TREATIES IN U.S. COURTS: JUDGE BORK'S ANTI-ORIGINALIST REVOLUTION

INTRODUCTION

Robert Bork is widely known as one of the leading modern exponents of originalism.[1] Many scholars would be surprised, therefore, to learn that Judge Bork authored a very influential opinion when he was a judge on the D.C. Circuit that shifted judicial doctrine in a direction that is directly contrary to the Founders' original understanding. The case was *Tel-Oren v. Libyan Arab Republic*.[2] The constitutional issue relates generally to separation of powers, and specifically to the judiciary's role in treaty enforcement. Judge Bork made new law in *Tel-Oren* by creating a presumption against private enforcement of treaties in U.S. courts. To overcome that presumption, Bork said, individual litigants must show that the treaty creates a private right of action, or that Congress has enacted legislation authorizing private enforcement of the treaty.[3] Thus, under the "Bork 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.

The Bork model contrasts sharply with the "Marshall model" of treaty enforcement, named for Chief Justice John Marshall. Under the Marshall model, if a treaty is the Law of the Land under the Supremacy Clause, and the treaty protects individual rights, then the judiciary has both the power and the duty to provide remedies for violations of individual treaty rights, unless the treaty itself bars domestic judicial remedies, or Congress has enacted legislation precluding judicial enforcement of the treaty. Moreover, in cases where a court has jurisdiction, the court does not need express authorization from the political branches – either in the form of a federal statutory right of action, or in the form of an express private right of action in the treaty – 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.[4]

---

1 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

2 726 F.2d 774 (D.C. Cir. 1984).

3 *See id*. at 808 (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.").

4 *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.")

The conflict between the Bork model and the Marshall model is directly relevant to two cases currently pending before the Supreme Court. In *Hamdan v. Rumsfeld*, the Court granted cert. to decide 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[5] in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch."[6] In *Sanchez-Llamas v. Oregon*, the Court granted cert. to decide whether Article 36 of the Vienna Convention on Consular Relations,[7] which protects the rights of foreign nationals arrested in the United States,[8] conveys "individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States."[9] Both the D.C. Circuit in *Hamdan* and the Oregon Supreme Court in *Sanchez-Llamas* applied the Borkian presumption against private enforcement of treaties, and concluded on that basis that the treaties at issue were not judicially enforceable in U.S. courts.[10] If the Supreme Court applies the Marshall model, though, it will undoubtedly decide that both treaties are judicially enforceable. Thus, the outcome of both cases may hinge on whether the Court applies the Marshall model or the Bork model.[11]

There are three reasons why the Supreme Court should reject the Bork model. First, the Marshall model is consistent with the Founders' original understanding of the judiciary's role in the domestic enforcement of treaties. The Bork model, in contrast, is at odds with the original understanding. Second, the Marshall model is consistent with two hundred years of Supreme Court jurisprudence. The Borkian presumption against private enforcement of treaties, on the other hand, is a radical departure from a two-centuries-old tradition. Judge Bork invented that presumption in 1984; it has never been endorsed by the Supreme Court. Third, application of the Bork model produces very harmful consequences. When courts apply the Bork model, they perpetuate treaty violations by state governments, they abdicate their constitutional responsibility to

---

[5] 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].

[6] Hamdan v. Rumsfeld, Docket Number 05-184, Questions Presented, *available at* http://www.supremecourtus.gov/qp/05-00184qp.pdf. Oral argument is set for March 28, 2006. For docket information, *see* http://www.supremecourtus.gov/docket/05-184.htm.

[7] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

[8] *See id*., art. 36, para. 1.

[9] Sanchez-Llamas v. Oregon, Docket Number 04-10566, Questions Presented, *available at* http://www.supremecourtus.gov/qp/04-10566qp.pdf. Similarly, *Bustillo v. Johnson*, which the Supreme Court consolidated with *Sanchez-Llamas*, presents the question whether "state courts may refuse to consider violations of Article 36 . . . because the treaty does not create individually enforceable rights." Bustillo v. Johnson, Docket Number 05-51, Questions Presented, *available at* http://www.supremecourtus.gov/qp/05-00051qp.pdf. Oral argument is set for both cases on March 29, 2006. For docket information, *see* http://www.supremecourtus.gov/docket/04-10566.htm.

[10] *See* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005); State v. Sanchez-Llamas, 108 P.3d 573 (Or. 2005). In *Bustillo*, the Virginia Supreme Court issued an unpublished order that affirmed the circuit court opinion without providing any rationale.

[11] In each case, it is possible for the Court to duck the question whether the treaty is judicially enforceable, and thus sidestep the conflict between the Marshall model and the Bork model, by deciding the case on other grounds.

restrain illegal executive action, and they damage the United States' international reputation.[12]

*****

This article builds upon two different strands of recent scholarship. First, in a seminal article published in 1999, G. Edward White debunked what he called the "myth of continuity," and demonstrated that there was a radical transformation in the constitutional regime of foreign relations in the period between the two World Wars.[13] His article focused on three topics: the status of executive agreements, federalism limits on the treaty power, and foreign sovereign immunity. This article demonstrates that a similar transformation is occurring now with respect to the judicial role in treaty enforcement. Courts applying the Bork model invoke the "myth of continuity" by citing nineteenth century Supreme Court decisions as authority. This article debunks that myth by showing that nineteenth century Supreme Court decisions provide no support for the Bork model. The current transformation of the judicial role in treaty enforcement is incomplete because the Supreme Court has not endorsed the Bork model. If the Court does endorse the Bork model in *Hamdan* and/or *Sanchez-Llamas*, it would advance the trend described by Professor White: a trend of consolidating foreign relations power in the federal executive branch at the expense of other constitutional actors.[14]

Second, Professors Vazquez and Flaherty have argued persuasively that the Framers intended treaties to be self-executing.[15] Article VI of the Constitution accords

---

[12] The author intends to develop these normative claims more fully in a separate article. The primary focus of this article is historical, not normative. Even so, it is important to foreshadow the normative arguments to highlight the contemporary relevance of the historical analysis. For a brief defense of the normative claims summarized above, *see infra* notes 288-98 and accompanying text.

[13] G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 3-6 (1999).

[14] As applied to the POW Convention, the Bork model diminishes the power of both Congress and the federal judiciary. As applied to the VCCR, the Bork model diminishes the power of both state and federal courts. It effectively enhances the power of state governments to violate federal law, but it does so in a way that is contrary to the central purpose of the Supremacy Clause. *See infra* notes 288-91 and accompanying text.

[15] *See* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097-1114 (1992). *But see* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (contending that the Framers' original understanding is consistent with a presumption against self-execution).

In contrast to Professors Flaherty, Vazquez and Yoo, this article purposefully avoids use of the term "self-executing." Instead, it frames the issue in terms of whether particular treaty provisions are judicially enforceable, or whether individual litigants have the capacity to enforce treaties. There are two reasons for this approach. First, debates about self-execution tend to conflate at least three distinct questions: whether a treaty has the status of law in the U.S. legal system, whether it is judicially enforceable, and whether it creates a private right of action. Second, recent cases involving the VCCR typically hold that the VCCR is not judicially enforceable, even though it is admittedly "self-executing." These cases demonstrate that analysis of self-execution does not necessarily resolve the question whether a treaty is judicially enforceable.

treaties the status of law in the U.S. legal system.[16] Articles III and VI empower federal and state courts, respectively, to enforce treaties.[17] Professors Vazquez and Flaherty have examined a variety of Founding era sources to demonstrate that the Framers understood the Constitution to mean what it says: that treaties have the status of law and courts have the power to enforce treaties.[18] It is clear, however, that all people cannot enforce all treaties in all cases. Thus, the question remains: in what circumstances can individual litigants invoke the power of a court to obtain remedies for treaty violations? The constitutional text does not answer this question. The traditional sources of originalist scholarship – records of the constitutional convention, state ratifying conventions, etc. – shed some light on the question,[19] but not much. Since eighteenth century materials are inconclusive in this respect, it is instructive to examine judicial decisions from the post-Founding period to ascertain whether they illuminate the Framers' understanding of the judicial role in treaty enforcement.[20]

This is the first article to present a comprehensive analysis of Supreme Court decisions between 1789 and 1838 in cases where an individual litigant raised a claim or defense on the basis of a treaty. The analysis demonstrates that, during this period, the Supreme Court routinely applied the Marshallian presumption in favor of judicial remedies for violations of individual treaty rights; it never applied the Borkian presumption against judicial enforcement of treaties. That conclusion is significant for two reasons. First, for those who believe that courts should decide cases in accordance with the original understanding, it provides evidence that the Founders understood the judicial role in treaty enforcement in accordance with the Marshall model, not the Bork model.[21] 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 Marshall model.[22]

---

16 U.S. Const. art VI, cl. 2 ("[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.")

17 U.S. Const. art. III, § 2, cl. 1 ("The [federal] judicial Power shall extend to all Cases . . . arising under . . . Treaties."); U.S. Const. art VI, cl. 2 (specifying that "the Judges in every State shall be bound" by treaties).

18 *See* Flaherty, *supra* note 15; Vazquez, *supra* note 15, at 1097-1114.

19 *See, e.g.*, The Federalist No. 22, at 182 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("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.").

20 The Supreme Court has emphasized that the force of constitutional precedents "tends to increase in proportion to their proximity to the Convention in 1787." Powell v. McCormack, 395 U.S. 486, 547 (1969).

21 I do 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. Even so, the analysis is instructive because it shows a consistent pattern of judicial decision-making that conforms to the Marshall model. That consistent pattern reinforces the conclusions that Professors Flaherty and Vazquez reached by examining Founding-era sources. Additionally, analysis of judicial decisions enables one to draw more specific conclusions about the circumstances in which individual litigants can obtain judicial remedies for treaty violations.

22 It is beyond the scope of this article to provide a comprehensive analysis of two centuries of Supreme Court jurisprudence in treaty cases. The author plans to conduct that analysis in future work. This article demonstrates that the Supreme Court consistently applied the Marshall model, not the Bork model,

Part One provides a conceptual overview of the distinction between the Bork model and the Marshall model. The models diverge in two distinct but related ways. First, at the constitutional level, the Marshall model presupposes that state and federal courts have fairly substantial powers to enforce treaties; in contrast, the Bork model assumes that courts have relatively limited power to enforce treaties. Second, at the sub-constitutional level, the comparison illustrates a dramatic transformation that has occurred in the way courts conceptualize the relationship between individual rights and judicial remedies. Application of the Marshall model leaves almost no gap between rights and remedies in the domestic law of treaties, because courts applying the Marshall model presume "that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."[23] In contrast, application of the Bork model leads to a significant gap between rights and remedies, because courts applying the Bork model presume, absent affirmative evidence to the contrary, that the treaty makers do not want U.S. courts to provide remedies for violations of individual treaty rights.

Part Two presents a comprehensive analysis of Supreme Court decisions between 1789 and 1838 -- 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-seven such cases altogether. Analysis of these cases demonstrates that every Supreme Court decision during this period was consistent with the Marshall model. In contrast, at least thirteen of the fifty-seven cases, and arguably as many as nineteen cases, are inconsistent with the Bork model. The consistent precedents of the Supreme Court during this period manifest the Founders' original understanding that the judiciary has both the power and the duty to provide remedies for individuals whose treaty-based individual rights are violated, even if the treaty does not create a private right of action, and even if Congress has not enacted legislation authorizing private enforcement of the treaty in domestic courts.

Part Three traces the origins of the Bork model. The analysis suggests that the Bork model emerged in the 1970s and 1980s 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. The merger of these two doctrines produced a revolution in both non-self-execution doctrine and implied right of action doctrine. Whereas prior non-self-execution doctrine was generally consistent with the maxim "where there is a right, there is a remedy," Borkian non-self-execution doctrine created a huge right-remedy gap in the domestic law of treaties. Whereas implied right of action doctrine, as applied in the statutory context, has never imposed a bar to judicial enforcement of federal statutes on behalf of habeas petitioners or criminal defendants, courts are now applying the Borkian private right of action test to preclude habeas petitioners and criminal defendants from obtaining judicial remedies for violations of their individual treaty rights.

---

during the first fifty years of constitutional history. It also shows that the Supreme Court cases most frequently cited as authority for the Bork model do not support the Borkian presumption against private enforcement of treaties. On the basis of this evidence, it is reasonable to infer that the Supreme Court has continued to apply the Marshall model for more than two hundred years.

[23] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting Blackstone's Commentaries).

I.
Two Models of Treaty Adjudication

This article utilizes the conceptual tools of the Bork model and the Marshall model to frame the historical analysis. Part One lays the groundwork for that analysis by providing a conceptual overview of the distinction between the Bork model and the Marshall model. To clarify that distinction, it is first necessary to discuss briefly the relationship between primary law and remedial law.

A. Rights and 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 & 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 Marshall model, treaty provisions that protect individual rights are generally judicially enforceable, regardless of whether the treaty creates an express private right of action.

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 & 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] Under this definition, a treaty creates an express private right of action if it expressly empowers individuals to invoke the treaty before a domestic court to obtain the court's judgment about a disputed question related to the treaty.[30]

---

[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*. at 122.

[26] *Id*. at 130.

[27] *Id*. at 130.

[28] *Id*. at 137.

[29] *Id*.

[30] Some modern treaties expressly authorize individuals to invoke the treaty before an international tribunal. Such treaty provisions would satisfy Hart & 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.

In contrast to Hart & Sacks, some courts applying the Bork model appear to understand the concept of a "private right of action" to encompass two distinct ideas: a right of access to court, and a power to invoke the treaty before a domestic court. Accordingly, 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. (Where appropriate, the article will distinguish between a "right of access" and a "power to invoke".) Treaties rarely create express private rights of action.[31] Under the Bork 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.

B. Marshall v. Bork

1. *Different Presumptions*: In *Tel-Oren v. Libyan Arab Republic*,[32] 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. When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action.[33]

In the first sentence, the phrase "rights that are privately enforceable in courts" clearly refers to remedial rights, not primary rights. Thus, under the Bork 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: a) if there is "authorizing legislation" that empowers courts to grant judicial remedies; or b) if the treaty itself "provides a private right of action." The second and third sentences, read together, make clear that a treaty-based private right of action could be either express or implied. Either way, though, under the Bork 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 Marshall model, in contrast, adopts a presumption in favor of domestic judicial remedies for violations of individual treaty rights.[34] The core principle of the

---

[31] *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 a private cause of action in domestic courts.")

[32] 726 F.2d 774 (D.C. Cir. 1984).

[33] *Id*. at 808 (Bork, J., concurring).

[34] Strictly speaking, the presumption applies only if the treaty provision at issue is the "Law of 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

Marshall model is "that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."[35] The Marshall model does not adopt a presumption for or against the view that treaties create individual rights, but it recognizes that some treaties do create individual rights. Whether a treaty creates or protects individual rights is a question of treaty interpretation.[36] If a treaty does create or protect individual rights, the Marshall model presumes that an individual whose treaty rights were violated is entitled to a domestic judicial remedy.[37] 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 defensively by civil or criminal defendants, or they can be invoked offensively by plaintiffs. 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 Bork 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.[38] Under the Marshallian presumption in favor of 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. Under the Borkian presumption against judicial enforcement, though, 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 Marshall era, individual plaintiffs routinely relied on common law rights of action to provide a right of access to court to pursue their treaty-based claims.[39] Thus, under the Marshall model, if a plaintiff can show that he has rights

---

detailed textual analysis of this constitutional provision, *see* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1, 46-55 (2002). Unless otherwise specified, this article is concerned only with treaty provisions that are "Law of the Land" under the Supremacy Clause.

[35] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.) (quoting William Blackstone, 3 Commentaries xxx).

[36] *See, e.g.*, Medellin v. Dretke, 125 S. Ct. 2088, 2103 (O'Connor, J., dissenting on other grounds) ("To ascertain whether Article 36 [of the VCCR] confers a right on individuals, we first look to the treaty's text as we would with a statute's.").

[37] *See, e.g.*, Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598 (1884) ("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.").

[38] *See, e.g.*, State v. Sanchez-Llamas, 108 P.3d 573, 575-76 (Or. 2005) (suggesting, in a case where a criminal defendant sought to invoke the VCCR 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").

[39] *See, e.g.,* Hughes v. Edwards, 22 U.S. 489 (1824) (suit to foreclose on mortgage); Soc'y for Propagation of Gospel v. New Haven, 21 U.S. 464 (1823) (action for ejectment); Craig v. Radford, 16 U.S. 594 (1818) (equitable action to divide a tract of land); Chirac v. Lessee of Chirac, 15 U.S. 259 (1817) (action for ejectment); Fitzsimmons v. Newport Ins. Co., 8 U.S. 185 (1808) (suit for breach of contract);

protected by a treaty, and he has a right of access to court based on common law or other domestic law sources, there is no additional showing required to establish that he has the power to invoke the treaty before a domestic court. Under the Bork model, though, 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.[40]

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 private right of action. Under the Bork 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 Marshall 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."[41] 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."[42]

Courts applying the Bork model are the intellectual descendants of Holmes. They typically begin by asking questions about remedial law, not primary law. Under the Borkian 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 Marshall 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."[43] Under the Marshallian method, it is not necessary to inquire whether the

---

Higginson v. Mein, 8 U.S. 415 (1808) (suit to foreclose on mortgage); Hopkirk v. Bell, 7 U.S. 454 (1806) (suit to recover payment on bond); Ogden v. Blackledge, 6 U.S. 272 (1804) (suit to recover payment on bond).

[40] This is 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 POW Convention. 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.

[41] Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 458 (1897).

[42] Henry M. Hart, Jr., *Holmes' Positivism – An Addendum*, 64 Harv. L. Rev. 929, 935 (1951).

[43] *Id*.

treaty creates a private right of action, because every individual who is properly before the court[44] and whose 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.[45]

In short, the Marshall model applies a "rights-focused" methodology, whereas the Bork model applies a "remedies-focused" methodology. The contrast between the Marshallian and Borkian 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 Bork model, it will lead to a substantial right-remedy gap in the domestic law of treaties. If the Supreme Court continues to apply the Marshall model, though, it would minimize the right-remedy gap, because most treaties that protect individual rights would be judicially enforceable.

II.
The Marshall Model in Action: 1789-1838

Part Two 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. To present a complete picture of the Marshall model, it is necessary to extend the analysis at least until 1835, the last year that John Marshall served on the Court. If the analysis stops in 1835, though, one loses an important part of the picture. Judge Bork and others have relied heavily on Marshall's opinion in *Foster v. Neilson*[46] to support the Bork model.[47] In *Garcia v. Lee*,[48] decided in 1838, Chief Justice Taney authored an opinion that helps illuminate 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 Bork model – it is essential to analyze the aftermath of *Foster* up through and including Taney's 1838 decision in *Garcia v. Lee*.

---

[44] An individual defendant is properly before the court if he is subject to the court's territorial jurisdiction. Under the Marshall 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.

[45] Under the Marshall 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.

[46] 27 U.S. 253 (1829).

[47] *See, e.g.,* Hamdan v. Rumsfeld, 415 F.3d at 38-39 (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*).

[48] 37 U.S. 511 (1838).

Between 1789 and 1838, the Supreme Court decided 57 cases in which an individual litigant raised a claim or defense on the basis of a treaty.[49] These 57 cases include: 22 cases involving disputes over title to property in Louisiana or Florida (territories that the U.S. acquired by treaties with France and Spain, respectively); 16 other cases involving disputes over title to real property; 11 admiralty cases; and 8 cases that are neither admiralty nor property cases.

Part Two analyzes the results of Supreme Court decisions during this period to determine which results are consistent with the Marshall model and which results are consistent with the Bork 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*, to ascertain which cases are consistent with which model. The analysis shows that every Supreme Court decision during this period was consistent with the Marshallian presumption in favor of judicial remedies.[50] In contrast, none of the 57 cases endorse the Borkian 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.

Part Two 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 34 cases. The second section addresses cases where the Court declined to reach the merits of a treaty-based claim or defense, a total of 7 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 16 such cases. The final section examines one of those 16 cases, *Foster v. Neilson*, in greater detail.

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

---

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

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. 523 (1827) (where neither party asserted individual right on basis of peace treaty between U.S. and Britain, Court cited treaty as evidence that land at issue was part of 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. 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. 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. 662 (1836).

[50] Of the 57 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. 410 (1838); Foster v. Neilson, 27 U.S. 253 (1829); and De la Croix v. Chamberlain, 25 U.S. 599 (1827). For the reasons explained below, all three are consistent with the Marshall model. *See infra* notes 161-234 and accompanying text.

Of the 57 treaty cases that the Supreme Court decided between 1789 and 1838, the individual invoking the treaty won his treaty-based claim or defense 34 times.[51] Those 34 cases are all consistent with the Marshall 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 Bork model, 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 to determine whether a particular case is consistent with the Bork model.[52] The cases divide into four groups: twelve cases where the individual litigant had a statutory right of action;[53] three cases where the treaty provided an express private right of action;[54] thirteen cases that are clearly inconsistent with the Bork model because the Court awarded remedies on the basis of a treaty even though there was no statutory or treaty-based right of action;[55] and six cases that are arguably inconsistent with the Bork model because there was no statutory right of action, and it is debatable whether the treaty created a private right of action.[56]

1. *Cases Involving a Statutory Right of Action*: The United States acquired Louisiana from France by a treaty signed in 1803.[57] 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."[58] 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.[59] Over the next two decades, Congress passed a series of laws regulating titles to

---

[51] 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. 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. 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).

[52] 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 Bork model.

[53] *See infra* Part II.A(1).

[54] *See infra* Part II.A(2).

[55] *See infra* Part II.A(3).

[56] *See infra* Part II.A(4).

[57] Treaty for the Cession of Louisiana, April 30, 1803, U.S.-France, *reprinted in* 2 Treaties and Other International Acts of the United States of America 498 (Hunter Miller ed., 1931) [hereinafter, "Louisiana Treaty"].

[58] *Id*., art. 3, at 501.

[59] *See* "An act for ascertaining and adjusting the titles and claims to land, within the territory of Orleans, and the district of Louisiana," March 2, 1805, sec. 5, 2 Stat. 324, 327.

land in the territory acquired from France.[60] Ultimately, in 1824, Congress created a federal statutory cause of action authorizing individuals who 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."[61] 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.[62]

The United States acquired Florida from Spain by a treaty signed in 1819.[63] 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.[64] 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.[65] The initial statutory scheme was purely administrative, with no provision for judicial review. In 1828, though, Congress created a federal statutory cause of action for individuals who claimed property rights protected by Article 8 of the Florida Treaty.[66] During the 1830s, the Supreme Court decided nine cases where

---

[60] *See* Harry L. Coles, Jr., *Applicability of the Public Land System to Louisiana*, 43 Mississippi Valley Historical Review No. 1, 39-58 (1956); Harry L. Coles, Jr., The Confirmation of Foreign Land Titles in Louisiana, 38 Louisiana Historical Quarterly No. 4, 1-22 (1955). *See also* 2 Stat. 324-25 (summarizing legislation from 1804 to 1843).

[61] An Act enabling the claimants to lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims," May 26, 1824, 4 Stat. 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 . . . .

[62] Mackey v. U.S., 35 U.S. 340 (1836); Soulard's Heirs v. U.S., 35 U.S. 100 (1836); Delassus v. U.S., 34 U.S. 117 (1835).

[63] Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, U.S.-Spain, *reprinted in* 3 Treaties and Other International Acts of the United States of America 3 (Hunter Miller ed., 1933) [hereinafter, "Florida Treaty"].

[64] *Id*., art. 8, at 9 ("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 . . . .")

[65] *See* "An Act for ascertaining claims and titles to land within the territory of Florida," May 8, 1822, 3 Stat. 709.

[66] See "An act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida," May 23, 1828, 4 Stat. 284. Section 6 of the Act says:

> 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 the act of May 26, 1824.

plaintiffs asserting a claim on the basis of this federal statute won on the merits of their treaty-based claims.[67]

All twelve cases where plaintiffs prevailed (three Missouri cases and nine Florida cases) are consistent with the Marshall model because the court granted remedies to the individual plaintiffs to protect their treaty-based rights. All twelve cases are also consistent with the Bork model, because Congress had enacted federal statutes authorizing judicial enforcement of those claims.[68] Even so, none of the cases endorse the Borkian presumption against private enforcement of treaties.

2. *Cases Involving a Treaty-Based Right of Action*: In *Higginson v. Mein*,[69] 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.[70] 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."[71] Article 5 granted the plaintiff an express private right of action.[72] The Court ruled in favor of the British plaintiff.

The *Bello Corrunes*[73] and *The Pizarro*[74] were both admiralty cases 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.[75] In both cases, the Court awarded judgment to the

---

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

68 Since all twelve cases involved claims against the United States, plaintiffs relied on federal statutes to overcome what would otherwise be a valid sovereign immunity defense.

69 8 U.S. 415 (1808).

70 *Id*. at 418-19.

71 Definitive Treaty of Peace, Sept. 3, 1783, art. 5, U.S.-Great Britain, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 151, 154 (Hunter Miller ed., 1931).

72 *See id*., art. 5 ("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.")

The text states explicitly that persons "shall meet with no lawful Impediment in the Prosecution of their just Rights." The text also identifies the persons to whom it applies: those "who have any Interest in confiscated Lands." The treaty specifically authorizes them 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 Borkian 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 98-119 and 128-39 and accompanying text.

73 19 U.S. 152 (1821).

74 15 U.S. 227 (1817).

75 Treaty of Frienship, Limits and Navigation, Oct. 27, 1795, art. 20, U.S.-Spain, *reprinted in* 2 Treaties and Other International Acts of the United States of America 318, 334-35 (Hunter Miller ed., 1931) [hereinafter, "1795 Treaty with Spain"] ("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 . . . .").

Spanish ship owners on the grounds that American privateers who captured the ships had violated the 1795 Treaty with Spain.[76]

Higginson, Bello Corrunes, and Pizarro are all consistent with the Marshall 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 Bork model because the treaties at issue granted the individual litigants an express private right of action. None of these cases, however, endorse the Borkian presumption against private enforcement of treaties. Moreover, none of the cases state or imply that individual litigants could not enforce 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 thirteen 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 thirteen cases include three admiralty cases,[77] five cases involving creditor-debtor disputes,[78] and five other cases.[79] In all thirteen cases, the Court applied the Marshallian presumption in favor of judicial remedies. In every case, the Court would have reached a different result if it had applied the Borkian presumption against judicial remedies. Thus, these cases are clearly inconsistent with the Bork model; they provide strong support for the Marshall model.

a. *Admiralty Cases*: In *Moodie v. The Ship Phoebe Anne*,[80] a French privateer had captured a British vessel. The British Consul filed a libel, seeking restitution on the grounds that the French privateer had illegally augmented its force in a U.S. port. In response, the privateer invoked article 19 of a 1778 treaty with France,[81] 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.[82] Accordingly, the Court awarded judgment to the French privateer on the basis of the treaty, even though the treaty at issue

---

[76] *See Bello Corrunes*, 19 U.S. at 171-72 (holding that the privateer had violated article XIV of the 1795 treaty with Spain), and at 154-55 (noting that the Circuit court had ordered restoration of the ship to the Spanish owners) and at 175-76 (affirming the Circuit court order in all relevant respects); *Pizarro*, 15 U.S. 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).

[77] U.S. v. Schooner Peggy, 5 U.S. 103 (1801); Moodie v. The Ship Phoebe Anne, 3 U.S. 319 (1796); Talbot v. Jansen, 3 U.S. 133 (1795).

[78] Hopkirk v. Bell, 8 U.S. 164 (1807) (*Hopkirk* II); Hopkirk v. Bell, 7 U.S. 454 (1806) (*Hopkirk* I); Ogden v. Blackledge, 6 U.S. 272 (1804); Ware v. Hylton, 3 U.S. 199 (1796); State of Georgia v. Brailsford, 3 U.S. 1 (1794).

[79] Carver v. Jackson, 29 U.S. 1 (1830); Carneal v. Banks, 23 U.S. 181 (1825); Soc'y for Propagation of the Gospel v. Town of New Haven, 21 U.S. 464 (1823); Chirac v. Chirac, 15 U.S. 259 (1817); Fitzsimmons v. Newport Insurance Co., 8 U.S. 185 (1808).

[80] 3 U.S. 319 (1796).

[81] Treaty of Amity and Commerce, Feb. 6, 1778, art. 19, U.S.-France, *reprinted in* 2 Treaties and Other International Acts of the United States of America 3, 17-18 (Hunter Miller ed., 1931) [hereinafter, "1778 Treaty with France"].

[82] *See Phoebe Anne*, 3 U.S. at 319.

did not create an express private right of action,[83] and there was no federal statute, other than the general grant of admiralty jurisdiction, that authorized the prevailing party to enforce the treaty in a U.S. court.

Talbot v. Jansen involved a Dutch brigantine, the Magdalena, which had been captured by privateers.[84] The Dutch ship owners argued that the capture violated article 19 of a 1782 treaty with the Netherlands.[85] The Supreme Court ruled in favor of the Dutch ship owners,[86] producing four separate opinions in support of that result. Two of the four opinions held expressly that the capture violated the 1782 Treaty with the Netherlands, and that the ship owners were entitled to a remedy on that basis.[87] As in *Moodie*, the Court granted a remedy to the ship owners even though the treaty at issue did not create an express private right of action,[88] 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.

Moodie and *Talbot* are both consistent with the Marshall model, but they are squarely inconsistent with the Bork model. In accordance with the Marshall model, the Court assumed that the treaties at issue were judicially enforceable on behalf of private parties,[89] even though the treaties did not expressly empower individuals to invoke those treaties before a U.S. court. Contrary to the Bork model, the absence of any statutory or treaty provision that expressly authorized private enforcement was not a bar to private enforcement of the treaty.

---

[83] 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 81, art. 19. The treaty does not contain any language that expressly empowers French citizens to invoke that provision before a U.S. court.

[84] 3 U.S. 133 (1795).

[85] Treaty of Amity and Commerce, Oct. 8, 1782, art. 19, U.S.-Netherlands, *reprinted in* 2 Treaties and Other International Acts of the United States of America 59, 76-77 (Hunter Miller ed., 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. at 152-58 (Paterson, J.). 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.).

[86] *Id*. at 169.

[87] *See id*. at 165 (Iredell, J.) (concluding that Talbot had a "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.) (stating that the capture "was a violation of the law of nations, and of the treaty with Holland").

[88] Article 19 provides expressly that any individual who violates its terms "shall be punished as a pirate." 1782 Treaty with Netherlands, *supra* note 85, art. 19, at 76-77. The treaty does not provide for civil actions against individuals who commit acts of piracy.

[89] *See Moodie,* 3 U.S. at 319 (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.")

In *United States v. Schooner Peggy,*[90] the Court ruled in favor of the French owners of a schooner captured by a U.S. naval vessel, holding that Article 4 of the 1800 Convention with France granted the French owners a right to recover the captured property.[91] 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.[92] 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.[93] It is unlikely, though, that Article 22 was intended to create a private right of action.[94] 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.[95]

In any case, the Court's opinion 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."[96] In accordance with the Marshall 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

---

90 5 U.S. 103 (1801).

91 *See id*. at 108-110.

92 Convention Between the French Republic and the United States of America, Sept. 30, 1800, art. 4, U.S.-France, *reprinted in* 2 Treaties and Other International Acts of the United States of America 457, 459-62 (Hunter Miller ed., 1931) [hereinafter, "1800 Convention with France"] (stipulating that "property captured, and not yet definitively condemned . . . shall be mutually restored").

93 *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.").

94 During the 1790s, there were a series of cases in which French nationals challenged the jurisdiction of U.S. courts to adjudicate prize cases involving French captors. *See, e.g*., Glass v. The Sloop Betsey, 3 U.S. 6, 9 (1794) (French captor asserts "[t]hat by the law of nations, the courts of the captor can alone determine the question of prize or no prize"). The United States, on the other hand, claimed that prize cases involving French captors were subject to the jurisdiction of U.S. courts if captors brought the ship into a U.S. port. *See id*., at 16 (rejecting the French captor's jurisdictional objection and affirming the jurisdiction of the district court). The stipulation in article 22 – authorizing courts *in the country to which the prizes may be conducted* to take cognizance of cases – was probably added to the treaty to resolve this issue, rather than to create a private right of action.

95 The 1800 Convention with France served two distinct goals. First, it was a peace treaty that terminated the undeclared war between the U.S. and France. Articles 1-5 were backward-looking and were intended to codify the termination of the war. Second, 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.

96 *Schooner Peggy*, 5 U.S. at 103-04.

> 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.[97]

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. Thus, *Schooner Peggy* is inconsistent with the Bork model.

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. *Ware v. Hylton*[98] is representative of these cases. In *Ware*, a British creditor sued U.S. debtors to collect payment on a bond that dated from 1774.[99] In 1777, during the Revolutionary War, the Virginia legislature "passed a law to sequester British property."[100] 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. 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.[101] In reply to that defense, the plaintiff invoked Article 4 of the peace treaty.[102] 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."[103] The Court applied a Marshallian 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.[104]

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.[105] 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.[106] In all four cases, the Court ruled in favor of the British creditors.[107] Like *Ware*, these cases are inconsistent with the Bork

---

97 *Schooner Peggy*, 5 U.S. at 109-110 (Marshall, C.J.).
98 3 U.S. 199 (1796).
99 *Id*. at 199.
100 *Id*. at 220 (Chase, J.).
101 *Id*. at 221.
102 Definitive Treaty of Peace, *supra* note 71, art. 4 (stipulating "that 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").
103 *Ware*, 3 U.S. at 235 (Chase, J.).
104 The plaintiff's suit was based on the common law right of action to recover payment on a bond.
105 Hopkirk v. Bell, 8 U.S. 164 (1807) (*Hopkirk* II); Hopkirk v. Bell, 7 U.S. 454 (1806) (*Hopkirk* I); Ogden v. Blackledge, 6 U.S. 272 (1804).
106 State of Georgia v. Brailsford, 3 U.S. 1 (1794).
107 *Hopkirk* II, 8 U.S. 164 (reaffirming *Hopkirk* I); *Hopkirk* I, 7 U.S. 454 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 4 of Definitive Treaty of Peace); *Ogden*, 6 U.S.

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 Bork 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." 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."[108] Thus, one could argue, *Ware* and the other Article 4 cases are consistent with the Bork 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.[109] Hart & Sacks would characterize Article 4 as a primary rule because it specifies what the treaty drafters expect "to happen when the arrangement works successfully."[110] 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."[111] 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, which expressly require enforcement in domestic courts,[112] the United States could have fulfilled its obligations under Article 4 without any judicial involvement.[113]

---

272 (same); *Brailsford*, 3 U.S. 1 (holding that article 4 of Definitive Treaty of Peace protected British defendant's right to recover debt).

108 *Ware*, 3 U.S. at 241. *See also Brailsford*, 3 U.S. at 5 (stating that "the very terms of the treaty, revived the right of action to recover the debt").

109 Definitive Treaty of Peace, *supra* note 71, art. 4 (stipulating "that 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").

110 Hart & Sacks, *supra* note 24, at 122.

111 *Id*.

112 *See, e.g.*, 1795 Treaty with Spain, *supra* note 75, art. 20, at 334-35 ("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 . . . .").

113 In fact, the U.S. later agreed on non-judicial means to execute its obligations under Article 4 because British creditors had ongoing problems enforcing their rights in U.S. courts. *See* JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 741-56 (1971) (Volume I of The Oliver Wendell Holmes Devise History of the Supreme Court of the United States) (recounting history of efforts by British creditors to recover pre-war debts). The United States agreed in the 1794 Jay Treaty that "The 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, Nov. 19, 1794, art. 6, U.S.-Great Britain, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 245, 250 (Hunter Miller ed., 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

Perhaps more importantly, Article 4 of the Definitive Treaty of Peace is virtually indistinguishable from Article 36(2) of the VCCR. Whereas Article 4 specifies that creditors "shall meet with no lawful impediment to the recovery of the full value" of debts, 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."[114] 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. U.S. courts applying the Bork model have uniformly held that Article 36(2) of the VCCR does not authorize judicial enforcement on behalf of private individuals.[115] Defenders of the Bork 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 Bork 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 from the commencement of suit, to the receipt of the money."[116] This statement, viewed in the proper historical context, manifests the Court's tacit assumption that "where there is a right, there is a remedy."[117] Article 4, by its terms, creates a primary duty for debtors to pay, and a correlative primary right for creditors to be paid.[118] 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 "where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."[119] In short, the Court applied the Marshallian presumption in favor of judicial remedies.

---

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 pounds in satisfaction of claims for pre-war debts." GOEBEL, *supra*, at 756.

Even after ratification of the 1802 treaty, the Supreme Court continued to enforce Article 4 of the Definitive Treaty of Peace on behalf of British plaintiffs. Hopkirk v. Bell, 8 U.S. 164 (1807) (*Hopkirk* II); Hopkirk v. Bell, 7 U.S. 454 (1806) (*Hopkirk* I); Ogden v. Blackledge, 6 U.S. 272 (1804). This fact is directly relevant to *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), one of the cases currently pending before the Supreme Court. In *Hamdan*, the D.C. Circuit reasoned that the POW Convention is not judicially enforceable because the Convention provides international dispute resolution mechanisms. *See id.* at 38-40. In the early nineteenth century, though, the Supreme Court continued to enforce Article 4 of the peace treaty on behalf of British plaintiffs, even after the parties had created an international mechanism designed specifically to resolve disputes related to Article 4. Thus, the logic of *Hamdan* is inconsistent with the Supreme Court's treatment of the British creditor cases.

[114] VCCR, *supra* note 7, art. 36, para. 2.

[115] *See, e.g.*, State v. Sanchez-Llamas, 108 P.3d 573, 575-78 (Or. 2005) (applying the Bork model and concluding on that basis "that the obligations that Article 36 describes are enforceable only by the affected signatory states and not by individual detainees").

[116] *Ware*, 3 U.S. at 241.

[117] This is a translation of the Latin maxim "ubi jus, ibi remedium." *See* Black's Law Dictionary (6th ed. 1990).

[118] Definitive Treaty of Peace, *supra* note 71, art. 4 (stipulating "that 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.

[119] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

c. *Other Cases That are Inconsistent with the Bork Model*: During the period under study, the Court decided five other cases that are inconsistent with the Borkian presumption against judicial remedies for treaty violations.

In *Chirac v. Chirac*,[120] 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.[121] 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.[122] 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 defendants in error in precisely the same situation, with respect to lands, as if they had become citizens."[123]

In *Carneal v. Banks*,[124] 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.[125] In response, defendants invoked Article 11 of the 1778 Treaty with France, which protects the property rights of French subjects residing in the United States.[126] 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

---

120 15 U.S. 259 (1817).

121 *Id*. at 273-74.

122 1800 Convention with France, *supra* note 92, 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.")

123 *Chirac*, 15 U.S. at 275.

124 23 U.S. 181 (1825).

125 *Id*. at 182-86.

126 1778 Treaty with France, *supra* note 81, art. 11, at 11-12 ("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.")

France, secures to the citizens and subjects of either power the privilege of holding lands in the territory of the other."[127]

In *Soc'y for Propagation of the Gospel v. Town of New Haven*,[128] a British corporation brought an action for ejectment against the Town of New Haven. The plaintiff owned the subject property before the Revolutionary War.[129] 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."[130] 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.[131] Neither Article 6 nor any other provision of the treaty specifically empowered the plaintiff to enforce the treaty in a domestic court.[132] 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."[133]

In *Carver v. Jackson,*[134] plaintiffs who traced their property claims to Roger Morris brought an action for ejectment. The New York legislature had confiscated Morris' property during the Revolutionary War.[135] 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.[136] When plaintiffs sued for ejectment, defendant sought compensation for improvements in accordance with New York law. In reply, plaintiffs contended that state laws requiring them to pay compensation for improvements violated Article 6 of the Definitive Treaty of Peace.[137] Neither Article 6 nor any other provision of the treaty specifically empowered the plaintiffs to enforce the treaty in a domestic court.[138]

---

127 *Carneal,* 23 U.S. at 189.

128 21 U.S. 464 (1823).

129 *Id*. at 465-66.

130 *Id*. at 466.

131 Definitive Treaty of Peace, *supra* note 71, art. 6, at 155 ("[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 or Property.")

132 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 69-72 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.

133 *Soc'y for the Propagation of the Gospel*, 21 U.S. at 490-91.

134 29 U.S. 1 (1830).

135 *Id*. at 4.

136 *Id*. at 99-100.

137 *Id*. at 54, 65-66.

138 The Court's opinion cites both Articles 5 and 6 of the Definitive Treaty of Peace. *See id*. at 99-101. 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 71. 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

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."[139]

In *Fitzsimmons v. Newport Insurance Co*.,[140] a British prize court 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.[141] The company claimed that the judgment of the British court terminated its contractual obligation under the policy. 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.[142] Article 18 created a duty for British naval vessels not to detain American ships.[143] 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.[144]

In all five cases, the Court applied the Marshallian 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 Bork 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. Those cases are patently inconsistent with the Bork 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 Borkian requirement for a right of action strictly, insisting on express treaty language that

---

made by defendants. *See Carver*, 29 U.S. 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 101. 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 69-72 and accompanying text, that right of action did not apply to the specific claim at issue in *Carver*.

139 *Carver,* 29 U.S. at 101.

140 8 US 185 (1808).

141 *Id*. at 197.

142 *See* Jay Treaty, *supra* note 113, art. 18, at 258-59.

143 *Id*., 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 . . . it 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.")

144 *Fitzsimmons*, 8 U.S. at 197-202.

empowers individual litigants to enforce the treaty, then these cases are also inconsistent with the Bork 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 Bork 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 Bork model by construing the Borkian right of action requirement liberally, that analysis is in tension with many of the modern cases applying the Bork 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,[145] and four cases where defendants won treaty-based defenses.[146] In none 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 Bork 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

---

[145] Hughes v. Edwards, 22 U.S. 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. 594 (1818) (ordering defendants to convey land to plaintiff because defendants had wrongfully appropriated land in violation of article 9 of Jay Treaty).

[146] Shanks v. DuPont, 28 U.S. 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. 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. 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. 603 (1812) (where plaintiff sued for ejectment, Court dismissed suit because defendant's title to land was secured by article 9 of Jay Treaty). For additional analysis of these cases, *see* GEORGE LEE HASKINS AND HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 554-57 (1981) (volume 2 of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States).

> 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.[147]

If the treaty drafters had not included the italicized phrase, Article 9 would clearly not satisfy the Borkian requirement for a private cause of action. Advocates of the Bork model could reasonably argue, though, that the decisions enforcing Article 9 on behalf of individual litigants are consistent with the Bork 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."[148]

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 Marshallian 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 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.[149] 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

---

147 Jay Treaty, *supra* note 113, art. 9 (emphasis added).

148 Hughes v. Edwards, 22 U.S. 489, 496 (1824).

149 The Court's decision in *Soc'y for Propagation of the Gospel v. Town of Pawlet,* 29 U.S. 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 71, art. 6 (prohibiting future confiscation of British property after 1783); Jay Treaty, *supra* note 113, 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 id*. 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 509. 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.

cases in which the Supreme Court awarded individual remedies for violations of Article 9 are inconsistent with the Bork model.

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

In *United States v. Judge Lawrence*,[150] the Attorney General petitioned the Supreme Court for a writ of mandamus, invoking Article 9 of a consular treaty with France,[151] and seeking to compel the district judge to issue a warrant for extradition of an alleged deserter.[152] The Attorney General asserted that the district judge had violated the treaty by refusing to issue a warrant.[153] 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.[154] *Judge Lawrence* is consistent with the Bork model because the party invoking the treaty did not obtain the remedy sought.[155] The case is also consistent with the Marshall 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.

In addition to *Judge Lawrence*, the Supreme Court decided six other treaty cases between 1789 and 1838 in which it declined to reach the merits of a treaty-based claim or defense. The Court dismissed three of those cases for lack of jurisdiction.[156] In three other cases, the Court concluded that it lacked sufficient information to decide the merits

---

150 3 U.S. 42 (1795).

151 Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls, Nov. 14, 1788, art. 9, U.S.-France, *reprinted in* 2 Treaties and Other International Acts of the United States of America 228, 237-38 (Hunter Miller ed., 1931) [hereinafter, "Consular Convention"].

152 *Judge Lawrence*, 3 U.S. 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 grounds 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.

153 *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 Marshall model.

154 *Id*. at 53.

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

156 Keene v. Clark's Heirs, 35 U.S. 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. 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. 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).

of the treaty claim.[157] All seven cases in which the Court did not reach the merits of a treaty-based claim or defense are consistent with the Bork 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 Borkian 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 seven cases in this category are consistent with the Marshall model.

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

Between 1789 and 1838, the Supreme Court decided 13 cases in which it ruled that a treaty did not protect the right asserted by the individual invoking the treaty.[158]

---

[157] Soulard v. U.S., 29 U.S. 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 judment which would be satisfactory" and decided "to hold the cases . . . under advisement"); The Divina Pastora, 17 U.S. 52 (1819) (where Spanish consul sought restoration of captured vessel to Spanish shipowners, alleging that capture violated the 1795 Treaty with Spain, Court remanded case to circuit court for further proceedings); Harden v. Fisher, 14 U.S. 300 (1816) (where British plaintiff raised claim based on Article 9 of Jay Treaty, Court remanded case to circuit court for additional factfinding).

[158] *See* Garcia v. Lee, 37 U.S. 511 (1838) (where plaintiff sued to eject defendant from land in Louisiana, asserting rights under 1819 treaty whereby U.S. acquired Florida from Spain, Court held that plaintiff had no rights under that treaty because U.S. had acquired subject land from France as part of Louisiana purchase in 1803); U.S. v. Kingsley, 37 U.S. 476 (1838) (where plaintiff asserted title to land in Florida protected by article 8 of 1819 Florida Treaty, Court held that he 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); U.S. v. Mills' Heirs, 37 U.S. 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. U.S., 35 U.S. 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. 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. 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 disputes between U.S. citizens); Blight's Lessee v. Rochester, 20 U.S. 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. 1 (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. 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. 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

The results of all 13 cases are consistent with the Bork model because the party invoking the treaty did not obtain a remedy. They are also consistent, however, with the Marshallian 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 13 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 13 cases cited above endorse the Borkian presumption against private enforcement of treaties. None of the cases denied relief on the grounds that the treaty at issue did not create a private right of action.[159] Moreover, none of the cases denied relief on the grounds that the treaty at issue was not judicially enforceable. Indeed, all 13 cases involved treaties that the Court did enforce on behalf of individual litigants in other cases.[160] Therefore, these 13 cases provide no support for the

---

nations in that respect); Smith v. State of Maryland, 10 U.S. 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); Geyer v. Michel, 3 U.S. 285 (1796) (where French captors of Dutch ship invoked article 17 of the 1778 Treaty with France as a bar to jurisdiction of U.S. courts, Court rejected treaty-based jurisdictional argument but ruled in favor of French captors on the merits); Glass v. The Sloop Betsey, 3 U.S. 6, 16 (1794) (where French privateer contended that article 17 of the 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").

[159] 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. 1 (1821); The Nuestra Senora de la Caridad, 17 U.S. 497 (1819). *See also supra* notes 73-76 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* U.S. v. Kingsley, 37 U.S. 476 (1838) (land in Florida); U.S. v. Mills' Heirs, 37 U.S. 215 (1838) (land in Florida); Smith v. U.S., 35 U.S. 326 (1836) (land in Missouri). *See also supra* notes 57-67 and accompanying text (discussing federal statutes pertaining to land in Florida and Missouri).

[160] *Smith v. U.S.*, 35 U.S. 326 (1836), involved Article 3 of the Louisiana Treaty, which the Court enforced on behalf of individual plaintiffs in three other cases. *See supra* note 62 and accompanying text (discussing those three cases). *Garcia v. Lee*, 37 U.S. 511 (1838), *U.S. v. Kingsley*, 37 U.S. 476 (1838), and *U.S. v. Mills' Heirs*, 37 U.S. 215 (1838), all involved Article 8 of the Florida Treaty, which the Court enforced on behalf of individual plaintiffs in nine other cases. *See supra* note 67 and accompanying text (discussing those nine cases). *Comegys v. Vasse*, 26 U.S. 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. 480 (1830), *Blight's Lessee v. Rochester*, 20 U.S. 535 (1822), and *Smith v. State of Maryland*, 10 U.S. 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 145-49 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 128-39 and accompanying text.

The Amiable Isabella, 19 U.S. 1 (1821), *The Nuestra Senora de la Caridad*, 17 U.S. 497 (1819), and *The Nereide*, 13 U.S. 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. 152 (1821), and *The Pizarro*, 15 U.S. 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

Bork model. In fact, these cases tend to support the Marshall model, because the Court generally applied a Marshallian "rights-focused methodology," not a Borkian "remedies-focused" methodology.

In addition to the 13 cases cited above, the Supreme Court decided three other cases during this period in which the party invoking the treaty lost on the merits of a treaty-based claim or defense: *Strother v. Lucas*,[161] *De la Croix v. Chamberlain*,[162] and *Foster v. Neilson*.[163] These three cases illustrate limits to the Marshallian principle that "where there is a right, there is a remedy." The remainder of this section analyzes *Strother* and *De la Croix*. Section D below addresses *Foster*.

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.[164] In both cases, the plaintiff's property rights were protected by treaty: Article 3 of the Louisiana Treaty in *Strother*;[165] and Article 8 of the Florida Treaty in *De la Croix*.[166] 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 Treaty. 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.[167] In *De la Croix*, the plaintiff and his predecessor-in-interest failed to present a claim to the relevant board of commissioners;[168] in *Strother,* plaintiff's predecessor failed to do so in a timely fashion.[169] In each case, the plaintiff's failure to

---

treaty. The Court did not decide any other cases during this period implicating that specific treaty provision.

Geyer v. Michel, 3 U.S. 285 (1796) and *Glass v. The Sloop Betsey*, 3 U.S. 6, 16 (1794) both involved article 17 of the 1778 Treaty with France. The Court enforced other provisions of the same treaty on behalf of individual litigants in *Moodie v. The Ship Phoebe Anne*, 3 U.S. 319 (1796) and *Carneal v. Banks*, 23 U.S. 181 (1825). *See supra* notes 80-83 and 124-27 and accompanying text. There were no Supreme Court cases during this period where the Court enforced article 17 on behalf of individual litigants. There were, however, decisions by lower federal courts enforcing article 17. *See, e.g.*, Moodie v. The Amity, 17 F.Cas. 650 (D.S.C. (1796) (holding that article 17 of 1778 Treaty with France precluded district court from exercising jurisdiction in prize case where French vessel captured ship outside the jurisdictional limits of the United States).

[161] 37 U.S. 410 (1838).

[162] 25 U.S. 599 (1827).

[163] 27 U.S. 253 (1829).

[164] *See Strother*, 37 U.S. at 430-32; *De la Croix*, 25 U.S. at 599-600.

[165] *See Strother*, 37 U.S. at 435-40. *See also* Louisiana Treaty, *supra* note 57, art. 3.

[166] *See De la Croix*, 25 U.S. at 601-02. *See also* Florida Treaty, *supra* note 63, art. 8.

[167] *See supra* notes 57-67 and accompanying text.

[168] *See De la Croix*, 25 U.S. 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.").

[169] *See Strother*, 37 U.S. 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.

present his claim to the relevant board of commissioners was a key element of the Court's rationale for awarding judgment to the defendant.[170]

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 Marshall model because the Marshall 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 Bork model, inasmuch as the Court denied remedies in both cases for plaintiffs whose rights were protected by treaties. Neither case, however, endorses the Borkian 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 on the grounds that the treaty was not judicially enforceable.

D. Foster and Its Progeny

In *Tel-Oren v. Libyan Arab Republic*, Judge Bork cited *Foster v. Neilson*[171] for the proposition that treaties "do not generally create rights that are privately enforceable in courts."[172] In recent cases involving both the VCCR and the POW Convention, state courts and lower federal courts have also cited *Foster* for similar propositions.[173] Indeed, virtually every modern case that endorses the Borkian presumption against judicial enforcement of treaties cites *Foster* as authority, or cites some other case that cites *Foster* as authority. In particular, the modern cases cite that portion of the *Foster* opinion that has come to be associated with the doctrine of non-self-executing treaties.[174] But insofar as the Bork model relies on *Foster's* non-self-execution holding,[175] it is a

---

170 *See id*. at 453-54; *De la Croix*, 25 U.S. at 601-02.

171 27 U.S. (2 Pet.) 253 (1829).

172 726 F.2d 774, 808 (Bork, J., concurring).

173 *See, e.g*., Al Odah v. United States, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (in a case raising claims under the POW Convention, citing *Foster* as authority for the proposition that "[t]reaties do not generally create rights privately enforceable in the courts"); United States v. Li, 206 F.3d 56, 60-61 (1st Cir. 2000) (in a case raising claims under the VCCR, citing *Foster* as authority for the proposition that "treaties do not generally create rights that are privately enforceable in the federal courts").

174 The so-called doctrine of non-self-executing treaties is actually four distinct doctrines. *See* Sloss, *Non-Self-Executing Treaties, supra* note 34, at 12-18 (2002) (summarizing four doctrines). *See also* Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995) (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, *Non-Self-Executing Treaties*, at 12-18. Thus, the "non-self-execution" portion of *Foster* bears very little relationship to the modern doctrine of non-self-executing treaties.

175 *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. 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

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.[176] Second, the Court overruled the non-self-execution portion of *Foster* four years after it decided the case.[177] 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 Bork 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" holding in *Foster*, and address the relationship between *Foster* and the Bork model.

1. *Historical Background*: The land at issue in *Foster* is situated within an area that is bounded on the North by the 31st parallel, on the West by the Mississippi River and on the East by the Perdido River.[178] 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.[179] 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.[180] In a separate, secret treaty concluded at about the same time, France ceded the residue of Louisiana to Spain.[181] 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.[182] At that time, Floriana became part of West Florida.

---

article will use the term "non-self-execution" to refer to the relevant portion of Marshall's opinion in *Foster*.

176 *See infra* notes 203-212 and accompanying text.

177 *See* U.S. v. Percheman, 32 U.S. 51, 88-89 (1833) (expressly overruling *Foster*'s non-self-execution holding). *See also* U.S. v. Arredondo, 31 U.S. 691 (1832) (overruling *Foster sub silentio*).

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

179 *Foster*, 27 U.S. at 300.

180 *Id*. at 300-01.

181 *Id*.

182 Harcourt v. Gaillard, 25 U.S. 523, 524 (1827). The 31st parallel now forms the border between the Florida panhandle and that portion of Southern Alabama that lies east of the Perdido River. The 31st parallel also forms part of the border between Mississippi and Louisiana.

The United States declared its independence from Britain in 1776. During the Revolutionary War, Spain conquered Florida, reclaiming the land from Britain.[183] 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,[184] 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 31st parallel as the southern boundary separating the U.S. from Florida.[185] 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 St. 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."[186] 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 31st 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.[187]

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 St. Ildefonso to define the boundaries of Louisiana.[188] Beginning in 1803, Congress passed a series of acts to establish U.S. control over Louisiana. Congressional actions left no doubt that Congress believed the U.S. had acquired Floriana from France as part of the Louisiana Purchase.[189] Congress, therefore, asserted U.S. sovereignty over Floriana. Meanwhile, though, 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 in 1819.[190] In the interim, though, 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 31st parallel, in what is now southeastern Louisiana. The plaintiffs traced their title to an 1804 land grant from the Spanish governor of Florida.[191] In response to their petition, defendant alleged that, prior

183 Henderson v. Poindexter's Lessee, 25 U.S. 530, 534 (1827).
184 *Foster*, 27 U.S. at 301.
185 *See* Definitive Treaty of Peace, *supra* note 71, art. 2.
186 *Foster*, 27 U.S. at 301 (quoting Treaty of St. Ildefonso).
187 *See id*. at 302-03.
188 *See* Louisiana Treaty, *supra* note 57, art. I.
189 *See Foster*, 27 U.S. at 303-09.
190 *See* Florida Treaty, *supra* note 63, arts. 2 and 3.
191 *See Foster,* at 253-55.

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."[192] 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 U.S. 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 U.S. 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).[193] 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 . . . it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed.[194]

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."[195] Since Congress had enacted numerous statutes asserting U.S. sovereignty over Floriana,[196] the Court accepted the U.S. view that the United States had acquired the subject property when it purchased Louisiana in 1803.[197] 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,[198] nine years after its decision in *Foster*.[199] 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

---

192 *Id*. at 255.

193 *Id*. at 306-07.

194 *Id*. at 307.

195 Garcia v. Lee, 37 U.S. 511, 516 (1838) (restating the holding of *Foster*). *See also* Delacroix v. Chamberlain, 25 U.S. 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.").

196 *See Foster,* 27 U.S., at 303-09.

197 *Id*. at 307-09.

198 37 U.S. 511 (1838).

199 Keene v. Clark's Heirs, 35 U.S. 291 (1836), involved land in Floriana, but the Court dismissed the case for lack of subject matter jurisdiction.

on as the true one by the political departments of the government, must be recognised as the true one by the judicial department."[200] 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 modern treaty cases, because the principle, in Marshall's own words, applies only to cases involving "a controversy between two nations concerning national boundary."[201] In *State v. Sanchez*-Llamas, though, one of the cases now pending before the Supreme Court, the Oregon Supreme Court cited *Foster*'s political question holding in support of its view that the VCCR is not judicially enforceable.[202] 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 holding, 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.[203] In Article 8, the U.S. promised to honor "[a]ll the grants of land made before the 24th of January 1818 by [Spain] . . . in the said Territories ceded by His Majesty to the United States."[204] 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.[205] Marshall conceded, though, that "[t]he majority of the Court . . . think differently."[206] The majority view was that the U.S. duty 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.[207]

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*,[208] the next case involving

---

200 *Garcia*, 37 U.S. at 520.
201 *Foster,* at 307.
202 *See Sanchez-Llamas*, 108 P.3d 573, 576 (Or. 2005).
203 *See Foster*, 27 U.S., at 310-14.
204 Florida Treaty, *supra* note 63, art. 8.
205 *See Foster*, 27 U.S. 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).
206 *Id*. at 313.
207 *See id*. at 310-14.
208 37 U.S. 511 (1838).

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![209]

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 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 judges rarely wrote separate opinions in the Marshall era.[210] Thus, Marshall's opinion for the Court presented the majority view,[211] and then presented his alternative non-self-execution rationale that yielded the same result.[212] 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" Holding 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

---

209 *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).

210 *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.")

211 *See Foster*, 27 U.S. at 310-13.

212 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.

promised immediate performance.[213] Marshall applied this distinction to Article 8 of the Florida treaty, which said: "All the grants of land made before the 24th of January 1818 by His Catholic Majesty or by his lawful authorities . . . *shall be ratified and confirmed* to the persons in possession of the lands . . . ."[214] 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."[215] 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.[216]

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.[217] 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."[218] 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

---

213 *See* 2 WILLIAM BLACKSTONE, 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. 87, 136-37 (1810). Justice Iredell applied this terminology to treaty provisions in *Ware v. Hylton*, 3 U.S. 199, 271-72 (1796) (Iredell, J., dissenting in part). Marshall did not 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, *Non-Self-Executing Treaties, supra* note 34, at 19-24.

214 Florida Treaty, *supra* note 63, art. 8 (emphasis added).

215 *Foster*, 27 U.S. at 314-15 (emphasis added).

216 Other 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); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 767 (1988); Vazquez, *Four Doctrines, supra* note 174, at 700-02. This interpretation does not conform to the 19th century understanding of *Foster*. *See* Sloss, *Non-Self-Executing Treaties, supra* note 34, at 19-24.

217 *Marbury*, 5 U.S. at 154-62.

218 *Id*. at 163.

grant them vested legal rights.[219] Moreover, until Congress enacted legislation to execute the treaty by granting them vested rights, the judiciary could not provide a remedy.[220]

Four years after *Foster*, in the case of *United States v. Percheman*,[221] Justice Marshall, writing for a unanimous court, reversed his decision in *Foster*, and concluded that Article 8 of the Florida treaty was executed, not executory.[222] 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 claimed on the basis of 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."[223] 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."[224] 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.[225] 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.[226] 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 the force of the instrument itself," that is, by the force of the treaty.[227] In short, the treaty language was

---

219 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. This meant that the United States had a duty under Article 8 to "ratify and confirm" the prior Spanish land grant. 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.

220 *Foster*, 27 U.S. 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.")

221 32 U.S. 51 (1833).

222 *See id*. at 88-89.

223 *Id*. at 82-83.

224 *Id*. at 87.

225 *Id*. at 87.

226 Percheman had vested property rights before the treaty because the land was granted to him in "abolute 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.

227 *Id*. 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

executed, the rights of Spanish grantees were fully vested, and those rights were enforceable in the courts.[228]

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 Marshallian presumption in favor of judicial remedies for violations of individual treaty rights. If applied cautiously, the *Foster* exception is generally consistent with the fundamental Marshallian presumption. 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.[229] 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.

5. Foster *and the Bork Model*: Contrary to claims advanced by advocates of the Bork 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.

Borkians 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."[230] 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

---

acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled.")

[228] Modern courts following the Bork 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 holding that Article 8 was executory.

[229] 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, *Non-Self-Executing Treaties, supra* note 34, at 71-73.

[230] *Foster*, 27 U.S. at 314.

object to be accomplished."[231] 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."[232] 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.[233] In Marshall's view, the U.S. constitution establishes "a different principle:" the principle that treaties are "to be regarded in courts of justice as equivalent to an act of the legislature."[234]

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 Bork model and the Marshall model 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 13 cases, and arguably as many as 19 cases, in which the Supreme Court enforced treaties on behalf of private individuals without express authorization from the political branches. 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 Marshall model, not the Bork model.

Other decisions by the Supreme Court during this period reinforce this conclusion. The Court decided 57 cases during this period in which an individual litigant raised a claim or defense on the basis of a treaty. In these 57 cases, the Court *never* said that treaties are not judicially enforceable unless the treaty itself, or a federal statute,

---

231 *See, e.g.*, Yoo, *supra* note 15, at 2087-89 (making a similar argument).

232 *Foster*, 27 U.S. at 314.

233 *See* Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2192-94 (1999) (developing this argument in greater detail).

234 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.

creates a private right of action. In these 57 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.[235] Moreover, all 57 cases are consistent with the Marshall model. Although *Strother*, *De la Croix* and *Foster* show that there are limitations on the Marshallian presumption in favor of judicial enforcement, those cases are consistent with the Marshall 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.

III.
The Origins of the Bork Model

Judge Bork set forth the core elements of the Bork model in a single paragraph in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*.[236] That paragraph advances two main propositions. First, there is a presumption against private enforcement of treaties in U.S. courts. Second, to overcome that presumption, an individual litigant who wishes to enforce a treaty must show either that there is legislation authorizing private enforcement, or that the treaty itself creates a private right of action.[237] Judge Bork cites various authorities for each of these propositions. Thus, one can trace the origins of the Bork model by examining the authorities he cites.

A. The Presumption Against Judicial Enforcement

Judge Bork cites only one Supreme Court decision, *Foster v. Neilson*, in support of his claim that there is a presumption against private enforcement of treaties in U.S. courts. For the reasons discussed above, *Foster* does not support any such presumption.[238] Bork also cites two other federal appellate opinions in support of the asserted presumption: *Canadian Transport Co. v. United States*,[239] and *Dreyfus v. Von Finck*.[240] In fact, neither case endorses a presumption against private enforcement of treaties in U.S. courts. Thus, Judge Bork invented the Borkian presumption against judicial enforcement of treaties in his concurring opinion in *Tel-Oren*.

In *Dreyfus v. Von Finck*, a Jewish plaintiff who lived in Germany before World War II brought suit against West German citizens, seeking recovery for wrongful

---

235 *See, e.g., supra* note 4 (quoting Owings v. Norwood's Lessee, 9 U.S. 344, 348 (1809)); text at note 99 (quoting United States v. Schooner Peggy, 5 U.S. 103, 109-110 (1801)); notes 118-21 and accompanying text (analyzing Ware v. Hylton, 3 U.S. 199 (1796)); and note 155 (quoting United States v. Judge Lawrence, 3 U.S. 42 (1795)).

236 726 F.2d at 808 (Bork, J., concurring).

237 *See id*. Judge Bork did not use the word "presumption" in *Tel-Oren*. He said that treaties "do not generally create rights that are privately enforceable in courts." *Id*. That assumption, though, effectively creates a presumption against judicial enforcement of treaties when it is combined with Bork's proposed rule that "an individual has access to courts for enforcement of a treaty's provisions only when the treaty . . . provides a private right of action." *Id*.

238 *See supra* Part II.D.

239 663 F.2d 1081 (D.C. Cir. 1980).

240 534 F.2d 24 (2d Cir. 1976).

confiscation of property in Nazi Germany in 1938.[241] Plaintiff invoked several treaties in support of his suit. In evaluating plaintiff's treaty claims, the court noted that "[i]t is only when a treaty . . . prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights."[242] Applying this test, the court held that none of the treaties invoked by plaintiff "dealt with the expropriation by Germans of the property of German citizens, and none conferred any private rights with regard to such property which were enforceable in American courts."[243] This analysis is entirely consistent with the Marshall model. The court's rationale is that the treaties at issue were not "enforceable in American courts" because they did not protect the plaintiff's property against confiscation by other Germans. In short, the plaintiff could not obtain a judicial remedy because the treaties did not protect the individual right he asserted.

The court's opinion in *Dreyfus* does contain one statement that could be construed to support the Borkian presumption against judicial remedies. The court states that a treaty may "contain provisions which confer rights upon the citizens of one of the contracting parties which are capable of enforcement as are any other private rights under the law. *In general, however, this is not so*."[244] Although the italicized language might be construed to create a presumption against judicial enforcement of treaties, the better view is that the court is making two distinct claims. The first sentence says that, when treaties do create individual rights, those rights are judicially enforceable "as are any other private rights under the law." This statement is entirely consistent with the Marshall model. The second sentence does not create a presumption; it merely makes a factual assertion that treaties generally do not create individual rights. Even if that assertion is true, which is debatable, it does not support the Bork model, because the Borkian presumption against judicial enforcement of treaties applies even to treaty provisions that do create individual rights.[245] *Dreyfus* definitely does not endorse a presumption against judicial enforcement of treaties that create individual rights.[246]

Judge Bork also cited *Canadian Transport Co. v. United States*[247] in support of the alleged presumption against judicial enforcement of treaties. In *Canadian Transport*, plaintiffs sued the United States for money damages, asserting that an 1815 treaty with Great Britain waived the United States' sovereign immunity. The D.C. Circuit rejected this argument and dismissed the claim on sovereign immunity grounds.[248] The opinion

---

241 *Id*. at 26.
242 *Id*. at 30
243 *Id*.
244 *Id*. at 29 (emphasis added).
245 *See supra* notes 32-40 and accompanying text.
246 In support of the statement quoted above, the court in *Dreyfus* cited Ian Brownlie, *The Place of the Individual in International Law*, 50 Va. L. Rev. 435 (1964). In that article, Brownlie says: "[I]t is obvious that states can agree to confer special rights on individuals . . . . In general, treaties do not create direct rights and obligations for private individuals, but, if it was the intention of the parties to do this, effect can be given to the intention." *Id*. at 439-40. Thus, the citation to Brownlie makes clear that the *Dreyfus* court was not endorsing the Borkian presumption against judicial remedies for violations of treaty provisions that create individual rights.
247 663 F.2d 1081 (D.C. Cir. 1980).
248 *Id*. at 1092-93.

includes one clause that appears to support the Bork model: the court stated that "treaty violations are normally to be redressed outside the courtroom."[249]

There are several reasons, however, why this statement cannot reasonably be construed as an endorsement of the Borkian presumption against private enforcement of treaties in U.S. courts. First, the 1815 treaty at issue in *Canadian Transport* has been enforced by U.S. courts in other contexts, where U.S. sovereign immunity was not implicated.[250] Second, the full sentence in *Canadian Transport* states: "In the absence of specific language in the treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom."[251] Thus, the court's main point was that plaintiffs who seek money damages against the United States for treaty violations cannot obtain judicial relief unless the treaty itself, or some other federal law, waives U.S. sovereign immunity. This proposition is consistent with the Marshall model because the Marshall model recognizes sovereign immunity as a valid defense to treaty-based claims in appropriate circumstances.

Additionally, the cases cited by the court in *Canadian Transport* actually support a presumption in favor of judicial enforcement of treaties that create individual rights. In support of its claim that "treaty violations are normally to be redressed outside the courtroom," the court in *Canadian Transport* quoted the following language from *The Head Money Cases*.

> 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.[252]

The court, however, omitted the passage from *Head Money* that follows immediately after the language quoted above. There, the Supreme Court said:

> 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

---

249 *Id*. at 1092.

250 *See, e.g.*, United States v. American Machine & Metals, Inc, 29 C.C.P.A. 137 (U.S. Ct. of Customs & Patent Appeals 1941) (applying the "most-favored-nation" clause of the 1815 treaty with Great Britain, together with other treaties, to support a judgment that importation of machines from England was subject only to a twenty percent duty, instead of the sixty percent duty imposed by the collector at the port). *See also* Baldwin v. Franks, 120 U.S. 678, 703-04 (Field, J., dissenting on other grounds) (stating that article 1 of the 1815 treaty with Great Britain, and other similar treaty provisions "operate by their own force; that is, they require no legislative action for their enforcement").

251 663 F.2d at 1092.

252 *Canadian Transport*, 663 F.2d at 1092 (quoting Head Money Cases, 112 U.S. 580, 598 (1884)).

> 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.[253]

Thus, *Head Money Cases* supports a presumption in favor of judicial enforcement of treaty provisions that "prescribe a rule by which the rights of the private citizen" may be determined. In other words, treaty provisions that create individual rights are presumptively enforceable in U.S. courts by private parties.[254]

In sum, the authorities cited by Judge Bork in *Tel-Oren* do not endorse the Borkian presumption against private enforcement of treaties in U.S. courts. Judge Bork made new law in *Tel-Oren* by inventing the Borkian presumption against judicial enforcement of treaties. Moreover, as the analysis in Part Two demonstrated, he made new law that is contrary to controlling Supreme Court precedent.

B. The Private Right of Action Test

In *Tel-Oren*, Judge Bork stated: "Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty . . . provides a private right of action."[255] He cited one Supreme Court decision in support of this assertion: *Head Money Cases*. The preceding quotation from *Head Money Cases*, though, demonstrates conclusively that the case does not support Judge Bork's claim. The Court in *Head Money* said nothing about private rights of action. To the contrary, *Head Money* says that a treaty is judicially enforceable if "its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."[256] In short, under *Head Money*, the critical question is whether a treaty provision creates individual rights. In *Tel-Oren*, though, Judge Bork recast the issue in terms of remedial rights, rather than primary rights. Thus, whereas *Head Money* endorses the Marshall model, *Tel-Oren* incorrectly cites *Head Money* as authority for the Bork model.

---

253 112 U.S. at 598-99 (emphasis added).

254 In addition to *Head Money Cases*, the court in *Canadian Transport* cited three lower federal court decisions in support of its assertion that treaty violations are normally redressed outside the courtroom: Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976); Z & F Assets Realization Corp. v. Hull, 114 F.2d 464 (1941); and Pauling v. McElroy, 164 F. Supp. 390 (D.D.C. 1958). None of these cases endorse the Borkian presumption against private enforcement of treaties in U.S. courts. For analysis of *Dreyfus, see supra* notes 241-46 and accompanying text. For analysis of *Z & F Assets*, *see infra* notes 260-64 and accompanying text. *Pauling v. McElroy* holds that certain provisions of the U.N. Charter and the Trusteeship Agreement for the Trust Territory of the Pacific Islands are not self-executing. 164 F. Supp. at 393. The opinion does not contain any language supporting a presumption against judicial enforcement of treaties.

255 *Tel-Oren*, 726 F.2d at 808 (Bork, J., concurring).

256 Head Money Cases, 112 U.S. at 598-99.

In addition to citing *Head Money*, Judge Bork cited three federal appellate opinions in support of his proposed private right of action test: *Z & F Assets Realization Corp. v. Hull*,[257] *Diggs v. Richardson*,[258] and *Mannington Mills, Inc. v. Congoleum Corp*.[259] *Z & F Assets* provides no support for Bork's private right of action test. In that case, plaintiffs sought a judicial declaration to invalidate a decision by a claims commission established pursuant to an international agreement between the United States and Germany.[260] The D.C. Circuit held that the district court "was without jurisdiction to hear or decide" plaintiff's claim because the claim "involve[d] a political and not a judicial question."[261] The D.C. Circuit recognized that "courts, in the exercise of their judicial functions must interpret and apply" treaties.[262] According to *Z & F Assets*, that is true only if the treaty at issue "prescribes a rule by which rights of individuals under it may be determined."[263] If the treaty does not prescribe such a rule, then "the alleged controversies arising out of treaty relationships . . . are not cases within the meaning of Article III of the Constitution and, consequently, are not subject to judicial determination."[264] Nowhere in *Z & F Assets*, however, did the court suggest that a treaty is not judicially enforceable unless it creates a private right of action.

In *Diggs v. Richardson*, plaintiffs sought declaratory and injunctive relief to prevent the U.S. government "from continuing to deal with the South Africans concerning the importation of seal furs from Namibia."[265] Plaintiffs based their claim on a U.N. Security Council resolution urging "member states to have no dealings with South Africa which impliedly recognize the legality of that country's occupation of the former U.N. territory of Namibia."[266] The D.C. Circuit held that the U.N. Security Council resolution was not self-executing.[267] The court elaborated on this holding by stating that the particular provisions of the resolution invoked by the plaintiffs "do not by their terms confer rights upon individual citizens."[268] This statement is consistent with the Marshall model; it suggests that the court denied relief on the grounds that the resolution at issue did not create or protect individual rights, at least not for the plaintiffs in *Diggs*.

Diggs contains two other statements, though, that are arguably inconsistent with the Marshall model. In one, the court stated that the U.N. resolution "does not confer rights on the citizens of the United States that are enforceable in court in the absence of

---

257 114 F.2d 464 (D.C. Cir. 1940).
258 555 F.2d 848 (D.C. Cir. 1976).
259 595 F.2d 1287 (3rd Cir. 1979).
260 *See Z & F Assets*, 114 F.2d at 465-67.
261 *Id*. at 468. The Supreme Court affirmed on other grounds. *See* Z & F Assets Realization Corp. v. Hull, 311 U.S. 470 (1941).
262 *Z & F Assets*, 114 F.2d at 470.
263 *Id*. at 470, n.19 (citing SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 160-61 (2d ed. 1916)). As in *Head Money Cases*, the court's analysis in *Z & F Assets* focuses on primary rights, not remedial rights. Thus, *Z & F Assets* is consistent with the Marshall model, not the Bork model.
264 *Id*. at 470.
265 555 F.2d 848, 849 (D.C. Cir. 1976).
266 *Id*.
267 *See id*. at 850, n.9.
268 *Id*. at 851.

implementing legislation."[269] Similarly, the court stated that the specific provisions at issue "do not confer on individual citizens rights that are judicially enforceable in American domestic courts."[270] Both statements could be construed to mean that the U.N. resolution does create individual rights for the *Diggs* plaintiffs, but those rights are not enforceable in U.S. courts. Under that interpretation, *Diggs* would be inconsistent with the Marshall model. Even if that interpretation is correct, though, *Diggs* does not say that there is a presumption against judicial enforcement of treaties, nor does it state or imply that individuals cannot enforce treaties unless the treaty creates a private right of action. Therefore, *Diggs* does not endorse the Bork model.[271]

In *Tel-Oren*, Judge Bork also cited *Mannington Mills, Inc. v. Congoleum Corp.*[272] in support of the proposition that individuals cannot enforce treaties unless the treaty creates a private right of action. In *Mannington Mills*, plaintiff alleged that defendant had violated U.S. antitrust law by securing patents from foreign countries through fraudulent means.[273] The Third Circuit remanded plaintiff's antitrust claim for additional factfinding. In addition to raising an antitrust claim, plaintiff also alleged that defendant violated two multilateral intellectual property treaties by securing foreign patents through fraud.[274] The Third Circuit dismissed this claim on the grounds that the treaties did not provide a private right of action.[275] Thus, *Mannington Mills* applied the Borkian private right of action test before Judge Bork endorsed that test in *Tel-Oren*. (*Mannington Mills* was not the first case to do so. *Dreyfus v. Von Finck,* decided by the Second Circuit in 1976, was the first case in which a U.S. court applied the private right of action test to a treaty-based claim.[276])

There are three reasons why *Mannington Mills* provides at best limited support for the Bork model. First, none of the authorities cited by the court in *Mannington Mills* endorse the Bork model.[277] Second, *Mannington Mills* does not endorse the Borkian presumption against judicial remedies for treaty violations.[278] Third, in contrast to Judge

---

269 *Id*. at 850.

270 *Id*. at 851.

271 Even so, *Diggs* is an important antecedent for the Bork model because the D.C. Circuit in *Diggs*, like Judge Bork in *Tel-Oren*, conflated questions of primary law with questions of remedial law.

272 595 F.2d 1287 (3rd Cir. 1979).

273 *Id*. at 1290.

274 *Id*. at 1298. The two treaties at issue were the Paris Convention of 1883 and the Pan-American Convention of 1910.

275 *Id*. at 1298-99.

276 *Dreyfus*, 534 F.2d 24, 30 (2d Cir. 1976) ("We conclude 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.") For the reasons discussed above, the bulk of the analysis in *Dreyfus* is consistent with the Marshall model, and *Dreyfus* does not endorse the Borkian presumption against judicial enforcement of treaties. *See supra* notes 241-46 and accompanying text.

277 The treaty portion of the court's opinion in *Mannington Mills* cites four cases: Head Money Cases, 112 U.S. 580 (1884); Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976); Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976); and Z & F Assets Realization Corp. v. Hull, 114 F.2d 464 (D.C. Cir. 1940). For the reasons discussed above, none of these cases support the Bork model. *See supra* notes 241-71 and accompanying text.

278 The court in *Mannington Mills* did make the following statement: "Like private rights under law, a treaty may confer rights capable of enforcement, but this is not the general rule." 595 F.2d at 1298. This

Bork's opinion in *Tel-Oren*, the court in *Mannington Mills* did not endorse any broad generalization to the effect that individuals cannot enforce treaties unless the treaty itself creates a private right of action. *Mannington Mills* addressed a specific case in which one private party sued another private party for money damages. The court in *Mannington Mills* did not purport to articulate a rule governing judicial enforcement of treaties by criminal defendants, or by federal habeas petitioners, for example. Thus, Judge Bork's opinion in *Tel-Oren* goes well beyond the precedent set by *Mannington Mills* because Bork's opinion suggests that criminal defendants and habeas petitioners, among others, cannot enforce treaties unless the treaty itself, or a federal statute, provides a private right of action.

C. Explaining the Rise of the Bork Model

The Bork model of treaty enforcement 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. In 1975, in *Cort v. Ash*,[279] the Supreme Court initiated a series of decisions that effectively created a presumption against recognizing implied rights of action in cases where individual plaintiffs sue to enforce rights under federal statutes.[280] 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. 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 Bork model in the 1970s and 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*: that 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."[281] Under the *Head Money* test, there was little or no right-remedy gap because treaties that protected 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."[282] The Bork model replaced the *Head Money*

---

statement arguably suggests that there is no presumption in favor of judicial enforcement of treaties, but it does not endorse a presumption against judicial enforcement. Moreover, immediately after this statement, the court in *Mannington Mills* quoted language from *Head Money Cases* that supports judicial enforcement of treaty provisions that create individual rights. Thus, *Mannington Mills* does not endorse the Borkian presumption against judicial enforcement of treaties.

279 422 U.S. 66 (1975).

280 *See* RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 781-82 (5th ed. 2003).

281 112 U.S. at 598-99 (1884). *See, e.g.*, Sei Fujii v. State, 242 P.2d 617, 619-22 (CA 1952) (applying the *Head Money* test and concluding that the human rights provisions of the U.N. Charter are not self-executing).

282 Prior to the emergence of the Bork 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-

primary rights test with a private right of action test. The Borkian 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.

The Bork model also deviates substantially from the implied right of action doctrine that the Supreme Court has applied in the context of federal statutes. Plaintiffs can 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 federal rights.[283] Plaintiffs can also bring suit against federal government officers under the Administrative Procedure Act to enjoin federal executive action that violates a federal statute, even if the statute does not create a private right of action.[284] The Supreme Court has never held that a criminal defendant 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. Nor has the Court said that a habeas petitioner must show that a federal statute creates a private right of action in order to invoke that statute in support of a petition for habeas corpus relief.

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 Bork 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 creates a private right of action, or Congress has authorized private enforcement of the treaty. Thus, the Bork 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.

---

remedy gap. (The *Head Money* version is a variant of the original *Foster* version. I count both as a single version of non-self-execution doctrine. *See* Sloss, *supra* note 34, at 19-29.) A second version holds that implementing legislation is constitutionally required to give effect to some treaty provisions. *See* Sloss, *supra* note 34, 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. A third version of non-self-execution doctrine is what I have called the "Restatement doctrine," because the Restatement (Second) of Foreign Relations Law, published in 1965, created this version of the doctrine. *See* Sloss, *supra* note 34, 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*. 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).

283 *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 282 (2002).

284 *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").

CONCLUSION

The Supreme Court should reject the Bork model for three reasons. First, the Bork model is at odds with the Founders' original understanding of the judiciary's role in treaty enforcement. Second, the Bork model is a radical departure from two centuries of Supreme Court jurisprudence. Third, application of the Bork model produces extremely harmful consequences.

The foregoing analysis of Supreme Court decisions from 1789 to 1838 demonstrates that the Court consistently applied the Marshallian presumption in favor of judicial remedies for treaty violations. During this period, the Court never applied the Borkian presumption against judicial remedies, nor did it endorse the Borkian private right of action test. Supreme Court decisions during the early years of U.S. constitutional history, by themselves, do not provide conclusive proof of the Founders' original understanding. Those decisions, however, are generally consistent with the constitutional text and eighteenth century historical materials. The constitutional text expressly grants both state and federal courts the power to enforce treaties.[285] Other scholars have analyzed eighteenth century historical materials to show that the Framers purposefully designed the constitution to make treaties self-executing.[286] This article's analysis of nineteenth century case law supplements these other sources. The analysis shows that Supreme Court decisions from 1789 to 1838 manifest the Founders' original understanding that the judiciary has both the power and the duty to enforce treaties on behalf of individuals whose treaty-based rights are violated, and that courts do not need express authorization from the political branches to provide remedies for violations of individual treaty rights.

There is a striking contrast between early nineteenth century Supreme Court jurisprudence, which conformed to the Marshall model, and late twentieth century decisions by lower courts that have applied the Bork model. The Bork model emerged in the 1970s and 1980s when federal appellate judges merged the pre-existing doctrine of non-self-executing treaties with the then-emerging presumption against finding implied rights of action under federal statutes. The merger of these two doctrines produced a revolution in both non-self-execution doctrine and implied right of action doctrine. Whereas prior non-self-execution doctrine was generally consistent with the maxim "where there is a right, there is a remedy," Borkian non-self-execution doctrine created a huge right-remedy gap in the domestic law of treaties. Whereas implied right of action doctrine, as applied in the statutory context, has never imposed a bar to judicial enforcement of federal statutes on behalf of habeas petitioners, or criminal defendants,

---

[285] *See* U.S. Const. art. III, § 2, cl. 1 ("The [federal] judicial Power shall extend to all Cases . . . arising under . . . Treaties."); U.S. Const. art VI, cl. 2 (specifying that "the Judges in every State shall be bound" by treaties).

[286] *See* Flaherty, *supra* note 15; Vazquez, *supra* note 15, at 1097-1114.

courts are now applying the Borkian private right of action test to bar judicial enforcement of treaties on behalf of habeas petitioners and criminal defendants.[287]

Application of the Bork model generates three different types of harmful consequences, which relate to federal supremacy, separation of powers, and U.S. foreign relations. Under the Articles of Confederation, states were routinely violating U.S. treaty obligations and the federal government was powerless to halt those violations.[288] The Framers' solution to this problem, embodied in the Supremacy Clause, was to give treaties the status of federal law, and to make treaties directly binding on judges in state courts.[289] In recent years, state and local governments have routinely violated U.S. obligations under Article 36(1) of the VCCR,[290] just as state governments violated U.S. treaty obligations before adoption of the Constitution. If courts applied the Marshall model, most law enforcement officers would probably stop violating the VCCR to avoid the likely consequences of continued violations: reversal of convictions or exclusion of evidence.[291] The treaty violations persist, however, because courts have applied the Bork model and refused to enforce the treaty. Thus, continued application of the Bork 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 relates to separation of powers. The Geneva Conventions are supreme federal law under the express terms of the Supremacy Clause. Accordingly, the President has a duty under the Take Care Clause[292] to ensure that the treaties are faithfully executed.[293] The President's decision to utilize military commissions to conduct trials of several Guantanamo detainees is a violation of the Geneva Conventions,[294] and therefore a violation of the President's duty to take care that

---

287 *See, e.g.,* Hamdan v. Rumsfeld, 415 F.3d 33, 38-40 (D.C. Cir. 2005) (applying Bork model and denying relief to habeas petitioner who alleged violation of his rights under the POW Convention); State v. Sanchez-Llamas, 108 P.3d 573, 575-78 (Or. 2005) (applying Bork model and denying relief to criminal defendant who alleged violation of his rights under the VCCR).

288 *See* Vazquez, *supra* note 15, at 1101-04.

289 *See id*. at 1104-10. *See also* Flaherty, *supra* note 15, at 2120-26.

290 Article 36(1) of the VCCR grants foreign nationals arrested in the United States a right to consult with consular officers from their home countries. *See* VCCR, *supra* note 7, art. 36, ¶ 1(a). The United States has a treaty obligation to "inform the person concerned without delay of his rights under" Article 36. *Id*., ¶ 1(b). State and local officers frequently violate the notification requirement under article 36(1)(b).

291 In many of the VCCR cases, government officers can make a plausible argument that the defendant was not prejudiced by the violation of his or her treaty rights. The Marshall model does not require a remedy in cases where the individual was not prejudiced. In other cases, though, individual defendants probably were prejudiced by the denial of their rights under the VCCR. The Marshall model does not mandate a *particular* remedy in cases where an individual is prejudiced by a violation of his treaty rights, but it does require an effective remedy. The two types of remedies most frequently requested by defendants in VCCR cases are exclusion of evidence (if the treaty violation is discovered before trial) and reversal of a conviction (if the treaty violation is discovered after trial).

292 U.S. Const. art. II, § 3 (obligating the President to "take Care that the Laws be faithfully executed").

293 *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97, 154-64 (2004).

294 This statement assumes that the detainees are protected by the Geneva Conventions, either as prisoners of war or under Common Article 3. For a defense of this assumption, *see* Hamdan v. Rumsfeld, No. 05-184, Brief of Professors Ryan Goodman, Derek Jinks and Anne-Marie Slaughter as *Amicus Curiae*

the treaties are faithfully executed. The judiciary has a constitutional responsibility to restrain federal executive action that violates federal law, including treaties. In *Hamdan v. Rumsfeld*, the D.C. Circuit abdicated its responsibility to restrain illegal executive action by refusing to halt the use of military commissions that violate the Geneva Conventions.[295] The D.C. Circuit's refusal to enforce the Geneva Conventions is directly attributable to its application of the Bork model.[296] When federal courts turn a blind 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. Thus, *Hamdan* shows how application of the Bork model induces courts to abdicate their responsibility to restrain illegal executive action, thereby distorting the constitutional balance of power among the branches.

Finally, judicial application of the Bork model harms the United States' international reputation. Ongoing U.S. violations of both the VCCR and the POW Convention contribute to a growing perception around the world that the United States is hostile to international law. More specifically, other countries accuse the U.S. of trying to develop an international system in which other states are constrained by international law, but the U.S. is free to pursue its national interests, unfettered by the requirements of international law. Proponents of the Bork 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 Borkians. 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."[297] Modern courts would do well to follow the Marshallian example.

Supporting Reversal, *available at* http://www.hamdanvrumsfeld.com/briefs. If a particular detainee is a prisoner of war, then trial by military commission would violate Article 102 of the POW Convention. *See* POW Convention, *supra* note 5, art. 102. If the detainee is protected by Common Article 3, trial by military commission is also prohibited because that article requires that he be tried only by a "regularly constituted court." *See* POW Convention, *supra* note 5, art. 3, para. 1(d).

[295] *See Hamdan*, 415 F.3d 33 (D.C. Cir. 2005). The D.C. Circuit held that "Congress authorized the military commission that will try Hamdan." *Id*. at 37-38. If this conclusion is correct, then the court would be justified in denying Hamdan's habeas petition because Congress has the constitutional power to authorize actions that violate U.S. treaty obligations. The claim that Congress authorized the use of military commissions, however, is not persuasive. *See* Amicus Brief of 280 Law Professors (contending that Congress has not approved the use of military commissions), *available at* http://www.hamdanvrumsfeld.com/briefs. Assuming that Congress has not authorized the use of military commissions that violate the Geneva Conventions, the President has a constitutional duty to comply with the treaties, and the courts have a constitutional duty to ensure that the President executes his duty.

[296] *See* Hamdan v. Rumsfeld, 415 F.3d 33, 38 (D.C. Cir. 2005) (stating that "this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights"); *id*. at 40 (holding 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").

[297] Haskins & Johnson, *supra* note 146, at 557.