the intervention of a grand jury to accuse and of a jury of trial to decide upon the charge”), in 7 WRITINGS OF JOHN QUINCY ADAMS, *supra* note 183, at 84, 86.

<sup>249</sup> See, e.g., 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 59:1 (7th ed. 2008) (“Simply because a civil statute is penal in nature does not convert it into a criminal statute and subject it to all the requirements of criminal law.”).

<sup>250</sup> See, e.g., *United States v. Eighty-Four Boxes of Sugar*, 32 U.S. (7 Pet.) 453, 462-63 (1833) (“The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly.”). See generally 3 SINGER & SINGER, *supra* note 249, § 59:2 (listing a wide range of non-criminal statutes treated as “penal” in the context of this rule of statutory interpretation).

<sup>251</sup> 146 U.S. 657, 666 (1892). The *Huntington* Court determined that Maryland violated the Full Faith and Credit Clause when it denied enforcement of a New York judgment in a civil suit for damages against a director and stockholder of a corporation on the grounds that the New York law imposed a penalty that was not enforceable out of state. *Id.* at 686. The Maryland court had followed the conflict-of-laws maxim, captured in Justice Marshall’s statement in *The Antelope*, that “[t]he courts of no country execute the penal laws of another.” *Id.* at 666 (quoting *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825)).

<sup>252</sup> *Id.* at 666-67 (citations omitted). The Court concluded that, in a conflict-of-laws sense, the crucial distinction was “whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual.” *Id.* at 668.

In addition to serving as a canon of statutory construction, the concept of “penal” laws also appears frequently in conflict-of-laws jurisprudence. In that context, the concept of “penal” laws also has not traditionally been limited to “criminal” statutes. As the Supreme Court explained in *Wisconsin v. Pelican Insurance Co.*,

The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties.<sup>253</sup>

Indeed, the classic statement of this conflict-of-laws rule actually comes from a slave-trade forfeiture case, *The Antelope*, where Chief Justice Marshall wrote, “The Courts of no country execute the penal laws of another . . . .”<sup>254</sup> It is more likely that it is this conflict-of-laws principle against the extraterritorial application of penal statutes, rather than any concern about the slave-trade tribunals’ capacity for criminal jurisdiction, that factored into the Americans’ concerns about the slave-trade courts’ jurisdiction. As discussed in Section II.C below, however, the potential conflict-of-laws problem arose because it was a municipal penal statute that was to be enforced, rather than the law of nations.<sup>255</sup> Foreign courts could not execute the penal laws of the United States, but they could execute the law of nations.

### *C. The Constitutional Objections in Proper Legal Context*

Even assuming that the constitutional objections were sincere, and even assuming that the tribunals might have exercised some criminal jurisdiction, Kontorovich misunderstands the nature of the crucial objections distinguishing the slave-trade tribunals from other tribunals in which the United States participated. The problem, as asserted by Adams and others, was that these *international* courts would be adjudicating *domestic* law violations, because the general law of nations did not prohibit the slave trade in the early 1820s.<sup>256</sup> Attorney General

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<sup>253</sup> 127 U.S. 265, 290 (1888), *overruled in part on other grounds by* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935).

<sup>254</sup> 23 U.S. (10 Wheat.) at 123; *see also* William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L.J. 161, 165 (2002) (describing this passage from *The Antelope* as “the standard citation in both English and American cases ever since” (footnotes omitted)).

<sup>255</sup> From this conflict-of-laws perspective, foreign enforcement of domestic legal rules that were not “penal” in a conflicts sense would also be unproblematic.

<sup>256</sup> President James Monroe recognized this in a letter in 1821:

Wirt highlighted this distinction in the very first meeting on the topic when he “pointed out distinctions between the two cases—between Courts constituted under the *laws of nations* and Courts to carry into effect *our municipal and penal statutes*.”<sup>257</sup>

Numerous statements by Adams and others support this interpretation of the objection. Over and over, these men objected to “a compact giving the power to the naval officers of one nation to search the merchant vessels of another, for offenders and offence *against the laws of the latter*,”<sup>258</sup> to “the trial of an American citizen for offences *against the laws of his country*”<sup>259</sup> by foreign judges; “to subjecting [American citizens] to trial for offences against their *municipal statutes*, before foreign judges in countries beyond the seas;”<sup>260</sup> and to giving power to “the courts of another nation to punish the *violation of the Laws of the United States*.”<sup>261</sup>

Why did they think that the law prohibiting the slave trade was one of the laws of the United States, not a part of the law of nations? And why did it bother them so much to imagine a foreign and extra-territorial court enforcing American laws against the slave trade? To understand these arguments, it is necessary to examine the legal context in which they were offered, for it is somewhat distant from our own. This undertaking requires a comprehension both of the way that the law of nations was conceptualized in this time period and of the developing field of conflict of laws.

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There is no question of the law of nations in this case, for the slave trade is not prohibited by that law. It is an abominable practice, against which nations are now combining, [and] it may be presumed that the combination will soon become universal. If it does the traffic must cease . . . .

Letter from James Monroe to Daniel Brent, *supra* note 180, at 322.

<sup>257</sup> Diary Entry of John Quincy Adams, *supra* note 148, at 151 (emphasis added).

<sup>258</sup> Letter from John Quincy Adams to Stratford Canning, *supra* note 248, at 86 (emphasis added).

<sup>259</sup> *Id.* at 86 (emphasis added).

<sup>260</sup> Letter from John Quincy Adams to Stratford Canning (Aug. 15, 1821) (emphasis added), in 7 WRITINGS OF JOHN QUINCY ADAMS, *supra* note 183, at 171, 174; see also Letter from John Quincy Adams to Stratford Canning (Aug. 15, 1821) (objecting to foreign trials for Americans “under charges for offences against the laws of their country!”), enclosed in Letter from Stratford Canning to the Marquess of Londonderry (Sept. 4, 1821), in IV. FURTHER PAPERS RELATING TO THE SLAVE TRADE: VIZ. COMMUNICATIONS TO THE ADMIRALTY, AND INSTRUCTIONS TO NAVAL OFFICERS; SINCE THE 6TH OF FEBRUARY 1821, 1822, H.C. 223, at 46 (U.K.).

<sup>261</sup> United States v. Watkins, 28 F. Cas. 419, 462 (C.C.D.C. 1829) (No. 16,649) (Thruston, J., dissenting) (emphasis added).

In late eighteenth- and early nineteenth-century America and Britain, the understanding of the law of nations hovered somewhere between the quasi-naturalistic view of earlier writers like Grotius and Vattel and the more purely positivist views of Bentham and others that would later become dominant.<sup>262</sup> Typical of the views prevalent in this period are those in Blackstone's *Commentaries* (with which American lawyers would have been familiar in the 1820s via St. George Tucker's 1803 American edition of this famous legal treatise), which divided law into four categories: the law of nature, revealed law, the law of nations, and municipal law.<sup>263</sup> Blackstone further explained the law of nations: "as none of these states will acknowledge a superiority in the other, [the law of nations] cannot be dictated by either; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities . . . ."<sup>264</sup>

In 1758, Emer de Vattel also combined elements of natural and positive law in defining the law of nations. Vattel (probably the most influential writer on the law of nations for the founding generation in the United States) identified portions of the law of nations derived from natural law—the "necessary" law of nations, which was "immutable,"<sup>265</sup> and the somewhat misleadingly named "voluntary" law of nations. The "voluntary" law of nations (which was largely obligatory) was "established by nature" but consisted of rules "which the general welfare and safety oblige [states] to admit in their transactions with each other."<sup>266</sup> Though largely based on natural law, Vattel formally classified it as part of the positive law of nations, as it flowed from the actual condition of nation-states. On the other hand, Vattel also classified treaties and customary law as part of the positive law of nations because they were de-

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<sup>262</sup> See generally MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789–1914*, at 1-24 (2004), for a discussion of Bentham's views on international law and his criticism of Blackstone. For a discussion of the evolution of views on these categories of the law of nations in the nineteenth century, see William S. Dodge, *Customary International Law, Congress, and the Courts: Origins of the Later-in-Time Rule*, in *MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY* 531, 544-54 (Pieter H.F. Bekker et al. eds., 2010).

<sup>263</sup> See 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*38-44 (describing the origins and characters of the four categories of law).

<sup>264</sup> *Id.* at \*43; see also 4 BLACKSTONE, *supra* note 263, at \*66 ("The law of nations is a system of rules, deducible by natural reason, and established by universal consent . . .").

<sup>265</sup> EMER DE VATTEL, *THE LAW OF NATIONS* 70 (Bela Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758) (emphasis omitted).

<sup>266</sup> *Id.* at 17.

rived not from natural law but from positive acts of states.<sup>267</sup> Vattel described treaties as the “conventional law of nations,” a distinct part of the positive law of nations characterized by the form of their creation.<sup>268</sup> As Vattel explained, “[a]s it is evident that a treaty binds none but the contracting parties, the conventional law of nations is not a universal but a particular law.”<sup>269</sup> Treaty law, in turn, was to be distinguished from “[c]ertain maxims and customs consecrated by long use, and observed by nations in their mutual intercourse with each other . . . [which] form the customary law of nations, or the custom of nations.”<sup>270</sup> Customary law might also be particular, rather than universal, depending on how many nations shared in the custom, but

[w]hen a custom or usage is generally established, either between all the civilised nations in the world, or only between those of a certain continent, as of Europe, for example, or between those who have a more frequent intercourse with each other . . . it becomes obligatory on all the nations in question, who are considered as having given their consent to it.<sup>271</sup>

These classifications worked their way in various forms into early decisions of the Supreme Court and were transformed as they made their way into American law.<sup>272</sup> In one early case, for example, the Court explained that

[t]he law of nations may be considered of three kinds, to wit, general, conventional, or customary. The first is universal, or established by the general consent of mankind, and binds all nations. The second is founded on express consent, and is not universal, and only binds those nations that have assented to it. The third is founded on tacit consent; and is only obligatory on those nations, who have adopted it.<sup>273</sup>

Between 1818 and 1824, it was the opinion of most, though not all, commentators and judges that, although the slave trade might be contrary to natural law, the general and customary law of nations still allowed the slave trade. The British courts had recognized this in the

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<sup>267</sup> See *id.* at 78 (stating that these three kinds of laws form the positive law of nations as they emerge from the will of nations). For a discussion of Vattel’s categories, see Dodge, *supra* note 262, at 534.

<sup>268</sup> VATTEL, *supra* note 265, at 77.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* (emphasis omitted).

<sup>271</sup> *Id.* at 78.

<sup>272</sup> See Dodge, *supra* note 262, at 539-41 (describing how Justices Chase, Iredell, and Wilson modified Vattel’s “voluntary law of nations” category).

<sup>273</sup> *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227 (1796) (emphasis omitted).

1817 case of *Le Louis*,<sup>274</sup> and the U.S. Supreme Court agreed in the 1825 case of *The Antelope*.<sup>275</sup> (Justice Story disagreed in 1822 in *La Jeune Eugenie*, but he was ahead of his time.)<sup>276</sup>

Indeed, as the map in Figure 1 below shows, in 1820 very few countries were parties to treaties totally prohibiting the slave trade. Only Great Britain and the Netherlands, plus their respective colonies, completely prohibited the slave trade by treaty. Some other nations, such as the United States and France, had passed municipal legislation against the trade by this point or had joined treaties that either partially prohibited the trade or described its ending as a desirable future occurrence. But in 1820, these states were not parties to treaties banning the slave trade altogether.

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<sup>274</sup> See (1817) 165 Eng. Rep. 1464 (High Ct. Admlty) 1473-74 (noting that the British Slave Trade Act was not binding on foreigners).

<sup>275</sup> See 23 U.S. (10 Wheat.) 66, 122 (1825) (stating that the slave trade remained legal in those countries that had not banned it).

<sup>276</sup> See *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 851 (C.C.D. Mass. 1822) (No. 15,551) (“I have come to the conclusion[] that the slave trade is a trade prohibited by universal law . . .”).

**Figure 1: Countries and Colonies Where the Slave Trade Was Prohibited by Treaty in 1820<sup>277</sup>**



Chief Justice Marshall's opinion in *The Antelope* is worth examining closely, because it clearly explains the dominant understanding of the law of nations and the slave trade in America in the 1820s. Writing for the Court, he observed, "That the course of opinion on the slave trade should be unsettled, ought to excite no surprise."<sup>278</sup> While "abhorrent," he explained, "it has been sanctioned in modern times by the laws of all nations who possess distant colonies" and "has claimed all the sanction which could be derived from long usage, and general acquiescence."<sup>279</sup> Thus, he went on to explain "[t]hat trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations."<sup>280</sup> Relying in part on the British decision in *Le Louis*, Marshall concluded that "the legality of the capture of a vessel engaged in the slave trade, depends on the

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<sup>277</sup> Slave-trade-treaty information was collected from the annual volumes of THE CONSOLIDATED TREATY SERIES (Clive Parry ed., 1969), the authoritative collection of treaties from 1648 to 1919. In the Figure, countries are shaded once they have ratified treaties totally prohibiting the transatlantic slave trade. Countries that have outlawed the trade only by domestic law but have not ratified treaties are not shaded. Similarly, countries that have ratified treaties only partially outlawing the trade (for example, in certain parts of the ocean) or treaties that only condemn the slave trade as immoral but do not actually outlaw it are also not shaded until they ratify a treaty actually banning it throughout the entire Atlantic region. Colonies of European powers are shaded along with the colonial power. For example, once Great Britain is a party to treaties against the slave trade, British colonies are also highlighted. For the list of treaties consulted to create this map, see *infra* app. Table 1.

<sup>278</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 114.

<sup>279</sup> *Id.* at 115.

<sup>280</sup> *Id.*



law of the country to which the vessel belongs.”<sup>281</sup> Marshall specifically noted the holding in *Le Louis* that there is no peacetime right of search except against pirates, who are “the enemies of the human race.”<sup>282</sup> But in the view of the British court, he explained, the slave trade was not piracy.<sup>283</sup> As for slavery, “[t]hat it is contrary to the law of nature will scarcely be denied,” for “every man has a natural right to the fruits of his own labour.”<sup>284</sup> However, since slavery had been allowed since ancient times, it “could not be pronounced repugnant to the law of nations,” for “[t]hat which has received the assent of all, must be the law of all.”<sup>285</sup> Marshall continued,

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favour of the legality of the trade.<sup>286</sup>

The opinion went on to explain that “[e]ach [nation] legislates for itself, but its legislation can operate on itself alone . . . . As no nation can prescribe a rule for others, none can make a law of nations . . . .”<sup>287</sup>

Marshall further explained the relation of the slave trade to piracy: “If it is consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.”<sup>288</sup> Thus, the Court concluded, “the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade cannot exist” for “[t]he Courts of no country execute the penal laws of another.”<sup>289</sup> James Kent’s influential *Commentaries on American Law*, published in 1826, reflected this same understanding. Kent described the turn of sentiment against the transatlantic slave trade as “repugnant to the principles of Christian

<sup>281</sup> *Id.* at 118.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 118-19.

<sup>284</sup> *Id.* at 120.

<sup>285</sup> *Id.* at 120-21.

<sup>286</sup> *Id.* at 121.

<sup>287</sup> *Id.* at 122.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 122-23.

duty, and the maxims of justice and humanity.”<sup>290</sup> However, the question remained “[w]hether it is to be considered as an offense against the law of nations, independent of compact.”<sup>291</sup> He concluded that the slave trade is

immoral and unjust, and it is illegal, when declared so by treaty, or municipal law; but that it is not piratical or illegal by the common law of nations, because, if it were so, every claim founded on the trade would at once be rejected every where, and in every court, on that ground alone.<sup>292</sup>

It was this understanding of the law of nations that undergirded Wirt’s and Adams’s constitutional arguments. The slave trade was lawful under the general and customary law of nations, and Great Britain and the United States could not change the general law of nations on their own. Laws prohibiting the trade, or even declaring it to be piracy, were municipal laws—even if enacted in coordination with another country by treaty. This was exemplified by the 1824 draft Anglo-American treaty, which noted that the two countries had made the slave trade piracy “by their respective laws” and also obligated them to “use their influence, respectively, with other maritime and civilized powers, to the end that the African slave trade may be declared to be piracy under the law of nations.”<sup>293</sup>

Tellingly, Kontorovich’s confusion over the significance of declaring the slave trade to be piracy emanates from his misunderstanding of this legal context. Kontorovich is forced to limit his argument in order to explain why the possibility of redefining the slave trade as piracy figured so prominently in the discussions. Kontorovich focuses on certain statements by Adams, among others, suggesting that the United States would feel differently if the slave trade were recognized as piracy under the law of nations.<sup>294</sup> Kontorovich reasons that the significance of the piracy analogy was that piracy was subject to universal jurisdic-

<sup>290</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 180 (New York, O. Halsted 1826).

<sup>291</sup> *Id.* at 179.

<sup>292</sup> *Id.* at 185.

<sup>293</sup> The Convention, U.S.-U.K., art. X, *done* Mar. 13, 1824 (not ratified), *enclosed in* Letter from Richard Rush to John Adams (Mar. 15, 1824), *in* 1 REG. DEB. app. at 14 (1824) (message from President James Monroe).

<sup>294</sup> See Kontorovich, *supra* note 1, at 91 & n.242 (“So long as the trade shall not be recognised as piracy by the law of nations, we cannot, according to our Constitution, subject our citizens to trial for being engaged in it, by any tribunal other than those of the United States.” (quoting 42 ANNALS OF CONG. app. at 3027-28 (1823) (letter from John Quincy Adams to Henry Middleton))).

tion to adjudicate under the law of nations<sup>295</sup>—that is, pirates could be criminally prosecuted by any nation that happened to find them.<sup>296</sup> He thus concludes that it would perhaps be constitutionally permissible for the United States to allow an international court to adjudicate charges against American nationals for offenses subject to universal jurisdiction to adjudicate.<sup>297</sup> Because not all crimes included in the statute of the ICC are subject to universal jurisdiction, however, and because the ICC treaty allows no reservations, he concludes that the United States could not constitutionally join the ICC.<sup>298</sup>

However, a closer reading of the debates suggests that the focus on piracy stemmed from concerns about the right to peacetime search of naval vessels (which was allowed in instances of suspected piracy), not to concerns about limits on international courts' jurisdiction to adjudicate.

Kontorovich misreads the discussions by American and British negotiators about declaring the slave trade to be piracy. He assumes that the reason for a declaration would be to subject the slave trade to universal jurisdiction to adjudicate (thereby, in his view, making it a potential subject of adjudication in international courts). To the contrary, the Americans were focused on redefining the slave trade as piracy as a way to cabin the right-of-search issue. The only peacetime right of search under the law of nations at that time was for piracy, and as shown in Section II.A above, the Americans were anxious to not be seen as giving any ground to the British in expanding the right of search. As Monroe explained in his 1824 message to the Senate, the problem with the original British proposal was that “[t]he right of search is the right of war, of the belligerent towards the neutral,” and

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<sup>295</sup> As noted in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987), international law today places limits on three types of a nation's jurisdiction. First, international law limits a nation's jurisdiction to adjudicate. *See id.* § 401(b) (defining such jurisdiction as “to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings”). Second, a nation's jurisdiction to prescribe is limited. *See id.* § 401(a) (describing this jurisdiction as “to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things”). Lastly, international law limits a nation's jurisdiction to enforce. *See id.* § 401(c) (describing this jurisdiction as “to induce or compel compliance or to punish noncompliance with its laws or regulations”). These limits on jurisdiction are part of the field of law known as private international law or conflict of laws. I use these terms for analytic clarity in portions of this discussion, though they were not used in the 1820s.

<sup>296</sup> Kontorovich, *supra* note 1, at 91-92.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 106-08. Kontorovich also discusses crimes by members of the armed forces, for which defendants receive nonjury trials in courts-martial. *Id.* at 97, 106.

“[t]o extend it, in time of peace, to any object whatever, might establish a precedent which might lead to others with some powers, and which, even if confined to the instance specified, might be subject to great abuse.”<sup>299</sup> On the other hand, assimilating the slave trade to piracy would not set a precedent for expanding peacetime search but would merely fit the slave trade into a preexisting category. “By making the crime piracy, the right of search attaches to the crime, and which, when adopted by all nations, will be common to all . . . .”<sup>300</sup>

Tellingly, the Americans did not seem to think that a treaty declaring the slave trade to be piracy would confer universal adjudicative jurisdiction over the offense. It does not even appear to have been the American negotiators’ understanding that all piracy was always subject to universal adjudicatory jurisdiction in the courts of all nations, though some types of piracy clearly were.<sup>301</sup> Rather, as Adams explained in a letter to Richard Rush,

there is no uniformity in the modes of trial to which piracy by the law of nations is subjected in different European countries; but that the trial itself is considered as the right and the duty, only of the nation to which the vessel belongs, on board of which the piracy was committed.<sup>302</sup>

It was on this basis that Adams argued that if the “slave-trade should be recognized as piracy under the law of nations,” although slave ships would be “seizable by the officers and authorities of every nation, they should be triable only by the tribunals of the country of the slave-trading vessel.”<sup>303</sup> This safeguard, he argued, was “indispensable to guard the innocent navigator against vexatious detentions, and all the evils of arbitrary search.”<sup>304</sup> That is why the 1824 treaty proposed trials in the courts of a ship’s own nation. As Adams put it in an 1823 letter to the British minister Stratford Canning,

The distinction between piracy by the law of nations and piracy by statute is well known and understood in Great Britain, and while the for-

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<sup>299</sup> 1 REG. DEB. app. at 20 (1824) (message from President James Monroe).

<sup>300</sup> *Id.*

<sup>301</sup> See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820) (“Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations.”).

<sup>302</sup> Letter from John Quincy Adams to Richard Rush (June 24, 1823), in 7 WRITINGS OF JOHN QUINCY ADAMS, *supra* note 183, at 489, 495. Adams was referring here to cases involving piracy by a ship’s own crew, that is, mutiny. Adams acknowledged that in cases of piracy committed by one vessel against another, there might be trial in the courts of “any country,” but asserted that these cases are “more usually tried by those of the country whose vessels have been the sufferers of the piracy.” *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

mer subjects the transgressor guilty of it to the jurisdiction of any and every country into which he may be brought, or wherein he may be taken, the latter forms part of the municipal criminal code of the country where it is enacted, and can be tried only by its own courts.<sup>305</sup>

Again, this distinction reflected the Americans' understanding that one or two countries could not change the general law of nations. At most, they would be changing their municipal laws in coordination with other nations, but the source of the legal prohibition would remain domestic law.<sup>306</sup>

This explains the Americans' concerns about delegating power to a non–Article III tribunal. The laws to be enforced were domestic and federal and could not be delegated to an international body. This is why Adams objected to “a compact giving the power to the naval officers of one nation to search the merchant vessels of another, for offenders and offence *against the laws of the latter*.”<sup>307</sup> He also objected to “the trial of an American citizen for offences *against the laws of his country*” by foreign judges<sup>308</sup> and to “subjecting [American citizens] to trial for offences against their *municipal statutes*, before foreign judges in countries beyond the seas.”<sup>309</sup>

In addition to any nondelegation concerns, the Americans were perhaps also troubled because they likely thought that enforcement of penal laws in a conflict-of-laws sense was limited to the sovereign that prescribed the penal law within its territorial jurisdiction. The field of conflict of laws was still immature in Anglo-American law in the 1820s, a decade before the publication Joseph Story's seminal *Commentaries*

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<sup>305</sup> Letter from John Quincy Adams to Stratford Canning, *supra* note 183, at 501-02; see also Letter from Albert Gallatin to John Quincy Adams (Feb. 2, 1822) (“[W]e never would agree that the property and, above all, the persons of our citizens should, for any presumed violation of our *own* laws, be tried by a foreign or mixed tribunal.” (emphasis added)), in 2 THE WRITINGS OF ALBERT GALLATIN, *supra* note 92, at 229, 230.

<sup>306</sup> It may also be relevant that U.S. law by then required that federal crimes be created by statute, not just common law. See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 415-416 (1816) (dismissing a piracy case involving a prize forcibly taken from two American privateers under the prior decision of *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, (1812), which required Congress to first criminalize an activity, attach a penalty, and grant federal jurisdiction over the offense for the federal courts to have jurisdiction over criminal cases).

<sup>307</sup> See, e.g., Letter from John Quincy Adams to Stratford Canning, *supra* note 248, at 85 (emphasis added).

<sup>308</sup> *Id.* at 86 (emphasis added).

<sup>309</sup> Letter from John Quincy Adams to Stratford Canning, *supra* note 260, at 174 (emphasis added).

on the *Conflict of Laws* in 1834.<sup>310</sup> But as Story would later state, the developing understanding was that “every nation possesses an exclusive sovereignty and jurisdiction within its own territory”<sup>311</sup> and that “no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein.”<sup>312</sup> Certain types of transitory claims (like those in contract or tort) might be enforced by foreign courts as a matter of comity, but claims that were local in character (including penal and property law claims) could not be enforced extraterritorially.<sup>313</sup>

Recall, again, that in *The Antelope*, after finding that the general law of nations did not prohibit the slave trade, Marshall explained that “[i]f [the slave trade] is consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.”<sup>314</sup> Thus, Marshall concluded, “the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade cannot exist,”<sup>315</sup> for “[t]he Courts of no country execute the penal laws of another.”<sup>316</sup> Calling upon an extra-

<sup>310</sup> See, e.g., DAVID P. CURRIE ET AL., *CONFLICT OF LAWS* 4-5 (8th ed. 2010) (noting that “[t]he first commentator to offer a satisfying explanation” of common law decisions involving conflict of laws was Story and describing his work as a “spectacularly successful” effort to “organize and explain the seemingly chaotic common law precedents”); ERNEST G. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 193-94 (1947) (describing Story’s *Commentaries* as “without question the most remarkable and outstanding work on the conflict of laws which had appeared since the thirteenth century in any country and in any language”); EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 18-19 (4th ed. 2004) (describing Story’s *Commentaries* as “the first comprehensive conflicts treatise in English” and noting that “[t]he influence of Story’s work was profound”).

<sup>311</sup> JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC* § 18 (Boston, Hilliard, Gray, & Co. 1834).

<sup>312</sup> *Id.* § 20.

<sup>313</sup> See William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT’L L.J. ONLINE 35, 39-40 nn.36-38 (2010), [http://www.harvardilj.org/2010/05/online\\_51\\_dodge](http://www.harvardilj.org/2010/05/online_51_dodge) (collecting eighteenth and nineteenth century cases).

<sup>314</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

<sup>315</sup> *Id.* at 122-23.

<sup>316</sup> *Id.* at 123. The rule against enforcing foreign penal laws predates *The Antelope*, but this version of it has been “the standard citation in both English and American” conflicts statements “ever since.” Dodge, *supra* note 254, at 165 (footnotes omitted).

The views Justice Story expressed in *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), are largely consistent with this understanding of both the law of nations and conflict-of-laws principles. That case concerned a French-flagged slaver that the United States Navy had captured. Justice Story, riding circuit, acknowledged that “the cognizance of penalties and forfeitures for breaches of municipal regulations exclusively belongs to the tribunals of the nation, by whom they are enacted.” *Id.* at 849. On that basis, he concluded that American courts could not di-

territorial, foreign court to implement the United States' municipal law ban on the slave trade would have been in serious tension with the dominant understanding of conflict-of-laws rules.

In sum, the problem in the 1820s was that the law of nations still allowed the slave trade, and thus the source of the ban would have been American "municipal and penal statutes."<sup>317</sup> When the United States eventually ratified the treaty in 1862,<sup>318</sup> however, the slave trade was illegal under the general law of nations; no municipal legislative act was required to make it so. As shown in Figure 2 below, most of the potentially relevant nations had joined treaties prohibiting the slave trade by 1850; therefore, the continued trading of slaves could be described as a violation of the general law of nations at that time.<sup>319</sup>

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rectly enforce the French municipal law prohibition of the slave trade (though he believed American courts could take cognizance of the French law in an in rem proceeding, like the case before him, in considering who had legal title to the ship). Justice Story considered the central question, however, to be "whether the . . . slave trade be prohibited by the law of nations." *Id.* at 845. He concluded,

I think, therefore, that I am justified in saying, that at the present moment the traffic is vindicated by no nation, and is admitted by almost all commercial nations as incurably unjust and inhuman. It appears to me, therefore, that in an American court of judicature, I am bound to consider the trade an offence against the universal law of society and in all cases, where it is not protected by a foreign government, to deal with it as an offence carrying with it the penalty of confiscation.

*Id.* at 847.

<sup>317</sup> Diary Entry of John Quincy Adams, *supra* note 148, at 151 ("Mr. Wirt pointed out distinctions between the two cases—between Courts constituted under the laws of nations and Courts to carry into effect our municipal and penal statutes.").

<sup>318</sup> Treaty for the Suppression of the Slave Trade, *supra* note 94.

<sup>319</sup> The reader will recall that the general and the customary law of nations were, in the early nineteenth century, treated as two separate categories—the first carrying more of a natural flavor and from which no derogation was permitted, and the second partaking more of positive law. By the mid-nineteenth century, some writers, such as Henry Wheaton, were suggesting that the general (or what Vattel had called "voluntary") law of nations was really just an amalgam of customary and conventional law. See generally William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169 (2010), <http://yalelawjournal.org/2010/12/17/dodge.html>. Given that the very understanding of these terms was changing during this time period, it is hard to track the status of the slave trade throughout the relevant decades to see if its status under each of them ever diverged. It seems most likely that whenever it became considered unlawful under the customary law of nations, it was at the same time considered unlawful under the general law of nations, though the sources are not fine grained enough on this distinction to say for certain.





by the idea of using international courts to enforce municipal laws, especially those that were “penal” in a conflict-of-laws sense. Beyond that, from a constitutional perspective, they seemed less concerned with any idea of universal jurisdiction than with the requirement that the general law of nations actually provide the rule of conduct to be enforced, rather than leaving it to idiosyncratic municipal laws.<sup>325</sup> The crimes within the ICC’s jurisdiction today—war crimes, crimes against humanity, and genocide—seem to meet this requirement. The ICC does not enforce the domestic laws of the nations that participate in it, but instead enforces a body of international law. Many of the norms in the ICC treaty form part of customary international law. Even for those norms that do not, the treaty itself—a widely ratified multilateral treaty—makes them *international* crimes against *international* law. The nineteenth-century concerns about using international courts to enforce idiosyncratic municipal laws—which prohibited practices that the law of nations generally allowed—seems wholly inapplicable to a widely ratified multilateral treaty like that of the ICC.

### III. SOME CONCLUDING OBSERVATIONS

This Article neither attempts to answer all possible constitutional objections to the ICC nor argues that it would be constitutional for the United States to join the ICC. Rather, my purpose is mainly to demonstrate that the debate over the slave-trade tribunals in President Monroe’s Administration does not suggest that participation in the ICC would be *unconstitutional*. To the contrary, the United States’ ratification of the slave-trade treaty with Great Britain in 1862 suggests that the slave-trade tribunals stand alongside the other nineteenth-century international courts and tribunals as positive examples of U.S. participation in international adjudication. The following Sections briefly address some of the modern objections to international courts and explain how my reading of the slave-trade-tribunals episode may be relevant to them. Again, my purpose is not to give a definitive analysis of the constitutional issues, but instead simply to discuss what lessons one can glean from the slave-trade tribunals.

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<sup>325</sup> Certainly, an offense against the law of nations that was also subject to universal jurisdiction to adjudicate in national courts would have likely been sufficiently international to address their concerns, but there is no indication that Adams and his colleagues viewed universal jurisdiction in *national* courts as *necessary* for jurisdiction in *international* courts. Rather, they seemed more concerned with what we would today call jurisdiction to prescribe, rather than jurisdiction to adjudicate.

A. *The Vesting of the “Judicial Power” in Non–Article III Courts*

One argument against international courts in general, and the ICC in particular, expresses concern over what is described as a delegation of federal powers to international institutions. Critics expressing this view argue that treaties creating international courts vest part of the federal judicial power in a non–Article III court.<sup>326</sup> A number of commentators have concluded that these objections are without foundation, but it is important to understand the contours of the argument to grasp why it is off base.<sup>327</sup> Most fundamentally, the episode of the slave-trade tribunals explains how the source of the law to be enforced is important in evaluating whether something is a delegation of federal judicial power. Just as Article III of the Constitution does not govern state courts because they do not exercise the judicial power of the United States, international courts charged with enforcing international law do not exercise the judicial power *of the United States*.

Article III of the Constitution provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>328</sup> In addition, it requires that “[t]he judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”<sup>329</sup> Article II, Section 2 empowers the President “by and with the Advice and Consent of the Senate” to appoint “Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for,” though “Congress may by Law vest the Appointment of such inferior Officers, as

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<sup>326</sup> See, e.g., Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 111-12 (2000) (explaining the argument that the North American Free Trade Agreement arbitral panel system violates Article III); McGinnis, *supra* note 44, at 1742-47 (discussing historical understandings of the Treaty Clause).

<sup>327</sup> See AM. SOC’Y OF INT’L LAW, *supra* note 4, at 41 (noting that constitutional concerns do not seem to preclude the United States from joining the ICC, but recommending further analysis of such concerns before joining); Scheffer & Cox, *supra* note 4, at 1004-10, 1066 (arguing that U.S. involvement with the ICC would not unconstitutionally interfere with the federal judicial power). See generally Wedgwood, *supra* note 45 (summarizing the constitutional issues related to the ICC).

<sup>328</sup> U.S. CONST. art. III, § 1. In addition, Article I empowers Congress to “constitute Tribunals inferior to the supreme Court.” *Id.* art. I, § 8.

<sup>329</sup> *Id.* art. III, § 1.

they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”<sup>330</sup>

Throughout the nation’s history, Congress has used its legislative power to create a variety of courts whose judges do not enjoy life tenure and which are not always subject to the Supreme Court’s appellate review, including military, territorial, consular, and administrative courts. Beginning with a series of nineteenth-century opinions, the Supreme Court has upheld these courts as constitutional. In the 1828 case of *American Insurance Co. v. 356 Bales of Cotton*, for example, the Supreme Court upheld the constitutionality of a non–Article III court established in the new territory of Florida.<sup>331</sup> Writing for the Court, Chief Justice Marshall rejected the argument that it was unconstitutional for the territorial court to exercise admiralty jurisdiction, one of the grounds for jurisdiction under Article III, without affording the judges life tenure.<sup>332</sup> The Court distinguished “constitutional Courts” established under Article III from “legislative Courts” established by Congress using its Article I or Article IV powers.<sup>333</sup>

The Supreme Court has specifically upheld the use of non–Article III courts in certain criminal cases. In 1858, for example, the Court held in *Dynes v. Hoover* that Congress’s power under Article I “to provide for the trial and punishment of military and naval offences” allowed Congress to authorize courts-martial for trial of service members.<sup>334</sup> Courts-martial do not have judges that fall under the provisions of Article III, do not provide jury trials, and for long periods of history were not subject to direct appellate review by Article III courts.<sup>335</sup>

Similarly, in a 1973 case rejecting a challenge to the use of legislative courts in the District of Columbia, the Supreme Court reasoned that Congress’s power to administer the District of Columbia encompassed the power to set up courts for the district and stated that a criminal defendant was “no more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is

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<sup>330</sup> *Id.* art. II, § 2.

<sup>331</sup> 26 U.S. (1 Pet.) 511, 546 (1828).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> 61 U.S. (20 How.) 65, 79 (1857).

<sup>335</sup> See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 230 n.6 (5th ed. 2007) (stating that the Military Justice Act of 1983, 28 U.S.C. § 1259 (2006), establishes the Supreme Court’s certiorari review of decisions by the Court of Appeals for the Armed Forces). Federal courts have traditionally considered habeas petitions arising from military proceedings, however. *Id.*

tried for a strictly local crime.<sup>336</sup> The Supreme Court has also upheld the use of consular courts in foreign territories,<sup>337</sup> though some of the premises of the reasoning in *In re Ross* are no longer valid—for example, that the Constitution does not apply extraterritorially.<sup>338</sup>

In addition, the Supreme Court has held that cases involving “public rights”—that is, civil claims between private individuals and the government—may be tried in non–Article III courts, while classic “private rights” cases between private individuals are entitled to an Article III forum.<sup>339</sup> This line of cases is rather muddled and has been criticized on a variety of grounds.<sup>340</sup> Even the Court itself has seemed to back off from the public rights/private rights distinction, suggesting in later cases that rather than “formalistic and unbending rules,” the Court will consider

<sup>336</sup> *Palmore v. United States*, 411 U.S. 389, 410 (1973).

<sup>337</sup> *See In re Ross*, 140 U.S. 453, 479 (1891) (affirming the authority of a U.S. consular tribunal in Japan to exercise jurisdiction over petitioner).

<sup>338</sup> *See Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (suggesting that the Constitution may restrain governmental power even outside the borders of the United States); *Reid v. Covert*, 354 U.S. 1, 17 (1957) (plurality opinion) (“It would be manifestly contrary to the objectives of those who created the Constitution . . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.”).

<sup>339</sup> *See Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853-54 (1986) (stating that private rights form the “‘core’ of matters normally reserved to Article III courts”); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (arguing that the public-rights doctrine embodies the idea that Article I courts may adjudicate rights that the executive or legislative branches could determine); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69-70 (1982) (plurality opinion) (stating that “*only* controversies [between the government and a private party] may be removed from Art. III courts”); *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (noting the distinction “between cases of private right and those which arise between the Government and persons subject to its authority in connection . . . [to] the executive or legislative departments”); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) (holding that an Article III forum is required for “any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty” but that “there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States”). *See generally* CHEMERINSKY, *supra* note 335, at 236 (“The Supreme Court has long held that legislative courts can be used for . . . ‘public rights’ cases.”). Unfortunately, the public/private rights distinction does not track well to the conflict-of-laws categories about which the Monroe Cabinet was concerned.

<sup>340</sup> *See, e.g.*, Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 214-19 (questioning several arguments in Justice Brennan’s plurality opinion in *Northern Pipeline*).

the extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.<sup>341</sup>

In any event, focusing on Congress’s power to create legislative courts not subject to Article III constraints improperly ignores an antecedent question, revealed by the way Adams and his contemporaries framed the question in the debates over the slave-trade tribunals: how is the exercise of jurisdiction over crimes under *international law* an aspect of the federal judicial power at all?<sup>342</sup> That federal courts might also have jurisdiction over some or all of the criminal acts cannot be dispositive, for state courts also have extensive overlap in criminal jurisdiction with the federal courts, and no one has ever suggested that they are somehow covered by the requirements of Article III. Similarly, foreign nations might also have jurisdiction over criminal acts subject to the jurisdiction of federal courts in certain circumstances, and extradition to foreign courts for trial has long been allowed.<sup>343</sup>

In the debates over the slave trade, the key question is whether the source of the legal proscription is genuinely international.<sup>344</sup> The ratification of the ICC statute by more than 100 nations suggests that it is not the legislative authority of the United States alone that would make any of the offenses under the ICC statute criminal; the source of the legal prohibition on those acts is clearly international, just as the prohibition of the slave trade in the 1860s was also international.<sup>345</sup>

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<sup>341</sup> *Schor*, 478 U.S. at 851.

<sup>342</sup> Diary Entry of John Quincy Adams, *supra* note 148, at 151 (“Mr. Wirt pointed out distinctions between the two cases—between Courts constituted under the laws of nations and Courts to carry into effect our municipal and penal statutes.”).

<sup>343</sup> Theresa L. Kruk & Russell G. Donaldson, *Test of “Dual Criminality” Where Extradition to or from Foreign Nation Is Sought*, 132 A.L.R. FED. 525, § 2[a], at 538 (1996) (“From early in its history, the United States . . . has maintained extradition treaties with other nations.”).

<sup>344</sup> One might argue that the modern equivalent of the sort of general law of nations rule for which Adams and his contemporaries seemed to be searching would not be offenses subject to universal jurisdiction, but rather offenses prohibited by customary international law. Although it is arguable, a widely ratified treaty—like that of the ICC—seems to address equally well the concerns about source of law that Adams expressed. It is difficult to see why customary law would be preferable to treaty law in the context of these concerns.

<sup>345</sup> This reading has the added advantage of suggesting that attempts to manipulate federal court jurisdiction through use of the treaty power might be unconstitutional. It would not be sufficient, for example, for the United States to declare “ma-

And this makes sense. It *would* be constitutionally alarming if Congress could delegate enforcement of purely domestic criminal law to an international court simply by signing a bilateral treaty. On the other hand, there is nothing anomalous about having international courts enforce genuine international law.

### B. Trial Procedures

A second major set of contemporary objections to the ICC concerns its procedures. The Fifth and Sixth Amendments to the U.S. Constitution guarantee certain procedural rights to criminal defendants in federal court.<sup>346</sup> Critics claim that procedures the ICC uses would not afford due process comparable to that provided in U.S. courts.<sup>347</sup> However, as others have demonstrated, the ICC provides extensive procedural protections including:

the right to remain silent and the guarantee against compulsory self-incrimination, the presumption of innocence, the right to confront accusers and cross-examine witnesses, the right to have compulsory process to obtain witnesses, the obligation on the prosecutor to disclose exculpatory evidence, the right to a speedy and public trial, the right to assistance of counsel of one's own choosing, the right to a written statement of charges, the prohibition of *ex post facto* crimes, protection against double jeopardy, freedom from warrantless arrests and searches, the right to be present at trial and the prohibition of trials *in absentia*, exclusion of illegally obtained evidence, and the right to [the equivalent of] a "Miranda" warning.<sup>348</sup>

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terial support of terrorism" an international crime with a loose definition by way of a bilateral treaty with a small country like Palau, and then delegate enforcement of this law to a newly constituted International Terrorism Court affording few procedural protections to defendants. The source of legislative authority would plainly be the United States in such an example, not international law.

<sup>346</sup> The Fifth Amendment guarantees,

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

<sup>347</sup> See, e.g., Casey, *supra* note 45, at 841-42 (arguing that the United States joining the ICC would result in an unconstitutional abrogation of American citizens' rights).

<sup>348</sup> AM. SOC'Y OF INT'L LAW, *supra* note 4, at 42-43 (footnotes omitted).

The most salient objection thus concerns the absence of juries in the international court.<sup>349</sup> But a number of countries, including many in continental Europe, do not provide jury trials, and the United States routinely extradites defendants who have committed crimes in foreign territory to those countries. Under well-established principles of modern international law, American citizens may be subject to criminal prosecution by other countries based on “territoriality, passive personality, or protective jurisdiction.”<sup>350</sup> That is, U.S. citizens can be prosecuted abroad when they commit crimes within or having effects within foreign territory, where the victims are foreign nationals, or where the crime affects the fundamental interests of the foreign state—for example, counterfeiting a foreign currency or committing espionage against the foreign government.<sup>351</sup> The United States has

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<sup>349</sup> The Sixth Amendment guarantees the right to a jury trial for criminal prosecutions.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI. Article III of the Constitution reiterates this requirement.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

*Id.* art. III, § 2, cl. 3. In civil cases, the Due Process Clause of the Fifth Amendment requires that no person be “deprived of life, liberty or property, without due process of law,” *id.* amend. V, while the Seventh Amendment guarantees,

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

*Id.* amend. VII.

<sup>350</sup> AM. SOC’Y OF INT’L LAW, *supra* note 4, at x.

<sup>351</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). Another objection focuses on the differences between double jeopardy doctrine in the United States and in the ICC. The ICC statute contains an explicit provision on *ne bis in idem* (another name for double jeopardy) stating that “no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.” Rome Statute of the International Criminal Court art. 20(1), July 17, 1998, 2187 U.N.T.S. 90. The ICC statute also states,

extradited individuals for trial abroad even where the alleged criminal conduct occurred primarily within the territorial United States,<sup>352</sup> and United States courts do not require that foreign criminal procedures exactly track American criminal procedures in order to grant an extradition request.<sup>353</sup> Given that the slave-trade tribunals did not, in fact, exercise criminal jurisdiction, the accompanying debates shed little light on any of these questions; certainly, they do not strongly support the argument that extraditing an American citizen for a nonjury trial under the authority of an international or foreign court would be unconstitutional in all circumstances.

### CONCLUSION

Legal history can be a hazardous enterprise. In a common law country like the United States, legal texts gain meaning from interpretation over many years. This slow accretion of meaning is thought to lend a kind of Burkean wisdom to the legal system.<sup>354</sup> As a lawyer

No person who has been tried by another court for conduct also proscribed under [the Rome Statute] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

*Id.* art. 20(3).

While the United States considers a proceeding complete at the trial level and does not allow the prosecution to appeal an acquittal, the ICC (like courts in many other countries) does allow the prosecution to appeal an acquittal and permits the introduction of new evidence on appeal in limited circumstances. Thus, the ICC does not treat a decision as final for double jeopardy purposes until the appeal has been decided. *See id.* art. 18(4) (“The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber . . .”); *id.* art. 84(1)(a) (providing for appeal of convictions by the prosecutor on the basis of new evidence). As with nonjury trials, however, the United States extradites defendants to countries that follow similar rules in determining when double jeopardy protection attaches. *See* AM. SOC’Y OF INT’L LAW, *supra* note 4, at 45 (citing Germany as an example of a country with double jeopardy provisions similar to the ICC).

<sup>352</sup> *See* Scheffer & Cox, *supra* note 4, at 1019.

<sup>353</sup> *See id.* at 1011-12 (“Federal courts have rejected the notion that ‘each element of due process as known to American criminal law must be present in a foreign criminal proceeding before Congress may give a conviction rendered by a foreign tribunal binding effect.’” (quoting *Rosado v. Civiletti*, 621 F.2d 1179, 1197 (2d Cir. 1980))).

<sup>354</sup> *See, e.g.*, Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 407 (2006) (“Burkeanism is best defended on the ground that those who follow en-



trained to look for continuity between past precedents and current law, I certainly agree that debates over the constitutionality of international courts in the early nineteenth century are relevant and informative. Indeed, I have argued that the slave-trade courts are an important precedent for modern international human rights courts and need to be given greater attention.

Nevertheless, it is important to be cautious in examining debates from another time, for it is easy to misread old words in light of current issues. On the whole, I believe Kontorovich's argument fails under close analysis because he has not sufficiently grasped the legal and political context in which the debates he recounts were made. There may be good reasons to be concerned about participation in the ICC and to spend time contemplating the policy and constitutional implications of such participation. But these debates from the 1820s should not stop today's debate completely, nor should they prevent us from thinking about the International Criminal Court in light of the concerns and issues of the modern world.

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trenched practices, or who attempt humbly to build on them, will do much better than those who abandon traditions or evaluate them by reference to an abstract theory.”).

## APPENDIX

**Table 1: Treaties Related to the Slave Trade Through 1820**

Date	Treaty
1818	Treaty Between His Britannic Majesty and His Majesty the King of the Netherlands, for Preventing Their Subjects from Engaging in Any Traffic in Slaves, May 4, 1818, Gr. Brit.-Neth., 5 B.S.P. 125 (1817-18), 68 Consol. T.S. 403 (1817-18).
1817	Treaty Between Great Britain and Spain, for the Abolition of the Slave Trade, Sept. 23, 1817, Gr. Brit.-Spain, 4 B.S.P. 33 (1816-17), 68 Consol. T.S. 45 (1817-18).
1817	Additional Convention Between Great Britain and Portugal, for the Prevention of Slave Trade, July 28, 1817, Gr. Brit.-Port., 4 B.S.P. 85 (1816-17), 67 Consol. T.S. 373 (1817).
1816	Declaration of the Dey of Algiers, Relative to the Abolition of Christian Slavery, Aug. 28, 1816, Algiers-Gr. Brit., 3 B.S.P. 517 (1815-16), 66 Consol. T.S. 299 (1816-17).
1816	Declaration of the Bay of Tripoli, Relative to the Abolition of Christian Slavery, Apr. 29, 1816, Gr. Brit.-Tripoli, 3 B.S.P. 515 (1815-16), 66 Consol. T.S. 43 (1816-17).
1816	Declaration of the Bey of Tunis, Relative to the Abolition of Christian Slavery, Apr. 17, 1816, Gr. Brit.-Tunis, 3 B.S.P. 513 (1815-16), 66 Consol. T.S. 7 (1816-17).
1815	Declaration des 8 Cours, relative d l'Abolition Universelle de la Traite des Nègres [Declaration of the Eight Courts Relative to the Universal Abolition of the Slave Trade], Feb. 8, 1815, 3 B.S.P. 971 (1815-16), 63 Consol. T.S. 473 (1813-15).
1815	Treaty Between Great Britain and Portugal, for the Restriction of the Portuguese Slave-Trade; and for the Annulment of the Convention of Loan of 1809, and Treaty of Alliance of 1810, Jan. 22, 1815, Gr. Brit.-Port., 2 B.S.P. 348 (1814-15), 63 Consol. T.S. 459 (1813-15).

Date	Treaty
1814	Treaty of Peace and Amity Between His Britannic Majesty and the United States of America, U.S.-Gr. Brit., art. X, Dec. 24, 1814, 8 Stat. 218.
1814	Treaty of Friendship and Alliance Between His Britannic Majesty and His Catholic Majesty Ferdinand VII, July 5, 1814, Gr. Brit.-Spain, 1 B.S.P. 273 (1812-14), 63 Consol. T.S. 259 (1813-15).
1814	Definitive Treaty of Peace and Amity Between His Britannic Majesty and His Most Christian Majesty, May 30, 1814, Fr.-Gr. Brit., 1 B.S.P. 151 (1812-14), 63 Consol. T.S. 171 (1813-15).
1814	Treaty of Peace Between His Britannic Majesty and His Majesty the King of Denmark, Jan. 14, 1814, Den.-U.K., 1 B.S.P. 234 (1812-14), 63 Consol. T.S. 33 (1813-15).
1813	Treaty of Concert and Subsidy Between His Britannic Majesty and the King of Sweden, Mar. 3, 1813, Gr. Brit.-Swed., 1 B.S.P. 296 (1812-14), 62 Consol. T.S. 147 (1812-13).

**Table 2: Treaties Related to the Slave Trade from 1820-1850**

Date	Treaty
1849	Engagement Between Her Majesty and Syed Syf bin Hamood, the Chief of Sohar, in Arabia, for the More Effectual Suppression of the Slave Trade, May 22, 1849, Arabia-U.K., 42 B.S.P. 700 (1852-53), 103 Consol. T.S. 83 (1849-50).
1849	Protocol of a Conference Between Great Britain and of France, for the Suppression of the Slave Trade, May 18, 1849, Fr.-Gr. Brit, 38 B.S.P. 480 (1849-50), 103 Consol. T.S. 51 (1849-50).
1848	Additional Articles to the Treaty Concluded at the Hague, May 4, 1818, Between Great Britain and the Netherlands, for the Suppression of the Slave Trade, Aug. 31, 1848, Gr. Brit.-Neth., 36 B.S.P. 449 (1847-48), 102 Consol. T.S. 327 (1847-49).

Date	Treaty
1848	Treaty Between Great Britain, Austria, Prussia, and Russia, on the One Part, and Belgium on the Other, Containing the Accession of Belgium to the Treaty Signed at London, December 20, 1841, for the Suppression of the African Slave Trade, Feb. 24, 1848, 36 B.S.P. 397 (1847-48), 102 Consol. T.S. 95 (1847-49).
1847	Protocol of a Conference Held at the Foreign Office, August 12, 1847, Between the Plenipotentiaries of Great Britain and of Portugal, Aug. 12, 1847, Gr. Brit.-Port., 36 B.S.P. 589 (1847-48), 101 Consol. T.S. 273 (1847).
1847	Treaty of Friendship and Commerce, and for the Suppression of the Slave Trade, Between Great Britain and Borneo, May 27, 1847, Borneo-Gr. Brit., 35 B.S.P. 14 (1846-47), 101 Consol. T.S. 73 (1847).
1847	Engagement Entered into by Sheik Sultan ben Suggester, Chief of Ras el Khyma and Chargah, for the Abolition of the African Slave Trade in His Ports, Apr. 30, 1847, Trucial Sheikdoms of Oman & Bahrein-U.K., 36 B.S.P. 691 (1847-48), 101 Consol. T.S. 3 (1847).
1845	Protocole d'une Conférence tenue au Foreign Office, le 3 octobre, 1845. Présents—les Plénipotentiaires d'Autriche, de la Grande Bretagne, de Prusse, et de Russie [Protocol of a Conference Held at the Foreign Office, October 3, 1845. Present—the Plenipotentiaries of Austria, Great Britain, Prussia, and Russia], Oct. 3, 1845, 34 B.S.P. 813 (1845-46), 99 Consol. T.S. 29 (1845-46).
1845	Agreement with the Sultan of Muscat, Oct. 2, 1845, Muscat-U.K., 35 B.S.P. 632 (1846-47), 99 Consol. T.S. 25 (1845-46).
1845	Articles additionnels, du 23 juin 1845, aux conventions passées entre la France et le Roi Fanatoro du Village de Fanama (Rivière du Cap de Monte), pour la suppression de la Traite [Additional Articles, from June 23, 1845, to the Conventions Passed Between France and King Fanatoro of the Village of Fanama (River of Cape Mount), for the Suppression of the Trade], June 23, 1845, Fanama-Fr., 5 RECUEIL DES TRAITÉS 298 (1843-49); 98 Consol. T.S. 279 (1845).

Date	Treaty
1845	Convention Between Great Britain and France, for the Suppression of the Traffic in Slaves, May 29, 1845, Gr. Brit.-Fr., 33 B.S.P. 4 (1844-45), 98 Consol. T.S. 219 (1845).
1844	Treaty Between Her Majesty the Queen of England and King William of Bimbia, for the Abolition of the Slave Trade, Agreed upon Between King William and Lieutenant Earle, of Her Britannic Majesty's Brig <i>Rapid</i> , Feb. 17, 1844, Bimbia-Gr. Brit., 35 B.S.P. 320 (1846-47), 96 Consol. T.S. 189 (1843-44).
1844	Declaration Supplemental to the Slave Trade Treaty, Feb. 16, 1844, U.K.-Tex., 33 B.S.P. 592 (1844-45), 96 Consol. T.S. 187 (1843-44).
1841	Treaty Between Great Britain, Austria, France, Prussia, and Russia, for the Suppression of the African Slave Trade, Dec. 20, 1841, 30 B.S.P. 269 (1841-42), 92 Consol. T.S. 437 (1841-42).
1841	Additional and Explanatory Convention Between Great Britain and Chile, for the Abolition of the Traffic in Slaves, Aug. 7, 1841, Chile-Gr. Brit., 30 B.S.P. 301 (1841-42), 92 Consol. T.S. 25 (1841-42).
1841	Treaty Between Great Britain and the Equator, for the Abolition of the Traffic in Slaves, July 5, 1847, Ecuador-Gr. Brit., 30 B.S.P. 304 (1841-42), 91 Consol. T.S. 429 (1840-41).
1841	Treaty Between Great Britain and Mexico, for the Abolition of the Traffic in Slaves, Feb. 24, 1841, Gr. Brit.-Mex., 29 B.S.P. 55 (1840-41), 91 Consol. T.S. 255 (1840-41).
1840	Treaty Between Great Britain and Texas, for the Suppression of the African Slave Trade, Nov. 16, 1840, Gr. Brit.-Tex., 29 B.S.P. 85 (1840-41), 91 Consol. T.S. 147 (1840-41).
1840	Treaty Between Great Britain and Bolivia, for the Abolition of the Traffic in Slaves, Sept. 25, 1840, Bol.-Gr. Brit., 29 B.S.P. 9 (1840-41), 90 Consol. T.S. 471 (1840).

<b>Date</b>	<b>Treaty</b>
<b>1840</b>	Convention conclue à Port-au-Prince, le 29 août 1840, entre la France et la République d'Haïti, dans le but d'assurer la répression de la Traite des Noirs [Convention Concluded in Port-au-Prince, on August 29, 1840, Between France and the Republic of Haiti, with the Intention of Ensuring the Suppression of the Trade in Black People], Aug. 29, 1840, Fr.-Haiti, 4 RECUEIL DES TRAITÉS 586 (1831-42); 90 Consol. T.S. 369 (1840).
<b>1839</b>	Convention Between Great Britain and Hayti, for the More Effectual Suppression of the Slave Trade, Dec. 23, 1839, Gr. Brit.-Haiti, 28 B.S.P. 1158 (1839-40), 89 Consol. T.S. 451 (1839-40).
<b>1839</b>	Treaty Between Great Britain and the Uruguay, for the Abolition of the Traffic in Slaves, July 13, 1839, Gr. Brit.-Uru., 28 B.S.P. 292 (1839-40), 90 Consol. T.S. 151 (1839-40).
<b>1839</b>	Treaty Between Great Britain and the Argentine Confederation, for the Abolition of the Slave Trade, May 24, 1839, Arg.-Gr. Brit., 29 B.S.P. 813 (1840-41), 89 Consol. T.S. 1 (1839-40).
<b>1839</b>	Treaty Between Great Britain and Venezuela, for the Abolition of the Slave Trade, Mar. 15, 1839, Gr. Brit.-Venez., 27 B.S.P. 969 (1838-39), 88 Consol. T.S. 359 (1838-39).
<b>1839</b>	Treaty Between Great Britain and Chile, for the Abolition of the Traffic in Slaves, Jan. 19, 1839, Gr. Brit.-Chile, 28 B.S.P. 260 (1839-40), 88 Consol. T.S. 231 (1838-39).
<b>1837</b>	Convention Between Great Britain and France and Tuscany, Containing the Accession of the Grand Duke of Tuscany to 2 Conventions Between Great Britain and France, for the More Effectual Suppression of the Slave Trade, Nov. 24, 1837, 26 B.S.P. 285 (1837-38), 87 Consol. T.S. 221 (1837-38).
<b>1837</b>	Convention Between Great Britain, France, and the Hans Towns, Containing the Accession of the Hans Towns to 2 Conventions Between Great Britain and France, for the More Effectual Suppression of the Slave Trade, June 9, 1837, 26 B.S.P. 268 (1837-38), 87 Consol. T.S. 19 (1837-38).

<b>Date</b>	<b>Treaty</b>
<b>1836</b>	Ordonnance du Roi des Français, qui prescrit la publication de la Convention conclue, le 21 mai, 1836, entre la France et le Royaume de Suède et de Norwége, pour la répression du Crime de la Traite des Noirs [Ordinance of the King of the French, Which Prescribes the Publication of the Convention Concluded on May 21, 1836, Between France and the Swedish and Norwegian Kingdom, for the Suppression of the Crime of the Trade of Blacks], May 21, 1836, Fr.-Swed. & Nor., 24 B.S.P. 556 (1835–36), 86 Consol. T.S. 151 (1836–37).
<b>1835</b>	Treaty Between His Majesty and the Queen Regent of Spain, During the Minority of her Daughter, Donna Isabella the Second, Queen of Spain, for the Abolition of the Slave Trade, June 28, 1835, Gr. Brit.-Spain, 23 B.S.P. 343 (1834–35), 85 Consol. T.S. 177 (1834–36).
<b>1835</b>	Additional Article to the Treaty Concluded at Stockholm, November 6, 1824, Between Great Britain and Sweden, for the Prevention of the Traffic in Slaves, June 15, 1835, Gr. Brit.-Swed., 23 B.S.P. 339 (1834–35), 85 Consol. T.S. 173 (1834–36).
<b>1834</b>	Treaty Between Great Britain and France, and Sardinia, for the More Effectual Suppression of the Slave Trade, Aug. 8, 1834, 22 B.S.P. 1059 (1833–34), 84 Consol. T.S. 393 (1833–34).
<b>1834</b>	Treaty Between Great Britain and France and Denmark, Containing the Accession of Denmark to the Conventions of 1831 and 1833, Between Great Britain and France, for the More Effectual Suppression of the Slave Trade, July 26, 1834, 22 B.S.P. 218 (1833–34), 84 Consol. T.S. 383 (1833–34).
<b>1833</b>	Supplementary Convention Between His Majesty and the King of the French, for the More Effectual Suppression of the Traffic in Slaves, Mar. 22, 1833, Fr.-Gr. Brit., 20 B.S.P. 286 (1832–33), 83 Consol. T.S. 259 (1832–33).

Date	Treaty
1831	Convention Between Great Britain and France, for the More Effectual Suppression of the Traffic in Slaves, Nov. 30, 1831, Fr.-Gr. Brit., 18 B.S.P. 641 (1830-31), 82 Consol. T.S. 271 (1831-32).
1826	Convention Between Great Britain and Brazil, for the Abolition of the African Slave Trade, Nov. 23, 1826, Braz.-Gr. Brit., 14 B.S.P. 609 (1826-27), 76 Consol. T.S. 491 (1825-26).
1824	Treaty Between His Britannick Majesty and His Majesty the King of Sweden and Norway, for Preventing Their Subjects from Engaging in any Traffick in Slaves, Nov. 6, 1824, Gr. Brit.-Swed. & Nor., 12 B.S.P. 3 (1824-25), 75 Consol. T.S. 1 (1824-25).
1824	The Convention, U.S.-U.K., art. X, <i>done</i> Mar. 13, 1824 (not ratified), <i>in</i> 1 REG. DEB. app. at 14 (1824).
1822	Explanatory and Additional Articles to the Treaty of the 4th of May, 1818, Between Great Britain and the Netherlands, for the Prevention of the Traffick in Slaves, Dec. 31, 1822, Gr. Brit.-Neth., 10 B.S.P. 554 (1822-23), 73 Consol. T.S. 75 (1822-24).
1822	Explanatory and Additional Articles to the Treaty Between Great Britain and Spain, Dec. 10, 1822, Gr. Brit.-Spain, 10 B.S.P. 87 (1822-23), 73 Consol. T.S. 33 (1822-24).