Articles

When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in *Hamdan* and *Sanchez-Llamas*

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In both Hamdan v. Rumsfeld *and* Sanchez-Llamas v. Oregon*, government briefs asserted that there is a "long-established presumption" that treaties do not create judicially-enforceable individual rights. In his dissent in* Sanchez-Llamas*, Justice Breyer challenged this claim. The debate about whether the Supreme Court should adopt such a presumption is part of a broader conflict between the "nationalist" and "transnationalist" models of treaty enforcement. The transnationalist model applies a presumption in favor of domestic judicial remedies for violations of treaty-based individual rights. In contrast, the nationalist model applies a presumption against individual remedies for treaty violations. This article analyzes the historical foundations of both models. It demonstrates that doctrines involving the domestic judicial enforcement of treaties have changed dramatically in the past thirty years. Between 1789 and 1975, there was not a single judicial decision endorsing the nationalist presumption against private enforcement of treaty rights. In contrast, there were dozens of Supreme Court decisions that applied the transnationalist pre-*

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sumption in favor of domestic judicial remedies. Although the nationalist presumption against individual enforcement of treaties has gained widespread acceptance in the lower courts in the past thirty years, the Supreme Court has never endorsed that presumption. The Court's decisions in Hamdan *and* Sanchez-Llamas *declined to endorse either the nationalist or transnationalist presumption, but the Court's ultimate resolution of the conflict between the nationalist and transnationalist models will have significant implications for U.S. foreign relations, separation of powers, and the rule of law.*

I. INTRODUCTION

In both *Hamdan v. Rumsfeld*[1] and *Sanchez-Llamas v. Oregon*,[2] the government urged the Supreme Court to adopt the "long-established presumption that treaties and other international agreements do not create judicially enforceable individual rights."[3] One problem with the government's argument, as Justice Breyer noted in his dissent in *Sanchez-Llamas*, "is that no such presumption exists."[4] Although lower federal courts first adopted a presumption against judicial enforcement of treaties in the 1980s, the Supreme Court has never adopted that presumption. The Supreme Court dodged the is-

1. 126 S. Ct. 2749 (2006).
2. 126 S. Ct. 2669 (2006).
3. Brief for the United States as Amicus Curiae Supporting Respondents at 11, Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006) (Nos. 05-51 and 04-10566), 2006 WL 271823 [hereinafter Gov't Sanchez-Llamas Brief]. *See also* Brief for Respondents at 30, Hamdan v. Rumsfeld, 126 S. Ct 2749 (2006) (No. 05-184), 2006 WL 460875 [hereinafter Gov't Hamdan Brief] ("The long-established presumption is that treaties and other international agreements do not create judicially enforceable rights.").
4. *Sanchez-Llamas*, 126 S. Ct. at 2697 (Breyer, J., dissenting).

sue in both *Hamdan* and *Sanchez-Llamas*, neither endorsing nor rejecting the proposed presumption against individual enforcement of treaties. Even so, given the volume of treaty litigation in U.S. courts today, and given the government's persistent advocacy in support of a presumption that treaties do not create individually enforceable rights, the Court is likely to confront the issue again soon.

The debate about whether the Supreme Court should adopt a presumption that treaties do not create individually enforceable rights is part of a broader conflict between the "nationalist" and "transnationalist" models of treaty enforcement.[5] The two models diverge in two critical respects. First, they adopt conflicting approaches to questions of treaty interpretation and primary individual rights. The transnationalist model applies the twin canons of good faith and liberal interpretation. The liberal interpretation canon—which states that "treaties should be liberally interpreted with a view to protecting the citizens of the respective countries in rights thereby secured"[6]—creates a presumption in favor of an expansive view of primary individual rights. In contrast, the nationalist model applies the canon of deference to the executive branch. That canon states: "Although not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight."[7] On its face, the canon of deference to the executive branch says nothing about the scope of primary individual rights under treaties. In practice, however, deference to the executive usually leads courts to adopt a restrictive view of the scope of treaty-based individual rights.

The nationalist and transnationalist models also apply conflicting approaches to questions involving domestic remedies for treaty violations. Whereas issues involving treaty-based primary rights are properly viewed as treaty interpretation questions, which are governed mainly by international law, issues involving domestic judicial remedies for treaty violations are governed chiefly by principles of domestic remedial law. Here, the transnationalist model applies a presumption in favor of domestic judicial remedies for violations of treaty-based individual rights.[8] This presumption is

5. Dean Harold Koh has suggested a similar usage of the terms "nationalist" and "transnationalist." *See, e.g.*, Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1513–14 (2003). However, this article introduces a novel presentation of the two models.

6. Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 581 (1908).

7. Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982).

8. This article uses the terms "individual treaty rights" and "treaty-based individual rights" to refer to primary rights, not remedial rights. On the distinction between primary

expressed in the traditional maxim "that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."[9] While it recognizes exceptions to this principle, the transnationalist model asserts that in cases where a court has jurisdiction, the court does not need express authorization from the political branches to provide judicial remedies for violations of individual treaty rights, because it is the judiciary's responsibility within our system of divided government to supply the remedy for violations of treaty-based individual rights.[10]

In contrast, the nationalist model applies a presumption against domestic judicial remedies for treaty violations. Under this model of treaty enforcement, courts lack authority to provide remedies for violations of individual treaty rights unless the treaty itself creates a private right of action, or Congress has enacted legislation authorizing private enforcement of the treaty in domestic courts.[11] Courts applying the nationalist presumption against private enforcement generally dodge the question whether the treaty at issue creates primary individual rights, and decide the case on the ground that individuals are not empowered to enforce the treaty in domestic courts. The D.C. Circuit applied the nationalist presumption against judicial remedies in *Hamdan*,[12] as did the Oregon Supreme Court in *Sanchez-Llamas*.[13]

Defenders of the nationalist and transnationalist models emphasize different normative arguments. Nationalists emphasize the importance of minimizing constraints on the President's flexibility in implementing foreign policy. A broad view of primary individual rights under treaties, as expressed in the canon of liberal interpretation, leads to increased constraints on the executive branch: the

rights and remedial rights, see *infra* notes 24–34 and accompanying text.

9. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.) (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *23).

10. *See, e.g.*, THE FEDERALIST NO. 22, at 182 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.").

11. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) ("Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action.").

12. Hamdan v. Rumsfeld, 415 F.3d 33, 38 (D.C. Cir. 2005) ("[T]his country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights.").

13. State v. Sanchez-Llamas, 108 P.3d 573, 576 (Or. 2005) (interpreting past precedent to mean that there is "a presumption *against* the creation of individual, judicially enforceable rights" by means of treaties) (emphasis in original).

broader the scope of individual rights, the greater the restrictions on the exercise of governmental powers. Hence, nationalists counter the canon of liberal interpretation with the canon of deference to the executive branch.[14] Similarly, from a nationalist perspective, the transnationalist presumption in favor of judicial enforcement of treaty-based individual rights inevitably results in judicial interference with Presidential discretion in choosing how best to implement treaties. In contrast, the nationalist presumption against judicial enforcement of treaties maximizes executive discretion by minimizing the opportunities for judicial involvement in treaty-related questions.[15]

Whereas nationalists emphasize the importance of Presidential discretion, transnationalists emphasize two competing values: harmonious foreign relations in the international sphere and the rule of law in the domestic sphere. Transnationalists endorse the twin canons of good faith and liberal interpretation because judicial application of these canons helps promote amicable relations with U.S. treaty partners.[16] In contrast, judicial deference to the executive branch frequently results in judicial decisions that generate friction with U.S. treaty partners. Moreover, transnationalists note that application of the presumption against judicial enforcement of treaties encourages judges to turn a blind eye to ongoing violations of U.S. treaty obligations by federal, state, and local government officers. Insofar as treaties have the status of supreme federal law in the U.S. constitutional system,[17] judicial inaction in the face of ongoing treaty violations by government officers is incompatible with fundamental rule of law values. Furthermore, persistent judicial refusal to provide remedies for foreign nationals harmed by U.S. treaty violations also generates friction with U.S. treaty partners.

Analysis of the normative arguments for and against the na-

14. *See* John C. Yoo, *Politics as Law? The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001) [hereinafter Yoo, *Politics as Law*] (contending that the power to interpret treaties is an executive power, and that the judiciary is therefore required to defer to the views of the executive branch on treaty interpretation issues); John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002) [hereinafter Yoo, *Rejoinder*] (same).

15. *See* John C. Yoo, *Rejoinder: Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2248 (1999) ("By refusing to enforce treaties . . . the courts can avoid the difficult policy questions inherent in determining how best to execute the nation's international obligations.").

16. *See* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1932–36 (2005) (noting that judicial application of the canons of good faith and liberal interpretation helps promote amicable international relations by minimizing treaty violations).

17. U.S. CONST. art. VI, cl. 2 (stipulating that treaties are the "supreme Law of the Land").

tionalist and transnationalist models merits a separate article. In contrast, the focus of this article is primarily historical. Proponents of both the nationalist and transnationalist models advance historical arguments in support of their respective positions. History may not be decisive in resolving the conflict between the two models, but it likely will be important.

The historical analysis herein is the first phase of a larger project to trace the history of judicial enforcement of treaties in U.S. courts from 1789 to the present. This article presents a comprehensive analysis of Supreme Court decisions in treaty cases during the first fifty years of U.S. constitutional history, from 1789 to 1838. It then presents a brief sketch of developments since 1838. The bulk of the analysis is devoted to issues involving domestic remedies for treaty violations, an area that has received very little scholarly attention.[18] In contrast, discussion of issues involving treaty interpretation and primary rights is much less detailed, largely because other scholars have analyzed these issues in great depth.[19] This article adds to the already extensive literature on treaty interpretation by linking it to

18. The doctrine of self-executing treaties has been the subject of extensive scholarly commentary. *See especially* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) [hereinafter Vazquez, *Four Doctrines*]; Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) [hereinafter, Vazquez, *Laughing*]; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); Yoo, *supra* note 15. Although the self-execution literature touches upon questions involving individual enforcement of treaty rights in domestic courts, most of the articles cited above focus on the distinct but related question of the status of treaties as law in the U.S. constitutional system. The last major article to focus on individual enforcement of treaty rights, apart from the self-execution question, was written almost fifteen years ago. *See* Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097–114 (1992) [hereinafter Vazquez, *Treaty-Based Rights*]. The present article is the first to trace the historical evolution of judicial doctrine related to individual enforcement of treaty rights.

19. *See especially* David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999) [hereinafter Bederman, *Deference or Deception*]; David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994) [hereinafter Bederman, *Revivalist Canons*]; Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25 (2005); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998); Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263 (2002) [hereinafter Van Alstine, *Treaty Delegation*]; Van Alstine, *supra* note 16; Yoo, *Politics as Law*, *supra* note 14; Yoo, *Rejoinder*, *supra* note 14; Robert M. Chesney, *Unraveling Deference:* Hamdan*, the Judicial Power, and Executive Treaty Interpretations*, 92 IOWA L. REV. (forthcoming 2006–07), *available at* http://ssrn.com/abstract=931997. *See also* David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, N.Y.U. ANN. SURV. AM. L. (forthcoming 2006–07).

questions of domestic judicial remedies and to the broader conflict between the nationalist and transnationalist models.

The historical analysis in this article says very little about *why* certain doctrinal changes have occurred; that is a subject for future work. Instead, the main goal here is to show *when* key changes occurred. Readers may be surprised to learn that doctrines involving the domestic judicial enforcement of treaties have changed dramatically in the past thirty years. If one surveyed judicial decisions from 1789 to 1975, one could not find a single decision endorsing the nationalist presumption against individual enforcement of treaty rights. In contrast, one could find dozens of Supreme Court decisions that applied the transnationalist presumption in favor of individual enforcement of treaty-based primary rights.[20] Thus, the government's claim that there is "a long-established presumption that treaties . . . do not create judicially enforceable individual rights"[21] is utterly false. Moreover, although the nationalist presumption against individual enforcement of treaties has gained widespread acceptance in the lower courts in the past two decades, the Supreme Court has never endorsed that presumption.

This article is divided into four parts. Part Two provides a conceptual overview of the distinction between the nationalist and transnationalist models. Part Three analyzes the Supreme Court decisions in *Hamdan v. Rumsfeld* and *Sanchez-Llamas v. Oregon*, as they relate to the conflict between the nationalist and transnationalist models. The Court resolved both cases in a manner that dodged the question whether there is a presumption for or against judicial enforcement of individual treaty rights. Analysis of the individual opinions in the two cases suggests that the Court is deeply divided on the issue of judicial remedies for treaty violations. Justices Stevens, Souter, Ginsburg, and Breyer apparently support the transnationalist presumption in favor of individual remedies for treaty violations. Chief Justice Roberts, as well as Justices Scalia, Thomas, and Alito, seem to prefer the nationalist presumption against domestic judicial remedies. In the next case where this issue is squarely presented, Justice Kennedy is likely to be the decisive swing vote.

Since the conflict between the nationalist and transnationalist models will not disappear, and since the Court's understanding of history will likely influence its resolution of that conflict, Parts Four

20. *See infra* notes 166–265, 396–424 and accompanying text (discussing cases in which the Supreme Court applied the transnationalist presumption in favor of judicial remedies).

21. Gov't Sanchez-Llamas Brief, *supra* note 3, at 11.

and Five analyze the historical foundations of the nationalist and transnationalist models. Part Four presents a comprehensive analysis of Supreme Court decisions during the first fifty years of U.S. constitutional history in cases where an individual litigant raised a claim or defense on the basis of a treaty. There were fifty-eight such cases altogether. The analysis demonstrates that, during this period, the Supreme Court consistently applied the transnationalist presumption in favor of judicial remedies for violations of individual treaty rights; it never applied the nationalist presumption against judicial enforcement of treaties. This conclusion is significant for two reasons. First, for those who believe that courts should decide cases in accordance with the original understanding, the analysis provides evidence that the Founders understood the judicial role in treaty enforcement in accordance with the transnationalist model, not the nationalist model.[22] Second, for those who value judicial precedent over original intent, it documents the "front end" of a two-hundred year tradition in which the Supreme Court has consistently applied the transnationalist presumption in favor of judicial remedies.

Part Five briefly sketches doctrinal developments since 1838. Professor Edward White has demonstrated that there was a dramatic transformation in the constitutional regime of foreign relations in the period between the two World Wars, which consolidated foreign relations power in the federal executive branch at the expense of other constitutional actors.[23] Part Five shows that there has been a further transformation of foreign affairs law in the post-World-War-II era. In the years since World War II, the nationalist approach to treaty interpretation has largely supplanted the transnationalist approach; this trend increases the concentration of foreign affairs power in the executive branch. However, with respect to domestic judicial remedies, the transnationalist model retains its vitality. The Supreme Court has never endorsed the nationalist presumption against private enforcement of treaties. Rather, that presumption emerged from a set of federal circuit court decisions in the period from 1976 to 1984.

22. The author does not claim that the analysis of Supreme Court decisions in the first fifty years of constitutional history provides conclusive proof of the Framers' original understanding. Nevertheless, the analysis is instructive because it shows a consistent pattern of judicial decision-making that conforms to the transnationalist model. That consistent pattern reinforces the conclusions that other scholars have reached by examining Founding-era sources. *See* Flaherty, *supra* note 18, at 2118–19 (contending that the Framers included treaties in the Supremacy Clause to ensure that courts would enforce U.S. treaty obligations); Vazquez, *Treaty-Based Rights*, *supra* note 18, at 1101–10 (contending the same).

23. G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

II. TWO MODELS OF TREATY ENFORCEMENT: NATIONALISM VS. TRANSNATIONALISM

This article documents the dominance of the transnationalist model in the early nineteenth century, and the rise of the nationalist model in the second half of the twentieth century. To lay the groundwork for that historical analysis, Part Two provides an overview of the conceptual distinction between the nationalist and transnationalist models. The first section discusses the relationship between primary law and remedial law. The second section compares nationalist and transnationalist approaches to questions of treaty interpretation and primary rights. The final section explains how the two models diverge in their approach to questions involving domestic remedies for treaty violations.

A. Primary Rights and Judicial Remedies

A primary legal rule specifies what the lawmaker "expects or hopes to happen when the arrangement works successfully."[24] A remedial rule, in contrast, "directs that a certain consequence, or sanction, may or shall follow upon an acknowledgment or formal official determination of noncompliance with the relevant primary provision."[25] According to Hart and Sacks, the concept of a primary duty is "the central conception of regulatory law."[26] A primary duty is "an authoritatively recognized obligation . . . not to do something, or to do it, or to do it if at all only in a prescribed way."[27]

A primary right "is the mere obverse of the duty."[28] Thus, an individual has a primary right under a treaty if the treaty imposes a duty on the state party "not to do something" to that individual, "or to do it" for that individual, "or to do it if at all only in a prescribed way." For the purposes of this article, therefore, a treaty "protects individual rights," or "creates individual rights," if an individual has a primary right under the treaty. Treaties frequently create or protect individual rights. Under the transnationalist model, treaty provisions that protect individual rights are generally judicially enforceable, regardless of whether the treaty creates an express private right of ac-

24. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 122 (1994) [hereinafter HART & SACKS].
25. *Id.*
26. *Id.* at 130.
27. *Id.*
28. *Id.* at 137.

tion.

Whereas legal rules that create or protect individual rights are primary legal rules, legal provisions that create private rights of action are remedial legal rules. A private right of action, according to Hart and Sacks, "is a capacity to invoke the judgment of a [court] . . . upon a disputed question about the application of [primary rules] and to secure, if the claim proves to be well-founded, an appropriate official remedy."[29] Treaties rarely create express private rights of action.[30] Under the nationalist model, a treaty that does not create an express private right of action is generally not judicially enforceable, even if the treaty protects individual rights.

Since Hart and Sacks wrote their classic treatise, the term "private right of action" has acquired a slightly different meaning. In contemporary usage, lawyers and judges say that a statute, for example, creates a private right of action if it grants an individual plaintiff a right of access to court. Under this definition, a defendant does not need a right of action because a defendant has been haled into court against his will. In contrast to this usage, which prevails in the statutory context, some courts in recent treaty cases have insisted that a defendant cannot obtain a remedy for a treaty violation unless the treaty creates a private right of action.[31] This usage of the term is consistent with the Hart and Sacks definition, which defines a private right of action in terms of the individual's power to invoke a treaty (or other law) before a court, rather than an individual's right of access to court. For the purposes of this article, a treaty creates a private right of action if it grants an individual a right of access to domestic court *or* it empowers the individual to invoke the treaty before that court.[32] The term "private cause of action" is used interchangeably with the term "private right of action."[33] Where appropriate, the article will distinguish between a "right of access" and a "power to invoke." Throughout the article, the terms "private right of action"

29. *Id.*

30. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987) [hereinafter RESTATEMENT] ("International agreements, even those directly benefiting private persons, generally do not . . . provide for a private cause of action in domestic courts . . . .").

31. *See, e.g.*, State v. Sanchez-Llamas, 108 P.3d 573, 575–76 (Or. 2005).

32. Some modern treaties expressly authorize individuals to invoke the treaty before an international tribunal. Such treaty provisions would satisfy Hart and Sacks' definition of a private right of action. Since this article focuses on judicial enforcement of treaties in domestic courts, though, this article defines the term "private right of action" with respect to domestic courts, not international tribunals.

33. In some cases, lawyers and judges use the term "cause of action" to refer to primary law rather than remedial law. In this article, though, the term "private cause of action" refers to a remedial right, not a primary right.

and "power to invoke" refer to the individual's power to invoke a treaty before a court, not the court's power to enforce the treaty on behalf of an individual.[34]

B. Treaty Interpretation and Primary Rights

To determine whether a treaty creates "individually enforceable rights," a court must address, explicitly or implicitly, three distinct questions: (1) Does the treaty have the status of domestic law in the United States? (2) Does the treaty create primary individual rights? (3) Does the individual litigant have a right of action to enforce his treaty-based primary rights? The first question is a question of domestic constitutional law that the author has analyzed in detail elsewhere.[35] Unless otherwise specified, this article assumes that all treaties under consideration have the status of domestic law in the United States.

This article focuses mainly on the third question: When do individuals have a right of action to obtain domestic judicial remedies for treaty violations? Even so, it is necessary to discuss briefly the methodology that courts utilize to determine whether an individual has a primary right under a treaty. In cases where a treaty does not create an express private right of action (which is the norm), courts have historically looked to domestic statutory and common law to supply the right of action to enforce treaty-based primary rights.[36] Thus, if a treaty does not create an express private right of action, the question of individual rights of action for treaty violations is governed principally by domestic remedial law. In contrast, the question whether an individual has a primary right under a treaty is a question of treaty interpretation. There is no domestic statutory or common law that a court could consult to answer that question, so the court must analyze the treaty itself to determine whether it creates primary individual rights. In short, whereas questions concerning rights of action are governed largely by domestic remedial law, the question whether a treaty creates primary individual rights is properly viewed as a matter of treaty interpretation.

Nationalists and transnationalists adopt different approaches

34. The court's power to enforce a treaty on behalf of an individual is a function of jurisdiction. If a court has jurisdiction over a claim, and an individual has the power to invoke a treaty, then the court has the power to enforce the treaty on behalf of that individual.

35. *See* Sloss, *supra* note 18.

36. *See infra* Part IV(A)(3).

to treaty interpretation. Transnationalists maintain that treaty interpretation should be governed primarily (but not exclusively) by principles of international law because treaties are international legal instruments.[37] Nationalists, in contrast, contend that treaty interpretation should be governed largely by principles of federal law because treaties have the status of supreme federal law.[38] This is not a black-and-white distinction; it is a matter of emphasis. Thus, for example, nationalists agree that U.S. courts should ordinarily construe treaties in accordance with the internationally agreed understanding of their terms.[39] Even so, the difference in emphasis between nationalist and transnationalist approaches can yield dramatically different results in concrete cases.

The transnationalist model of treaty interpretation applies the twin canons of good faith and liberal interpretation. The canon of good faith stipulates that treaties "are to be kept in most scrupulous good faith,"[40] and that a treaty "should be interpreted . . . in a manner to carry out its manifest purpose."[41] The companion canon of liberal interpretation adds: "treaties should be liberally interpreted with a view to protecting the citizens of the respective countries in rights thereby secured."[42] The canon of good faith emphasizes mutuality of obligation: we should extend to the citizens of our treaty partners the same consideration that we would want them to extend to U.S. citizens. The canon of liberal interpretation applies a presumption in favor of primary individual rights: when in doubt, the treaty should be interpreted to protect primary individual rights.[43] When combined with the transnationalist presumption in favor of judicial remedies for violations of individual treaty rights, the canons of good faith and liberal interpretation help ensure that U.S. courts provide substantial legal protection for the citizens of other nations with whom the United States has concluded treaties. This approach tends to promote harmonious diplomatic relations between the United States and its treaty partners.

37. *See, e.g.*, Van Alstine, *supra* note 16, at 1887–88.

38. Chief Justice Roberts's opinion in *Sanchez-Llamas* applies the nationalist approach in this respect. *See Sanchez-Llamas*, 126 S. Ct. at 2684.

39. *See* Olympic Airways v. Husain, 540 U.S. 644, 659–61 (2004) (Scalia, J., dissenting).

40. Chew Heong v. United States, 112 U.S. 536, 540 (1884) (quoting JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 174).

41. Tucker v. Alexandroff, 183 U.S. 424, 437 (1902) (citing HANNIS TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW § 383 (1901).

42. Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 581 (1908).

43. *See* Factor v. Laubenheimer, 290 U.S. 276, 293–94 (1933) ("[I]f a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.").

In the years since World War II, the canons of good faith and liberal interpretation have been supplanted by the nationalist canon of judicial deference to executive branch treaty interpretations.[44] Deference is not absolute. The Supreme Court has consistently maintained that "courts interpret treaties for themselves."[45] Nevertheless, Professor Bederman has argued persuasively that, at least since the 1960s, "judicial deference to the Executive's position on treaty interpretation is the single best predictor of interpretive outcomes in American treaty cases."[46] Whereas judicial application of the canon of good faith promoted harmony with U.S. treaty partners, judicial deference to executive treaty interpretation tends to generate friction with them. Moreover, whereas the canon of liberal interpretation provides expansive protection for individual treaty rights, deference to the executive tends to restrict the scope of treaty-based individual rights.

C. Treaties and the Domestic Law of Remedies

1. Different Presumptions

In *Tel-Oren v. Libyan Arab Republic*, Robert Bork, then a federal appellate judge, wrote:

> Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts. Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action.[47]

In the first sentence, the phrase "rights that are privately enforceable in courts" clearly refers to remedial rights, not primary rights. Thus, under the nationalist model, there is a presumption that individuals are not entitled to domestic judicial remedies for violations of individual treaty rights. The second sentence makes clear that there are two ways, and only two ways, to overcome that presumption: (1) if there is "authorizing legislation" that empowers courts to grant judicial remedies; or (2) if the treaty itself "provides a private right of ac-

44. *See infra* notes 428–34 and accompanying text.
45. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).
46. Bederman, *Deference or Deception*, *supra* note 19, at 1464–65.
47. 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring).

tion." Thus, under the nationalist model, there is a presumption against judicial remedies for treaty violations, and the individual invoking a treaty before a domestic court has the burden of overcoming that presumption.

The transnationalist model, in contrast, adopts a presumption in favor of domestic judicial remedies for violations of individual treaty rights. The core principle of the transnationalist model is "that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."[48] Not every treaty provision creates individual rights. If a treaty does not create primary individual rights, then the presumption in favor of judicial remedies does not apply. However, if a treaty has the status of supreme federal law,[49] and it creates or protects individual rights, the transnationalist model presumes that an individual whose treaty rights were violated is entitled to a domestic judicial remedy.[50] That presumption can be overcome if the treaty explicitly bars domestic judicial remedies, or if Congress has enacted legislation expressly precluding judicial enforcement of the treaty. The mere failure of the political branches to create an express private right of action, however, is not a bar to judicial enforcement of a treaty provision that protects individual rights.

Treaties can be invoked both offensively by plaintiffs and defensively by civil or criminal defendants. A civil or criminal defendant does not need a right of access to court because he has been haled into court against his will. Thus, when courts applying the nationalist model suggest that an individual defendant requires a "private right of action" to enforce a treaty, they presumably mean that the defendant requires a power to invoke the treaty, not a right of access to court.[51] Under the transnationalist presumption in favor of

48. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.) (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *23).

49. The transnationalist presumption applies only if the treaty provision at issue is the "Law of the Land" under the Supremacy Clause. Under the express terms of the Constitution, every treaty "made . . . under the Authority of the United States" is the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. For a detailed textual analysis of this constitutional provision, see Sloss, *supra* note 18, at 46–55. Unless otherwise specified, this article is concerned only with treaty provisions that are the "Law of the Land" under the Supremacy Clause.

50. *See, e.g.*, Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348 (1809) (Marshall, C.J.) ("Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected."); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.) ("[W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress . . . .").

51. *See, e.g.*, State v. Sanchez-Llamas, 108 P.3d 573, 575–76 (Or. 2005) (suggesting,

judicial enforcement, an individual defendant whose rights are protected by a treaty is presumed to have the power to invoke that treaty before a domestic court, absent countervailing action by the political branches.[52] However, under the nationalist presumption against judicial enforcement, individual defendants lack the power to invoke treaties, even treaties that protect individual rights, unless the political branches have taken affirmative steps to grant individuals that power.

Apart from the power to invoke a treaty, individual plaintiffs must also establish a right of access to court. During the early nineteenth century, individual plaintiffs routinely relied on common law rights of action to provide a right of access to court to pursue their treaty-based claims.[53] Thus, under the transnationalist model, if a plaintiff can show that he has primary rights protected by a treaty, and he has a right of access to court based on common law or some other domestic law source, there is no additional showing required to establish that he has the power to invoke the treaty before a domestic court. However, under the nationalist model, even if a plaintiff has rights protected by a treaty, and even if a federal statute grants him a right of access to U.S. courts, he must still identify some other statutory or treaty provision that grants him the power to invoke the treaty before a domestic court.[54]

In sum, the two models apply opposing presumptions in cases where an individual litigant seeks judicial enforcement of a treaty that protects individual rights, but that does not create an express pri-

in a case where a criminal defendant sought to invoke a treaty as the basis for a defense in a criminal proceeding, that treaties are "enforceable by individuals" only if the "treaty as a whole" manifests an intent to create "an individual right of action").

52. *See, e.g.*, United States v. Rauscher, 119 U.S. 407 (1886) (reversing a criminal conviction on the ground that a treaty immunized the defendant from criminal prosecution for the offense charged, even though the treaty did not expressly empower the defendant to invoke that treaty before a domestic court). *See also infra* notes 410–19 and accompanying text (discussing *Rauscher* in more detail).

53. *See, e.g.*, Hughes v. Edwards, 22 U.S. (9 Wheat.) 489 (1824) (suit to foreclose on mortgage); Soc'y for Propagation of Gospel v. Town of New Haven, 21 U.S. (8 Wheat.) 464 (1823) (action for ejectment); Craig v. Radford, 16 U.S. (3 Wheat.) 594 (1818) (equitable action to divide a tract of land); Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259 (1817) (action for ejectment); Higginson v. Mein, 8 U.S. (4 Cranch) 415 (1808) (suit to foreclose on mortgage); Fitzsimmons v. Newport Ins. Co., 8 U.S. (4 Cranch) 185 (1808) (suit for breach of contract); Hopkirk v. Bell, 7 U.S. (3 Cranch) 454 (1806) (suit to recover payment on bond); Ogden v. Blackledge, 6 U.S. (2 Cranch) 272 (1804) (suit to recover payment on bond).

54. This was the logic of the D.C. Circuit's analysis in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). The petitioner filed a habeas petition to enforce his rights under the Geneva Conventions. The D.C. Circuit said: "The availability of habeas may obviate a petitioner's need to rely on a private right of action . . . but it does not render a treaty judicially enforceable." *Id.* at 40.

vate right of action. Under the nationalist model, courts exceed their authority if they grant remedies to individuals for violations of such treaties, unless Congress has enacted legislation authorizing private enforcement of the treaty. Under the transnationalist model, courts abdicate their responsibility if they refuse to grant remedies for violations of such treaties, unless the treaty explicitly bars domestic judicial remedies, or Congress has enacted legislation expressly precluding judicial enforcement of the treaty.

2. Different Methodologies

In a famous speech in 1897, Oliver Wendell Holmes declared that it puts "the cart before the horse . . . to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward."[55] In an equally famous critique of Holmes, Henry Hart stated: "Holmes' 'cart' is the horse and his 'horse' is the cart . . . . The remedial parts of law—rights of action and other sanctions—are subsidiary. To the primary parts they have the relation of means to ends. They come second not first."[56]

Courts applying the nationalist model are the intellectual descendants of Holmes. They typically begin by asking questions about remedial law, not primary law. Under the nationalist method, it would be inappropriate for a court to consider whether a treaty protects individual rights, or whether those rights have been violated, until *after* the court has determined that the individual has a private right of action. If the individual lacks a private right of action, then the individual is not entitled to a judicial remedy in any case, so it would be a waste of judicial resources to attempt to answer questions about primary rights.

Courts applying the transnationalist model, by contrast, can be viewed as the intellectual predecessors or descendants of Henry Hart. They typically begin by asking questions about primary law, not remedial law, because the "remedial parts of law . . . come second not first."[57] Under the transnationalist method, it is not necessary to inquire whether the treaty creates a private right of action, because every individual who is properly before the court[58] and whose

55. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

56. Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 935 (1951).

57. *Id.*

58. An individual defendant is properly before the court if he is subject to the court's

individual treaty rights have been violated is entitled to a judicial remedy, assuming that the political branches have not foreclosed judicial remedies. By deciding explicitly that the individual's rights have been violated, the court also decides (implicitly, at least) that the individual is entitled to a remedy. Of course, individual cases may raise difficult questions about the *appropriate* remedy. In the vast majority of cases, though, the central question of remedial law—whether the individual is entitled to *some* remedy—does not require separate analysis, because the court answers that question by deciding whether the individual's primary rights have been violated.[59]

In short, the transnationalist model applies a "rights-focused" methodology, whereas the nationalist model applies a "remedies-focused" methodology. The contrast between the transnationalist and nationalist methodologies has tremendous practical significance because treaties rarely create an express private right of action, and Congress rarely enacts legislation authorizing individuals to enforce a specific treaty. Therefore, if the Supreme Court endorses the nationalist model, it will lead to a substantial right-remedy gap in the domestic law of treaties. If the Supreme Court continues to apply the transnationalist model, though, it would minimize the right-remedy gap, because most treaties that protect individual rights would be judicially enforceable.

III. CONFLICT BETWEEN THE NATIONALIST AND TRANSNATIONALIST MODELS IN *HAMDAN* AND *SANCHEZ-LLAMAS*

Part Three analyzes the Supreme Court decisions in *Sanchez-Llamas v. Oregon*[60] and *Hamdan v. Rumsfeld*[61] as they relate to the conflict between the nationalist and transnationalist models. In *Sanchez-Llamas*, the Oregon Supreme Court squarely endorsed the nationalist presumption against private enforcement of treaties in U.S.

territorial jurisdiction. Under the transnationalist model, an individual plaintiff is properly before the court if there is some provision of law—common law, statute, treaty, or other—that grants him a right of access to court.

59. Under the transnationalist model, there are three circumstances in which an individual whose treaty rights were violated is not entitled to a remedy: (1) if the political branches have taken affirmative action to limit judicial remedies; (2) if the individual did not suffer any harm or prejudice as a result of the treaty violation; or (3) if the defendant is protected by an affirmative defense, such as sovereign immunity.

60. 126 S. Ct. 2669 (2006).

61. 126 S. Ct. 2749 (2006).

courts.[62] Similarly, in *Hamdan* the D.C. Circuit also endorsed the nationalist presumption.[63] In both cases, though, the Supreme Court dodged the issue whether there is a presumption for or against private enforcement, and refused to decide whether the treaties at issue create judicially enforceable individual rights.[64]

For the reasons discussed below, the Court will probably confront the issue again in the near future. Despite the Court's refusal to endorse a presumption for or against private enforcement, analysis of individual opinions indicates that the Court is deeply divided on the question. Justices Breyer, Stevens, Ginsburg, and Souter clearly endorse the transnationalist presumption in favor of individual enforcement of treaty rights. Chief Justice Roberts and Justices Scalia, Thomas, and Alito appear to support the nationalist presumption against individually enforceable rights. Justice Kennedy remains undecided. His vote will be crucial in future cases presenting the issue.

A. Sanchez-Llamas and the Vienna Convention

The Vienna Convention on Consular Relations (VCCR) is a multilateral treaty that regulates the functions of consular officers.[65] Article 36 of the VCCR stipulates that "consular officers shall be free to communicate with nationals of the sending state" and that foreign nationals "shall have the same freedom with respect to communication with and access to consular officers of the sending State."[66] These rights of communication and access apply expressly to any foreign national who "is arrested or committed to prison or to custody pending trial or is detained in any other manner."[67] For any foreign national who is arrested or otherwise detained in the United States, the United States has an obligation to "inform the person concerned without delay of his rights under this sub-paragraph."[68] Unfortunately, the United States has frequently violated its treaty obliga-

62. State v. Sanchez-Llamas, 108 P.3d 573 (Or. 2005).

63. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

64. Interestingly, the Court seems to have adopted a transnationalist approach to treaty interpretation in *Hamdan*, whereas it applied a nationalist approach in *Sanchez-Llamas*. Since this article focuses primarily on issues pertaining to domestic remedies, not issues related to treaty interpretation, Part Three does not address the Court's approach to treaty interpretation in *Hamdan* and *Sanchez-Llamas*.

65. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. *See also* LUKE T. LEE, CONSULAR LAW AND PRACTICE (2d ed. 1991).

66. VCCR, *supra* note 65, art. 36(1)(a).

67. *Id.* art. 36(1)(b).

68. *Id.*

tion to inform detained foreign nationals about their Article 36 rights, largely because many arresting officers are not aware of their obligations under the VCCR. State courts and lower federal courts have decided hundreds of cases in the past decade involving claims under Article 36.[69] In the vast majority of cases, courts have refused to provide judicial remedies to individuals invoking the treaty despite clear evidence of treaty violations.[70]

In *Sanchez-Llamas*, the State of Oregon arrested the defendant, a Mexican national, in December 1999. It is undisputed that Oregon violated the VCCR because the police did not "inform him that he could ask to have the Mexican Consulate notified of his detention."[71] The state charged defendant with attempted murder and other felonies.[72] Defendant learned about the VCCR before the case went to trial. Accordingly, he filed a pre-trial motion to suppress statements he had made to the police. The trial court denied his motion to suppress and convicted him of eleven felony counts. The Oregon Supreme Court affirmed the conviction, holding "that Article 36 of the VCCR does not create rights that individual foreign nationals may assert in a criminal proceeding."[73]

The Oregon Supreme Court reached this conclusion by applying the nationalist presumption against judicial remedies. The court stated explicitly that there is "a presumption *against* the creation of individual, judicially enforceable rights" by means of treaties.[74] Moreover, the court asserted that treaties permit "enforcement by an individual right of action, only when a specific intent to create such individual rights [of action] can be discerned from the treaty as a whole."[75] Consistent with nationalist methodology, the court's

69. *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2694 (2006) (Breyer, J., dissenting) (noting that this issue "has arisen hundreds of times in the lower federal and state courts").

70. This author is aware of only two cases in which U.S. courts have rendered judgments in favor of individual petitioners seeking relief for violations of Article 36. *See* Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005) (holding that Article 36 creates an individual right that is enforceable in an action for money damages brought under the Alien Tort Statute); Osbaldo Torres v. State, No. PCD-04-442 (Okla. Crim. App. 2004), *reprinted in* 43 I.L.M. 1227 (2004) (staying execution of death row prisoner and remanding case to district court for evidentiary hearing to determine whether prisoner was prejudiced by the State's violation of his rights under the VCCR).

71. *Sanchez-Llamas*, 126 S. Ct. at 2676.

72. *Id.*

73. State v. Sanchez-Llamas, 108 P.3d 573, 574 (Or. 2005).

74. *Id.* at 576 ("In fact, the general rule, widely recognized in the federal courts, is that rights created by international treaties belong to the signatory state and are *not* enforceable in American courts by private individuals.").

75. *Id.* at 575. *See also id.* at 576 ("Certainly, the noted presumption can be overcome by explicit wording and even by provisions that necessarily imply a private right of judicial

analysis dodged the question whether Article 36 creates primary individual rights.[76] Instead, the court said, even if the defendant's individual rights were violated, he was not entitled to a remedy because "there is nothing about the subject matter of the VCCR that would compel an inference that a private right of action was intended."[77] Since the defendant's right of access to court was not at issue, the Court evidently used the term "private right of action" to refer to a power to invoke a treaty before a domestic court.

The Supreme Court granted certiorari in *Sanchez-Llamas* to decide, *inter alia*, whether Article 36 of the VCCR conveys "individual rights . . . to a foreign detainee enforceable in the Courts of the United States."[78] The companion case of *Bustillo v. Johnson*, which the Supreme Court consolidated with *Sanchez-Llamas*, presented the question whether "state courts may refuse to consider violations of Article 36 . . . because the treaty does not create individually enforceable rights."[79] Both the State of Oregon, in *Sanchez-Llamas*, and the State of Virginia, in *Bustillo*, urged the Court to endorse the nationalist presumption against private enforcement of treaties. Oregon argued that "[t]he presumption is against finding an individually enforceable right implied in the treaty."[80] Similarly, Virginia asserted: "Even if the *VCCR* does create individual rights, those rights are not judicially enforceable . . . [because] the Treaty's text does not provide for judicial enforcement."[81] Additionally, the United States, as *amicus curiae*, urged the Court to endorse the nationalist presumption "that treaties . . . do not create judicially enforceable individual rights."[82]

Despite these arguments, the Court refused to decide whether the VCCR creates individually enforceable rights. Instead, writing for himself and four other Justices, Chief Justice Roberts's majority opinion assumed, without deciding, that Article 36 does "grant[] individuals enforceable rights."[83] The majority affirmed the Oregon

enforcement.").

76. *See id.* at 575–78.

77. *Id.* at 577.

78. Sanchez-Llamas v. Oregon, No. 04-10566, Questions Presented, *available at* http://www.supremecourtus.gov/qp/04-10566qp.pdf.

79. Bustillo v. Johnson, No. 05-51, Questions Presented, *available at* http://www.supremecourtus.gov/qp/05-00051qp.pdf.

80. Brief for Respondent State of Oregon at 13, *Sanchez-Llamas*, 126 S. Ct 2669 (2006) (No. 04-10566), 2006 WL 259987.

81. Brief of the Respondent at 19, Bustillo v. Johnson, 126 S. Ct 2669 (2006) (No. 05-51), 2006 WL 259993.

82. Gov't Sanchez-Llamas Brief, *supra* note 3, at 11.

83. *Sanchez-Llamas*, 126 S. Ct at 2677–78 ("Because we conclude that Sanchez-Llamas and Bustillo are not in any event entitled to relief on their claims, we find it

Supreme Court's decision in *Sanchez-Llamas* on the ground that suppression is not an appropriate remedy for a violation of Article 36.[84] Similarly, the majority affirmed the Virginia state court's decision in *Bustillo* on the grounds that a State may apply its regular rules of procedural default to Article 36 claims.[85] However, the five Justices who comprised the majority did not adopt the nationalist presumption against judicial remedies.

Justice Breyer wrote a dissenting opinion in which he contended that Article 36 of the VCCR does create judicially enforceable individual rights.[86] His analysis began with the premise that a court should resort to a treaty for a rule of decision "whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."[87] In other words, in accordance with the transnationalist model, Justice Breyer asserted that courts have the duty to enforce treaties at the behest of private individuals whenever a treaty creates primary individual rights. Applying this analysis, Justice Breyer concluded that Article 36 creates individual rights that "do not differ in their 'nature' from other procedural rights that courts commonly enforce,"[88] and that "this Court has routinely permitted individuals to enforce treaty provisions similar to Article 36 in domestic judicial proceedings."[89] In response to the assertion that there is a presumption that treaties do not create judicially enforceable individual rights, Justice Breyer stated emphatically "that no such presumption exists."[90] In short, Justice Breyer's opinion decisively rejected the nationalist presumption against judicial remedies and endorsed the transnationalist presumption in favor of judicial remedies. Justices Stevens, Souter, and Ginsburg joined this portion of Justice Breyer's opinion.[91]

unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights. Therefore, for purposes of addressing petitioners' claims, we assume, without deciding, that Article 36 does grant Bustillo and Sanchez-Llamas such rights.").

84. *Id.* at 2678–82.

85. *Id.* at 2682–87. Whereas Sanchez-Llamas raised the Article 36 issue at trial, and sought a suppression remedy, Bustillo raised the Article 36 issue for the first time in a habeas corpus petition filed in state court. *See id.* at 2676. The main thrust of his argument was that the treaty preempted state procedural default rules.

86. *See id.* at 2693–98 (Breyer, J., dissenting).

87. *Id.* at 2695 (quoting Head Money Cases, 112 U.S. 580, 598–99 (1884)).

88. *Id.*

89. *Id.* at 2696.

90. *Id.* at 2697.

91. Justice Ginsburg concurred with the majority that Sanchez-Llamas was not entitled to a suppression remedy. *Id.* at 2688–89 (Ginsburg, J., concurring). She also concurred with the majority that procedural default rules barred Bustillo's claim. *Id.* at 2689–90. However, she joined the portion of Breyer's dissent in which he defended the view that the VCCR does create individually enforceable rights. She also stated explicitly in her concurring opinion

B. Hamdan and the Geneva Conventions

The POW Convention[92] is one of four treaties regulating the conduct of warfare that were concluded in 1949 and that are referred to collectively as the Geneva Conventions. The Geneva Conventions set forth a detailed code of conduct that is designed to provide humanitarian protection for victims of warfare, including the sick and wounded,[93] prisoners of war,[94] and civilians.[95] Of particular concern here is Common Article 3, a provision that is identical in all four treaties. Common Article 3 applies to "armed conflict not of an international character."[96] It prohibits "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[97]

On November 13, 2001, President Bush issued an order authorizing the creation of military commissions to conduct trials of individuals who are past or current members of al Qaeda, or who have engaged in terrorist activities harmful to the United States.[98] Forces allied with the United States captured Salim Ahmed Hamdan, a Yemeni national, in Afghanistan in November 2001. The United States has detained Hamdan at Guantanamo Bay since June 2002.[99] In July 2003, President Bush designated Hamdan for trial by military commission. In response, Hamdan filed a habeas corpus petition challenging the President's authority to try him by military commission. The district court granted his petition, holding expressly that trial by military commission would violate Hamdan's rights under the Geneva Conventions.[100]

The D.C. Circuit reversed the district court, holding that the

that "Article 36 of the Vienna Convention grants rights that may be invoked by an individual in a judicial proceeding." *Id.* at 2688.

92. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Convention].

93. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

94. *See* POW Convention, *supra* note 92.

95. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

96. POW Convention, *supra* note 92, art. 3.

97. *Id.*

98. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

99. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006).

100. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 158–65 (D.D.C. 2004).

POW Convention "does not confer upon Hamdan a right to enforce its provisions in court."[101] The court reached this result by applying an exceptionally rigid version of the nationalist model. The court's analysis merits scrutiny because Chief Justice Roberts, who was a judge on the D.C. Circuit at that time, was a member of the panel that decided *Hamdan* in the D.C. Circuit, and he joined fully in Judge Randolph's majority opinion. The court began its analysis by adopting the nationalist presumption against private enforcement of treaties.[102] Even if one accepts that presumption, though, the nationalist model permits private enforcement of treaties if Congress has authorized such enforcement. Hamdan alleged that his custody violated the POW Convention. He brought his claim under the federal habeas statute, which expressly authorizes federal courts to grant habeas relief for individuals who are "in custody in violation of the Constitution or laws *or treaties* of the United States."[103] Thus, Hamdan's claim is the precise type of claim that Congress authorized in the federal habeas statute.

Even so, the D.C. Circuit held that the habeas statute merely granted the district court jurisdiction over Hamdan's habeas petition, but it "did not render the Geneva Convention judicially enforceable."[104] Apparently, then, for the D.C. Circuit (and for Chief Justice Roberts) to find that a treaty is judicially enforceable in a federal habeas petition, either the treaty drafters must refer specifically to the U.S. habeas statute in the text of the treaty, or Congress must refer specifically to the particular treaty in the text of the habeas statute. This exceedingly rigid version of the nationalist model is at odds with nineteenth century Supreme Court precedents.[105] It imposes unrealistic constraints on the political branches.[106] As a practical matter, this approach, which Chief Justice Roberts seemingly approved, would make it virtually impossible for individuals to obtain domestic judicial remedies for violations of their treaty-based individual rights.

The Supreme Court granted certiorari in *Hamdan* to decide

101. Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005).

102. *Id.* at 38 ("This country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights.").

103. 28 U.S.C. § 2241(c)(3) (2000) (emphasis added).

104. *Hamdan*, 415 F.3d at 40.

105. *See, e.g.*, Chew Heong v. United States, 112 U.S. 536 (1884) (granting habeas relief to petitioner who was detained in violation of a treaty). *See also infra* notes 391–95 and accompanying text (discussing *Chew Heong*).

106. *See generally* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 378–90 (2000) (pointing out the practical necessities and historical trends that have required courts to "flesh out statutory enactments" beyond the narrow textualist methods of statutory construction).

two questions: (1) whether the President had statutory and/or constitutional authority to utilize military commissions "to try petitioner and others similarly situated for alleged war crimes in the 'war on terror;'" and (2) whether Guantanamo detainees who have been designated for trial by military commission can "obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch[.]"[107] The government's brief on the merits devoted several pages to defending the proposition that the "Geneva Convention does not give rise to judicially enforceable rights."[108] The government's argument relied heavily on the nationalist model, asserting that there is a "long-established presumption . . . that treaties and other international agreements do not create judicially enforceable rights."[109]

The Supreme Court decided *Hamdan* by a 5-3 majority; Chief Justice Roberts recused himself because he was a member of the panel that decided the case in the D.C. Circuit. The bulk of Justice Stevens' majority opinion addressed a variety of statutory interpretation questions.[110] The majority held that the Detainee Treatment Act did not deprive the Court of jurisdiction over cases, such as *Hamdan*, that were pending at the time the statute was enacted.[111] In response to the government's argument that Congress had authorized the use of military commissions, the Court held that the relevant statutes "at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war."[112] The majority held that the commissions created by the Bush Administration are inconsistent with the statutory requirement, embodied in Article 36 of the Uniform Code of Military Justice (UCMJ), that "the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable."[113]

107. Questions Presented, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (Nov. 11, 2005) (No. 05-184), http://www.supremecourtus.gov/qp/05-00184qp.pdf.

108. Gov't Hamdan Brief, *supra* note 3, at 30–37.

109. *Id.* at 30.

110. *See Hamdan*, 126 S. Ct 2749.

111. *Id.* at 2762–69. After the Court granted certiorari in *Hamdan*, Congress passed the Detainee Treatment Act (DTA), which restricts the jurisdiction of federal courts over cases filed by or on behalf of Guantanamo detainees. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739. The government filed a motion to dismiss the *Hamdan* case for lack of jurisdiction, claiming that the DTA deprived the Supreme Court of jurisdiction over the pending case. *See* Respondents' Motion to Dismiss for Lack of Jurisdiction, Hamdan v. Rumsfeld, 126 S. Ct 2749 (2006) (No. 05-184), 2006 WL 77694.

112. *Hamdan*, 126 S. Ct. at 2775.

113. *Id.* at 2790.

In the final portion of its opinion, the Court held that "[t]he procedures adopted to try Hamdan also violate the Geneva Conventions."[114] In its rationale in support of this conclusion, the majority said that it did not need to decide whether the Geneva Conventions are judicially enforceable.[115] Since Article 21 of the UCMJ authorizes trial by military commission only "with respect to offenders or offenses that . . . by the law of war may be tried by military commissions,"[116] and since the Court indisputably has the authority to enforce the UCMJ, and since the Geneva Conventions are "part of the law of war" referenced in Article 21,[117] the majority concluded that it had to interpret and apply the Conventions in order to determine whether Hamdan's commission was permissible under Article 21. Applying this rationale, the Court held that Hamdan is entitled to the protections of Common Article 3 because the United States' conflict with al Qaeda is a "conflict not of an international character" within the meaning of Common Article 3.[118] The Court also held that Hamdan's military commission violates the treaty requirement that prisoners protected by Common Article 3 must be tried by a "regularly constituted court."[119] Based on this rationale, the majority enforced Common Article 3 without deciding whether the Geneva Conventions are judicially enforceable *in the absence of implementing legislation*, and without addressing the conflict between the nationalist and transnationalist models.

The three dissenters disagreed with virtually every major conclusion of the majority opinion. Justice Scalia, joined by Justices Thomas and Alito, argued that the Detainee Treatment Act deprived the Court of jurisdiction over the case.[120] Justice Alito, joined by Justices Scalia and Thomas, argued that the Bush Administration's military commissions are "regularly constituted court[s]" within the meaning of Common Article 3.[121] Most importantly for purposes of this article, Justice Thomas, joined by Justices Scalia and Alito, ar-

114. *Id.* at 2793.
115. *Id.* at 2793–94.
116. 10 U.S.C. § 821 (2000).
117. *Hamdan*, 126 S. Ct at 2794.
118. *Id.* at 2794–96. It is noteworthy that the Court rejected the President's interpretation of Common Article 3. *See* Sloss, *supra* note 19 (discussing the Court's non-deferential approach to treaty interpretation in *Hamdan*).
119. *Id.* at 2796–97. A plurality of four Justices also approved Hamdan's argument that the military commission procedures adopted by the Bush Administration violate Common Article 3 because they do not afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 2797–98. Justice Kennedy did not join this portion of Justice Stevens's opinion.
120. *Id.* at 2810–23 (Scalia, J., dissenting).
121. *Id.* at 2850–55 (Alito, J., dissenting).

gued that the Geneva Conventions are not judicially enforceable.[122]

Surprisingly, Justice Thomas's argument did not explicitly invoke the nationalist presumption against judicial enforcement. Instead, he argued that "Hamdan's Geneva Convention claims are foreclosed by *Johnson v. Eisentrager*."[123] In *Eisentrager*, the Supreme Court stated in dicta that the rights of alien enemies under a 1929 prisoner of war treaty were not judicially enforceable because the drafters intended that diplomatic measures would be the exclusive mechanism for vindicating their treaty rights.[124] Without any explanation or analysis, Justice Thomas asserted that the 1949 POW Convention, like the 1929 predecessor convention, contemplates that diplomatic measures provide the exclusive enforcement mechanism.[125] In fact, the 1949 POW Convention does not contain any language indicating that diplomacy is the exclusive enforcement mechanism, nor does it contain language manifesting an intention to preclude domestic judicial remedies.

As a formal matter, Justice Thomas's analysis in *Hamdan* is consistent with the transnationalist model. Thomas's dissent does not explicitly endorse the nationalist presumption against judicial enforcement of treaties. Instead, he claims that the POW Convention is not judicially enforceable because the treaty drafters chose to preclude domestic judicial enforcement by stipulating that diplomatic measures would provide the exclusive enforcement mechanism. This analysis is superficially consistent with the transnationalist model because that model recognizes that the treaty makers can preclude do-

122. *Id.* at 2844–46 (Thomas, J., dissenting).

123. *Id.* at 2844 (Thomas, J., dissenting) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

124. *Eisentrager*, 339 U.S. at 789 n.14. Justice Thomas characterized the key statement in *Eisentrager* as "an alternative holding." *See Hamdan*, 126 S. Ct. at 2844 (Thomas, J., dissenting). The claim that this was an "alternative holding" is simply not true. In *Eisentrager*, the Supreme Court held that there was "no basis for invoking federal judicial power in any district." *Id.* at 790. Parts I to III of the Court's opinion provided the rationale supporting that conclusion. *See id.* at 768–85. The footnote that Justice Thomas relies upon is in Part IV, which addressed the merits of the prisoners' habeas petition. *Id.* at 785–90. As the dissent in *Eisentrager* noted, the "petition for certiorari here presented no question except that of jurisdiction; and neither party has argued, orally or in briefs, that this Court should pass on the sufficiency of the petition." *Id.* at 792 (Black, J., dissenting). Thus, the *Eisentrager* footnote addressed an issue that was never argued before the Supreme Court and that the Court, according to its own holding in the case, lacked jurisdiction to decide.

125. *See Hamdan*, 126 S. Ct. at 2845 (Thomas, J., dissenting) ("The judicial nonenforceability of the Geneva Conventions derives from the fact that those Conventions have exclusive enforcement mechanisms.") Justice Thomas cites *Eisentrager* as authority for this proposition, despite the fact that *Eisentrager* concerned a different treaty. Justice Thomas does not cite any provision of the 1949 POW Convention to support his contention that this treaty has exclusive enforcement mechanisms.

mestic judicial enforcement by providing in the treaty that some other remedial mechanism is the exclusive enforcement mechanism. Even so, Justices Thomas, Scalia and Alito manifested their antipathy towards domestic judicial remedies for treaty violations by stating, without any supporting evidence, that the drafters of the 1949 POW Convention chose to preclude domestic judicial enforcement. Thus, Justice Thomas's dissenting opinion suggests that the three *Hamdan* dissenters would likely favor the nationalist model, rather than the transnationalist model, in a case that squarely presented the choice.

C. Implications for Future Cases

The Court's opinion in *Sanchez-Llamas* does not preclude all avenues of judicial relief for violations of Article 36 of the VCCR. In particular, the Court's opinion leaves open the possibility that foreign nationals may be able to vindicate their rights under Article 36 through ineffective-assistance-of-counsel claims. With respect to the procedural default issue, the Court held only that Article 36 claims are subject to "the same procedural default rules that apply generally to other federal-law claims."[126] Procedural default rules do not generally preclude a habeas petitioner from raising a claim that trial counsel's representation fell below the minimum constitutional requirements of the Sixth Amendment. The majority in *Sanchez-Llamas* emphasized that, in our adversarial system, it is the defense counsel's responsibility to raise the Article 36 issue at or before trial.[127] Thus, the Court's rationale in *Sanchez-Llamas* may support an argument in future habeas petitions that trial counsel's performance was constitutionally deficient because counsel failed to advise his client of his rights under Article 36.[128] Given the large number of foreign nationals imprisoned in the United States who have been denied their Article 36 rights, it is likely that state and federal courts will soon be faced with numerous Article 36 claims that are dressed up as ineffective-assistance-of-counsel claims.

To resolve those claims, courts could dodge the question

126. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2687 (2006).

127. *See id.* at 2685 (stating that an adversarial system "relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time"); *id.* at 2686 ("In our [adversarial] system, . . . the responsibility for failing to raise an issue generally rests with the parties themselves.").

128. *See id.* at 2690 n.3 (Ginsburg, J., concurring) ("[O]nce Bustillo became aware of his Vienna Convention rights, nothing prevented him from raising an ineffective-assistance-of-counsel claim predicated on his trial counsel's failure to assert the State's violation of those rights.").

whether Article 36 creates individually enforceable rights by holding that a defense attorney's failure to raise the Article 36 issue did not violate the Sixth Amendment, or that the foreign national client was not prejudiced by that failure.[129] But it is likely that some courts will address directly the question whether Article 36 creates individually enforceable rights. To answer that question, courts will have to choose between the transnationalist presumption in favor of private enforcement of individual treaty rights and the nationalist presumption against private enforcement. Therefore, the Supreme Court may well confront another VCCR case within the next few years that presents the conflict between the nationalist and transnationalist models.

At first blush, it may appear that the recently enacted Military Commissions Act of 2006 precludes any further Supreme Court review of claims by Guantanamo detainees based on the Geneva Conventions.[130] Section 3 of the Act creates a new Chapter 47A in Title 10 of the U.S. Code.[131] Included in the new Chapter 47A is § 948b(g), which states: "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."[132] This provision clearly precludes specified individuals from invoking the Geneva Conventions during a trial by military commission. If the military commission renders a guilty verdict, § 950g provides for judicial review by the D.C. Circuit, and then by the Supreme Court.[133] It is unclear whether § 948b(g) precludes an enemy combatant convicted by a military commission from invoking the Geneva Conventions in appellate proceedings before the D.C. Circuit or the Supreme Court.[134]

129. Under the test established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), a habeas petitioner who seeks reversal of a criminal conviction based on ineffective assistance of counsel must show that his trial counsel's performance was constitutionally deficient and "that the deficient performance prejudiced the defense." *Id*. at 687. To establish prejudice based on a VCCR violation, the petitioner would have to show two things: (1) that he would have sought consular assistance if the attorney had advised him of his rights under the VCCR; and (2) that consular assistance would probably have affected the outcome of the trial. Absent contrary evidence, the first point could presumably be established by submitting an affidavit to that effect. Proving that consular assistance would have affected the outcome of trial is more difficult. Assuming that the petitioner bears the burden of proof on this issue, the majority of petitioners are likely to lose. However, *Bustillo* is one case where the petitioner presented fairly compelling evidence that consular assistance would have yielded a different trial outcome. *See* Brief for Petitioner Mario A. Bustillo, *Sanchez-Llamas*, 126 S. Ct. 2669 (No. 05-51), 2005 WL 3597704.

130. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

131. *Id.* § 3(a)(1).

132. *Id.*

133. *Id.*

134. The statutory language, on its face, could be construed to preclude alien unlawful enemy combatants from invoking the Geneva Conventions in any proceeding before any

Assume that § 948b(g) does not preclude a convicted alien from invoking the Geneva Conventions during such appellate proceedings. The alien must still overcome at least one other hurdle. Section 5(a) of the Military Commissions Act states: "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories."[135] This provision precludes application of the Geneva Conventions in a "habeas corpus or other civil action." However, one could argue that the procedure for exercising judicial review of a final judgment rendered by a military commission is neither a habeas corpus proceeding nor a civil action; it is an appeal from a criminal conviction. Thus, it is unclear whether Section 5(a) precludes a criminal defendant from invoking the Geneva Conventions in an appeal challenging the validity of a final judgment rendered by a military commission.[136]

Suppose, however, that the Court construes § 948b(g), or section 5(a), or both, to prohibit a criminal defendant from invoking the Geneva Conventions in an appeal from the final judgment of a military commission. In that case, the Court will have to decide whether those provisions are constitutional. It is firmly established that the government "must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."[137] Although there is no case directly on point, the "opportunity to be heard" arguably means that, if a criminal defendant contests the validity of procedures utilized by the government to obtain a criminal conviction, he has the opportunity to raise any legal argument he chooses, and the court has a duty to address the merits of that argument (assuming that the defendant has not waived the argu-

U.S. court. Such a construction is arguably overbroad, though, because § 948b(g) is included in chapter 47A of Title 10, a portion of the U.S. Code that addresses the structure and process of military commissions. For the most part, Chapter 47A says nothing about judicial proceedings before federal courts.

135 *Id.* § 5(a).

136. Section 5(a) refers to "any habeas corpus or other civil action *or proceeding*." *Id.* (emphasis added). If one construes the phrase "or proceeding" to encompass any other judicial proceeding of any kind, then the phrase "habeas corpus or other civil action" would be superfluous. On the other hand, if one construes the statute to apply only to a "habeas corpus or other civil action," then the phrase "or proceeding" would be superfluous. Thus, it is unclear whether the phrase "or proceeding" was intended to expand the scope of the statutory language to apply to a judicial proceeding other than a habeas corpus or other civil action.

137. Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

ment, for example, by failing to raise it in a timely fashion).[138] It is beyond the scope of this article to analyze this procedural due process argument in detail.[139] The main point is that there are non-trivial arguments in support of the view that, notwithstanding § 948b(g) and section 5(a), defendants convicted by a military commission can invoke the Geneva Conventions in a subsequent appeal to the Supreme Court. In deciding whether to address the merits of such an appeal, the Court may be forced to choose between the nationalist and transnationalist models.

As noted above, Justice Breyer's dissenting opinion in *Sanchez-Llamas* strongly suggests that Justices Breyer, Stevens, Souter, and Ginsburg are prepared to endorse the transnationalist presumption in favor of judicial remedies. Chief Justice Roberts's decision to

138. The opportunity to be heard is an essential procedural right of both civil and criminal defendants. Although the Due Process Clause does not guarantee plaintiffs a right of access to courts, "due process of law signifies a right to be heard in one's defense." *Boddie*, 401 U.S. at 377 (quoting Hovey v. Elliott, 167 U.S. 409, 417 (1897)). The distinction between plaintiffs and defendants is fundamental, because plaintiffs have the option of resolving their disputes through "private structuring of individual relationships," but defendants are "forced to settle their claims of right and duty through the judicial process." *Id.* at 375–77. Even in the nineteenth century, well before the advent of the modern "due process revolution," the Supreme Court affirmed the principle that defendants must have an opportunity to be heard. *See, e.g.*, Windsor v. McVeigh, 93 U.S. 274, 277 (1876) ("Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.").

139. One potential counter-argument is a "greater power includes the lesser power" argument. There is no doubt that Congress has the constitutional authority to enact legislation superseding the Geneva Conventions. Thus, for example, Congress could have added language to the Military Commissions Act of 2006 along the following lines: "In the event of a conflict between the Geneva Conventions and the procedures specified herein, courts shall apply the procedures embodied in this Act." Such language would preclude courts from applying the Geneva Conventions by making clear that Congress intended to supersede the Conventions as a matter of domestic law. Thus, one could argue, the greater power to supersede the Geneva Conventions includes the lesser power to preclude individuals from invoking the treaties as a defense to a criminal prosecution.

It is beyond the scope of this article to respond to this argument in detail. One point merits brief discussion, though. If Congress decides to enact legislation explicitly superseding the Geneva Conventions, then Congress is accountable for that political decision. In the Military Commissions Act of 2006, though, Congress reaffirmed the U.S. commitment to adhere to the Geneva Conventions. *See* § 948b(f) (specifying that "[a] military commission established under this chapter" satisfies the requirements "of common Article 3 of the Geneva Conventions"). If the Supreme Court applies the Act in a manner that precludes any judicial review of claims alleging violations of the Geneva Conventions, then the Court would effectively permit the executive branch to violate the Geneva Conventions without any accountability. Thus, the Court might reject the "greater includes the lesser" argument noted above to ensure that one of the federal political branches is accountable for a decision to violate the Geneva Conventions.

join the majority opinion in the D.C. Circuit in *Hamdan* strongly suggests that Chief Justice Roberts is prepared to endorse the nationalist presumption against judicial remedies. Similarly, Justice Thomas's dissent in the Supreme Court in *Hamdan* suggests that Justices Scalia, Thomas, and Alito are likely to endorse the nationalist presumption. Thus, the current Justices are apparently divided 4-4 between those who support the transnationalist model and those who support the nationalist model. In a future case presenting the issue, if the composition of the Court does not change in the interim, Justice Kennedy will likely provide the crucial swing vote. Based upon his comments during oral argument in *Hamdan* and *Sanchez-Llamas*,[140] his separate concurrence in *Hamdan*,[141] and his silent agreement with the majority opinion in *Sanchez-Llamas*,[142] it appears that Justice Kennedy is reluctant to endorse either the nationalist or the transnationalist approach.

Since the Supreme Court is likely to address the conflict between the nationalist and transnationalist models in the near future, and since the Court's understanding of history will likely influence its resolution of that conflict, the rest of this article examines the historical basis for the two models.

IV. THE TRANSNATIONALIST MODEL IN ACTION: 1789–1838

Part Four presents a comprehensive analysis of Supreme Court decisions between 1789 and 1838 in which an individual litigant raised a claim or defense on the basis of a treaty. The year 1838 provides an appropriate closing date for this analysis. Modern proponents of the nationalist presumption against judicial remedies rely heavily on Chief Justice Marshall's 1829 opinion in *Foster v. Neilson*[143] to support that presumption.[144] In *Garcia v. Lee*,[145] decided in 1838, Chief Justice Taney authored an opinion that helps illuminate

140. *See* Transcript of Oral Argument at 15, *Hamdan*, 126 S. Ct. 2749 (No. 05-184) (Mar. 28, 2006); Transcript of Oral Argument at 38, *Sanchez-Llamas*, 126 S. Ct. 2669 (No. 04-10566) (Mar. 29, 2006), *both available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html.

141. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799–809 (2006) (Kennedy, J., concurring).

142. *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006).

143. Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

144. *See, e.g.*, Hamdan v. Rumsfeld, 415 F.3d 33, 38–39 (D.C. Cir. 2005) (citing *Foster*); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (citing *Foster*); State v. Sanchez-Llamas, 108 P.3d 573, 576 (Or. 2005) (citing *Foster*).

145. Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838).

Marshall's inscrutable analysis in *Foster*. Thus, to obtain a clear understanding of Marshall's opinion in *Foster*—and to demonstrate conclusively that *Foster* provides no support for the nationalist model—it is essential to analyze the aftermath of *Foster* up through and including Taney's 1838 decision in *Garcia v. Lee*.

Between 1789 and 1838, the Supreme Court decided fifty-eight cases in which an individual litigant raised a claim or defense on the basis of a treaty.[146] These fifty-eight cases include: twenty-two cases involving disputes over title to property in Louisiana or Florida (territories that the United States acquired by treaties with France and Spain, respectively); sixteen other cases involving disputes over title to real property; twelve admiralty cases; and eight cases that are neither admiralty nor property cases.

Part Four analyzes the results of Supreme Court decisions during this period to determine which results are consistent with the transnationalist model and which results are consistent with the nationalist model. Since few cases explicitly endorse the core premises of either model, it is necessary to examine what the Court *did*, as well as what the Court *said*. The analysis exposes the unstated assumptions that actually guided the Court's decision-making in treaty cases during this period. Part Four demonstrates that every Supreme Court decision during this period was consistent with the transnationalist

146. This figure does not include cases involving treaties with Indian tribes. Only cases involving treaties with foreign nations are included.

During the period before John Marshall became Chief Justice, the Supreme Court decided numerous cases without issuing a published decision. The Court probably relied on treaties to supply the rule of decision in many of those cases. *See* JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 812 (1971) (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States Vol. 1) (indicating that thirty-one of the seventy-nine cases disposed by the Supreme Court before 1801 involved treaties). The figure of fifty-eight cases cited in the text includes only published Supreme Court opinions that reference a treaty.

Cases where an individual plaintiff invoked a treaty in reply to a defense raised by the defendant are included. However, cases where the Court cited a treaty as evidence supporting a contested proposition, but where neither party asserted an individual right on the basis of that treaty, are excluded. *See, e.g.*, Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827) (where neither party asserted an individual right on the basis of the peace treaty between the United States and Britain, the Court cited the treaty as evidence that the land at issue was part of the United States in 1777).

The phrase "individual litigant" includes companies as well as natural persons. *See, e.g.*, Soc'y for Propagation of the Gospel v. Town of New Haven, 21 U.S. (8 Wheat.) 464 (1823) (suit by British corporation). It also includes individual officials of foreign governments who file suit to represent the interests of their government, or of their country's nationals. *See, e.g.*, The Divina Pastora, 17 U.S. (4 Wheat.) 52 (1819) (petition filed by Spanish consul on behalf of Spanish nationals). Since the article focuses on treaty enforcement by individual litigants, cases where the adverse parties are both government entities are excluded. *See, e.g.*, New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836).

presumption in favor of judicial remedies. In contrast, none of the fifty-eight cases endorse the nationalist presumption against private enforcement of treaties. Moreover, there was not a single Supreme Court decision during this period suggesting that individuals cannot enforce treaties in the absence of a statutory or treaty-based right of action. In sum, the maxim *ubi jus, ibi remedium*[147] was a key unstated assumption that the Court simply took for granted; the Supreme Court's decisions in treaty cases during this period did not deviate from this principle.[148]

Part Four is divided into four sections. The first section analyzes cases in which the party invoking the treaty won on the merits of a treaty-based claim or defense, a total of thirty-six cases. The second section addresses cases where the Court declined to reach the merits of a treaty-based claim or defense, a total of nine cases. The third section discusses cases in which the party invoking the treaty lost on the merits of a treaty-based claim or defense; there were thirteen such cases. The final section examines one of those thirteen cases, *Foster v. Neilson*, in greater detail.

A. Cases Where the Party Invoking the Treaty Won on the Merits

Of the fifty-eight treaty cases that the Supreme Court decided between 1789 and 1838, the individual invoking the treaty won his treaty-based claim or defense thirty-six times.[149] Those thirty-six cases are all consistent with the transnationalist model because, in each case, the Court enforced the treaty on behalf of an individual litigant. To determine whether the cases are consistent with the na-

147. This is a Latin maxim that means "where there is a right, there is a remedy." BLACK'S LAW DICTIONARY (6th ed. 1990).

148. Of the fifty-eight treaty cases that the Supreme Court decided during this period, only three create a slight right-remedy gap in the domestic law of treaties: Strother v. Lucas, 37 U.S. (12 Pet.) 410 (1838); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); and De la Croix v. Chamberlain, 25 U.S. (12 Wheat.) 599 (1827). For the reasons explained below, all three are consistent with the transnationalist model. *See infra* text accompanying notes 279–87 and 293–358.

149. If a party who invokes a treaty wins the case, but loses on the treaty issue, that counts as a loss. *See, e.g.*, Soc'y for Propagation of the Gospel v. Town of Pawlet, 29 U.S. (4 Pet.) 480 (1830) (where British company filed ejectment action against town, Court affirmed plaintiff's right to recover possession of land, but rejected plaintiff's treaty-based claim for mesne profits). If both parties assert rights under a treaty, and one party wins its treaty-based claim or defense, that counts as a win. *See, e.g.*, Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (1795) (where Dutch ship owners sought to recover property captured by privateers who claimed to be French, and captors invoked treaty with France as a bar to Court's jurisdiction, the Court rejected the jurisdictional objection and ruled in favor of Dutch ship owners on the basis of a treaty with the Netherlands).

tionalist presumption against judicial remedies, it is essential to determine whether the individual invoking the treaty had a statutory or treaty-based right of action. Since the Court almost never addressed this question in its opinions, it is necessary to look beyond the text of the opinions.[150] The cases divide into four groups: twelve cases where the individual litigant had a statutory right of action;[151] three cases where the treaty provided an express private right of action;[152] fifteen cases that are clearly inconsistent with the nationalist model because the Court awarded remedies on the basis of a treaty even though there was no statutory or treaty-based right of action;[153] and six cases that are arguably inconsistent with the nationalist model because there was no statutory right of action, and it is debatable whether the treaty created a private right of action.[154]

1. Cases Involving a Statutory Right of Action

The United States acquired Louisiana from France by a treaty signed in 1803.[155] Under Article 3 of that treaty, the United States promised that "[t]he inhabitants of the ceded territory . . . shall be maintained and protected in the free enjoyment of their . . . property."[156] At the time of the acquisition, many individuals had private property rights based upon grants received from prior French and Spanish governments. Congress, therefore, enacted legislation in 1805 that authorized the President to appoint commissioners to conduct hearings and review evidence for the purpose of distinguishing between valid and invalid property claims.[157] Over the next two decades, Congress passed a series of laws regulating titles to land in the territory acquired from France.[158] Ultimately, in 1824, Congress created a federal statutory cause of action authorizing individuals who

150. The fact that the vast majority of Supreme Court opinions during this period did not even consider whether the treaty at issue provided a private right of action is itself compelling evidence that the Court did not endorse or apply the nationalist methodology.

151. *See infra* Part IV.A(1).

152. *See infra* Part IV.A(2).

153. *See infra* Part IV.A(3).

154. *See infra* Part IV.A(4).

155. Treaty for the Cession of Louisiana, U.S.-Fr., Apr. 30, 1803, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 498 (Hunter Miller ed., Gov't Printing Office 1931) [hereinafter Louisiana Treaty].

156. *Id.* art. 3.

157. Act of Mar. 2, 1805, ch. 26, § 5, 2 Stat. 324, 327–28.

158. *See* Harry L. Coles, Jr., *Applicability of the Public Land System to Louisiana*, 43 MISS. VALLEY HIST. REV. 39, 43–46, 51–53 (1956); Harry L. Coles, Jr., *The Confirmation of Foreign Land Titles in Louisiana*, 1955 LA. HIST. Q. 1, 1–22 (Oct. 1955). *See also* Act of Mar. 2, 1805, ch. 26, 2 Stat. 324, 324–25 n.(a) (summarizing legislation from 1804 to 1844).

claimed property rights "protected or secured by the treaty between the United States of America and the French republic . . . to present a petition to the district court of the state of Missouri . . . ."[159] During the 1830s, the Supreme Court decided three cases where plaintiffs asserting a claim on the basis of this federal statute won on the merits of those claims.[160]

The United States acquired Florida from Spain by a treaty signed in 1819.[161] Under Article 8 of that treaty, the United States promised to respect the property rights of individuals who had valid titles based on prior Spanish land grants.[162] Congress wanted to implement that treaty obligation, while simultaneously establishing safeguards to prevent the distribution of large tracts of land to individuals with fraudulent claims. Accordingly, in 1822 Congress enacted legislation authorizing the President to appoint commissioners to conduct hearings and review evidence for the purpose of distinguishing between valid and invalid property claims.[163] The initial statutory scheme was purely administrative, with no provision for judicial review. In 1828, however, Congress created a federal statutory cause of action for individuals who claimed property rights protected by Article 8 of the Florida Treaty.[164] During the 1830s, the Supreme Court decided nine cases in which plaintiffs asserting a claim on the basis of this federal statute won on the merits of their treaty-based

159. Act of May 26, 1824, ch. 173, § 1, 2 Stat. 52, 52. The statute says, in relevant part:

> That it shall and may be lawful for any person . . . claiming lands . . . within the state of Missouri, by virtue of any French or Spanish grant . . . which was protected or secured by the treaty between the United States of America and the French republic . . . to present a petition to the district court of the state of Missouri . . . and the said court is hereby authorized and required to hold and exercise jurisdiction of every petition, presented in conformity with the provisions of this act . . . .

160. Mackey v. United States, 35 U.S. (10 Pet.) 340 (1836); Soulard's Heirs v. United States, 35 U.S. (10 Pet.) 100 (1836); Delassus v. United States, 34 U.S. (9 Pet.) 117 (1835).

161. Treaty of Amity, Settlement, and Limits, U.S.-Spain, Feb. 22, 1819, *reprinted in* 3 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 3 (Hunter Miller ed., Gov't Printing Office 1933) [hereinafter Florida Treaty].

162. *Id.* art. 8 ("All the grants of land made before the 24th of January 1818 by His Catholic Majesty or by his lawful authorities in the said Territories ceded by His Majesty to the United-States, shall be ratified and confirmed to the persons in possession of the lands. . . ." (footnote omitted)).

163. *See* Act of May 8, 1822, ch. 129, 3 Stat. 709.

164. *See* Act of May 23, 1828, ch. 70, 4 Stat. 284. Section 6 of the Act states:

> That all claims to land within the territory of Florida, embraced by the treaty between Spain and the United States . . . shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge, and claimants in the state of Missouri, by act of Congress, approved May twenty-sixth, eighteen hundred and twenty-four . . . .

claims.[165]

All twelve cases where plaintiffs prevailed (three Missouri cases and nine Florida cases) are consistent with the transnationalist model because the Court granted remedies to the individual plaintiffs to protect their treaty-based rights. All twelve cases are also consistent with the nationalist model because Congress had enacted federal statutes authorizing judicial enforcement of those claims. Even so, none of the cases endorse the nationalist presumption against private enforcement of treaties.

2. Cases Involving an Express Treaty-Based Right of Action

In *Higginson v. Mein*,[166] a British mortgagee sued to foreclose on a mortgage related to land in Georgia. The State of Georgia had confiscated the mortgaged property during the Revolutionary War.[167] The British plaintiff invoked Article 5 of the Definitive Treaty of Peace, which protected the rights of "all Persons who have any Interest in confiscated Lands, either by Debts, Marriage Settlements, or otherwise."[168] Article 5 granted the plaintiff an express private right of action. The treaty stipulated: "And it is agreed that all Persons who have any Interest in confiscated Lands . . . shall meet with no lawful Impediment in the Prosecution of their just Rights."[169] The Court ruled in favor of the British plaintiff.

Bello Corrunes[170] and *Pizarro*[171] were both admiralty cases

165. United States v. Sibbald, 35 U.S. (10 Pet.) 313 (1836); United States v. Seton, 35 U.S. (10 Pet.) 309 (1836); United States v. Fernandez, 35 U.S. (10 Pet.) 303 (1836); Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); United States v. Clarke, 34 U.S. (9 Pet.) 168 (1835); United States v. Huertas, 33 U.S. (8 Pet.) 488 (1834) (plaintiff wins claim for 11,000 acres but loses claim for 4000 acres); United States v. Clarke, 33 U.S. (8 Pet.) 436 (1834) (plaintiff wins claim for 8000 acres but loses claim for other land); United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832).

166. 8 U.S. (4 Cranch) 415 (1808).

167. *See id.* at 418–19.

168. Definitive Treaty of Peace, U.S.-Gr. Brit., art. 5, Sept. 3, 1783, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 151, 154 (Hunter Miller ed., Gov't Printing Office 1931).

169. *Id.* Thus, the treaty specifically authorizes those "who have any Interest in confiscated Lands" to prosecute "their just rights" in the confiscated lands, which are restored by Article 5. It is difficult to imagine what else the treaty drafters would have to say in order to satisfy the nationalist requirement for a private right of action. In contrast, neither Article 4 nor Article 6 of the Definitive Treaty of Peace creates an express private right of action. For analysis of those articles, *see infra* notes 216–36, 247–58 and accompanying text.

170. 19 U.S. (6 Wheat.) 152 (1821).

171. 15 U.S. (2 Wheat.) 227 (1817).

involving disputes between U.S. captors and Spanish ship-owners. In both cases, Article XX of the 1795 Treaty with Spain granted Spanish ship owners an express private right of action authorizing suits in U.S. courts. The treaty stated: "It is also agreed that the inhabitants of the territories of each Party shall respectively have free access to the Courts of Justice of the other, and they shall be permitted to prosecute suits for the recovery of their properties . . . and for obtaining satisfaction for the damages which they may have sustained . . . ."[172] In both cases, the Court awarded judgment to the Spanish ship owners on the grounds that American privateers who captured the ships had violated the 1795 Treaty with Spain.[173]

Higginson, *Bello Corrunes*, and *Pizarro* are all consistent with the transnationalist model because, in each case, the Court awarded a remedy to an individual victim of a treaty violation. All three cases are also consistent with the nationalist model because the treaties at issue granted the individual litigants an express private right of action. None of these cases, however, endorse the nationalist presumption against private enforcement of treaties. Moreover, none of the cases state or imply that individual litigants could not have enforced the treaty in the absence of a treaty-based right of action.

3. Cases in Which There Was No Express Private Right of Action

The Supreme Court decided fifteen cases between 1789 and 1838 in which an individual litigant won on the merits of a treaty-based claim or defense, even though the treaty at issue did not create an express private right of action and Congress had not enacted legislation authorizing private enforcement of the treaty in domestic courts. The fifteen cases include five admiralty cases,[174] five cases

172. Treaty of Friendship, Limits and Navigation, U.S.-Spain, art. 20, Oct. 27, 1795, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 318, 334–35 (Hunter Miller ed., Gov't Printing Office 1931) [hereinafter 1795 Treaty with Spain].

173. *See Bello Corrunes*, 19 U.S. (6 Wheat.) at 171–72 (holding that the privateer had violated Article XIV of the 1795 Treaty with Spain), 154–55 (noting that the Circuit court had ordered restoration of the ship to the Spanish owners), 175–76 (affirming the Circuit court order in all relevant respects); *Pizarro*, 15 U.S. (2 Wheat.) at 242–47 (holding that the capture violated Article XV of the 1795 Treaty with Spain and ordering restitution of the ship to the Spanish owners).

174. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Moodie v. Ship Phoebe Anne, 3 U.S. (3 Dall.) 319 (1796); Geyer v. Michel, 3 U.S. (3 Dall.) 285 (1796); Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (1795); United States v. Peters, 3 U.S. (3 Dall.) 121 (1795).

involving creditor-debtor disputes,[175] and five other cases.[176] In all fifteen cases, the Court applied the transnationalist presumption in favor of judicial remedies. In every case, the Court would have reached a different result if it had applied the nationalist presumption. Consequently, these cases are clearly inconsistent with the nationalist model; they provide strong support for the transnationalist model.

a. Admiralty Cases

In the years 1795 and 1796, the Supreme Court decided four admiralty cases in which the Court enforced a treaty on behalf of an individual litigant, despite the fact that the treaty at issue did not create an express private right of action: *Moodie v. Ship Phoebe Anne*, *Geyer v. Michel*, *Talbot v. Jansen*, and *United States v. Peters*.[177] All four cases arose in the context of a naval war between France and other European powers.

Talbot v. Jansen involved a Dutch brigantine, the Magdalena, which had been captured by privateers.[178] The Dutch ship owners argued that the capture violated a 1782 treaty between the United States and The Netherlands.[179] The Supreme Court ruled in favor of the Dutch ship owners,[180] producing four separate opinions in support of that result. Two of the four opinions expressly held that the capture violated the 1782 Treaty with The Netherlands, and that the ship

175. Hopkirk v. Bell, 8 U.S. (4 Cranch) 164 (1807) (*Hopkirk* II); Hopkirk v. Bell, 7 U.S. (3 Cranch) 454 (1806) (*Hopkirk* I); Ogden v. Blackledge, 6 U.S. (2 Cranch) 272 (1804); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794).

176. Carver v. Jackson, 29 U.S. (4 Pet.) 1 (1830); Carneal v. Banks, 23 U.S. (10 Wheat.) 181 (1825); Soc'y for the Propagation of the Gospel v. Town of New Haven, 21 U.S. (8 Wheat.) 464 (1823); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817); Fitzsimmons v. Newport Ins. Co., 8 U.S. (4 Cranch) 185 (1808).

177. See the cases cited *supra* note 174.

178. 3 U.S. (3 Dall.) 133 (1795).

179. Treaty of Amity and Commerce, U.S.-Neth., art. 19, Oct. 8, 1782, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 59, 76–77 (Hunter Miller ed., Gov't Printing Office 1931) [hereinafter 1782 Treaty with Netherlands]. Article 19 prohibited U.S. citizens from accepting a commission from any state at war with The Netherlands "for arming any Ship or Ships, to act as Privateers" against Dutch ships. One of the captors, Talbot, was allegedly a U.S. citizen who had accepted a commission from France, which was at war with The Netherlands. Talbot claimed that Article 19 did not apply to him because he had renounced his U.S. citizenship and acquired French citizenship. Justice Paterson, who wrote one of the two main opinions in the case, would have resolved the case on other grounds without deciding whether Talbot was a French citizen. *See Talbot*, 3 U.S. (3 Dall.) at 152–58 (Paterson, J., plurality opinion). Justice Iredell, who wrote the other main opinion in the case, held squarely that Talbot was a U.S. citizen. *See id.* at 161–65 (Iredell, J., plurality opinion).

180. *Talbot*, 3 U.S. (3 Dall.) at 169.

owners were entitled to a remedy on that basis.[181] The Court granted a remedy to the ship owners, even though the treaty at issue did not create an express private right of action,[182] and there was no federal statute, other than the general grant of admiralty jurisdiction, that authorized the ship owners to enforce the treaty in a U.S. court.[183]

In *Moodie v. Ship Phoebe Anne*, a French privateer captured a British vessel. The British Consul filed a libel, seeking restitution on the ground that the French privateer had illegally augmented the vessel's force in a U.S. port.[184] In response, the privateer invoked Article 19 of a 1778 treaty with France,[185] which granted the privateer a right to enter a U.S. port for repairs. The Court held that the treaty protected the privateer's activities in this case.[186] Accordingly, the Court awarded judgment to the French privateer on the basis of the treaty, even though the treaty at issue did not create an express private right of action,[187] and there was no federal statute that authorized the privateer to enforce the treaty in a U.S. court.

In *United States v. Peters*, the commander of a French warship filed a writ of prohibition in the Supreme Court to prevent Richard Peters, the district judge for the District of Pennsylvania, from exercising jurisdiction over a libel filed in that court by James

181. *See id.* at 165 (Iredell, J., plurality opinion) (concluding that Talbot breached his "duty of not cruising against the Dutch, in violation of the law of nations, generally, and of the treaty with Holland, in particular"); *id.* at 169 (Rutledge, C.J., plurality opinion) (stating that the capture "was a violation of the law of nations, and of the treaty with Holland").

182. Article 19 expressly provides that any individual who violates its terms "shall be punished as a Pirate." 1782 Treaty with Netherlands, *supra* note 179. The treaty does not provide for civil actions against individuals who commit acts of piracy. *See id.*

183. The statute conferring admiralty jurisdiction empowered federal courts to adjudicate admiralty disputes, but it did not expressly empower the Dutch ship owners to invoke the treaty. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (granting district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction"). From an eighteenth-century viewpoint, though, the absence of an express private right of action was immaterial. Every person with an admiralty claim had a right of access to court to enforce that claim, and every person whose treaty-based primary rights were violated had a power to invoke the treaty before a court. This eighteenth-century logic does not apply to modern cases brought under 28 U.S.C. § 1331, because a plaintiff bringing suit under that jurisdictional statute must usually identify some other source of federal law that grants him a right of access to court.

184. *See* Moodie v. Ship Phoebe Anne, 3 U.S. (3 Dall.) 319 (1796).

185. Treaty of Amity and Commerce, U.S.-Fr., art. 19, Feb. 6, 1778, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 3, 17–18 (Hunter Miller ed., Gov't Printing Office 1931) [hereinafter 1778 Treaty with France].

186. *See Phoebe Anne*, 3 U.S. (3 Dall.) at 319.

187. Article 19 of the 1778 treaty with France protects the right of French mariners who seek shelter in U.S. ports to obtain "all things needful for . . . reparation of their Ships" and to "depart when and whither they please without any let or hindrance." 1778 Treaty with France, *supra* note 185. The treaty does not contain any language that expressly empowers French citizens to invoke that provision before a U.S. court.

Yard.[188] In his libel in the district court, Yard alleged that he was the owner of the schooner William Lindsey, which had been captured illegally by a French warship, the Cassius, and taken to Port de Paix (a French port).[189] When the Cassius subsequently returned to Philadelphia (while the William Lindsey was still in Port de Paix), Yard filed a libel and moved to attach the Cassius in an effort to secure compensation for the damages he sustained as a result of the allegedly illegal capture of the William Lindsey.[190] Samuel Davis, the commander of the Cassius, responded by filing a writ of prohibition in the Supreme Court.[191] The Supreme Court granted the writ,[192] holding that the 1778 treaty with France[193] precluded the district court from exercising jurisdiction in a case where a French warship had captured an American vessel and taken the captured vessel to a French port.[194] Again, the Court awarded judgment on the basis of the treaty, even though the treaty did not create an express private right of action, and there was no federal statute that authorized Davis to enforce the treaty in a U.S. court.

The Supreme Court's opinion in *Geyer v. Michel* addressed two separate cases. One involved a Dutch ship (the Den Onzekeren) captured by a French privateer. The other involved a British ship (The Betty Cathcart) captured by the same French privateer.[195] In both cases, agents of the owners filed libels in federal district court in South Carolina, seeking restitution of the captured prizes.[196] The French captor invoked Article 17 of the 1778 treaty with France as a bar to the district court's jurisdiction.[197] Judge Thomas Bee, who was the federal district judge in South Carolina, issued a published

188. *See* 3 U.S. (3 Dall.) 121, 121–25 (1795).
189. *Id.* at 121–22.
190. *Id.*
191. *Id.* at 122–23.
192. *Id.* at 129.
193. 1778 Treaty with France, *supra* note 185. The Court's opinion in *Peters* refers generally to "the treaties subsisting between the United States and the Republic of France," 3 U.S. (3 Dall.) at 129, but other contemporaneous cases make it clear that the Court was relying on Article 17 of the 1778 Treaty with France. *See infra* notes 195–204 and accompanying text.
194. *Peters*, 3 U.S. (3 Dall.) at 129–32. The Court also invoked the law of nations in support of its conclusion.
195. *See* Geyer v. Michel, 3 U.S. (3 Dall.) 285, 286–89 (1796). *See also* Minutes of the Supreme Court, Mar. 3, 1796, *reprinted in* 7 AM. J. LEGAL HIST. 63, 75–76 (1963) (noting that the two cases "were agreed by Counsel to be argued together as depending upon similar principles").
196. *See Geyer*, 3 U.S. (3 Dall.) at 286; Moodie v. The Betty Cathcart, 17 F. Cas. 651 (D.S.C. 1795) (No. 9742).
197. *Geyer*, 3 U.S. (3 Dall.) at 287.

decision in *The Betty Cathcart* on April 27, 1795;[198] his decision in *The Den Onzekeren* was unpublished. Before issuing his decision in *The Betty Cathcart*, Judge Bee had published decisions in eight other cases in which he held that Article 17 of the 1778 treaty with France precluded the district court from exercising jurisdiction over prize cases involving French privateers who captured enemy ships on the high seas.[199] Thus, by the time Judge Bee decided *The Den Onzekeren* and the *The Betty Cathcart*, it was well established that Article 17 gave French privateers a valid defense to the jurisdiction of U.S. courts.[200]

However, the libellants in *The Den Onzekeren* and *The Betty Cathcart* raised a novel argument; they alleged that the French privateer had illegally augmented its force in a U.S. port in violation of U.S. neutrality laws.[201] Judge Bee ruled in favor of the libellants on this basis, reasoning that the French privateer effectively waived its immunity to the jurisdiction of U.S. courts by breaching U.S. neutrality laws.[202] After obtaining additional evidence, the Circuit Court reversed Judge Bee's decisions on factual grounds, concluding that the French privateer had not illegally augmented its force.[203] The Supreme Court affirmed the Circuit Court decision without stating its rationale.[204] Even so, the rationale is clear in light of the historical

198. *The Betty Cathcart*, 17 F. Cas. 651.

199. *See* British Consul v. The Mermaid, 4 F. Cas. 169 (D.S.C. Apr. 3, 1795) (No. 1897); Williamson v. The Betsy, 30 F. Cas. 7 (D.S.C. Mar. 23, 1795) (No. 17,750); Moodie v. The Brothers, 17 F. Cas. 653 (D.S.C. Mar. 1795) (No. 9743); Reid v. The Vere, 20 F. Cas. 488 (D.S.C. Jan. 22, 1795) (No. 11,670); Salderondo v. Nostra Signora del Camino, 21 F. Cas. 225 (D.S.C. Sept. 1794) (No. 12,247); Stannick v. The Friendship, 22 F. Cas. 1056 (D.S.C. Aug. 1794) (No. 13,291); British Consul v. The Favorite, 4 F. Cas. 169 (D.S.C. 1794) (No. 1896) (published as a note to United States v. The Hawke, 26 F. Cas. 233 (D.S.C. 1794) (No. 15,331)); Castello v. Bouteille, 5 F. Cas. 278 (D.S.C. 1794) (No. 2504).

200. Article 17 provides:

> It shall be lawful for the Ships of War of either Party & Privateers freely to carry whithersoever they please the Ships and Goods taken from their Enemies, without being obliged to pay any Duty to the Officers of the Admiralty or any other Judges; nor shall such Prizes be arrested or seized, when they come to and enter the Ports of either Party; nor shall the Searchers or other Officers of those Places search the same or make examination concerning the Lawfulness of such Prizes, but they may hoist Sail at any time and depart and carry their Prizes to the Places express'd in their Commissions . . . .

1778 Treaty with France, *supra* note 185.

201. *Geyer*, 3 U.S. (3 Dall.) at 286–87; *The Betty Cathcart*, 17 F. Cas. at 651–53. This was not the first time Judge Bee addressed the argument that a French privateer had illegally augmented its force in a U.S. port. *See* British Consul v. The Nancy, 4 F. Cas. 171 (D.S.C. 1795) (No. 1898) (ordering restitution of prize and cargo on the grounds that French privateer augmented its force in a U.S. port in violation of U.S. neutrality).

202. *The Betty Cathcart*, 17 F. Cas. at 653.

203. *Geyer*, 3 U.S. (3 Dall.) at 289–93.

204. *Id.* at 296.

context: absent proof that the privateer had illegally augmented its force, Article 17 of the 1778 treaty precluded U.S. courts from exercising jurisdiction. Moreover, the Court enforced Article 17 on behalf of the French privateer, even though the treaty did not create an express private right of action, and there was no federal statute that authorized the privateer to enforce the treaty in a U.S. court.[205]

In *United States v. Schooner Peggy*,[206] the Court ruled in favor of the French owners of a schooner captured by a U.S. naval vessel, holding that Article 4 of an 1800 Convention with France granted the French owners a right to recover the captured property.[207] Article 4 granted the French owners a primary right to regain possession of the ship, but it did not explicitly empower them to enforce that right in a U.S. court.[208] Nor was there any federal statute, other than the general grant of admiralty jurisdiction, that authorized the French ship owners to enforce the treaty in a U.S. court. One could argue that Article 22 of the 1800 Convention with France granted the French ship owners a private right of action.[209] It is clear from the historical context, however, that Article 22 was not intended to create a private right of action.[210] Moreover, even if one reads Article 22 to create a right of action, it is questionable whether that right of action applied to cases, such as *Schooner Peggy*, implicating Article 4 of the treaty.[211]

205. *Id.*

206. 5 U.S. (1 Cranch) 103, 108–10 (1801).

207. *Id.*

208. Convention Between the French Republic and the United States of America, U.S.-Fr., art. 4, Sept. 30, 1800, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 457, 459–62 (Hunter Miller ed., Gov't Printing Office 1931) [hereinafter 1800 Convention with France] ("[P]roperty captured, and not yet definitively condemned . . . shall be mutually restored.").

209. *See id.* art. 22 ("It is further agreed that in all cases, the established courts for Prize Causes, in the Country to which the prizes may be conducted, shall alone take cognizance of them.").

210. In the 1790s, the French Ambassador had instructed French consuls in the United States to exercise jurisdiction over prize cases in which French privateers captured enemy vessels and brought them into U.S. ports. *See* CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793, at 206–11 (1967). The United States objected strenuously to this practice. *See id.* Article 22 thus codified France's acknowledgment that U.S. courts had exclusive jurisdiction over prize cases involving captured vessels brought to the United States.

211. The 1800 Convention with France served two distinct goals. First, it was a peace treaty that terminated the undeclared war between the United States and France. Articles 1–5 were backward-looking and were intended to codify the termination of the war. Meanwhile, Articles 6–27 were forward-looking and were designed to govern future relations. Hence, the word "cases" in Article 22 may have been intended to include only the admiralty cases addressed in Articles 6–27, not the cases implicating Article 4, which addressed property captured during the war. *See* 1800 Convention with France, *supra* note 208.

In any case, the Court's opinion in *Schooner Peggy* makes no reference to Article 22, and does not rely on that treaty provision as a basis for a private right of action. Rather, the Court's rationale was that "[t]he court is as much bound as the executive to take notice of a treaty, and will . . . decree restoration of the property under the treaty."[212] In accordance with the transnationalist model, the Court assumed that Article 4 was judicially enforceable by private parties, even though that article did not expressly empower individuals to invoke the treaty before a U.S. court. Chief Justice Marshall, writing for the Court, stated:

> The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. . . . [W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress; and . . . to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.[213]

In Marshall's view, it was immaterial whether the treaty created a private right of action because the Court had a duty under the Supremacy Clause to enforce the treaty on behalf of the French ship owners.

Talbot, *Phoebe Anne*, *Peters*, *Geyer*, and *Schooner Peggy* are all consistent with the transnationalist model, but they are squarely inconsistent with the nationalist model. In accordance with the transnationalist model, the Court assumed that the treaties at issue were judicially enforceable on behalf of private parties, even though the treaties did not create an express private right of action.[214] Contrary to the nationalist model, the absence of any statutory or treaty provision that expressly authorized private enforcement was not a bar to private enforcement of the treaty.

212. *Schooner Peggy*, 5 U.S. (1 Cranch) at 103–04.

213. *Id.* at 109–10 (Marshall, C.J.).

214. *See, e.g.*, *Moodie v. Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319, 319 (1796) (Elsworth, C.J.) ("Suggestions of policy and conveniency cannot be considered in the judicial determination of a question of right: the Treaty with France . . . must have its effect.").

b. Creditor-Debtor Disputes

During the period under study, the Supreme Court decided five cases in which it awarded judgment to British creditors on the basis of Article 4 of the Definitive Treaty of Peace.[215] *Ware v. Hylton*[216] is representative of these cases. In *Ware*, a British creditor sued U.S. debtors to collect payment on a bond that dated from 1774.[217] In 1777, during the Revolutionary War, the Virginia legislature "passed a law to sequester British property."[218] In 1780, pursuant to that Virginia law, the U.S. debtors paid a portion of their debt into a loan office established by the State of Virginia.[219] After the war was over, when the British creditor sued to recover payment on the bond, the defendants pled the Virginia law, and their payment into the loan office, as a bar to the suit.[220] In reply to that defense, the plaintiff invoked Article 4 of the Definitive Treaty of Peace.[221] The Supreme Court ruled in favor of the British plaintiff, holding that "the 4th article of the said treaty nullifies the law of Virginia . . .; destroys the payment made under it; and revives the debt . . . ."[222] The Court applied the transnationalist presumption in favor of judicial remedies, granting a remedy to the British plaintiff, despite the fact that neither the treaty nor a federal statute granted the plaintiff a private right of action.[223]

In addition to *Ware*, the Supreme Court decided three other cases implicating Article 4 in which British creditors sued U.S. debtors to recover debts that had been confiscated or sequestered during the Revolutionary War.[224] In one other case, the State of Georgia sued a British creditor, and the creditor invoked Article 4 defensively to assert his entitlement to a debt sequestered during the war.[225] In

215. *See infra* notes 216–28 and accompanying text.
216. 3 U.S. (3 Dall.) 199 (1796).
217. *Id.* at 199.
218. *Id.* at 220 (Chase, J.).
219. *Id.* at 221.
220. *Id.*
221. Definitive Treaty of Peace, *supra* note 168, art. 4 ("Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted.").
222. *Ware*, 3 U.S. (3 Dall.) at 235 (Chase, J.).
223. The plaintiff's suit was based on the common law right of action to recover payment on a bond.
224. Hopkirk v. Bell (*Hopkirk II*), 8 U.S. (4 Cranch) 164 (1807); Hopkirk v. Bell (*Hopkirk I*), 7 U.S. (3 Cranch) 454 (1806); Ogden v. Blackledge, 6 U.S. (2 Cranch) 272 (1804).
225. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794).

all the cases, the Court ruled in favor of the British creditors.[226] Like *Ware*, these cases are inconsistent with the nationalist model because the Court granted remedies to British creditors even though Article 4 did not grant the creditors a private right of action, and there was no federal statute that empowered British creditors to invoke the treaty before a U.S. court.

Defenders of the nationalist model might contend that Article 4 does create a private right of action. The treaty states explicitly "that Creditors on either Side shall meet with no lawful Impediment to the recovery . . . of all bona fide Debts heretofore contracted."[227] This language, one could argue, manifests the drafters' expectation that private individuals could enforce the treaty in domestic courts. Moreover, the Court stated explicitly in *Ware* that the phrase "to the Recovery" refers "to the right of action, judgment, and execution . . . . The word recovery is very comprehensive and operates, in the present case, to give remedy from the commencement of suit, to the receipt of the money."[228] Thus, one could argue, *Ware* and the other Article 4 cases are consistent with the nationalist model because they are cases where the treaty itself created a private right of action.

This argument is not persuasive. The express language of Article 4 says nothing about courts or lawsuits; it merely refers to recovery of debts. Hart and Sacks would characterize Article 4 as a primary rule because it specifies what the treaty drafters expect "to happen when the arrangement works successfully."[229] It is not a remedial rule because it does not specify "that a certain consequence, or sanction, may or shall follow upon . . . noncompliance with the relevant primary provision."[230] In this respect, Article 4 differs markedly from provisions of other contemporaneous treaties that create an express private right of action. Unlike those treaty provisions that expressly require enforcement in domestic courts,[231] the United

226. *Hopkirk II*, 8 U.S. (4 Cranch) 164 (reaffirming *Hopkirk I*); *Hopkirk I*, 7 U.S. (3 Cranch) 454 (ordering debtor to pay debt wrongfully withheld from creditor in violation of Article 4 of the Definitive Treaty of Peace); *Ogden*, 6 U.S. (2 Cranch) 272 (same); *Brailsford*, 3 U.S. (3 Dall.) 1 (holding that Article 4 of the Definitive Treaty of Peace protected British defendant's right to recover debt).

227. Definitive Treaty of Peace, *supra* note 168, art. 4.

228. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 241 (1796). *See also Brailsford*, 3 U.S. (3 Dall.) at 5 ("[T]he very terms of the treaty, revived the right of action to recover the debt . . . .").

229. HART & SACKS, *supra* note 24, at 122.

230. *Id.*

231. *See, e.g.*, 1795 Treaty with Spain, *supra* note 172, art. 20 ("It is also agreed that the inhabitants of the territories of each Party shall respectively have free access to the Courts of Justice of the other, and they shall be permitted to prosecute suits for the recovery of their properties . . . and for obtaining satisfaction for the damages which they may have sustained

States could have fulfilled its obligations under Article 4 without any judicial involvement.[232]

Perhaps more importantly, Article 4 of the Definitive Treaty of Peace is virtually indistinguishable from Article 36(2) of the VCCR, the treaty provision at issue in *Sanchez-Llamas v. Oregon*.[233] Whereas Article 4 specifies that creditors "shall meet with no lawful impediment to the recovery of the full value" of debts,[234] Article 36(2) specifies that U.S. "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."[235] Both provisions, in essence, say that states parties cannot interpose domestic law as an obstacle to prevent individuals whose rights are protected by the treaty from deriving the full benefit of those rights. Courts applying the nationalist model have uniformly held that Article 36(2) of the VCCR does not authorize judicial enforcement on behalf of private individuals.[236] Defenders of the nationalist model cannot have it both ways. Their claim that Article 36(2) does not authorize domestic judicial enforcement contradicts the argument that *Ware* and the other Article 4 cases are consistent with the nationalist model.

In light of these observations, consider again the Court's statement in *Ware* that the word "recovery" in Article 4 refers "to the right of action . . . and operates, in the present case, to give remedy

. . . .").

232. In fact, the United States later agreed on non-judicial means to implement its obligations under Article 4 because British creditors had ongoing problems enforcing their rights in U.S. courts. *See* GOEBEL, *supra* note 146, at 741–56 (recounting history of efforts by British creditors to recover pre-war debts). The United States agreed in the 1794 Jay Treaty that "[t]he United States will make full and complete Compensation for" debts owed by U.S. citizens to British creditors. *See* Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., art. 6, Nov. 19, 1794, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 245, 250 (Hunter Miller ed., Gov't Printing Office 1931) [hereinafter Jay Treaty]. Moreover, the treaty established a bilateral U.S.-British arbitral tribunal that provided a non-judicial forum where British creditors could enforce their rights protected by Article 4 of the peace treaty. *Id.* The tribunal ceased operations in 1798, but the United States and Great Britain concluded a new treaty in 1802 "by which the United States agreed to pay the sum of £600,000 in satisfaction of claims for pre-war debts." GOEBEL, *supra* note 146, at 756.

233. 126 S. Ct. 2669 (2006).

234. Definitive Treaty of Peace, *supra* note 168, art. 4.

235. VCCR, *supra* note 65, art. 36(2).

236. *See, e.g.*, United States v. Emuegbunam, 268 F.3d 377, 388–94 (6th Cir. 2001) (applying the nationalist presumption against judicial enforcement and concluding on that basis "that the Vienna Convention does not create a right for a detained foreign national . . . that the federal courts can enforce"); United States v. Jimenez-Nava, 243 F.3d 192, 195–98 (5th Cir. 2001) (same); United States v. Li, 206 F.3d 56, 66–68 (1st Cir. 2000) (Selya, J. & Boudin, J. concurring) (same).

from the commencement of suit, to the receipt of the money."[237] This statement, viewed in the proper historical context, manifests the Court's tacit assumption that "where there is a right, there is a remedy." Article 4, by its terms, creates a primary duty for debtors to pay and a correlative primary right for creditors to be paid.[238] The Court inferred, on the basis of this primary rule, that creditors must have a judicial remedy in cases where debtors refuse to pay their debts, because the Court assumed the validity and applicability of the maxim *ubi jus, ibi remedium*. In short, the Court applied the transnationalist presumption in favor of judicial remedies.

c. Other Cases that Are Inconsistent with the Nationalist Model

During the period under study, the Court decided five other cases that are inconsistent with the nationalist presumption against judicial remedies for treaty violations.

In *Chirac v. Chirac*,[239] the French heirs of John Baptiste Chirac brought an action for ejectment to gain possession of real estate in Maryland. If the Court had applied Maryland law, the land would have escheated to the state.[240] In support of their action for ejectment, the French heirs invoked Article 7 of the 1800 Convention with France, which protected the rights of French subjects holding property in the United States.[241] Neither Article 7 nor any other provision of the treaty specifically empowered the plaintiffs to enforce the treaty in a domestic court. Regardless, Justice Marshall, writing for the Court, enforced the treaty on behalf of the plaintiffs, holding that the treaty "does away the incapacity of alienage, and places the

237. *Ware*, 3 U.S. (3 Dall.) at 241.

238. Definitive Treaty of Peace, *supra* note 168, art. 4 ("Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted."). A remedial rule, creating a private right of action, would have specified that if debtors refuse to pay, creditors may bring suit to enforce their rights.

239. 15 U.S. (2 Wheat.) 259 (1817).

240. *Id*. at 273–74.

241. 1800 Convention with France, *supra* note 208, art. 7 ("The Citizens, and inhabitants of the United States shall be at liberty to dispose by testament, donation, or otherwise, of their goods, moveable, and immoveable, holden in the territory of the French Republic in Europe, and the Citizens of the French Republic, shall have the same liberty with regard to goods, moveable, and immoveable, holden in the territory of the United States, in favor of such persons as they shall think proper. The Citizens and inhabitants of either of the two countries, who shall be heirs of goods, moveable, or immoveable in the other shall be able to succeed *ab intestato*, without being obliged to obtain letters of naturalization, and without having the effect of this provision contested or impeded under any pretext whatever.").

defendants in error in precisely the same situation, with respect to lands, as if they had become citizens."[242]

In *Carneal v. Banks*,[243] the plaintiff sued to rescind a land swap contract with defendants. Plaintiff alleged, *inter alia*, that defendants did not have a valid title to the land they promised to transfer because their title was derived from Lacassaign, a French national, whose alienage precluded him from conveying title to the property.[244] In response, defendants invoked Article 11 of the 1778 Treaty with France, which protected the property rights of French subjects residing in the United States.[245] Neither Article 11 nor any other provision of the treaty specifically empowered the defendants to enforce the treaty in a domestic court. Regardless, Justice Marshall, writing for the Court, applied the treaty on behalf of the defendants. The Court held that the "alienage of Lacassaign constitutes no objection . . . [because] the treaty of 1778, between the United States and France, secures to the citizens and subjects of either power the privilege of holding lands in the territory of the other . . . ."[246]

In *Society for Propagation of the Gospel v. Town of New Haven*,[247] a British corporation brought an action for ejectment against the Town of New Haven. The plaintiff owned the subject property before the Revolutionary War.[248] After the war, the Vermont legislature passed a law that expropriated the plaintiff and granted its property rights in the state "to the respective towns in which such lands lay . . . ."[249] In support of its suit for ejectment, plaintiff invoked Article 6 of the Definitive Treaty of Peace, which prohibited confiscation of British property in the United States.[250] Neither Article 6 nor

242. *Chirac*, 15 U.S. (2 Wheat.) at 275.

243. 23 U.S. (10 Wheat.) 181 (1825).

244. *Id.* at 182–86.

245. 1778 Treaty with France, *supra* note 185, art. 11 ("The Subjects and Inhabitants of the said United States . . . may by Testament, Donation, or otherwise dispose of their Goods moveable and immoveable in favour of such Persons as to them shall seem good; and their Heirs, Subjects of the Said United States, residing whether in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain Letters of Naturalization, and without having the Effect of this Concession contested or impeded under Pretext of any Rights or Prerogatives of Provinces, Cities, or Private Persons. . . . The Subjects of the most Christian King shall enjoy on their Part, in all the Dominions of the said States, an entire and perfect Reciprocity relative to the Stipulations contained in the present Article.").

246. *Carneal*, 23 U.S. (10 Wheat.) at 189.

247. 21 U.S. (8 Wheat.) 464 (1823).

248. *Id.* at 465–66.

249. *Id.* at 466.

250. Definitive Treaty of Peace, *supra* note 168, art. 6 ("[T]here shall be no future Confiscations made nor any Prosecutions commenc'd against any Person or Persons for or by Reason of the Part, which he or they may have taken in the present War, and that no Person shall on that Account suffer any future Loss or Damage, either in his Person Liberty

any other provision of the treaty specifically empowered the plaintiff to enforce the treaty in a domestic court.[251] Nevertheless, the Court enforced the treaty on behalf of the plaintiff. Referring to the land grant from the Vermont legislature to the Town of New Haven, the Court said: "[T]he only question is, whether this grant was not void by force of the 6th article of the above treaty? We think it was."[252]

In *Carver v. Jackson*,[253] plaintiffs who traced their property claims to Roger Morris brought an action for ejectment. The New York legislature had confiscated Morris's property during the Revolutionary War.[254] After conclusion of the peace treaty with Britain, New York passed laws requiring plaintiffs who sued to regain possession of confiscated properties to pay the occupants of those properties for any improvements made thereon.[255] When plaintiffs sued for ejectment, defendant sought compensation for improvements in accordance with New York law.[256] In reply, plaintiffs contended that state laws requiring them to pay compensation for improvements violated the Definitive Treaty of Peace.[257] Neither Article 6 nor any other provision of the treaty specifically empowered the plaintiffs to enforce the treaty in a domestic court.[258] Nevertheless, the Supreme Court enforced the treaty on behalf of the plaintiffs, holding "that the claim for improvements in this case, is inconsistent with the treaty of peace, and ought to be rejected."[259]

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or Property . . . .").

251. Article 5 of the treaty created a private right of action for British subjects whose land was confiscated *before* entry into force of the Definitive Treaty of Peace. *See supra* notes 168–69 and accompanying text. Article 5 did not apply in this case, though, because the treaty took effect in 1783, and the confiscation in this case did not occur until 1794. Thus, this case was governed by Article 6, which addressed future confiscations. Article 6 did not create a private right of action.

252. *Town of New Haven*, 21 U.S. (8 Wheat.) 464, 490–91 (1823).

253. 29 U.S. (4 Pet.) 1 (1830).

254. *Id.* at 4.

255. *Id.* at 99–100.

256. *Id.* at 4–5.

257. *Id.* at 65–66.

258. The Court's opinion cites both Articles 5 and 6 of the Definitive Treaty of Peace. *See id.* at 100–01. Article 5 was retrospective, addressing confiscation of British property before entry into force of the treaty; Article 6 was prospective, addressing future confiscations. *See* Definitive Treaty of Peace, *supra* note 168. The point at issue in *Carver* was whether New York could enforce laws enacted in 1784 and 1786 (after entry into force of the peace treaty) that would have required plaintiffs to pay for improvements made by defendants. *See Carver*, 29 U.S. (4 Pet.) at 99–100. The Court held that state laws requiring plaintiffs to pay for improvements constituted a "confiscation" of their estate, in violation of Article 6. *Id.* at 100–01. Thus, although Article 5 created a private right of action for claims involving confiscation of property before entry into force of the peace treaty, see *supra* notes 168–69 and accompanying text, that right of action did not apply to the specific claim at issue in *Carver*.

259. *Carver*, 29 U.S. (4 Pet.) at 101.

In *Fitzsimmons v. Newport Insurance Co.*,[260] a British prize court had condemned a U.S. ship. The ship owner sued the insurance company for breach of contract because the insurer refused to issue payment on the policy.[261] The company claimed that the judgment of the British court terminated its contractual obligation under the policy.[262] The Supreme Court, though, ruled in favor of the ship owner on the grounds that the capture and condemnation of the ship violated Article 18 of the Jay Treaty.[263] Article 18 created a duty for British naval vessels not to detain American ships.[264] The treaty, however, did not explicitly empower ship owners to bring suit in U.S. courts for violations of Article 18. Nor was there any federal statute that authorized private enforcement of the treaty. Nevertheless, the Court awarded a remedy to the individual plaintiff whose treaty rights were violated.[265]

In all five cases, the Court applied the transnationalist presumption in favor of judicial remedies for violations of individual treaty rights. In every case, the Court enforced the treaty on behalf of the party invoking the treaty, even though there was no statutory or treaty provision that expressly empowered individual litigants to enforce the treaty. All five cases, therefore, are inconsistent with the nationalist model. From the standpoint of Justice Marshall and his contemporaries, though, the absence of an express private right of action was not a bar to judicial enforcement because, in their view, every treaty provision that protects individual rights empowers the right-holder to invoke the treaty before a U.S. court.

4. Cases in Which It Is Unclear Whether the Treaty Created a Private Right of Action

The previous section analyzed cases where the Court enforced a treaty on behalf of an individual litigant, despite the fact that there was no statutory or treaty provision granting that individual a private cause of action. That section was purposefully repetitive to make the point that the Supreme Court repeatedly, in case after case, applied a

260. 8 U.S. (4 Cranch) 185 (1808).
261. *Id.* at 197.
262. *Id.*
263. *Id.* at 199–202.
264. *See* Jay Treaty, *supra* note 232, art. 18 ("And Whereas it frequently happens that vessels sail for a Port or Place belonging to an Enemy, without knowing that the same is . . . blockaded . . . [i]t is agreed, that every Vessel so circumstanced may be turned away from such Port or Place, but she shall not be detained . . . unless after notice she shall again attempt to enter . . . .").
265. *Fitzsimmons*, 8 U.S. (4 Cranch) at 197–202.

treaty to resolve a dispute where neither a treaty nor a statute created a private right of action. Those cases are patently inconsistent with the nationalist model.

This section analyzes cases where the Court enforced a treaty on behalf of an individual litigant, there was no statutory right of action, and it is debatable whether the treaty at issue created a private right of action. If one construes the nationalist requirement for a right of action strictly, insisting on express treaty language that empowers individual litigants to enforce the treaty, then these cases are also inconsistent with the nationalist model. If one construes the right of action requirement less rigidly, permitting implied rights of action in some cases, then these cases are arguably consistent with the nationalist model.

Before analyzing these cases, two points merit attention. First, in none of the cases under consideration here did the Court specifically address, separate from the merits of the case, the question whether the treaty created a private right of action. In the jurisprudence of the early nineteenth century, the Court simply assumed that every individual litigant whose treaty-based rights were violated had the power to enforce those rights in a domestic court. Second, while it is possible to analyze these cases in a manner that is consistent with the nationalist model by construing the right of action requirement liberally, that analysis is in tension with many of the modern cases applying the nationalist model, where courts have construed the right of action requirement quite strictly.

During the period under study, the Supreme Court decided six cases in which it awarded judgment to individual litigants whose rights were protected under Article 9 of the Jay Treaty, including two cases where plaintiffs prevailed in their treaty-based claims,[266] and four cases where defendants won treaty-based defenses.[267] In none

266. Hughes v. Edwards, 22 U.S. (9 Wheat.) 489 (1824) (ordering foreclosure and sale of mortgaged property to secure individual property right protected by Article 9 of Jay Treaty); Craig v. Radford, 16 U.S. (3 Wheat.) 594 (1818) (ordering defendants to convey land to plaintiff because defendants had wrongfully appropriated land in violation of Article 9 of Jay Treaty).

267. Shanks v. DuPont, 28 U.S. (3 Pet.) 242 (1830) (where plaintiffs brought equitable action, asserting entitlement to defendants' share of proceeds from sale of land, Court held that Article 9 of Jay Treaty protected defendants' right to half of proceeds from sale); Orr v. Hodgson, 17 U.S. (4 Wheat.) 453 (1819) (where plaintiff sued to rescind contract for purchase of land, challenging validity of defendant's title, Court dismissed bill for rescission because defendant had valid title protected by Article 6 of Definitive Treaty of Peace and Article 9 of Jay Treaty); Jackson v. Clarke, 16 U.S. (3 Wheat.) 1 (1818) (where plaintiff sued for ejectment, Court dismissed suit because Article 9 of Jay Treaty protected rights of British citizens to hold and inherit land); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812) (where plaintiff sued for ejectment, Court dismissed suit because

of these cases was there a federal statute empowering individual litigants to enforce Article 9 in a U.S. court. Thus, every case would have been decided differently under the nationalist model, unless the treaty itself creates a private right of action. Whether it does is a close question.

Article 9 states as follows:

> It is agreed, that British Subjects who now hold Lands in the Territories of the United States, and American Citizens who now hold Lands in the Dominions of His Majesty, shall continue to hold them according to the nature and Tenure of their respective Estates and Titles therein, and may grant Sell or Devise the same to whom they please, in like manner as if they were Natives; and that neither they nor their Heirs or assigns shall, so far as may respect the said Lands, *and the legal remedies incident thereto*, be regarded as Aliens.[268]

If the treaty drafters had not included the italicized phrase, Article 9 would clearly not satisfy the nationalist requirement for a private cause of action. Advocates of the nationalist model could reasonably argue, though, that the decisions enforcing Article 9 on behalf of individual litigants are consistent with the nationalist model because the italicized phrase empowers individual litigants to enforce Article 9 in a domestic court. In support of this argument, they could cite the Supreme Court's statement that "the remedies, as well as the rights, of these aliens, are completely protected by the treaty of 1794 . . . ."[269]

On the other hand, the phrasing of Article 9 suggests that the treaty-drafters, like the courts of that era, were working against the background assumption that "where there is a right, there is a remedy." That widely shared background assumption may explain why the treaty drafters described the legal remedies as being "incident to" estates and titles in land. Under this transnationalist view, the treaty itself protects titles in land (a primary right), and the associated legal remedies are "incident to" those titles.

Assume, hypothetically, that the New York legislature passed

defendant's title to land was secured by Article 9 of Jay Treaty). For additional analysis of *Fairfax's Devisee*, see GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15, at 554–57 (1981) (History of the Supreme Court of the United States Vol. 2).

268. Jay Treaty, *supra* note 232, art. 9 (emphasis added).

269. Hughes v. Edwards, 22 U.S. (9 Wheat.) 489, 496 (1824).

a law abolishing the traditional action for ejectment, and requiring individuals to petition the Governor, instead of filing suit in court, whenever they wanted to assert claims to land occupied by someone else. If the law applied equally to citizens and aliens, there would be no violation of the Jay Treaty.[270] Therefore, Article 9 of the Jay Treaty does not actually empower British citizens to enforce the treaty in U.S. courts—that is, it does not create a private right of action. It merely prevents discrimination against British citizens who hold title to property in the United States, ensuring that they have equal access to the remedies that U.S. law provides for U.S. citizens. If this view is correct, then the six cases in which the Supreme Court awarded individual remedies for violations of Article 9 are inconsistent with the nationalist model.

B. Cases Where the Court Did Not Reach the Merits of a Treaty-Based Claim or Defense

In *United States v. Judge Lawrence*,[271] the Attorney General petitioned the Supreme Court for a writ of mandamus, invoking Article 9 of a consular treaty with France,[272] and seeking to compel the

270. The Court's decision in *Society for Propagation of the Gospel v. Town of Pawlet*, 29 U.S. (4 Pet.) 480 (1830), supports this point. The plaintiff was a British corporation that owned land in Vermont before the Revolutionary War. *See id.* at 500–02. In 1794, many years after the war ended, the Vermont legislature confiscated plaintiff's property in Vermont. By operation of state law, the land at issue passed to the Town of Pawlet, which then rented the subject property to Ozias Clarke, who retained possession and occupancy until plaintiff sued for ejectment. *Id.* at 481–84. The Vermont law confiscating plaintiff's property was a clear violation of Article 6 of the Definitive Treaty of Peace, and of Article 9 of the Jay Treaty. *See* Definitive Treaty of Peace, *supra* note 168, art. 6 (prohibiting future confiscation of British property); Jay Treaty, *supra* note 232, art. 9 (protecting the rights of British nationals who held land in the United States). Plaintiff sought two distinct remedies for the violation of its treaty rights: recovery of the land and collection of mesne profits. The traditional common law action for ejectment carried with it a remedial right to recover mesne profits. *See Town of Pawlet*, 29 U.S. (4 Pet.) at 489, 508. Vermont, though, had enacted statutes that superseded the common law and barred recovery of mesne profits by plaintiffs in ejectment actions. *Id.* at 508–09. Defendants, therefore, contested plaintiff's claim for mesne profits. The Court ruled in favor of the defendants on this point. Justice Story, writing for the Court, said that Vermont had "prescribed the restrictions upon which mesne profits shall be recovered; and these restrictions are obligatory upon the citizens of the state. The plaintiffs have not, in this particular, any privileges by treaty beyond those of citizens." *Id.* at 509–10. Since the law restricting mesne profits applied equally to citizens and aliens, Vermont could apply the law to British plaintiffs without violating their treaty rights.

271. 3 U.S. (3 Dall.) 42 (1795).

272. Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls, U.S.-Fr., art. 9, Nov. 14, 1788, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 228, 237–38 (Hunter Miller ed., Gov't Printing Office 1931) [hereinafter Consular Convention].

district judge to issue a warrant for extradition of an alleged deserter.[273] The Attorney General asserted that the district judge had violated the treaty by refusing to issue a warrant.[274] The Supreme Court declined to rule on the merits of the government's treaty claim, holding unanimously "that a mandamus ought not to issue" because the judge had acted within the scope of his discretion.[275] *Judge Lawrence* is consistent with the nationalist model because the party invoking the treaty did not obtain the remedy sought.[276] The case is also consistent with the transnationalist model, though, because the district court held that the United States did not have a duty to extradite the fugitive (hence, France had no right to compel his extradition), and the Supreme Court did not disturb that ruling.

The Supreme Court decided three treaty cases between 1789 and 1838 that it dismissed for lack of jurisdiction.[277] In three other cases, the Court concluded that it lacked sufficient information to decide the merits of the treaty claim.[278] None of these six cases support

273. *Judge Lawrence*, 3 U.S. (3 Dall.) at 42–44. Initially, the French Vice Consul filed suit in the district court, seeking a warrant for extradition of Captain Barre. *Id.* at 42–43. The district judge refused to issue the warrant on the ground that the Vice Consul failed to provide the proof required by the treaty. *See id.* at 43–44. The case counts as a case in which an individual litigant raised a treaty-based claim because the Vice Consul asserted, on behalf of France, a right to have the deserter extradited.

274. *See id*. at 48–53. Interestingly, in support of the government's argument for a writ of mandamus, the Attorney General stated: "The general principle of issuing that writ, is founded on the necessity of affording a competent remedy for every right . . . ." *Id.* at 52. Thus, in the late 18th century, even the Attorney General apparently endorsed the transnationalist presumption in favor of judicial remedies for treaty violations.

275. *Id.* at 53.

276. At the district court level, the French Vice Consul failed to obtain a warrant for extradition, which was the remedy he sought. *Id.* at 52. At the Supreme Court level, the Attorney General failed to obtain a writ of mandamus, which was the remedy he sought. *Id.* at 53.

277. Keene v. Clark's Heirs, 35 U.S. (10 Pet.) 291 (1836) (where plaintiff claimed that he was evicted from land, and that his title was protected by treaty, Court dismissed for lack of jurisdiction because state court had decided case on the basis of state law); New Orleans v. De Armas, 34 U.S. (9 Pet.) 224, 236 (1835) (where individual plaintiffs sued City of New Orleans, asserting title to property in the city, and City raised defense based on Louisiana Treaty, Court held that "[t]he case involves no principle on which this court could take jurisdiction"); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344 (1809) (where defendant raised defense based on Article 5 of the Definitive Treaty of Peace, Court dismissed case for lack of jurisdiction, holding that case did not "arise under" a treaty).

278. Soulard v. United States, 29 U.S. (4 Pet.) 511, 513 (1830) (where plaintiffs asserted rights to land in Missouri, claiming title based on Spanish grants protected by the Louisiana Treaty, Court determined that it was "unable to form a judgment which would be satisfactory" and decided "to hold the cases . . . under advisement"); The Divina Pastora, 17 U.S. (4 Wheat.) 52 (1819) (where Spanish consul sought restoration of captured vessel to Spanish ship owners, alleging that capture violated the 1795 Treaty with Spain, Court remanded case to circuit court for further proceedings); Harden v. Fisher, 14 U.S. (1 Wheat.) 300 (1816) (where British plaintiff raised claim based on Article 9 of Jay Treaty, Court remanded case to circuit court for additional fact-finding).

the transnationalist model because, in each case, the Court declined to enforce the treaty on behalf of an individual litigant. However, none of these cases endorse the nationalist presumption against private enforcement of treaties. In each case, the Court's rationale for refusing to reach the merits is a rationale that applies equally to constitutional, statutory, and common law claims. In no case did the Court decline to reach the merits because the treaty was not "judicially enforceable," or because the treaty did not create a private right of action. Thus, all six cases are consistent with both the nationalist and transnationalist models.

In addition to the seven cases cited above, the Supreme Court decided two other cases during this period in which it declined to reach the merits of a treaty-based claim or defense: *Strother v. Lucas*[279] and *De la Croix v. Chamberlain*.[280] Both *Strother* and *De la Croix* were ejectment actions. In both cases, the plaintiff claimed title to land as the successor to a person who acquired an interest in the subject property when the territory was under Spanish control.[281] In both cases, the plaintiff's property rights were protected by treaty: Article 3 of the Louisiana Treaty in *Strother*[282] and Article 8 of the Florida Treaty in *De la Croix*.[283] Congress had enacted a series of statutes creating boards of commissioners with authority to entertain claims by individuals who asserted property rights protected by the Louisiana or Florida treaties. The statutes directed individuals to present their claims to the relevant board, and granted the boards authority to confirm titles to land in territory subject to their respective jurisdictions.[284] In *De la Croix*, the plaintiff and his predecessor-in-interest failed to present a claim to the relevant board of commissioners;[285] in *Strother*, the plaintiff's predecessor failed to do so in a timely fashion.[286] In each case, the plaintiff's failure to abide by

279. 37 U.S. (12 Pet.) 410 (1838).

280. 25 U.S. (12 Wheat.) 599 (1827).

281. *See Strother*, 37 U.S. (12 Pet.) at 430–32; *De la Croix*, 25 U.S. (12 Wheat.) at 599–600.

282. *See Strother*, 37 U.S. (12 Pet.) at 435–40. *See also* Louisiana Treaty, *supra* note 155, art. 3.

283. *See De la Croix*, 25 U.S. (12 Wheat.) at 601–02. *See also* Florida Treaty, *supra* note 161, art. 8.

284. *See supra* notes 155–65 and accompanying text.

285. *See De la Croix*, 25 U.S. (12 Wheat.) at 601–02 ("It does not appear that this order of survey has ever been recorded or passed upon by the board of commissioners, or register of the land office, established by Congress in the district in which the land lies.").

286. *See Strother*, 37 U.S. (12 Pet.) at 453–54. In *Strother*, the plaintiff's predecessor did file a claim with the recorder of land titles in 1815. *See id.* However, defendant's predecessor had filed a claim with the board of commissioners in 1806, which the board had confirmed in 1809–10. *Id.* at 433. Plaintiff's predecessor, therefore, filed her claim several years too late.

statutorily prescribed procedures was a key element of the Court's rationale for awarding judgment to the defendant.[287]

Therefore, *Strother* and *De la Croix* signify that in cases where Congress has established a domestic remedial mechanism enabling individuals to enforce their treaty-based rights, individuals who fail to utilize the congressionally established mechanism may ultimately lose the ability to enforce their rights. Both cases are consistent with the transnationalist model because that model recognizes that Congress has the power to enact legislation that restricts the availability of domestic judicial remedies for individuals who have treaty-protected rights. Both cases are also consistent with the nationalist model, inasmuch as the Court denied remedies in both cases for plaintiffs whose rights were protected by treaties. Neither case, however, endorses the nationalist presumption against private enforcement of treaties. In neither case did the Court deny relief on the grounds that the treaty at issue did not create a private right of action or that the treaty was not judicially enforceable.

C. Cases Where the Party Invoking the Treaty Lost on the Merits

Between 1789 and 1838, the Supreme Court decided twelve cases in which it ruled that a treaty did not protect the right asserted by the individual invoking the treaty.[288] All twelve cases are consis-

287. *See id*. at 453–54; *De la Croix*, 25 U.S. (12 Wheat.) at 601–02.

288. *See* Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838) (where plaintiff sued to eject defendant from land in Louisiana, asserting rights under 1819 treaty whereby the United States acquired Florida from Spain, plaintiff had no treaty rights because the United States had acquired subject land from France as part of Louisiana purchase in 1803); United States v. Kingsley, 37 U.S. (12 Pet.) 476 (1838) (where plaintiff asserted title to land in Florida protected by Article 8 of 1819 Florida Treaty, plaintiff never acquired title from Spain because he failed to perform condition precedent that was required in order to obtain title by virtue of Spanish grant); United States v. Mills' Heirs, 37 U.S. (12 Pet.) 215 (1838) (where plaintiff asserted title to land in Florida protected by Article 8 of 1819 Florida Treaty, Court rejected claim because he failed to perform condition required by express terms of Spanish grant); Smith v. United States, 35 U.S. (10 Pet.) 326 (1836) (where plaintiff claimed title to land in Missouri protected by Article 3 of Treaty for Cession of Louisiana, Court rejected claim because Spanish "grant" merely gave him option to select land, and option expired because he failed to exercise option before March 1804); Soc'y for Propagation of the Gospel v. Town of Pawlet, 29 U.S. (4 Pet.) 480 (1830) (where British corporation asserted right to recover mesne profits for confiscated land, Court held that neither the Jay Treaty nor the Definitive Treaty of Peace granted plaintiff right to recover mesne profits); Comegys v. Vasse, 26 U.S. (1 Pet.) 193 (1828) (where claims commission established by treaty awarded payment to assignees from U.S. bankruptcy proceeding, bankrupt person sued assignees to recover funds, and assignees invoked judgment of treaty-based claims Commission as a defense, Court held that Commission's judgment did not bar suit because Commission's authority under treaty extended only to claims by U.S. citizens against Spain, but not to

tent with the transnationalist presumption in favor of judicial remedies. That presumption applies only in cases where an individual establishes that his or her treaty rights have been violated. In each of these twelve cases, the presumption did not apply because the Court decided that the treaty did not protect the right asserted by the individual invoking the treaty.

It bears emphasis that none of the twelve cases cited above endorses the nationalist presumption against private enforcement of treaties. None of the cases denied relief on the ground that the treaty at issue did not create a private right of action.[289] Moreover, none of the cases denied relief on the ground that the treaty at issue was not judicially enforceable. Indeed, all twelve cases involved treaties that the Court enforced on behalf of individual litigants in other cases.[290]

disputes between U.S. citizens); Blight's Lessee v. Rochester, 20 U.S. (7 Wheat.) 535 (1822) (where plaintiffs asserted title to land in Kentucky by descent from James Dunlap, a British subject, Court held that Dunlap's title was not protected by either the Jay Treaty or the Definitive Treaty of Peace, because he acquired title after the peace treaty took effect and died before signature of the Jay Treaty); The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 76 (1821) (in a dispute between a U.S. captor and a Spanish claimant who invoked Article XVII of the 1795 Treaty with Spain, the Court ruled in favor of the U.S. captor, holding that "the immunity . . . intended by that article [XVII] never took effect"); The Nuestra Senora de la Caridad, 17 U.S. (4 Wheat.) 497 (1819) (ruling in favor of captor and rejecting claim of Spanish ship owner, who invoked the 1795 Treaty with Spain, because the treaty did not protect the subject goods from capture); The Nereide, 13 U.S. (9 Cranch) 388 (1815) (where American privateer captured enemy vessel with neutral cargo, and asserted a right to seize the cargo under Article 15 of the 1795 Treaty with Spain, Court held that the law of nations protects neutral cargo from capture, and the treaty did not alter the law of nations in that respect); Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810) (where defendant held land in trust for British subject that Maryland confiscated in 1780, Court held that confiscation did not violate Article 6 of the Definitive Treaty of Peace because Maryland confiscated the land before the treaty took effect); Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 16 (1794) (where French privateer contended that Article 17 of 1778 Treaty with France barred the district court's exercise of jurisdiction in a prize case, Court ruled that the treaty did not deprive the district court of jurisdiction, and instructed the court to decide whether "restitution can be made consistently with the laws of nations and the treaties and laws of the United States").

289. In two of the cases, the party invoking the treaty had an express private right of action under Article 20 of the 1795 Treaty with Spain. *See* The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821); The Nuestra Senora de la Caridad, 17 U.S. (4 Wheat.) 497 (1819). *See also supra* notes 170–73 and accompanying text (discussing other cases involving Article 20 of the 1795 Treaty with Spain). In three of the cases, the party invoking the treaty had an express private right of action under federal statutes pertaining to land in Florida or Missouri. *See* United States v. Kingsley, 37 U.S. (12 Pet.) 476 (1838) (land in Florida); United States v. Mills' Heirs, 37 U.S. (12 Pet.) 215 (1838) (land in Florida); Smith v. United States, 35 U.S. (10 Pet.) 326 (1836) (land in Missouri). *See also supra* notes 159–65 and accompanying text (discussing federal statutes pertaining to land in Florida and Missouri).

290. *Smith v. United States*, 35 U.S. (10 Pet.) 326 (1836), involved Article 3 of the Louisiana Treaty, which the Court enforced on behalf of individual plaintiffs in three other cases. *See supra* notes 155–60 and accompanying text (discussing those three cases). *Garcia v. Lee*, 37 U.S. (12 Pet.) 511 (1838), *United States v. Kingsley*, 37 U.S. (12 Pet.) 476 (1838), and *United States v. Mills' Heirs*, 37 U.S. (12 Pet.) 215 (1838) all involved Article 8

Therefore, these twelve cases provide no support for the nationalist model. In fact, these cases tend to support the transnationalist model, because the Court generally applied a transnationalist "rights-focused methodology," not a nationalist "remedies-focused" methodology.

In addition to the twelve cases cited above, the Supreme Court decided one other case during this period in which the party invoking a treaty lost on the merits of a treaty-based claim or defense: *Foster v. Neilson*.[291] *Foster* illustrates an important limitation on the transnationalist principle that "where there is a right, there is a remedy."[292] Section D below addresses *Foster*.

D. Foster *and Its Progeny*

Virtually every modern case that endorses the nationalist presumption against individual enforcement of treaty rights cites *Foster v. Neilson*[293] as authority for that presumption,[294] or cites some other

of the Florida Treaty, which the Court enforced on behalf of individual plaintiffs in nine other cases. *See supra* notes 161–65 and accompanying text (discussing those nine cases). *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), involved Articles 9 and 11 of the Florida Treaty. The Court did not decide any other cases during this period implicating those specific treaty provisions.

Soc'y for Propagation of the Gospel v. Town of Pawlet, 29 U.S. (4 Pet.) 480 (1830), *Blight's Lessee v. Rochester*, 20 U.S. (7 Wheat.) 535 (1822), and *Smith v. Maryland*, 10 U.S. (6 Cranch) 286 (1810) all involved Article 9 of the Jay Treaty, or Article 6 of the Definitive Treaty of Peace, or both. The Court enforced Article 9 of the Jay Treaty on behalf of individual litigants in six other cases during this period. *See supra* notes 266–72 and accompanying text. The Court enforced Article 6 of the Definitive Treaty of Peace on behalf of individual litigants in two other cases. *See supra* notes 247–59 and accompanying text.

The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821), *The Nuestra Senora de la Caridad*, 17 U.S. (4 Wheat.) 497 (1819), and *The Nereide*, 13 U.S. (9 Cranch) 388 (1815) all involved the 1795 Treaty with Spain. The Court enforced that treaty on behalf of individual litigants in two other cases: *The Bello Corrunes*, 19 U.S. (6 Wheat.) 152 (1821) and *The Pizarro*, 15 U.S. (2 Wheat.) 227 (1817). Both *The Nereide* (where the party invoking the treaty lost) and *The Pizarro* (where the party invoking the treaty won) involved Article 15 of that treaty. *The Nuestra Senora de la Caridad* does not say which specific Article is implicated. The *Amiable Isabella* involved Article 17 of the treaty. The Court did not decide any other cases during this period implicating that specific treaty provision.

Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794) involved Article 17 of the 1778 Treaty with France. The Court enforced Article 17 on behalf of individual litigants in *United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795) and *Geyer v. Michel*, 3 U.S. (3 Dall.) 285 (1796). *See supra* notes 188–205 and accompanying text.

291. 27 U.S. (2 Pet.) 253 (1829).

292. *Strother v. Lucas*, 37 U.S. (12 Pet.) 410 (1838) and *De la Croix v. Chamberlain*, 25 U.S. (12 Wheat.) 599 (1827) also illustrate important limitations on the *ubi jus* principle. *See supra* notes 279–87 and accompanying text.

293. 27 U.S. (2 Pet.) 253 (1829).

294. *See, e.g.*, Al Odah v. United States, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (citing *Foster* as authority for the proposition that "[t]reaties do not generally create rights privately

case that cites *Foster* as authority. In particular, the modern cases cite the portion of the *Foster* opinion that has come to be associated with the doctrine of non-self-executing treaties.[295] But insofar as the nationalist model relies on *Foster's* non-self-execution rationale,[296] it is a model erected on a foundation of sand. This is true for three reasons. First, the non-self-execution portion of *Foster* is properly viewed as a concurring opinion because the majority in *Foster* would have decided the case on other grounds.[297] Second, the Court overruled the non-self-execution portion of *Foster* four years after it decided the case.[298] Third, *Foster* says nothing about private rights of action, and it did not endorse a presumption against judicial enforcement of treaties.

This section demonstrates that *Foster* provides no support for the nationalist model. The analysis is divided into five sub-sections. The first sub-section provides historical background. Next, the article discusses the "political question" holding in *Foster*. Then, the article addresses the territorial application of Article 8 of the Florida Treaty. The last two sub-sections examine the "non-self-execution" rationale in *Foster*, and address the relationship between *Foster* and the nationalist model.

1. Historical Background

The land at issue in *Foster* is situated within an area that is

enforceable in the courts"); United States v. Li, 206 F.3d 56, 60–61 (1st Cir. 2000) (citing *Foster* as authority for the proposition that "treaties do not generally create rights that are privately enforceable in the federal courts").

295. The so-called doctrine of non-self-executing treaties is actually four distinct doctrines. *See* Sloss, *supra* note 18, at 12–18 (summarizing four doctrines). *See also* Vazquez, *Four Doctrines*, *supra* note 18 (presenting a different four-fold classification). The two versions of the doctrine that emerged in the twentieth century are radically different, in important respects, from the two nineteenth century versions of the doctrine. *See* Sloss, *supra* note 18, at 12–18. Thus, the "non-self-execution" portion of *Foster* bears very little relationship to the modern doctrine of non-self-executing treaties.

296. *Foster* never used the terms "self-executing" or "non-self-executing". Justice Marshall's contemporaries used the terms "executory" and "executed" to describe what is now commonly referred to as *Foster*'s non-self-execution holding. *See, e.g.*, Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 746–47 (1838). It was not until 1887, in the case of *Bartram v. Robertson*, 122 U.S. 116, 120 (1887), that the Court first used the terms "self-executing" and "non-self-executing" to describe *Foster*'s distinction between executory and executed treaty provisions. Nevertheless, in accordance with modern terminology, this article will use the term "non-self-execution" to refer to the relevant portion of Marshall's opinion in *Foster*.

297. *See infra* notes 313–31 and accompanying text.

298. *See* United States v. Percheman, 32 U.S. (7 Pet.) 51, 88–89 (1833) (expressly overruling the non-self-execution portion of *Foster*). *See also* United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832) (overruling *Foster sub silentio*).

bounded on the North by the thirty-first parallel, on the West by the Mississippi River, and on the East by the Perdido River.[299] In terms of contemporary geography, this area includes the southernmost portions of Alabama and Mississippi, and parts of southeastern Louisiana (not including New Orleans). This article will refer to the area as "Floriana." In the early nineteenth century, there was a dispute between the United States and Spain as to whether Floriana was part of Florida, which Spain owned at that time, or Louisiana, which the United States owned.

As of 1760, Louisiana was French territory and Florida was Spanish territory. The Perdido River was the accepted boundary between Louisiana and Florida.[300] Floriana, therefore, was part of Louisiana. In 1763, Great Britain, France, and Spain signed the Treaty of Paris. By that treaty, Great Britain acquired Florida from Spain. Great Britain also acquired from France that portion of Louisiana that lay east of the Mississippi River, except for New Orleans and the island on which it is situated.[301] In a separate, secret treaty concluded at about the same time, France ceded the residue of Louisiana to Spain.[302] The King of England then divided his newly acquired territory into two provinces, which were labeled East and West Florida. By a royal proclamation issued in 1763, he established the 31st parallel as the northern border of the two Floridas.[303] At that time, Floriana became part of West Florida.

The United States declared its independence from Britain in 1776. During the Revolutionary War, Spain conquered Florida, reclaiming the land from Britain.[304] In September 1783, Great Britain signed peace treaties with both the United States and Spain. In the treaty with Spain, Britain ceded East and West Florida, including Floriana, to Spain,[305] but that treaty did not specify the boundaries of Florida. The treaty between Britain and the United States established the Mississippi River as the western boundary of the United States, and the thirty-first parallel as the southern boundary separating the

299. The Perdido River currently forms the western boundary of Florida that separates the Florida panhandle from Alabama.

300. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 300 (1829).

301. *Id.* at 300–01.

302. *Id.*

303. Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523, 524 (1827). The thirty-first parallel now forms the border between the Florida panhandle and that portion of Southern Alabama that lies east of the Perdido River. The thirty-first parallel also forms part of the border between Mississippi and Louisiana.

304. Henderson v. Poindexter's Lessee, 25 U.S. (12 Wheat.) 530, 534 (1827).

305. *Foster*, 27 U.S. (2 Pet.) at 301.

United States from Florida.[306] Neither treaty established a boundary between Louisiana and Florida, but the issue was unimportant at that time because Spain owned both territories, having acquired Louisiana from France in 1763 and Florida from Britain in 1783.

In 1800, France and Spain concluded the Treaty of Saint Ildefonso, in which Spain agreed "to retrocede to the French republic . . . the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it . . . ."[307] This language was deeply ambiguous. The province of Louisiana "when France possessed it," prior to 1763, included Floriana—i.e., the land east of the Mississippi, west of the Perdido, and south of the thirty-first parallel. But Britain had incorporated Floriana into Florida in 1763, and Spain had acquired Floriana (along with the rest of Florida) from Britain in 1783. Thus, Spain insisted that when it ceded Louisiana to France "with the same extent that it now has in the hands of Spain," Floriana was not included as part of Louisiana.[308]

In the Louisiana Purchase agreement concluded in 1803, the United States acquired Louisiana from France. That treaty, however, merely referred back to the Treaty of Saint Ildefonso to define the boundaries of Louisiana.[309] Beginning in 1803, Congress passed a series of acts to establish U.S. control over Louisiana.[310] Congressional actions left no doubt that Congress believed the United States had acquired Floriana from France as part of the Louisiana Purchase.[311] Congress, therefore, asserted U.S. sovereignty over Floriana. Meanwhile, Spain continued to assert Spanish sovereignty over Floriana, claiming the territory as part of Florida. The United States and Spain did not finally resolve this political dispute until Spain ceded Florida to the United States in the Florida Treaty of 1819.[312] In the interim, however, between 1803 and 1819, Spain had granted land in Floriana to various Spanish grantees.

2. The "Political Question" Holding in Foster

Foster involved a dispute over title to land east of the Mississippi River, and south of the thirty-first parallel, in what is now

306. *See* Definitive Treaty of Peace, *supra* note 168, art. 2.
307. *Foster*, 27 U.S. (2 Pet.) at 301 (quoting Treaty of St. Ildefonso).
308. *See id.* at 302–03.
309. *See* Louisiana Treaty, *supra* note 155, art. 1.
310. *See Foster*, 27 U.S. (2 Pet.) at 303–09.
311. *Id.*
312. *See* Florida Treaty, *supra* note 161, arts. 2 and 3.

southeastern Louisiana. The plaintiffs traced their title to an 1804 land grant from the Spanish governor of Florida.[313] In response to their petition, defendant alleged that, prior to the 1804 grant, the land had been "ceded by Spain to France, and by France to the United States; and the officer making said grant had not then and there any right [to grant the land], and the said grant is wholly null and void."[314] Thus, the first question presented in *Foster* was whether the 1804 Spanish land grant was valid. The resolution of that question, in turn, hinged on the issue whether the United States had acquired the land from France in 1803 as part of the Louisiana purchase, the very issue that had been the subject of a political dispute between the United States and Spain from 1803 to 1819.

The Court noted that the language of the relevant treaties—the Louisiana Treaty and the Treaty of St. Ildefonso—could plausibly be interpreted to support either the Spanish position (that the land at issue was part of Spanish Florida in 1804) or the U.S. position (that it was part of the United States in 1804).[315] In this context, Marshall stated:

> In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided . . . . [I]t is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed.[316]

In short, the Court's initial holding in *Foster* was "that the question of boundary between the United States and Spain, was a question for the political departments of the government . . . ."[317]

313. *See Foster*, 27 U.S. (2 Pet.) at 253–55.
314. *Id.* at 255.
315. *Id.* at 306–07.
316. *Id.* at 307.
317. Garcia v. Lee, 37 U.S. (12 Pet.) 511, 516 (1838) (restating the holding of *Foster*). *See also* Delacroix v. Chamberlain, 25 U.S. (12 Wheat.) 599, 600 (1827) (foreshadowing *Foster*'s political question holding in the following terms: "A question of disputed boundary between two sovereign independent nations is, indeed, much more properly a subject for diplomatic discussion . . . than of judicial investigation.").

Since Congress had enacted numerous statutes asserting U.S. sovereignty over Floriana,[318] the Court accepted the U.S. view that the United States had acquired the subject property when it purchased Louisiana in 1803.[319] This meant that the plaintiffs could not establish a valid title on the basis of the 1804 Spanish grant because the Spanish governor had no authority to grant land in U.S. territory.

The Court did not decide another case involving land in Floriana until it decided *Garcia v. Lee* in 1838,[320] nine years after its decision in *Foster*.[321] By that time, Roger Taney was Chief Justice, Marshall having died in the interim. In *Garcia*, Taney reaffirmed *Foster*'s political question holding, stating "that the boundary line determined on as the true one by the political departments of the government, must be recognised as the true one by the judicial department . . . ."[322] Indeed, Taney characterized this holding as the "leading principle" of the Court's decision in *Foster*. Clearly, *Foster*'s "leading principle" has no application to recent disputes about judicial enforcement of treaties because the principle, in Marshall's own words, applies only to cases involving "a controversy between two nations concerning national boundary."[323] In *State v. Sanchez-Llamas*, though, the Oregon Supreme Court cited *Foster*'s political question holding in support of its view that the VCCR is not judicially enforceable.[324] Thus, the Oregon Supreme Court conflated the distinction between *Foster*'s political question holding, which applies only to disputes concerning national boundaries, and *Foster*'s non-self-execution rationale, which has potentially broader application.

3. The Territorial Application of Article 8

Having held that the plaintiffs could not establish a valid title on the basis of the 1804 Spanish land grant, the Court in *Foster* next considered whether the plaintiffs could establish a valid title on the basis of Article 8 of the Florida Treaty.[325] In Article 8, the United States promised to honor "[a]ll the grants of land made before the 24th of January 1818, by [Spain] . . . in the said Territories ceded by

318. *See Foster*, 27 U.S. (2 Pet.) at 303–09.
319. *Id.* at 307–09.
320. 37 U.S. (12 Pet.) 511 (1838).
321. *Keene v. Heirs of Clark*, 35 U.S. (10 Pet.) 291 (1836), involved land in Floriana, but the Court dismissed the case for lack of subject matter jurisdiction.
322. 37 U.S. (12 Pet.) at 520.
323. 27 U.S. (2 Pet.) at 307.
324. *See* State v. Sanchez-Llamas, 108 P.3d 573, 576 (Or. 2005), *aff'd on other grounds*, 126 S. Ct. 2669 (2006).
325. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 310–14 (1829).

his majesty to the United States."[326] This phraseology left open the question whether Floriana was part of the territory "ceded by his majesty to the United States," within the meaning of Article 8. The Justices disagreed among themselves on that question. Marshall and one other Justice thought that the United States had a duty under Article 8 to protect the interests of individuals, such as the *Foster* plaintiffs, who received Spanish land grants in Floriana before January 1818.[327] Marshall conceded, though, that "[t]he majority of the Court . . . think[s] differently."[328] The majority view was that the duty of the United States under Article 8 to protect the property rights of Spanish grantees applied only to grantees of land in Florida proper, not to grantees of land in Floriana.[329]

If Marshall had concurred with the majority view that Article 8 did not apply to land in Floriana, it would never have been necessary for the *Foster* court to decide whether Article 8 was self-executing. The Court could have resolved the case on the grounds that: (1) the plaintiffs' grant from Spain was void *ab initio* (the Court's unanimous "political question" holding); and (2) plaintiffs had no rights under the treaty because Article 8 did not apply to the land at issue (the majority view on the territorial application question). Indeed, the Court decided *Garcia v. Lee*,[330] the next case involving land in Floriana, on precisely these grounds. Moreover, Chief Justice Taney, writing for the majority in *Garcia*, stated that the Court had decided *Foster* on these grounds![331]

Thus, from the perspective of Chief Justice Taney, writing nine years after *Foster*, Marshall's discussion of non-self-execution in *Foster* was pure dicta, unrelated to the central holdings of the case. In a very important sense, Taney was right. If the *Foster* Court had followed modern practice, wherein different justices write separate opinions, a different judge would have written the majority opinion, holding that Article 8 did not apply to land in Floriana, and Marshall

326. Florida Treaty, *supra* note 161, art. 8.

327. *See Foster*, 27 U.S. (2 Pet.) at 312–13 (stating that "[o]ne other judge and myself are inclined to adopt" the view that Article 8 applied to the Spanish grants in Floriana).

328. *Id.* at 313.

329. *See id.* at 310–14.

330. 37 U.S. (12 Pet.) 511 (1838).

331. *See id*. at 520–21 ("[T]he case of Foster and Elam v. Neilson, decides this case. It decides that the territory in which this land was situated, belonged to the United States at the time that this grant was made by the Spanish authority; it decides that this grant is not embraced by the eighth article of the treaty, which ceded the Floridas to the United States; *that the stipulations in that article are confined to the territory which belonged to Spain at the time of the cession, according to the American construction of the treaty* . . . .") (emphasis added).

would have written a separate concurrence setting forth his view that Article 8 was executory (not self-executing). But Marshall exercised tight discipline over "his" court, so justices rarely wrote separate opinions in the Marshall era.[332] Thus, Marshall's opinion for the Court presented the majority view,[333] and then presented his alternative non-self-execution rationale that yielded the same result.[334] Modern scholars have failed to recognize that the doctrine of non-self-executing treaties has been constructed on the basis of a portion of Marshall's opinion that was an alternative rationale supporting a conclusion that the majority reached on other grounds. Worse yet, as the next section shows, modern cases relying on *Foster* have misinterpreted Marshall's rationale, and have discounted the fact that the Court itself rejected that rationale four years after it decided *Foster*.

4. The "Non-Self-Execution" Rationale in *Foster*

Since Marshall disagreed with the majority about the territorial application of Article 8, he had two choices. He could dissent from the majority view, or he could devise an alternative rationale supporting the majority's conclusion that Article 8 did not grant plaintiffs title to the disputed property. Marshall chose the latter course.

Marshall's rationale relied on the distinction between "executory" and "executed" treaty provisions. In the terminology that was widely used in the early nineteenth century, an executory contract promised future performance, whereas an executed contract promised immediate performance.[335] Marshall applied this distinction to Arti-

332. *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 184 (1988) (volumes 3 and 4 of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States) ("Throughout most of Marshall's tenure, the Court had a remarkable percentage of unanimous or near unanimous decisions . . . . For example, between 1816 and 1823, a period in which the Court's composition was unchanged, the Justices produced a total of 302 majority opinions. In all these cases, only twenty-four dissents and eight concurrences were recorded . . . .").

333. *See Foster*, 27 U.S. (2 Pet.) at 310–13.

334. The result was that plaintiffs lost because they failed to establish valid title, either on the basis of the Spanish grant, or on the basis of Article 8. Marshall agreed with the majority that Article 8 did not grant plaintiffs a complete title to the land at issue, but he agreed for different reasons. The majority thought that the subject property was not within the geographical scope of Article 8. Marshall thought that Article 8 was executory. *See id.* at 313.

335. *See* WILLIAM BLACKSTONE, 2 COMMENTARIES *443 (explaining the difference between executory and executed contracts). Justice Marshall had previously relied on the distinction between executory and executed contracts in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136–37 (1810). Justice Iredell applied this terminology to treaty provisions in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 271–72 (1796) (Iredell, J., dissenting in part). Marshall did not

cle 8 of the Florida Treaty, which said: "All the grants of land made before the 24th of January 1818. [sic] by His Catholic Majesty or by his lawful authorities . . . *shall be ratified and confirmed* to the persons in possession of the lands . . . ."[336] Marshall noted that the article "does not say that those grants *are hereby confirmed*. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it . . . ."[337] In short, if Article 8 said that the grants "are hereby confirmed," it would have been an executed treaty provision that granted vested property rights to the Spanish grantees. Since the treaty used the language "shall be ratified and confirmed," however, it was merely executory—a promise of future action that required legislative implementation before the Spanish grantees could obtain vested property rights.[338]

The term "vested" rights is important here. In *Marbury v. Madison*, Justice Marshall devoted a considerable portion of his opinion to establishing the proposition that Mr. Marbury's appointment was not revocable, and that the law creating the office granted him "vested" legal rights.[339] Marshall then famously declared: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[340] Thus, in Marshall's view, the violation of a *vested* legal right requires a remedy, but the violation of a non-vested right does not necessarily require a remedy. Under Marshall's non-self-execution rationale, Article 8 of the treaty granted the plaintiffs an inchoate title in the subject property, but it did not grant them vested legal rights.[341] Moreover, until Congress enacted legislation

use the terms "executed" and "executory" in *Foster*, but his contemporaries understood that Marshall was drawing a distinction between executory and executed treaty provisions in *Foster*. *See* Sloss, *supra* note 18, at 19–24.

336. Florida Treaty, *supra* note 161, art. 8 (emphasis added).

337. *Foster*, 27 U.S. (2 Pet.) at 314–15 (emphasis added).

338. Modern commentators have generally understood *Foster*'s distinction between self-executing and non-self-executing treaties to turn on the question whether the treaty has domestic legal effect in the absence of implementing legislation. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 198–200 (2d ed. 1996); Paust, *supra* note 18, at 767; Vazquez, *Four Doctrines*, *supra* note 18, at 700–02. This interpretation does not conform to the nineteenth century understanding of *Foster*, which hinged on the distinction between executory and executed treaty provisions. *See* Sloss, *supra* note 18, at 19–24.

339. 5 U.S. (1 Cranch) at 154–62.

340. *Id.* at 163.

341. Marshall did not use these terms in *Foster*, but this is the necessary implication of what he did say. As noted above, Marshall believed that the land at issue was within the territorial scope of Article 8. *See Foster*, 27 U.S. (2 Pet.) at 313. This meant that the United

to execute the treaty by granting them vested rights, the judiciary could not provide a remedy.[342]

Four years after *Foster*, in the case of *United States v. Percheman*,[343] Justice Marshall, writing for a unanimous court, reversed his opinion in *Foster* and concluded that Article 8 of the Florida Treaty was executed, not executory.[344] In contrast to *Foster*, the land at issue in *Percheman* was clearly within the territorial scope of Article 8 because it was located in East Florida in an area that was subject to undisputed Spanish sovereignty before the 1819 treaty. Moreover, since the plaintiff's claim was based on a Spanish grant issued in December 1815, there was no question that Spain had the authority to issue the grant. The grant conveyed to Percheman "two thousand acres of land . . . in absolute property."[345] Under principles of international law that were generally accepted at that time, when territory passed by treaty from one sovereign to another, "[t]he king cedes that only which belonged to him. Lands he had previously granted, were not his to cede."[346] Thus, even if the parties had not included Article 8 in the treaty, Percheman's property rights "would have been unaffected by the change" in sovereigns.[347] Therefore, it was apparent to Marshall and the other justices that his previous interpretation of Article 8, as applied to property in Florida (east of the Perdido) was untenable, because it would have had the effect of divesting landowners of their vested property rights.[348] Accordingly, Marshall reinterpreted the phrase "shall be ratified and confirmed" in the text of Article 8 to mean that the property rights of the grantees of Spanish land grants were "'ratified and confirmed' by force of the in-

States had a duty under Article 8 to "ratif[y] and confirm[]" the prior Spanish land grant. *Id.* at 314–15. That duty necessarily gave the grantees certain correlative rights. Since the grant itself was void, though, the plaintiffs had no rights by virtue of the grant. Moreover, in accordance with nineteenth century conceptions of property rights, it would have been unthinkable for a treaty—or any other legal document for that matter—to grant unnamed individuals vested property rights in unspecified land. Therefore, Marshall must have thought that the treaty granted the plaintiffs some type of inchoate property right that required legislative action to be perfected into a complete title.

342. *Id.* at 314 ("But when the terms of the stipulation import a contract . . . the legislature must execute the contract before it can become a rule for the Court.").

343. 32 U.S. (7 Pet.) 51 (1833).

344. *See id.* at 88–89.

345. *Id.* at 82–83.

346. *Id.* at 87.

347. *Id.*

348. Percheman had vested property rights before the treaty because the land was granted to him in "absolute property." Under Marshall's interpretation of Article 8 in *Foster*, though, the treaty would have converted Percheman's absolute title into an inchoate property interest that could not be perfected without congressional action. This would have been contrary to natural law principles that were widely accepted at the time, and might even have been viewed as an unconstitutional taking.

strument itself," that is, by the force of the treaty.[349] In short, the treaty language was executed, the rights of Spanish grantees were fully vested, and those rights were enforceable in the courts.[350]

Marshall's non-self-execution rationale in *Foster* established an exception to the general principle that there is a remedy for every violation of a right: the principle applies only to vested rights. If a treaty provision is executory, then individuals cannot obtain judicial remedies for violations of that treaty provision until the provision is executed and their rights have vested. The fact that Marshall himself overruled *Foster* only four years after the case was decided suggests that courts should be cautious in applying this exception to the presumption in favor of judicial remedies for violations of individual treaty rights. If applied cautiously, the *Foster* exception is generally consistent with the fundamental transnationalist presumption. Indeed, the Supreme Court has been extremely cautious in applying the *Foster* exception. In more than 175 years since Marshall's decision in *Foster*, the Supreme Court has never applied the doctrine of non-self-executing treaties to deny a remedy to an individual whose treaty rights were violated.[351] Unfortunately, in recent years, state courts and lower federal courts have expanded the *Foster* exception to the point where it threatens to swallow the underlying principle.

349. *Percheman*, 32 U.S. (7 Pet.) at 89. Other commentators have noted that Marshall relied on the Spanish text of the treaty to support his reinterpretation of Article 8. While that explanation is true, it is incomplete. Marshall also relied heavily on the fact that his previous interpretation of Article 8, if applied to land in Florida, would be contrary to principles of natural law embodied in the law of nations. *See id.* at 86–87 ("The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled.").

350. Modern courts following the nationalist model frequently cite *Foster*, and then include a parenthetical comment noting that *Percheman* overruled *Foster* "on other grounds." *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring). This form of citation is very misleading. *Percheman* specifically overruled *Foster*'s rationale that Article 8 was executory.

351. Only once since *Foster* has the Supreme Court held that a treaty was not self-executing, and that was an alternative holding. *See* Cameron Septic Tank Co. v. City of Knoxville, 227 U.S. 39, 47–50 (1913). The main holding was that the Treaty of Brussels did not apply to the patent at issue, and therefore did not grant plaintiff the patent rights it asserted. *See id.* at 44–47. More recently, the Supreme Court stated in dicta that the International Covenant on Civil and Political Rights is not self-executing, but the plaintiff in that case did not assert rights under the treaty. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2763, 2767 (2004). For a brief survey of Supreme Court decisions involving self-execution, see Sloss, *supra* note 18, at 71–73.

5. *Foster* and the Nationalist Model

Contrary to claims advanced by advocates of the nationalist model, *Foster*'s non-self-execution rationale says nothing about private rights of action, nor does it establish a presumption against judicial enforcement of treaties. If modern courts wish to adhere faithfully to Marshall's non-self-execution rationale, then they must examine the relevant treaty language to determine whether it promises immediate performance (executed) or future performance (executory). Marshall's opinion in *Foster* does not support a presumption that treaties are generally executory.

Nationalists may cite the following passage from *Foster* in defense of their view that *Foster* supports a presumption against self-execution:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.[352]

This passage, one could argue, shows that Marshall endorsed the broader principle that treaties generally must be "carried into execution by the sovereign power" in order to effect "the object to be accomplished."[353] This argument, though, ignores the sentences immediately after the quoted language:

> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.[354]

Thus, as others have noted, if one reads the entire passage, rather than quoting selected portions of it, it is evident that Marshall's statement that treaties do not effect "the object to be accomplished" is a statement about treaties in other countries, not treaties in the United States.[355] In Marshall's view, the U.S. Constitution estab-

352. *Foster*, 27 U.S. (2 Pet.) at 314.

353. *See, e.g.*, Yoo, *Globalism and the Constitution*, *supra* note 18, at 2087–89 (making a similar argument).

354. *Foster*, 27 U.S. (2 Pet.) at 314.

355. *See* Vazquez, *Laughing*, *supra* note 18, at 2192–94 (developing this argument in greater detail).

lishes "a different principle": the principle that treaties are "to be regarded in courts of justice as equivalent to an act of the legislature."[356]

The further qualification—that this principle applies whenever a treaty "operates of itself"—makes clear that the principle applies only to executed treaty provisions. But this qualification does not establish a presumption that treaties are generally executory. To the contrary, the fact that *Percheman* overruled *Foster*, and the fact that the Supreme Court has never again applied the doctrine of non-self-executing treaties to deny a remedy to an individual whose treaty rights were violated, supports the opposite presumption: that treaties are generally executed (meaning that treaty obligations are to be performed immediately upon entry into force of the treaty) unless the treaty language makes it abundantly clear that the drafters intended a particular obligation to be executory (meaning that they did not expect the obligation to be performed until some time in the future, after entry into force of the treaty).

* * * * *

The conflict between the nationalist model and the transnationalist model, insofar as it relates to domestic remedies, centers around the question whether courts have the authority to enforce treaties on behalf of private individuals in the absence of express authorization by the political branches. Between 1789 and 1838, there were at least fifteen cases, and arguably as many as twenty-one cases, in which the Supreme Court enforced treaties on behalf of private individuals without express authorization from the political branches.[357] These Supreme Court decisions demonstrate that the Court believed that express authorization was not necessary. In short, the cases demonstrate that the Court understood the role of the judiciary in treaty enforcement in accordance with the transnationalist model, not the nationalist model.

Other decisions by the Supreme Court during this period reinforce this conclusion. The Court decided fifty-eight cases during this period in which an individual litigant raised a claim or defense on the basis of a treaty. In these fifty-eight cases, the Court *never* said that treaties are not judicially enforceable unless the treaty itself, or a fed-

356. The Constitution states explicitly that "the Judges in every State shall be bound" by both treaties and statutes. U.S. CONST. art. VI, cl. 2. Thus, the Framers of our Constitution believed that the principle that treaties are "to be regarded in courts of justice as equivalent to an act of the legislature" was sufficiently important that they included that principle in the text of the Constitution.

357. *See* Parts IV.A(3) and IV.A(4) (analyzing these twenty-one cases).

eral statute, creates a private right of action. In these fifty-eight cases, the Court *never* endorsed a presumption against judicial enforcement of treaties. In fact, several Supreme Court decisions during this period contain language that appears to endorse a presumption in favor of judicial enforcement of treaties.[358] Moreover, all fifty-eight cases are consistent with the transnationalist model. Although *Strother*, *De la Croix*, and *Foster* show that there are limitations on the transnationalist presumption in favor of judicial enforcement, those cases are consistent with the transnationalist model because they support, at most, narrow exceptions to the general principle that individuals are entitled to judicial remedies for violations of their treaty-based individual rights.

V. THE RISE OF THE NATIONALIST MODEL IN THE LATE TWENTIETH CENTURY

In an amicus brief for the Supreme Court in *Sanchez-Llamas v. Oregon*, the U.S. government asserted: "It is a long-established presumption that treaties and other international agreements do not create judicially enforceable individual rights."[359] In fact, the "long-established presumption" is almost precisely the opposite of what the government claimed. Part Four demonstrated that, during the first fifty years of U.S. constitutional history, the Supreme Court consistently applied the transnationalist presumption in favor of judicial remedies for individuals whose treaty rights are violated. Part Five carries the historical analysis forward, providing a brief sketch of treaty enforcement in U.S. courts from 1840 to the present. Whereas the historical analysis in Part Four was comprehensive for the fifty-year period it covered, the analysis in Part Five is necessarily more selective.

Part Five is divided into three sections. The first section analyzes the Supreme Court cases cited by the government in *Sanchez-Llamas* and *Hamdan* in support of the alleged presumption that treaties do not create individually enforceable rights. The analysis shows

358. *See, e.g.*, *supra* note 50 (quoting Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348 (1809)); text accompanying note 213 (quoting United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109–110 (1801)); notes 216–18 and accompanying text (analyzing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)); and note 274 (quoting United States v. Judge Lawrence, 3 U.S. (3 Dall.) 42, 52 (1795)).

359. Gov't Sanchez-Llamas Brief, *supra* note 3, at 11. Similarly, in a merits brief for the Supreme Court in *Hamdan v. Rumsfeld*, the government claimed: "The long-established presumption is that treaties and other international agreements do not create judicially enforceable rights." Gov't Hamdan Brief, *supra* note 3, at 30.

that the Supreme Court has never endorsed that presumption.

The second section documents the Supreme Court's continuing application of the transnationalist model. It discusses three cases from the late nineteenth and early twentieth centuries that illustrate the Court's application of the transnationalist presumption in favor of private enforcement of treaties. Since World War II, there have been relatively few cases where the Court has been forced to choose between the nationalist and transnationalist presumptions. Even so, the Court has occasionally applied the transnationalist presumption in favor of judicial remedies.

The final section shows that the nationalist presumption against individual enforcement of treaties first arose in a set of federal circuit court opinions in the 1970s and 1980s. Those cases borrowed from 1970s Supreme Court jurisprudence that established a presumption against implied rights of action for enforcing federal statutes. The circuit courts transferred that presumption from the statutory context to the treaty context. However, the circuit courts have imposed far more draconian restrictions on private enforcement of treaties than the Supreme Court has ever applied in the statutory context.

A. The Supreme Court and the Nationalist Presumption

The government briefs in *Hamdan* and *Sanchez-Llamas* cited six Supreme Court decisions in support of the nationalist presumption against private enforcement of treaties: *Foster v. Neilson*,[360] *Head Money Cases*,[361] *Whitney v. Robertson*,[362] *Charlton v. Kelly*,[363] *Johnson v. Eisentrager*,[364] and *Argentine Republic v. Amerada Hess Shipping Corp*.[365] The analysis in Part Four above demonstrated that Chief Justice Marshall's opinion in *Foster v. Nielson* does not support the nationalist model. This section demonstrates that none of the other cases cited above supports the nationalist presumption against private enforcement of treaties.

The government briefs in *Hamdan* and *Sanchez-Llamas* relied heavily on the following language from the *Head Money Cases*:

360. 27 U.S. (2 Pet.) 253 (1829).
361. 112 U.S. 580 (1884).
362. 124 U.S. 190 (1888).
363. 229 U.S. 447 (1913).
364. 339 U.S. 763 (1950).
365. 488 U.S. 428 (1989).

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.[366]

The government, however, disregarded the passage from *Head Money* that immediately follows the language just quoted:

> But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country . . . . The constitution of the United States places such provisions as these in the same category as other laws of Congress . . . . A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.[367]

Thus, in *Head Money*, the Supreme Court drew a critical distinction between treaties that are "primarily a compact between independent nations," and treaties that "contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other." *Head Money* explicitly directs courts to enforce treaty provisions that "prescribe a rule by which the rights of the private citizen" may be determined. In other words, *Head Money* endorses the transnationalist presumption in favor of private enforcement of treaty provisions that create primary individual rights.

The government brief in *Sanchez-Llamas* cited *Whitney v.*

366. Head Money Cases, 112 U.S. 580, 598 (1884). *See* Gov't Sanchez-Llamas Brief, *supra* note 3, at 11 (quoting *Head Money*); Gov't Hamdan Brief, *supra* note 3, at 30 (quoting *Head Money*).

367. 112 U.S. at 598–99 (emphasis added).

Robertson[368] in support of the proposition that "issues of compliance with treaty obligations are 'not judicial questions.'"[369] As with *Head Money*, the government misrepresented what the Court said in *Whitney*. In *Whitney*, plaintiffs sued a U.S. customs collector, alleging that he had imposed a duty on imported goods that should have been admitted duty-free under a treaty with the Dominican Republic.[370] The Court held, as a matter of treaty interpretation, that the treaty did not grant the subject goods an exemption from import duties.[371] Alternatively, the Court held, even if the plaintiffs had a treaty-based right to import the goods free of duty, they were not entitled to a remedy because "[t]he act of Congress under which the duties were collected authorized their exaction."[372] Moreover, that statute was enacted "after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control."[373] In short, the later-in-time statute trumped the earlier treaty.

In that context, the *Whitney* Court added:

> [W]hether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary . . . but to the executive and legislative departments of our government . . . .[374]

In short, if Congress approves legislation that contravenes U.S. treaty obligations, it is not the judiciary's responsibility to second-guess that legislative choice. That is a far cry from the government's assertion that *Whitney* stands for the proposition that "issues of compliance with treaty obligations are 'not judicial questions.'"[375] The Court's decision in *Whitney* provides no support whatsoever for the government's contention in *Sanchez-Llamas*, or for the nationalist

368. 124 U.S. 190 (1888).

369. Gov't Sanchez-Llamas Brief, *supra* note 3, at 11. Similarly, in *Hamdan*, the government cites *Whitney* for the following proposition: "When a violation of a treaty . . . occurs, it becomes the subject of international negotiations and reclamations, not of judicial redress." Gov't Hamdan Brief, *supra* note 3, at 30.

370. 124 U.S. at 190–91.

371. *Id.* at 192–93.

372. *Id.* at 193.

373. *Id.* at 194.

374. *Id.* at 194–95.

375. Gov't Sanchez-Llamas Brief, *supra* note 3, at 11.

presumption.[376]

The government also cited *Charlton v. Kelly*[377] in support of the asserted presumption against judicial enforcement of treaties.[378] In *Charlton*, petitioner sought habeas corpus relief to prevent his extradition to Italy.[379] He raised four distinct objections to extradition, relying in part on a treaty between the United States and Italy.[380] The fourth objection is especially pertinent here.[381] Petitioner contended that the U.S. treaty obligation to extradite him to Italy was no longer operative because Italy had breached its treaty obligations. The Court agreed that a treaty violation by Italy "would have justified the United States in denouncing the treaty as no longer obligatory, [but] it did not automatically have that effect," and added, "[the treaty] was only voidable, not void . . . ."[382] Since the political branches had chosen not to abrogate the treaty, the U.S. obligation to extradite petitioner to Italy remained "in full force and effect," and the Court had a duty to enforce that obligation.[383]

In the context of addressing petitioner's argument, the Court in *Charlton* quoted language from Moore's International Law Digest, which in turn quoted the aforementioned passage from *Head Money Cases*.[384] As noted above, *Head Money* actually supports the transnationalist model, not the nationalist model. Moreover, *Charlton* cited this passage in support of the proposition that the Court was obligated to enforce the extradition treaty with Italy, notwithstanding Italy's alleged breach of the treaty.[385] Thus, *Charlton* provides no support for the nationalist presumption against judicial enforcement of treaties.

The government brief in *Hamdan* relied heavily on a single footnote in *Johnson v. Eisentrager*[386] to support its assertion that the 1949 POW Convention is not judicially enforceable.[387] That footnote, referring to the 1929 Geneva Convention, not the 1949 POW

376. 124 U.S. at 194–95.
377. 229 U.S. 447 (1913).
378. Gov't Sanchez-Llamas Brief, *supra* note 3, at 11; Gov't Hamdan Brief, *supra* note 3, at 30.
379. 229 U.S. at 448.
380. *Id.* at 457.
381. With respect to the first three objections, see *id.* at 457–69.
382. *Id.* at 473.
383. *Id.* at 476.
384. *Id.* at 474 (quoting 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW at 366 (1906) (quoting, in turn, Head Money Cases, 112 U.S. 580, 598–99 (1884)).
385. *See Charlton*, 229 U.S. at 474.
386. 339 U.S. 763 (1950).
387. *See* Gov't Hamdan Brief, *supra* note 3, at 31–34 (citing Johnson v. Eisentrager, 339 U.S. 763, 789 n.14 (1950)).

Convention, stated as follows: "It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers . . . ."[388] On its face, this statement does not say anything about a presumption against judicial enforcement of treaties. It merely asserts that a particular treaty, which was not at issue in *Hamdan*, was designed to be enforced through diplomatic measures. In any case, that footnote has no precedential value because it is included in a portion of the *Eisentrager* opinion addressing an issue that was never argued before the Supreme Court, and that the Court, according to its own holding in the case, lacked jurisdiction to decide.[389]

Moreover, the logic of the *Eisentrager* footnote is seriously flawed. That logic can be summarized as follows: the 1929 Geneva Convention is not judicially enforceable because the Convention provides expressly for international dispute resolution, but it says nothing about domestic judicial enforcement.[390] This rationale is inconsistent with numerous Supreme Court precedents. For example, in *Chew Heong v. United States*,[391] the Court granted habeas relief to a Chinese laborer who was detained in violation of an 1880 treaty between the United States and China.[392] The treaty said nothing about domestic judicial enforcement.[393] Moreover, the treaty provided expressly for diplomatic negotiations to resolve issues related to treaty implementation.[394] Nevertheless, the Court granted the writ of habeas corpus. In addition to *Chew Heong*, there are numerous cases in which the Supreme Court has approved domestic judicial enforcement of a treaty that was silent with respect to domestic judicial enforcement, but provided expressly for international dispute resolution.[395] Thus, the treaty makers' decision to provide for international

388. *Eisentrager*, 339 U.S. at 789 n.14.

389. *See id. See also supra* note 124.

390. *See* Gov't Hamdan Brief, *supra* note 3, at 31–34 (elaborating this argument from the *Eisentrager* footnote).

391. 112 U.S. 536 (1884).

392. *Id.* at 538–39.

393. *See* Treaty Concerning Immigration, U.S.-China, Nov. 17, 1880, 22 Stat. 826.

394. *See id.* art. IV (stipulating that, if the United States adopts measures that "are found to work hardship upon the subjects of China, the Chinese Minister at Washington may bring the matter to the notice of the Secretary of State of the United States, who will consider the subject with him; and the Chinese Foreign Office may also bring the matter to the notice of the United States Minister at Peking and consider the subject with him, to the end that mutual and unqualified benefit may result.").

395. *See, e.g.*, *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489 (1824) (granting remedy for violation of Article 9 of Jay Treaty, even though Articles 4, 5, 6, 7, 12, and 15 of that treaty

negotiation, without more, cannot support an inference that the treaty makers intended to bar domestic judicial remedies.

Finally, the government brief in *Sanchez-Llamas* cited *Argentine Republic v. Amerada Hess*[396] in support of the assertion that "there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts."[397] In *Amerada Hess*, two Liberian corporations sued the Argentine Republic in a U.S. court after an Argentine military plane bombed a Liberian oil tanker.[398] Argentina invoked the Foreign Sovereign Immunities Act (FSIA) in support of its sovereign immunity defense.[399] The Court held that the FSIA was "the sole basis for obtaining jurisdiction over a foreign state in our courts,"[400] and that the FSIA "does not authorize jurisdiction over a foreign state in this situation."[401] Plaintiffs argued that two treaties to which the United States and Argentina were both parties "create an exception to the FSIA. . . ."[402] The Court acknowledged that a treaty could waive a foreign state's sovereign immunity, but said that the treaty would have to contain an express waiver to achieve that result, and the treaties invoked by the plaintiffs contained no such express waivers.[403] In any case, the Court's insistence that a treaty must contain an express waiver to overcome foreign sovereign immunity, which is protected by the FSIA, provides no support for the government's claim that there is a presumption against judicial enforcement of treaties.

In sum, although the government presumably devoted hundreds of hours of legal research to the task of identifying legal authority for the nationalist presumption, it was unable to find a single Supreme Court decision that provides any support whatsoever for that presumption. The government's utter failure to find any Supreme Court authority for its preferred position leads inescapably to the conclusion that the Supreme Court has never endorsed the nationalist presumption.

provide expressly for international dispute resolution); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453 (1819) (enforcing Article 9 of Jay Treaty); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594 (1818) (enforcing Article 9 of Jay Treaty); *Jackson v. Clarke*, 16 U.S. (3 Wheat.) 1 (1818) (enforcing Article 9 of Jay Treaty); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812) (enforcing Article 9 of Jay Treaty); *Fitzsimmons v. Newport Insurance Co.*, 8 U.S. (4 Cranch) 185 (1808) (enforcing Article 18 of Jay Treaty).

396. 488 U.S. 428 (1989).
397. *See* Gov't Sanchez-Llamas Brief, *supra* note 3, at 11–12.
398. *See Amerada Hess*, 488 U.S. at 431–32.
399. *See id.* at 428.
400. *Id.* at 434.
401. *Id.* at 431.
402. *Id.* at 442.
403. *Id.* at 442–43.

B. The Continued Vitality of the Transnationalist Model

The transnationalist presumption in favor of judicial remedies for violations of individual treaty rights is not merely a relic of the past. The Supreme Court continued to apply that presumption throughout the nineteenth century and the first half of the twentieth century. In the years since World War II, the Court has generally avoided the need to decide questions involving domestic remedies for treaty violations by adopting narrow treaty interpretations that restrict the scope of treaty-based primary rights. Even so, the Court has already decided one case in the early twenty-first century that applied a variant of the transnationalist presumption. The first sub-section below discusses three cases that illustrate the Court's continued application of the transnationalist presumption before World War II. The second sub-section addresses developments since World War II.

1. The Transnationalist Presumption in the Late Nineteenth and Early Twentieth Centuries

In *Chew Heong v. United States*,[404] a Chinese laborer who was detained on a ship near San Francisco filed a habeas corpus petition in federal court to obtain release from custody.[405] Chew Heong alleged that his detention violated Article II of an 1880 treaty between the United States and China, which stated: "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will . . . ."[406] The treaty itself did not grant Chew Heong a right of access to a U.S. court, nor did it expressly grant him the power to invoke the treaty before one. Even so, the Supreme Court granted Chew Heong's habeas petition, holding that he was "entitled to enter and remain in the United States."[407] In short, the Court applied the transnationalist presumption in favor of judicial remedies. The treaty was judicially enforceable because the treaty granted petitioner a primary individual right to remain in the United States, and the federal habeas statute granted him a right of action to enforce that primary right.

With respect to the judicial enforcement of treaty rights, *Chew Heong* is indistinguishable from *Hamdan v. Rumsfeld.* Like the petitioner in *Chew Heong*, the petitioner in *Hamdan* brought a

404. 112 U.S. 536 (1884).
405. *Id.* at 538.
406. Treaty Concerning Immigration, U.S.-China, art. II, Nov. 17, 1880, 22 Stat. 826.
407. *Chew Heong*, 112 U.S. at 560.

habeas corpus action against the federal government to enforce primary individual rights protected by a treaty (the POW Convention) that does not grant the petitioner a private right of action. The majority in *Hamdan* ducked the question whether petitioner could utilize the habeas statute to enforce his treaty-based primary rights.[408] Regardless, *Chew Heong* provides strong support for Hamdan's argument that the federal habeas statute provides a private right of action that enables him to enforce his primary rights under the POW Convention.[409]

In *United States v. Rauscher*,[410] the appellee had been extradited from Great Britain to the United States to be tried for murder. After his extradition to the United States, he was indicted for and convicted of cruel and unusual punishment.[411] On appeal, Rauscher challenged his criminal conviction on the ground that it violated Article X of the Webster-Ashburton Treaty.[412] Article X listed specific offenses for which individuals could be extradited under the treaty, including the crime of murder.[413] However, the crime of "cruel and unusual punishment"—the crime for which he was charged and convicted—was not one of the offenses enumerated in the treaty. Moreover, it was not the crime for which he had been extradited. Accordingly, the Court held that "the prisoner, under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire[d] a right to be exempt from prosecution upon the charge set forth in the indictment . . . ."[414]

It is worth quoting the *Rauscher* opinion at length because it provides a classic expression of the Court's endorsement of the transnationalist model:

> [U]nder the doctrine that the treaty is the supreme law of the land, and is to be observed by all the courts, state and national, 'anything in the laws of the states to the contrary notwithstanding,' if the state court

408. *See supra* notes 107–19 and accompanying text (discussing *Hamdan*).

409. The federal habeas statute authorizes courts to grant habeas relief for any individual who "is in custody in violation of the Constitution or laws *or treaties* of the United States." 28 U.S.C. § 2241(c)(3) (2006) (emphasis added).

410. 119 U.S. 407 (1886).

411. *Id*. at 409.

412. Webster-Ashburton Treaty, U.S.-Gr. Brit., art. X, Aug. 9, 1842, *reprinted in* 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 363, 369–79 (Hunter Miller ed., Gov't Printing Office 1934).

413. *Id.*

414. *Rauscher*, 119 U.S. at 409. The language quoted is taken from the question certified to the Supreme Court. The Court answered the question in the affirmative. *See id.* at 433.

> should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the Federal government, which has been fully recognized. This remedy is by a writ of error . . . . If the party, however, is under arrest and desires a more speedy remedy in order to secure his release, a writ of *habeas corpus* from one of the Federal judges or Federal courts . . . will bring him before a Federal tribunal . . . . State courts also could issue such a writ, and thus the judicial remedy is complete, when the jurisdiction of the court is admitted. This is a complete answer to the proposition that the rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress.[415]

The Webster-Ashburton Treaty did not expressly empower Rauscher to invoke Article X as a defense to criminal charges. Nevertheless, the Court applied the transnationalist presumption in favor of judicial remedies, reasoning that a criminal defendant who has been harmed by a violation of his treaty-based primary rights has the power to invoke that treaty as a defense to a criminal prosecution, even if the treaty is silent with respect to domestic judicial remedies. Accordingly, the Court granted Rauscher a judicial remedy for the violation of his treaty-based individual rights by reversing his criminal conviction. *Rauscher* is indistinguishable from modern cases where criminal defendants have sought judicial remedies for violations of their treaty-based rights under the VCCR.

The Supreme Court continued to apply the transnationalist presumption in favor of private enforcement of individual treaty rights in the early twentieth century. In *Asakura v. City of Seattle*,[416] the plaintiff was a Japanese national who operated a pawnbroker business in Seattle.[417] Seattle passed an ordinance that prohibited non-U.S. citizens from operating a pawnbroker business in the city.[418] Plaintiff sued to enjoin enforcement of the ordinance on the grounds that it violated a bilateral treaty with Japan.[419] The treaty granted Japanese citizens a primary right "to carry on trade" in the

415. *Id.* at 430–31.
416. 265 U.S. 332 (1924).
417. *Id.* at 339.
418. *Id.* at 339–40.
419. Treaty of Commerce and Navigation, U.S.-Japan, Feb. 21, 1911, 37 Stat. 1504.

United States "upon the same terms as native citizens or subjects."[420] However, the treaty did not expressly grant Japanese citizens a right to sue for injunctive relief. Nevertheless, the Supreme Court affirmed an injunction in favor of the plaintiff.

In sum, the Court continued to apply the transnationalist presumption in favor of judicial remedies during the late nineteenth and early twentieth centuries.

2. Developments Since World War II

In the years since World War II, there have been few cases where the Supreme Court has been forced to choose between the nationalist and transnationalist presumptions. The dearth of such cases is attributable to two factors. The first relates to treaty-based rights of action. The second relates to treaty interpretation.

Modern friendship, commerce, and navigation treaties ("FCN treaties") typically include an express private right of action. Accordingly, in post-World War II cases such as *Clark v. Allen*[421] and *Kolovrat v. Oregon*,[422] where the Supreme Court enforced FCN treaties on behalf of individual litigants, foreign nationals could point to express treaty provisions that granted them a right of access to U.S. courts.[423] Given those express treaty provisions, the Court had no need to apply a presumption for or against domestic judicial remedies.

In contrast, FCN treaties concluded in the eighteenth and early nineteenth centuries often did not contain express private rights of action. Thus, in cases enforcing those treaties, the Court routinely applied the transnationalist presumption in favor of judicial remedies

420. *Id.* art. I.
421. 331 U.S. 503 (1947).
422. 366 U.S. 187 (1961).
423. In *Clark*, the Court enforced the Treaty Between the United States and Germany of Friendship, Commerce and Consular Rights, U.S.-F.R.G., Dec. 8, 1923, 44 Stat. 2132 [hereinafter U.S.-Germany Treaty], on behalf of German nationals. 331 U.S. at 507–14 (upholding right of German nationals to inherit real property in California). Article I of the treaty with Germany created an express private right of action. *See* U.S.-Germany Treaty, *supra* ("The nationals of each High Contracting Party shall enjoy freedom of access to courts of justice of the other . . . as well for the prosecution as for the defense of their rights . . . ."). In *Kolovrat*, the Court enforced the Treaty of Commerce Between the United States of America and Serbia, U.S.-Serb. & Mont., Oct. 14, 1881, 22 Stat. 963 [hereinafter U.S.-Serbia Treaty], on behalf of Yugoslav nationals. 366 U.S. at 192–96 (upholding right of Yugoslav nationals to inherit personal property in Oregon). Article IV of the treaty with Serbia created an express private right of action. *See* U.S.-Serbia Treaty, *supra* ("They shall have reciprocally free access to the courts of justice . . . both for the prosecution and for the defence of their rights . . . .").

to ensure the availability of domestic judicial remedies for individuals whose treaty rights were violated.[424] It bears emphasis that modern Supreme Court cases enforcing FCN treaties, such as *Clark* and *Kolovrat*, provide no indication that the Supreme Court was even aware that the subject treaties contained provisions creating a private right of action.[425] The analysis in those cases proceeds as if the Court simply did not care whether the treaties at issue created a private cause of action. Thus, *Clark* and *Kolovrat* are entirely consistent with the transnationalist model.

The second key factor is that the Supreme Court's approach to treaty interpretation has changed substantially since World War II. In the nineteenth and early twentieth centuries, the Court routinely applied the twin canons of good faith and liberal interpretation in cases raising treaty interpretation questions.[426] Application of these canons generally led the Court to adopt an expansive view of the scope of primary individual rights protected by treaties.[427] Because it adopted an expansive view of primary rights, the Court frequently found violations of those treaty-based primary rights. Having found a violation, the Court was forced to make decisions about available remedies. In cases where the treaty did not provide expressly for domestic judicial remedies, the Court applied the transnationalist presumption in favor of judicial remedies to fill the gap.

In the years since World War II, the canon of deference to the executive branch has largely supplanted the canons of good faith and liberal interpretation.[428] Whereas judicial application of the twin canons of good faith and liberal interpretation typically led the Court to adopt an expansive view of the scope of treaty-based primary rights, deference to the executive branch typically leads the Court to adopt a narrow view of the scope of individual rights protected by

424. *See, e.g.*, Carneal v. Banks, 23 U.S. (10 Wheat.) 181 (1825) (enforcing art. 11 of 1778 treaty with France); Fitzsimmons v. Newport Ins. Co., 8 U.S. (4 Cranch) 185 (1808) (enforcing art. 18 of Jay Treaty); Moodie v. Ship Phoebe Anne, 3 U.S. (3 Dall.) 319 (1796) (enforcing art. 19 of 1778 treaty with France); Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (1795) (enforcing art. 19 of 1782 treaty with Netherlands).

425. *See Kolovrat*, 366 U.S. at 192–96; *Clark*, 331 U.S. at 507–14.

426. *See generally* Van Alstine, *supra* note 16, at 1907–14 (documenting the Court's reliance on the good faith and liberal interpretation canons).

427. *See supra* Part II.B.

428. *See* Bederman, *Deference or Deception*, *supra* note 19, at 1464–66 (reviewing treaty cases under the Warren, Burger, and Rehnquist Courts and concluding that "judicial deference to the Executive's position on treaty interpretation is the single best predictor of interpretive outcomes in American treaty cases"). *See also* Van Alstine, *supra* note 16, at 1914–19 (documenting the fact that the Court has ceased applying the twin canons of good faith and liberal interpretation).

treaties.[429] That narrow view, in turn, means that the Court rarely finds that an individual's treaty rights have been violated. Without a finding of a treaty violation, there is no need for the Court to consider the question of domestic remedies. In sum, the Court's treaty jurisprudence since World War II has generally combined a transnationalist "rights-focused" methodology[430] with the nationalist canon of deference to the executive branch. This approach has enabled the Court to dodge the question whether there is a presumption for or against individual enforcement of treaty rights by holding, in the majority of cases, that the individual's rights were not violated.

Despite the trends described above, the Court has occasionally applied the transnationalist presumption in favor of judicial remedies in the post-World-War II era. The most prominent recent example is the Court's decision in *American Insurance Ass'n. v. Garamendi*.[431] In *Garamendi*, a trade association sued to enjoin enforcement of a California statute that required insurance companies to disclose information about "insurance policies issued to persons in Europe, which were in effect between 1920 and 1945."[432] The plaintiffs argued that the federal policy embodied in certain bilateral agreements between the United States and European governments preempted the California law.[433] The international agreements mani-

429. *See, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 179–87 (1993) (adopting executive's interpretation of Article 33 of the U.N. Convention Relating to the Status of Refugees and holding that Article 33 does not protect Haitian refugees apprehended by U.S. government officers on the high seas beyond the territorial jurisdiction of the United States); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 64–71 (1993) (adopting executive's interpretation of two different international customs conventions, and denying relief to domestic corporation that claimed that treaties granted it immunity from state tax liability for certain international transactions); United States v. Alvarez-Machain, 504 U.S. 655, 662–70 (1992) (adopting executive's interpretation of U.S.–Mexico extradition treaty, and holding that Drug Enforcement Administration agents did not violate treaty when they orchestrated the kidnapping of a Mexican doctor from his home in Mexico, and his forcible abduction to the United States to stand trial on federal criminal charges); Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534–53 (1991) (adopting executive's interpretation of the Warsaw Convention, and holding that Article 17 did not allow plaintiffs to recover for mental or psychic injuries unaccompanied by physical injury); O'Connor v. United States, 479 U.S. 27, 29–35 (1986) (adopting executive's interpretation of Article XV of the Agreement in Implementation of the Panama Canal Treaty and holding that Article XV does not grant U.S. citizen employees of the Panama Canal Commission an exemption from U.S. income tax for salaries paid by the Commission).

430. *See supra* notes 47–51 and accompanying text.

431. 539 U.S. 396 (2003).

432. *Id.* at 409 (citing Cal. Ins. Code § 13,804(a)) (internal quotation marks omitted).

433. *See id.* at 413 ("The principal argument for preemption made by petitioners . . . is that [California state law] interferes with foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France.") The preemption analysis in *Garamendi* relies primarily on three bilateral executive agreements: Agreement Concerning the Foundation "Remembrance, Responsibility and the

fest the drafters' expectations that the federal government might invoke the agreements in support of motions to dismiss private lawsuits.[434] In *Garamendi*, though, the insurance companies invoked the agreements offensively in support of a suit against the state Insurance Commissioner to enjoin enforcement of a California statute.[435] There is no language in any of the international agreements indicating that the drafters intended to authorize this type of private lawsuit. Even so, the Court granted relief to plaintiffs on the grounds that the foreign policy embodied in those agreements preempted California law.[436] The Court's opinion does not identify the source of the plaintiff's private right of action. Regardless, it is clear that the Court tacitly applied the transnationalist presumption in favor of judicial remedies because there was no federal statute or treaty that authorized the private lawsuit in *Garamendi*.

Garamendi differs from earlier cases applying the transnationalist presumption in two respects. First, the agreements at issue were not "treaties" in the constitutional sense of that term because they had not been approved by the Senate; they were executive agreements concluded by the President. Second, the Court did not say it was enforcing the agreements as such. Rather, the Court said it was enforcing the foreign policy embodied in those agreements.[437] These differences highlight the continued vitality of the transnationalist presumption. *Garamendi* demonstrates that the Supreme Court believes it has the authority to enforce, at the behest of private parties, the foreign policy embodied in an international agreement of a type that is not mentioned in the Supremacy Clause, even if there is no treaty or statute that grants the plaintiff a private right of action. If that belief is correct, then the Court must also have the authority to enforce, at the behest of private parties, the legal obligations embod-

Future," U.S.-F.R.G, July 17, 2000, 39 I.L.M. 1298 [hereinafter U.S.-Germany Agreement]; Agreement Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," U.S.-Austria, Oct. 24, 2000, 40 I.L.M. 523; Agreement Concerning Payments for Certain Losses Suffered During World War II, U.S.-Fr., Jan. 18, 2001, Temp. State Dep't No. 01–36, 2001 WL 416465.

434. *See, e.g.*, U.S.-Germany Agreement, *supra* note 433, art. 2(1) ("The United States shall, in all cases in which the United States is notified that a claim described in Article 1(1) has been asserted in a court in the United States, inform its courts . . . that dismissal of such cases would be in its foreign policy interest.").

435. *See Garamendi*, 539 U.S. at 412.

436. *See id.* at 420–29.

437. *See id.* at 416–17 ("[I]f the agreements here had expressly preempted [state] laws . . . the issue would be straightforward. But petitioners . . . have to acknowledge that the agreements include no preemption clause, and so leave their claim of preemption to rest on asserted interference with the foreign policy those agreements embody.") (citations omitted).

ied in a treaty that is the "supreme Law of the Land,"[438] regardless of the presence or absence of a statutory or treaty-based private cause of action.

This statement is not meant to imply that the Court has unbounded authority to enforce treaty obligations in any private lawsuit. Context is important. In *Garamendi*, the plaintiffs sought prospective, injunctive relief to enjoin enforcement of a state law that conflicted with international agreements.[439] The Supreme Court has routinely allowed private plaintiffs to bring claims for prospective, injunctive relief to enjoin enforcement of state laws that conflict with federal statutes, even in cases where the statute at issue does not create a private right of action.[440] The main rationale for allowing plaintiffs to bring these "*Shaw* preemption claims,"[441] even without a federal statutory cause of action, is that *Shaw* preemption claims are necessary to preserve the rule of law and to maintain the supremacy of federal law.[442] That rationale applies with equal force in cases where plaintiffs sue to enjoin enforcement of state laws that conflict with federal treaties.[443] Moreover, there is an additional rationale that applies in treaty cases: these types of suits are necessary to ensure U.S. compliance with its treaty obligations. Thus, the *Shaw* preemption line of cases supports the continued application of the transnationalist presumption in favor of judicial remedies, at least in cases where plaintiffs sue to enjoin enforcement of state laws that are allegedly preempted by international agreements.

438. U.S. CONST. art. VI, cl. 2.

439. The term "conflict" here is deliberately ambiguous.

440. *See* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 390–401 (2004) (analyzing cases). *See also* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 47–48 (5th ed. Supp. 2005) [hereinafter HART & WECHSLER].

441. The label is taken from the Supreme Court's decision in *Shaw v. Delta Air Lines, Inc*., 463 U.S. 85 (1983), in which the Court permitted private plaintiffs to seek a declaration that federal law preempted state law.

442. *See Sloss*, *supra* note 440, at 401–03. In contrast, suits between private parties for money damages do not implicate rule of law and federal supremacy concerns to the same extent. Accordingly, the Court has insisted that plaintiffs must identify a federal statutory cause of action to support these types of claims.

443. *See* David Sloss, Ex parte Young *and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1193–1202 (2000) (contending that the rationale supporting the Shaw preemption line of cases applies equally to some treaty-based preemption claims).

C. The Origins of the Presumption Against Judicial Enforcement of Treaties

The presumption that treaties do not create individually enforceable rights emerged when lower federal courts combined two previously separate lines of cases: one related to the doctrine of non-self-executing treaties, and the other related to implied rights of action. *Dreyfus v. Von Finck*,[444] decided by the Second Circuit in 1976, was the first case that linked the concept of a non-self-executing treaty to the concept of a private right of action. In *Dreyfus*, the court initially stated that a treaty is self-executing "when it prescribes rules by which private rights may be determined."[445] This definition of "self-executing" can be traced to the Supreme Court's decision in *Head Money Cases*.[446] It says that a treaty is self-executing, and therefore judicially enforceable, when it creates primary individual rights. This is the transnationalist model. However, at the very end of its discussion of self-executing treaties, the *Dreyfus* court added "that the District Court was correct in holding that no private right of action could be based on the four treaties referred to in plaintiff's complaint."[447] By linking the concept of non-self-executing treaties to the concept of a private right of action, the Second Circuit initiated a transformation in legal doctrine.

The next step in the process of doctrinal transformation was the Third Circuit's 1979 decision in *Mannington Mills, Inc. v. Congoleum Corp*.[448] In *Mannington Mills*, the court cited *Head Money Cases* and *Dreyfus* in support of the following statement: "Thus, unless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action."[449] In *Dreyfus*, the Second Circuit used the term "private right of action" only once; its analysis focused on the question whether the treaties at issue created primary individual rights.[450] In *Mannington Mills*, though, the Third Circuit used the terms "private right of action" and "private cause of action" repeatedly.[451] Its entire analysis focused on the question whether the treaty at issue created a private right of action. Thus, *Mannington Mill*s initiated a shift from the transnationalist

444. 534 F.2d 24.
445. *Id.* at 30.
446. 112 U.S. 580, 598–99 (1884).
447. 534 F.2d at 30.
448. 595 F.2d 1287.
449. *Id.* at 1298.
450. 534 F.2d at 29–30.
451. 595 F.2d at 1298–99.

"rights-focused" methodology to the nationalist "remedies-focused" methodology. But *Mannington Mills* did not endorse the nationalist presumption against private enforcement of treaties.

Robert Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*,[452] decided by the D.C. Circuit in 1984, was the first judicial opinion that unambiguously endorsed the nationalist presumption against private enforcement of individual treaty rights. In *Tel-Oren*, Judge Bork succinctly summarized the core elements of the nationalist model in two sentences: "Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts. Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action."[453] The first sentence establishes a presumption against private enforcement of treaties. The second sentence indicates that an individual can overcome that presumption by showing that Congress has authorized private enforcement, or by showing that the treaty itself creates a private right of action. This is the nationalist model.

In retrospect, it is not surprising that the nationalist model emerged from a series of federal appellate cases decided in the late 1970s and early 1980s. In 1975, in *Cort v. Ash*,[454] the Supreme Court elaborated a four-part test for finding an implied private right of action to enforce a federal statute.[455] Over the next few years, the four-part test evolved into a one-part test that focused narrowly on the question whether Congress intended to create a private right of action.[456] Since 1979, the Supreme Court, in practice, has applied a strong presumption against recognizing implied private rights of action in cases where individual plaintiffs sue other private parties to enforce rights under federal statutes.[457] In *Dreyfus v. Von Finck*, *Mannington Mills*, and *Tel-Oren*, federal judges transplanted the Supreme Court's implied right of action jurisprudence from the statutory context to the treaty context. However, that doctrinal innovation produced significant changes in both non-self-execution doctrine and implied right of action doctrine whose implications have not yet been fully appreciated.

Prior to the advent of the nationalist model in the 1970s and

452. 726 F.2d 774, 798.
453. *Id.* at 808 (citations omitted).
454. 422 U.S. 66.
455. *See id.* at 78.
456. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979).
457. *See* HART & WECHSLER, *supra* note 440, at 781–82.

1980s, non-self-execution doctrine had not generated a substantial right-remedy gap in the domestic law of treaties. Courts applying non-self-execution doctrine generally followed the test articulated by the Supreme Court in *Head Money Cases*: an individual can enforce a treaty in a U.S. court "whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."[458] Under the *Head Money* test, there was little or no right-remedy gap because treaties that protected primary individual rights were at least presumptively enforceable in U.S. courts. Granted, there were other versions of non-self-execution doctrine, but those other versions were generally consistent with the maxim "where there is a right, there is a remedy."[459] The nationalist model replaced the *Head Money* primary rights test with a private right of action test. The nationalist right of action test creates a huge gap between treaty-based rights and domestic judicial remedies because most treaties that protect individual rights do not create an express private right of action. By severing the link between rights and remedies in domestic law, the nationalist model creates a substantial gap between U.S. international obligations and the domestic performance of those obligations, thereby generating friction between the United States and its treaty partners.

The nationalist model also deviates substantially from the implied right of action doctrine that the Supreme Court has developed in the context of federal statutes.[460] In cases involving federal statutes, the Court has applied a presumption against implied rights of action in suits between private parties.[461] However, the Court has not

458. Edye v. Robertson, 112 U.S. 580, 598–99 (1885). *See, e.g.*, Sei Fujii v. State, 242 P.2d 617, 619–22 (Cal. 1952) (applying the *Head Money* test and concluding that the human rights provisions of the U.N. Charter are not self-executing).

459. Prior to the emergence of the nationalist model, there were three different versions of non-self-execution doctrine. The first version was the *Head Money* version, which did not create a substantial right-remedy gap. (The *Head Money* version is a variant of the original *Foster* version. *See* Sloss, *supra* note 18, at 19–29.). A second version holds that implementing legislation is constitutionally required to give effect to some treaty provisions. *See* Sloss, *supra* note 18, at 29–35. That version of non-self-execution doctrine does not create a right-remedy gap because it applies primarily to treaty provisions that obligate the United States to appropriate money, and such treaty provisions do not create individual rights. The Restatement (Second) of Foreign Relations Law, published in 1965, created a third version of non-self-execution doctrine. *See* Sloss, *supra* note 18, at 12–18, 70–75. The Restatement doctrine does create a right-remedy gap, but very few courts applied the doctrine before 1984, when Judge Bork published his concurring opinion in *Tel-Oren*, *supra* note 452. The leading example is *United States v. Postal*, 589 F.2d 862, 876–84 (5th Cir. 1979) (applying the Restatement doctrine and holding that Article 6 of the Convention on the High Seas is not self-executing).

460. *See, e.g.*, HART & WECHSLER, *supra* note 440, at 766-89.

461. *Id.*

typically applied such a presumption in suits that pit private individuals against government officers.[462] Private plaintiffs can still bring suit against state and local government officers under 42 U.S.C. § 1983 to enforce federal statutes that do not create a private right of action, as long as the statute they seek to enforce creates primary individual rights.[463] Plaintiffs can also bring suit against federal government officers under the Administrative Procedure Act (APA) to enjoin federal executive action that violates a federal statute, even if the statute does not create a private right of action.[464] Any person who is detained by state or federal officers "in violation of the . . . laws . . . of the United States" can file a habeas corpus petition to obtain release from custody;[465] it has never been necessary for a habeas petitioner to show that the federal statute that the officer is violating creates a private right of action. Similarly, the Supreme Court has never suggested that an individual whom the government subjects to criminal prosecution must show that a federal statute creates a private right of action in order to invoke that statute as a defense to a criminal charge.

In short, although the Supreme Court has endorsed a presumption against recognizing implied rights of action under federal statutes, there are a wide variety of remedial mechanisms that enable individual litigants to enforce federal statutory rights, even when the statute at issue does not create a private right of action. The nationalist model, in contrast, precludes the use of any remedial mechanism—by criminal defendants, habeas petitioners, or civil plaintiffs—to enforce treaty-based individual rights unless the treaty itself

462. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court did apply the presumption against implied rights of action in a suit against a state government officer. However, the Court's decision in *Sandoval* is difficult to reconcile with at least ten other Supreme Court decisions in the period from 1984 to 2001 in which the Court authorized private lawsuits against government officers to enforce federal statutes that did not create a private right of action. *See* Sloss, *supra* note 443.

463. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) ("Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983.").

464. *See, e.g.*, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 61 (2004) (where plaintiffs sued to enforce a statute that did not create a private right of action, Justice Scalia, writing for a unanimous court, held that "[t]he APA authorizes suit" for federal statutory violations "[w]here no other statute provides a private right of action").

465. 28 U.S.C. § 2241(c)(3) (extending the writ of habeas corpus to any person who "is in custody in violation of the Constitution or laws or treaties of the United States"). *See also* 28 U.S.C. § 2254(a) (authorizing federal courts to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"); 28 U.S.C. § 2255 (authorizing habeas relief for federal prisoners "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States").

creates a private right of action, or Congress has authorized private enforcement of the treaty. Thus, the nationalist model imposes far more draconian constraints on the judicial enforcement of treaty rights than the Supreme Court has imposed on the judicial enforcement of statutory rights.

VI. CONCLUSION

We can learn much about the legal thought of past generations by focusing on what the courts did not say. The propositions that did not need to be stated because courts took them for granted may be as revealing as what the courts did say. During the first fifty years of U.S. constitutional history, the Supreme Court consistently decided treaty cases in accordance with the transnationalist model: they assumed that treaties have the status of law in our domestic constitutional system, that some treaty provisions create primary rights for individuals, and that individuals whose treaty rights are violated are entitled to remedies in domestic courts. The Court occasionally stated these assumptions explicitly. However, the best evidence that the Justices shared these assumptions is the Court's consistent record of awarding remedies to individuals whose treaty rights were violated, even in cases where the political branches had not authorized the courts to provide remedies for treaty violations. Thus, the nationalist claim that there is a long-standing presumption that treaties do not create individually enforceable rights is utterly false. The truth is that the transnationalist model explains the actual record of Supreme Court decisions in treaty cases for most of U.S. history.

This does not mean that the nationalist presumption against private enforcement of treaties is indefensible. Rather, it means that the nationalists cannot win the debate by citing precedents that do not actually support their position. The strongest defense of the nationalist model is an argument that relies on changed circumstances. The world is a very different place today than it was in 1789, or 1839, or even 1939. The United States is a superpower; we confront enemies who have demonstrated their willingness to use unconventional means to attack us. There is a considerable risk that some of those enemies may acquire weapons of mass destruction. In these circumstances, the President arguably needs a greater degree of flexibility in framing and implementing national security policy than he did 100 or 200 years ago. During the twentieth century, the Court adopted several doctrinal innovations that supported the increasing concentration

of foreign affairs power in the executive branch.[466] Nationalists may contend that adoption of the nationalist presumption against private enforcement of treaties would be a sensible next step in the evolution of foreign affairs doctrine.

If the Court takes this step, though, it should acknowledge honestly that it is embracing a novel doctrinal innovation. Moreover, before the Court endorses this doctrinal innovation, it should consider the potential negative consequences. Adoption of the nationalist presumption against private enforcement of treaties would yield three different types of harmful consequences. These relate to federal supremacy, separation of powers, and U.S. foreign relations.

Under the Articles of Confederation, the federal government was powerless to halt treaty violations by state government officers.[467] The Framers solved this problem by including treaties in the text of the Supremacy Clause: they gave treaties the status of supreme federal law and made treaties directly binding on state courts.[468] In recent years, state and local governments have routinely violated U.S. obligations under Article 36 of the VCCR,[469] just as state governments violated U.S. treaty obligations before adoption of the Constitution. The treaty violations persist because state courts and lower federal courts have invoked the nationalist presumption against private enforcement as a justification for their refusal to enforce the treaty.[470] In *Sanchez-Llamas v. Oregon*,[471] the Supreme Court had an opportunity to halt the ongoing treaty violations, but it failed to deliver. The Court in *Sanchez-Llamas* did not endorse the nationalist presumption against private enforcement of treaties.[472] However, the Court applied a nationalist approach to treaty interpretation,[473] adopting a restrictive view of the scope of legal protection

466. *See* White, *supra* note 23.

467. *See* Vazquez, *Treaty-Based Rights*, *supra* note 18, at 1101–04.

468. *See* U.S. CONST. art. VI, cl. 2 (stipulating that treaties are "the supreme Law of the Land" and that "Judges in every State shall be bound thereby"). *See also* Vazquez, *Treaty-Based Rights*, *supra* note 18, at 1104–10; Flaherty, *supra* note 18, at 2120–26.

469. *See supra* notes 65–69 and accompanying text.

470. *See, e.g.*, State v. Sanchez-Llamas, 108 P.3d 573 (Or. 2005). *See also supra* notes 69, 70, 74–77 and accompanying text.

471. 126 S. Ct. 2669 (2006).

472. *See supra* notes 75–77 and accompanying text.

473. Recall that the transnationalist model applies the twin canons of good faith and liberal interpretation, whereas the nationalist model applies the canon of deference to the executive branch. *See supra* notes 32–38 and accompanying text. The Court in *Sanchez-Llamas* explicitly invoked the nationalist canon of deference to the executive branch in support of its decision. *See Sanchez-Llamas*, 126 S. Ct. at 2685. In contrast, the Court's opinion makes no reference to the canons of good faith and liberal interpretation. Moreover, the Court's decision is contrary to both those canons. The canon of good faith counsels courts to interpret a treaty in accordance with the agreed international understanding of its

accorded to foreign nationals under the treaty. By restricting the range of judicial remedies available to individual victims of Article 36 violations, the Court effectively signaled to state and local officers that they can continue to violate the treaty without fearing judicial sanctions.[474] Thus, application of the nationalist model perpetuates the very problem of treaty violations by state officers that the Framers thought they solved by including treaties in the text of the Supremacy Clause.

The second harmful consequence associated with the nationalist model relates to separation of powers. In *Hamdan v. Rumsfeld*, the Supreme Court ruled that Common Article 3 of the Geneva Conventions is a part of U.S. federal law, that Common Article 3 grants rights to individual Guantanamo detainees, and that it would violate the rights of those detainees to subject them to trial by military commission.[475] If the Court had endorsed the nationalist presumption against private enforcement of treaties, it might well have ruled that the Geneva Conventions are not judicially enforceable.[476] In that case, the Court would presumably have denied relief to Hamdan on the grounds that individual claimants cannot enforce the Geneva Conventions in U.S. courts. Thus, even though the Supreme Court held that the proposed military commission proceedings violate federal law, and that they violate Hamdan's federal rights, a court applying the nationalist presumption would disclaim the power to halt those ongoing violations. That type of rationale is squarely at odds with core rule-of-law principles. When federal courts turn a blind

terms, but the *Sanchez-Llamas* majority explicitly rejected the agreed international understanding of Article 36 of the VCCR, as reflected in decisions by the International Court of Justice. *See id.* at 2683–86. The canon of liberal interpretation counsels courts to interpret a treaty to provide the broadest possible protection for the rights of foreign nationals, but the Court interpreted Article 36 in a manner that left both petitioners, and countless other foreign nationals, without any meaningful remedy for the acknowledged violation of their treaty-based individual rights.

474. The Court specifically rejected two proposed remedies for Article 36 violations: application of the exclusionary rule and preemption of state procedural default rules to enable individuals to raise Article 36 claims in post-conviction proceedings in state court. *See Sanchez-Llamas*, 126 S. Ct. at 2678–87. The Court's opinion leaves open the possibility that individuals can obtain judicial remedies for Article 36 violations by raising ineffective-assistance-of-counsel claims. *See supra* notes 126–28 and accompanying text. However, since this remedial mechanism does not affect the state officers who violated the treaty in the first place, it provides no incentive for them to comply with the treaty.

475. *See* 126 S. Ct. 2749, 2793–97 (2006).

476. Even if the Court adopted the nationalist presumption against private enforcement, it could reasonably have held that the federal habeas statute grants individuals a private right of action that empowers them to enforce the Geneva Conventions by filing a habeas corpus petition. However, courts that have endorsed the nationalist presumption have generally held that the Geneva Conventions are not judicially enforceable in a habeas corpus action. *See, e.g.*, Hamdan v. Rumsfeld, 415 F.3d 33, 38–40 (D.C. Cir. 2005).

eye to executive action that violates federal law, they distort the constitutional balance of power by ceding too much power to the President and diminishing the relative powers of the legislative and judicial branches.[477] Thus, courts that apply the nationalist model abdicate their constitutional responsibility to restrain illegal executive action, thereby distorting the balance of power among the branches.

Finally, judicial application of the nationalist model harms the United States' international reputation. U.S. violations of the VCCR and the Geneva Conventions contribute to a growing perception that the United States is hostile to international law. More specifically, other countries accuse the United States of trying to develop an international system in which other states are constrained by international law, but the United States is free to pursue its national interests, unfettered by the requirements of international law. Proponents of the nationalist model may object that it is inappropriate for courts to concern themselves with international perceptions of U.S. behavior. That objection, though, merely serves to highlight the intellectual gulf between the Marshall Court and modern nationalists. According to a leading historical account, the Marshall Court's decisions manifested "deep concern that the United States be known for its adherence to international law and its respect for treaty obligations. . . . In construing treaties of the Untied States, the Court exercised great liberality in broadening the rights of the signatory powers and those claiming under them."[478] Modern courts would do well to follow Chief Justice Marshall's transnationalist approach.

477. In the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, Congress has authorized the President to utilize military commissions similar to the ones that the President initially tried to establish without congressional authorization. The fact of congressional authorization clearly mitigates concerns about unchecked executive power in this context. Nevertheless, the nationalist model is problematic because it encourages judges to turn a blind eye to unlawful executive action.

478. HASKINS & JOHNSON, *supra* note 267, at 557.