Treaties, Self-Execution, and the Public Law Litigation Model

ANN WOOLHANDLER

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INTRODUCTION

Modern debates over treaty justiciability follow the general lines of division in the international law scholarly community. On one side are ranged those favoring broad federal judicial enforceability of international law and treaty norms, and recognition of federal power to enter treaties exceeding Congress's domestic legislative powers. On the

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1. See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 190 (2d ed. 1996) [hereinafter HENKIN, FOREIGN AFFAIRS] (arguing against federalism limitations on the treaty power); Louis Henkin, International Law as Law in the United States, 82 Mich. L:
other side are those who are more skeptical of expanding litigation of international law and treaty norms, and who favor accommodating foreign affairs to domestic constitutional limitations.\(^2\)

One aspect of the debate addresses justiciability at a high level of generality: whether the public law model of litigation, which has expanded the occasions to litigate domestic constitutional and statutory law, should extend to the foreign relations context.\(^3\) This extension would entail a broadening of foreign governmental as well as individual standing, and subject a broader range of treaty duties to judicial determination. Proponents of such expanded justiciability rely partly on an historical argument that the federal courts regularly decided broad nation-to-nation issues in the nineteenth century.\(^4\)

At a more specific level, the justiciability debate addresses whether treaties are self-executing,\(^5\) thereby creating domestically enforceable law without congressional legislation.\(^6\) Some scholars argue that treaties, particularly human rights treaties, should be presumptively or even conclusively self-executing.\(^7\) The issue of domestic enforcement of

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human rights treaties in turn raises questions of the scope of the treaty power, because some view that power as a way around the Supreme Court’s limitations on congressional authority under Section 5 of the Fourteenth Amendment and other constitutional provisions. Although Congress presumptively may legislate to implement treaties, self-execution would make the enforcement of treaty rights that exceed Congress’s domestic powers that much easier. Proponents of self-execution of modern human rights treaties that arguably exceed congressional powers again look to history for support. They argue that nineteenth-century federal court cases viewed treaties as presumptively self-executing and vindicated rights such as alien land ownership that encroached on state reserved powers. According to this view, the Supreme Court’s 1920 decision in Missouri v. Holland, explicitly allowing Congress to exceed its domestic legislative powers by treaty, was consistent with prior precedent.

This article addresses both levels of the treaty justiciability debate—the issue of the public law model as well as the issue of self-execution—partly through the lens of history. It compares nineteenth-century constitutional and treaty cases to examine whether the modern public law model for domestic issues should translate wholesale to foreign relations issues. It also explores whether the pre-Holland cases indicate that treaties may broadly trench on state reserved powers and that such treaties should be presumptively self-executing.

(elaborating on textual and structural arguments for non-self-execution).


10. Louis Henkin, U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker, 89 AM. J. INT’L L. 341, 345-46 (1995) (arguing for broad treaty powers and self-execution); Damrosch, supra note 1, at 527 (favoring self-execution, particularly with respect to human rights treaties), discussed in Bradley & Goldsmith, Conditional Consent, supra note 2, at 446; see also id. at 450 (criticizing the position that treaty-makers have power to make treaties on any subject, but no power to determine treaties’ domestic effects).


12. Golove, supra note 8, at 1079.

13. 252 U.S. at 416.
Part I of this article provides the historical background for considering whether the public law model should apply in modern treaty cases. It shows that in the early Republic neither state nor foreign governments could generally sue in federal court to vindicate their constitutional and treaty rights, respectively. Rather, governments normally could sue in federal court only to vindicate their own common law claims, such as claims to specific property. As opposed to civil actions initiated by governments, common law cases involving individuals were the principal means of adjudicating constitutional and treaty rights. Nevertheless, constitutional and treaty claims differed. In a proper common law case, the Court would generally litigate even structural constitutional issues with little play for a political question doctrine, while in treaty cases the Court more often declined to decide broad nation-to-nation issues in ways that would override the decisions of the political branches. The implications of this distinction are addressed in Part III.

Part II explores the kinds of rights that the Court vindicated in pre-modern treaty cases and the implications for the scope of the treaty power and self-execution. It concludes that the federal courts in treaty cases vindicated similar rights of contract and property that they enforced domestically under the Contracts Clause, the Privileges and Immunities Clause, the general common law, and later, the Due Process Clause. The scope of these judicially enforced treaty rights indicates that the treaty power did not broadly interfere with state reserved powers, for the federal courts merely enforced the same rights for aliens that they enforced for citizens. Thus, contrary to some scholarly commentary,\textsuperscript{14} the expansion of federal treaty powers in \textit{Missouri v. Holland} did represent a break with the past. The pre-\textit{Holland} cases do not suggest judicial sanction of broad federal powers that exceed congressional powers under Article I or Section 5 of the Fourteenth Amendment. Nor do these cases suggest that treaties protecting human rights beyond those domestically recognized should be considered self-executing.

Part III returns to the issue of whether the public law model should transfer unabated to the foreign affairs arena. It concludes that, given traditional differences in the justiciability of duties under the Constitution and treaties, attempts to use the public law litigation model to allow individuals and governments to address broad nation-to-nation issues of treaty compliance should be resisted. It also suggests that

\textsuperscript{14} Golove, \textit{supra} note 8, at 1079.
expansions of standing to allow states to vindicate interests that are more properly litigated by individuals should not be extended to foreign nations due to inherent problems with governmental standing.

I. JUSTICIABILITY IN CONSTITUTIONAL AND TREATY CASES

A. Non-Self-Execution, Standing, and Political Questions Defined

Commentators often note the problems of distinguishing among the doctrines of non-self-execution, standing, and political question in the treaty context. All three doctrines, however, address some aspect of whether there exists either a judicially cognizable injury on the part of the plaintiff or a judicially cognizable duty on the part of the defendant.

Standing is concerned with the legally cognizable injury component of a claim. Non-self-execution, most usefully described as addressing whether a treaty creates domestically judicially enforceable law, commonly addresses whether a judicially cognizable duty exists under a treaty. The political question doctrine also addresses the issue of a judicially cognizable duty. The political question doctrine, however, focuses on whether an issue might be more suitably determined by the political branches, while the non-self-execution doctrine looks more to the intent of the treaty-makers.

While a failure of standing amounts to a failure to state a claim for relief, a plaintiff may or may not have a prima facie claim for relief when the ultimate merits of her claim turn on a political question or a non-self-executing duty. Thus, while non-self-execution and the political question doctrine involve the existence of justiciable duties,

15. "State," as used herein, refers to one of the United States.
16. See generally Vazquez, Four Doctrines, supra note 6, at 695-97.
18. Vazquez, Laughing, supra note 7, at 2181 (indicating that the non-self-execution doctrine is best seen as an intent-based inquiry, but that an intent to make a provision self-executing may more easily be found lacking if the implementation of the provision seems better suited to the political branches).
20. Baker v. Carr, 369 U.S. 186, 198 (1962) (noting that in "the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can by judicially identified and its breach judicially determined, and whether protection for the right can be judicially molded.") In Luther v. Borden, 48 U.S. (7 How.) 1 (1849), for example, the plaintiff stated a traditional trespass action. Id. at 2. Nevertheless, the plaintiff lost, inter alia, because the Court left to the political branches the determination of whether the state had a republican form of government. Id. at 42-45.
they do not always technically involve a failure to state a claim for relief.

B. The Private Law Model of Litigating Constitutional and Treaty Issues

Treaties, along with federal statutes and the Constitution, were to be the supreme law of the land, enforceable in state and federal courts. Because treaties were compacts between independent sovereigns, however, fewer of their provisions would be judicially enforceable than was true of the Constitution and statutes.21 Examining how constitutional and treaty rights were enforced, including the role of governmental and private enforcement, provides some insights into whether modern expansions of justiciability for constitutional and statutory claims should also extend to treaty-based claims.

Constitutional rights did not create their own causes of action. Rather, constitutional issues arose in the ordinary course of cases and controversies that otherwise existed. Notably, issues of the scope of federal and state power did not characteristically arise in suits between states and the federal government (or its officials) or in suits between the states themselves.22 Rather, constitutional issues arose by way of individual defenses to enforcement actions, in ordinary civil suits, and in damage and injunctive suits by individuals against government officers sued as individuals.23

For example, a state could raise an issue of its power to regulate

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21. The Head Money Cases, 112 U.S. 580, 598 (1884), provide the classic statement:
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 recriminations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing within the territorial limits of the other.
See also Foster v. Nielson, 27 U.S. (2 Pet.) 253, 307 (1829), stating,
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 its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest.
See also Louis Henkin, Is There a "Political Question" Doctrine? 85 YALE L.J. 597, 611 (1976) (indicating foreign affairs had a larger political component than domestic constitutional affairs).
commerce by passing legislation and enforcing that legislation against individuals in its own courts. 24 The defendant in the enforcement action could raise as a defense the issue of whether the state regulation trenched on federal commerce powers. 25 Contracts Clause issues could arise in an ordinary action to collect a debt, when the debtor excused his nonpayment under state debtor relief laws. The creditor could raise in reply that the state law violated the Contracts Clause. 26 Claims that a state tax violated the Commerce Clause could be addressed by traditional suits against the individual collector in assumpsit following payment under protest. 27

Article III as well as the First Judiciary Act provided for Supreme Court jurisdiction over certain suits brought by the states. 28 But states’ standing to initiate suits in the federal courts during the nineteenth century was limited to cases where the state had a common law interest—for example, a claim for payment of a debt. 29 As noted above, a state could not sue the federal government or its officers to claim that the federal government had trenched on the state’s rights to govern. Nor could a state file enforcement actions in federal courts or sue to vindicate the legal interests of its citizens. 30 This common law version of state standing in federal courts directed states to test their powers by using their own governmental institutions—by legislating and enforcing legislation through their own officials, in their own courts. This narrow version of standing also reinforced the concept that individuals were rights holders against the government, and it minimized the more direct


25. Id. at 392 (indicating the defendant had filed a demurrer raising conflict of the New York statute with the Constitution).


27. The Passenger Cases, 48 U.S. at 409-10 (on direct review, holding that a Massachusetts statute conflicted with the Commerce Clause in an action to recover back exactions paid under protest).

28. Article III provides, in part: "[t]he judicial Power shall extend . . . to Controversies between two or more States; —between a State and Citizens of another State, . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." See also Act of Sept 24, 1789, ch. 20, 1 Stat. 73 [hereinafter First Judiciary Act].

29. Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792) (entertaining a state’s suit on a debt).

clashes between the judiciary and other branches of government.31

Cases in which states attempted to contest the lawfulness of Reconstruction demonstrate the states’ inability to use federal civil suits to enforce their constitutional claims against the federal government. In Georgia v. Stanton,32 the State of Georgia sued federal officials, alleging that congressional statutes unconstitutionally invaded its sovereign rights over its inhabitants.33 The Court held that a legally cognizable injury was lacking in the state’s attempt to litigate interests in governing vis-à-vis the federal government.34

The Court also indicated that the case as framed presented a political question.35 The nonjusticiability in Stanton, however, may have arisen more from the lack of a judicially cognizable injury than from the Court’s treating the constitutionality of the military government as implicating a nonjusticiability duty. The Court was willing to entertain similar issues of the legality of Reconstruction military authority when they arose in habeas cases, where a traditional common law interest in liberty was involved, and the individual remedy would arguably cause less strain on judicial powers.36 Congressional jurisdiction stripping, however, forestalled the apparent judicial willingness to take on the issue of the legality of Reconstruction.37

Like the states, foreign nations were also covered under party-based grants of subject matter jurisdiction in Article III.38 Although Congress did not expressly provide for foreign government party-based

31. Id. at 439-40.
32. 73 U.S. (6 Wall.) 50 (1867).
33. Id. at 52 (statement of case), 76.
34. The Court found a lack of justiciability in the state’s claims of injury to “the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State.” Id. at 77; see also Cherokee Nation v. State of Georgia, 30 U.S. (5 Pet.) 1, 39 (1831) (Johnson, J., concurring) (indicating that the Cherokees’ interest in vindicating their sovereignty was nonjusticiable); cf. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866) (rejecting state’s challenge to Reconstruction as invading its right to govern, on ground that the court lacked jurisdiction to interfere with the discretionary acts of the President). The Court would litigate sovereignty issues in interstate boundary disputes, but the Court considered the fact that sovereignty was involved to weigh against justiciability. The Court entertained these claims because the Framers seem to have intended that they be litigated, and also because they resembled ordinary property claims that the Court could decide according to ordinary principles of law and equity. Woolhandler & Collins, supra note 22, at 415.
35. Stanton, 73 U.S. at 77.
36. Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1867) (refusing to dismiss appeal in habeas case); cf. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) (invalidating trial by a military tribunal of a civilian in a state that was in rebellion).
37. Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) (dismissing appeal based on congressional statute).
jurisdiction in the 1789 Judiciary Act,\textsuperscript{39} foreign governments nevertheless occasionally sued under other grants of jurisdiction such as admiralty. On the whole, foreign government standing paralleled state standing.\textsuperscript{40} The Court noted in 1887 that the “only cases in which the courts of the United States have entertained suits by a foreign State have been to enforce demands of a strictly civil nature,”\textsuperscript{41} and it cited cases in which France libeled a private vessel for damage to a ship it owned and in which Spain sued individuals in an action in the nature of assumpsit.\textsuperscript{42} Thus, like states, foreign governments could sue to enforce their own common-law types of claims. And similar to state inability to sue the federal government or its officials to enforce claims of constitutional violation, foreign nations were generally unable to sue in United States courts to enforce general treaty obligations.\textsuperscript{43} Indeed, they rarely if ever tried.\textsuperscript{44}

Foreign government standing differed to some extent from state standing. Consular officials were able to bring claims for restitution on behalf of particular citizens.\textsuperscript{45} Most frequently seen in prize cases, this

\textsuperscript{39} 1 Stat. 73, §§ 9, 11, 13. Jurisdiction as to consuls, ambassadors and public ministers was provided in the Act.

\textsuperscript{40} Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888) (in holding that a state could not sue in federal court on a judgment for a civil penalty, the Court referred to limitations on foreign governments’ ability to sue).

\textsuperscript{41} Id. at 290.

\textsuperscript{42} Id. The Court explained:
The case of \textit{The Sapphire} [78 U.S. (11 Wall.) 164 (1870)], was a libel in admiralty, filed by the late Emperor of the French, and prosecuted by the French Republic after his deposition, to recover damages for a collision between an American ship and a French transport ... \textit{The King of Spain v. Oliver} [2 Wash. C.C. 429; Pet. C.C. 217]. although a suit to recover duties imposed by the revenue laws of Spain, was not founded upon those laws, or brought against a person who had broken them, but was in the nature of an action of assumpsit against other persons alleged to be bound by their own contract to pay the duties; and the action failed because no express or implied contract of the defendants was proved.

\textsuperscript{43} The Head Money Cases, 112 U.S. 580, 598 (1884).


\textsuperscript{45} The Belle Corrunes, 19 U.S. (6 Wheat.) 152 (1821). In this action in which the Spanish vice consul appeared to claim a ship and cargo, the Court stated that the official:
is a competent party to assert or defend the rights of property of individuals of his nation, in any Court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of his subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them is the great object for which Consuls are deputed by their sovereigns....

\textit{Id.} at 168. \textit{See also} \textit{The Antelope}, 23 U.S. (10 Wheat.) 66, 67 (1825) (enterting action by consuls to restore property unlawfully seized by Americans); \textit{cf.} \textit{The Anne}, 16 U.S. (3 Wheat.)
representation presumably existed in part to alleviate the problems that foreign vessel and cargo owners might have in making an appearance in United States courts. In addition, consular or other officials occasionally seemed to have slightly greater abilities than states to assert their governments’ claims of judicial jurisdiction over particular persons and property in federal courts.46 Foreign governments’ greater ability than states to raise such jurisdictional claims may have been partly due to the difficulty foreign nations would encounter in bringing suit in their own courts to test their authority, when the persons and property involved were located within the United States.

But overall, as was true with domestic constitutional claims, individuals were the parties expected to assert rights under treaties.47 For example, treaty provisions that guaranteed aliens the right to hold and

436, 445 (1818) (advertising to consuls’ power to sue for restitution for particular foreign nationals); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 397 (1821) (referring to the ability of consuls to sue as parties of record in prize cases). According to the Restatement (Second) of the Foreign Relations Law of the United States:

[although there is some overlap between diplomatic and consular functions, diplomatic representatives are primarily concerned with the conduct of foreign relations between states, whereas consular representative are primarily concerned with the interests of nationals of the sending state in the receiving state, the sending state’s relations with its own nationals in the receiving state, its relations with local authorities there, and generally, matters relating to the details of commercial intercourse and travel between the two.


46. Santovincenzo v. Egan, 284 U.S. 30, 35 (1931) (allowing consul to enforce treaty provision that effects of deceased subject were to be delivered up to the agent of the nation, to be disposed of according to the laws of that country). But cf. Republic of Iraq v. First National Bank of Chicago, 350 F.2d 645 (7th Cir. 1975) (rejecting Iraq’s attempt to raise a claim of its jurisdiction over a probate case, inter alia, due to lack of standing). The property at issue in Santovincenzo was likely to escheat to Italy. Id. at 34; see also Wildenhus’s Case, 120 U.S. 1 (1887) (allowing consul to bring an (ultimately unsuccessful) habeas corpus action to enforce a convention giving the consul jurisdiction over matters of internal discipline on Belgian ships that did not affect public order); The Anne, 16 U.S. at 446 (indicating that a properly authorized Spanish official might have raised a claim for restitution of ship allegedly seized from Spanish territory in violation of Spanish neutrality, although consul here had not shown such authority). Comparably to state officials, consuls also could bring proceedings for extradition. See, e.g., In re Kaine, 55 U.S. (14 How.) 103 (1852) (indicating that consul had appeared to request extradition); see also Kentuck y v. Dennison, 65 U.S. (24 How.) 66, 105 (1860) (describing statutory process for interstate extradition); Tucker v. Alexandroff, 183 U.S. 424, 426 (1902) (in denying habeas corpus to detainee, indicating that Russian vice consul under treaty could apply for arrest of deserter from Russian naval vessel). Federal statutes prescribed procedures for extradition. Kaine, 55 U.S. at 109 (indicating that statute allowed consuls and vice consuls to take actions for return of deserting seamen under treaties).

47. This was perhaps indicated by the failure of the first Judiciary Act to provide explicitly for foreign governmental standing. First Judiciary Act, supra note 28. In addition, the Alien Tort Statute, whatever it may mean, apparently addressed individual cases for torts in violation of treaties. 28 U.S.C. § 1350 (1994).
inherit property without the disabilities of alienage would be applied in ejectment actions. British creditors could bring actions to collect debts, to which the debtor might raise a claim of discharge under state law, and to which the creditor could reply that the state law violated treaty prohibitions on impediments to debt collection. Persons claiming that customs duties violated most-favored-nation clauses of treaties could bring traditional actions against the collector for payment under protest. These actions paralleled those in which constitutional issues arose. Like the Constitution, treaties generally created no causes of action in and of themselves, but they might create duties that could be adjudicated in a common law case by a party with a common law injury.


50. Whitney v. Robertson, 124 U.S. 190 (1888) (entertaining unsuccessful action for payments made under protest). In addition, persons held in custody could bring habeas corpus actions. See, e.g., Lem Sing v. United States, 158 U.S. 538 (1895).

51. Some modern scholars argue that a treaty’s being non-self-executing merely indicates that it does not create a cause of action but nevertheless creates domestically enforceable duties that may be litigated if a cause of action otherwise exists in which to raise the treaty claim. Sloss, supra note 5, at 1108 (arguing that non-self-execution declarations should mean that treaties do not create a private cause of action); cf. Koh, supra note 3, at 2360-61, 2383 (criticizing the non-self-executing doctrine as avoiding “the sole relevant question—whether the plaintiff has stated a claim on which relief can be granted”); Vazquez, Treaty-Based Rights, supra note 11, at 1116, 1134 (arguing, in individual rights context, that standing and inquiry into whether failure to give remedy would undermine United States obligations to the state of the litigant’s nationality under international law, rather than self-execution doctrine, should determine the enforceability of treaty-based rights). Historically, however, self-executing treaty provisions generally did not create actions of action but did create duties that could be enforced in a proper case. In addition, to interpret non-self-execution provisions to mean only that a treaty does not create a cause of action would generally be contrary to the intent of the treaty-makers. Bradley & Goldsmith, Conditional Consent, supra note 7, at 420 (criticizing Sloss’s position as contrary to the treaty-makers’ intent); cf. Vazquez, Laughing, supra note 7, at 2174 (indicating willingness to recognize that some treaties do not create domestically enforceable law). But cf. Sloss, supra note 5, at 1115 (although recognizing treaty-makers’ intent not to create obligations going beyond those already existing under domestic law, still arguing that treaties should create domestic law, because non-enforcement would be “inconsistent with the goal of ensuring United States compliance with its international obligations”). Cases that discuss self-execution in terms of whether a treaty creates a cause of action often find no cause of action, and the results of these cases would thus be the same if the courts used the broader formulation of whether the treaty created domestically enforceable law. Tel Oren v. Libyan Arab Republic, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring) (indicating that law of nations did not create a cause of action that could be sued on
The presumptive limitations on foreign governmental standing, similar to the limitations on state standing, reinforced the concept of individuals as rights-holders and helped to avoid judicial clashes with the political branches. It also directed foreign governments to use means other than suits in the courts of other sovereigns (such as diplomacy) to vindicate their treaty claims. But while constitutional and treaty litigation were similar in many respects, the political question and related doctrines of deference to the political branches were broader in treaty cases than in constitutional cases. In the course of deciding common law cases, the Court had little trouble resolving domestic constitutional issues contrary to the decisions of the political branches.\textsuperscript{52} Cases brought by individuals involving treaties, however, were a different matter. While the Court readily determined particular applications of extant treaties protecting the rights of aliens, it frequently shied from deciding broad issues of nation-to-nation obligations contrary to the decisions of the political branches,\textsuperscript{53} including issues of whether treaties remained in force.\textsuperscript{54} For example, in

\textsuperscript{52} See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{53} Compare The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812) (refusing to decide issue of title to vessel once it was in French military service), with Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (deciding that bank was entitled to return of trunk containing money from state official) and United States v. Lee, 106 U.S. 196 (1882) (successful ejectment action for recovery of land held by United States military officials). See also Octjen v. Central Leather Co., 246 U.S. 297, 301-02 (1918) (refusing to decide legitimate government of Mexico when matter had been determined by the political branches); United States v. Klintock, 18 U.S. (5 Wheat.) 144, 149 (1820) (rejecting defense in piracy case that the defendant acted under legitimate authority, because the United States did not recognize the government); cf. Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853) (refusing to decide issue of whether Spanish government had power to annul by treaty certain large last-minute land grants).

\textsuperscript{54} See, e.g., Terlinden v. Ames, 184 U.S. 270, 287 (1902) (refusing to decide contrary to the political branches that a treaty was no longer in force due to Prussia's transformation with other states into the German Empire); Charlton v. Kelly, 229 U.S. 447 (1913) (indicating that the court would not reconsider the executive's decision that a treaty remained in force despite allegation that Italy had breached its reciprocal extradition obligations); Whitney, 124 U.S. at 194-95 (discussing with approval prior observations of Justice Curtis that

whether a treaty with a foreign sovereign had been violated by him; whether the consideration of a particular stipulation of the treaty had been voluntarily withdrawn by one party so that it was no longer obligatory on the other; whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty... were not
the early treaty case Ware v. Hylton, the Court held that a treaty overrode Virginia law discharging a debt, thereby deciding the merits of the individual creditor's rights under the treaty. But the Court did not consider the debtor's defense that the Court should hold the obligations of the treaty abrogated due to British infractions.

Some scholars have emphasized that from early on the federal courts decided broad issues of whether treaties were in force as well as other nation-to-nation issues in foreign relations cases, and no doubt at times they did. But in some of the cases relied on by these scholars, the federal political branches had not taken a definitive position to which the judiciary could defer. For example, Professor Bederman contrasts cases in which the judiciary held nonjusticiable defenses that treaties judicial questions).

55. 3 U.S. (3 Dall.) 199 (1796).

56. Id. at 201-03, 206 (statement of facts, laying out pleadings to the effect that the British creditor should not recover due to British treaty violations). The claims of British violations seem to have been presented as the defendants' fourth plea in bar of the action, id. at 201-03, and also as part of defendants' rejoinder to the plaintiff's replication to the defendants' second plea that the payment under Virginia law absolved the debtor. The Court's strict limitations were directed to the second plea and subsequent pleadings thereon. Id. at 207. Iredell, as Circuit Justice below, had indicated that Congress rather than the judiciary should decide the issue of whether the treaty was abrogated due to British violations. Id. at 256, 260 (Iredell, Circuit Justice, decision below). Although rejecting defendants' arguments on this point, Iredell had decided that the defendants' payment under Virginia law barred recovery notwithstanding the treaty, id. at 280, a position that the Supreme Court ultimately rejected. The Justices in their Supreme Court opinions did not explicitly address the abrogation argument. DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT 1789-1888, at 40-41 (1985) (noting that the Court ignored the argument that the treaty had been broken by England and was no longer in force).

57. Koh, supra note 3, at 2354-55; Bederman, supra note 4, at 1454-57.

58. Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954) (deciding somewhat non-differentially the issue of whether an extradition treaty with Serbia had survived various changes in government), discussed by Bederman, supra note 4, at 1455-56.

59. Baker v. Carr, 369 U.S. 186, 211, 212 (1962) (in discussing point that not all questions of foreign relations are political questions, pointing to cases where courts would decide issues when the political branches had not made a conclusive determination). Professor Koh cites Brown v. United States, 12 U.S. (8 Cranch) 110 (1814), as supporting the proposition that courts may decide the issue of the unlawfulness of war in the course of making individual decisions as to the propriety of a seizure. Koh, supra note 3, at 2378 & n.160 ("When a court holds a war unlawful, it does not merely recognize the horizontal legal right of the other state to resist the use of force, it also vertically recognizes the rights of the individuals warred upon (or whose property has been seized) to be free of the unlawful war. Cf. Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (invalidating executive seizure of property before War of 1812)"). The seizure at issue in Brown in fact occurred after the declaration of war, id. at 110 (argument of counsel), and the unlawfulness of the war was not at issue. Rather, the Brown Court, in invalidating the seizure, found that the political branches had not taken the position that inland property of aliens was subject to confiscation. Id. at 122, 125. The Court indicated that the United States attorney had not been acting on higher authority when he seized the inland property. Id. at 122. The Court further indicated that the issue of what should be done with enemy property when war breaks out is a question of policy, not law, for the consideration of the legislature. Id. at 128-29.
had been abrogated by the foreign nation’s breach of its obligations under the treaty with cases in which the court decided whether treaties were abrogated by the outbreak of hostilities with the foreign country.\textsuperscript{60} In both types of cases, however, the Court effectively employed a default position that treaties, particularly to the extent they protected private rights, remained in force absent definitive action by the political branches.\textsuperscript{61} This stance was at once consistent with treating issues of abrogation as belonging primarily to the political branches as well as with the general presumptions protecting property, discussed more fully below.\textsuperscript{62}

In other cases that scholars point to as evidence that the Court decided nation-to-nation issues, the Court, while perhaps discussing the merits of nation-to-nation issues,\textsuperscript{63} agreed with the position that the

\textsuperscript{60} Bederman, supra note 4, at 1456-57.

\textsuperscript{61} See, e.g., Society for the Propagation of the Gospel in Foreign Parts v. New Haven, 21 U.S. (18 Wheat.) 464, 495 (1823) (protecting from Vermont confiscatory legislation property of charitable organization established under Crown; deciding that the War of 1812 did not abrogate prior treaties protecting against confiscations of British property; indicating that some treaties were of such a nature as to be extinguished by war, but such was not the case of treaty provisions protecting property); cf. Techt v. Hughes, 128 N.E. 185 (N.Y. 1920) (refusing to find that treaty had been abrogated by hostilities, thereby protecting an alien daughter’s right to inherit). Bederman discusses Techt as a case where the court decided, contrary to the opinion of the political branches, that a treaty was still in force. Bederman, supra note 4, at 1457. Although Bederman cites a document to indicate that the executive had favored abrogation, the court’s opinion makes no reference to it and concludes that the political branches had not revealed an intention to abrogate the treaty’s provisions protecting inheritance. Techt, 128 N.E. at 192, 193 (indicating that court thought the will of the political departments was unrevealed); see also Clark v. Allen, 331 U.S. 503, 513-14 (1947) (similarly holding treaty provisions as to inheritance of real property were not abrogated by hostilities, and finding that the political branches had not treated obligations that would normally survive war to be abrogated); cf. Bederman, supra note 4, at 1457 (discussing Clark as a case in which the Court appeared to defer but also conducted an independent review).

\textsuperscript{62} See, e.g., Society for the Propagation of the Gospel, 21 U.S. at 495 (protecting property by finding that treaty had not been abrogated by hostilities); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 206 (1796) (Op. of Chase, J.); cf. Brown, 12 U.S. at 123 (indicating that confiscation of property should not be presumed absent action of political branches); The Peterhoff, 72 U.S. (5 Wall.) 28, 51, 54 (1866) (interpreting U.S. blockade narrowly, thereby limiting condemnation of property); Fairfax’s Devises v. Hunter’s Lessee, 11 U.S. (7 Cranch) 603, 623 (1813) (holding that the common law requirement of inquest in office before confiscation of land should not be presumed to be abrogated absent clear statutory language, and thus protecting land under treaty).

\textsuperscript{63} Thomas M. Franck, Political Questions/Judicial Answers 21 (1992) (claiming that, in many instances, when the courts deferred to the political branches they were nevertheless deciding on the merits that the political branches had decided correctly); cf. G. Edward White, The Transformation of the Constitutional Regime of Foreign Relations, 85 Va. L. Rev. 1, 27 (1999) (stating that the nineteenth century courts were “willing to investigate facts and to ground their decisions on legal principles, sometimes invoking those principles in support of policies declared by Congress or the Executive”). One can emphasize in such cases, as does Franck, the Court’s consideration of the merits, or one can emphasize the Court’s reliance on the political question doctrine. Franck, supra, at 23-25 (characterizing cases as really deciding the merits).
executive had taken and stated that the matter was one for the political branches. For example, Professor Koh cites the Prize Cases for the proposition that the Court determined that the Civil War was a "war" that allowed the Union to avail itself of the sovereign rights of a belligerent. While the Court did decide that a civil war could be such a "war," it also stated:

[w]hether the President in fulfilling his duties as Commander-in-Chief or in suppressing an insurrection, has met such armed and hostile resistance, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the government to which this power has been entrusted.

While deference to the political branches certainly did not extend to every executive decision to seize property or to every executive argument for the validity of such a seizure in particular litigation, the

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64. For example, Koh cites Jones v. United States, 137 U.S. 202 (1890), for deciding nation-to-nation issues by invoking the law of nations to sustain the United States' acquisition of new territory. Koh, supra note 3, at 2355; Jones, 137 U.S. at 212. But in the same case the Court decided that the question of U.S. sovereignty, which the criminal defendant claimed was lacking, was a political question. Id. at 212. Koh also cites the Court's decision of interstate boundary disputes as an instance of nation-to-nation issues. Koh, supra note 3, at 2354. The Court, however, did not generally resolve international, as opposed to interstate, boundary disputes. See, e.g., Foster v. Neilson, 27 U.S. (2 Pet.) 253, 309-10 (1829) (indicating the Court's unwillingness to decide issue of whether land would have been within Spanish territory that was later acquired by United States or had been part of earlier ceded French territory, given that the political branches were consistently treating the land as earlier ceded, stating that 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 its own rights, and if they cannot adjust their differences peaceably, right remains with the strongest). Id. at 306-07; cf. Monaco v. Mississippi, 292 U.S. 313, 331 (1934) (stating in dicta that it was not to be supposed that a suit between a state and a foreign state as to territorial boundaries was to be taken out of sphere of international negotiations and adjusted through the courts); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839) (holding that court would not contradict the political department's determination that the Falkland Islands were not within the territory of the Buenos Aires government, although indicating it would have decided the issue had the political branches not decided it).

65. The Prize Cases, 67 U.S. (2 Black) 635 (1862). The case, in any event, might not necessarily be considered a foreign affairs case.

66. Koh, supra note 3, at 2354.

67. The Prize Cases, 67 U.S. at 670; cf. The Belle Corunus, 19 U.S. (6 Wheat.) 153, 171-172 (1821) (indicating that congressional determination that a state of war existed as used in treaty meant that the Court did not need to examine the issue); The Protector, 79 U.S. (12 Wall.) 700, 702 (1871) (relying on executive proclamations to determine beginning and end of rebellion).

68. See, e.g., Brown v United States, 12 U.S. (8 Cranch.) 110, 122 (1914) (finding that the
Court often seemed to defer to the political branches on more general policies adopted toward foreign nations.

One can thus contrast the Court's presumptive willingness to override decisions of the political branches on issues of domestic constitutional duties with its explicit reluctance to override the political branches on general issues of treaty obligations. The regime of law that made so many constitutional duties justiciable if raised in a proper case contrasted with the regime of politics that had much broader play in the treaty context.\textsuperscript{69} This divergence suggests that modern expansions of the justiciability of domestic constitutional and statutory issues should be tempered in the foreign relations context, as discussed in Part III.

II. THE SCOPE OF ENFORCEABLE PRIVATE RIGHTS

Some scholars have argued that the presumptive self-execution of provisions protecting individual rights under treaties in the nineteenth century supports broad enforceability of modern human rights treaties and conventions. First, they argue that because the individual rights enforceable under treaties often concerned matters such as land ownership and inheritance, the treaty power was not limited by enumerated congressional powers and the reserved powers of the states.\textsuperscript{70} For example, Professor Golove emphasizes that self-executing treaties addressed issues over which states otherwise had exclusive regulatory power.\textsuperscript{71} According to his argument, \textit{Missouri v. Holland},\textsuperscript{72} which explicitly held that treaty powers and congressional implementing legislation could exceed Article I powers, had a long historical pedigree. Second, they argue that given that treaties protecting such individual rights were presumptively self-executing in the past, a

\textsuperscript{69} See, e.g., The Head Money Cases, 112 U.S. 580, 598 (1884).

\textsuperscript{70} Golove, supra note 8, at 1079.

\textsuperscript{71} Id. at 1248 (emphasizing in discussion of \textit{In re} Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880), that the treaty rights protected therein conflicted with the reserved powers of the state over corporations); see also id. at 1270 (emphasizing local nature of matters covered by treaties). Golove discusses intermittent resurfacing of states' reserved powers issues, but concludes that the nationalist conception of the treaty power repeatedly won out. Id. at 1116.

\textsuperscript{72} 252 U.S. 416 (1920).
similar presumption should be entertained for modern human rights treaties.\textsuperscript{73}

As Professor Bradley has pointed out, however, the rights protected by treaties concerned aliens and thus fit within a foreign affairs subject-matter limitation on the treaty power.\textsuperscript{74} Another important feature of the individual rights protected by early treaties, moreover, was their affinity with private rights—both constitutional and general common law—that the federal courts otherwise protected. Thus, characterization of the rights enforced by the federal courts in nineteenth century treaty cases as squarely trenching on the reserved powers of the states bears qualification.

For example, the Contracts Clause was directed to nullifying state debtor-protective legislation, and was aimed at protecting creditors, many of whom were northeastern and British.\textsuperscript{75} Similar creditor protections were in the 1783 treaty with Great Britain,\textsuperscript{76} which overrode state statutes that discharged local debtors from British debts.\textsuperscript{77} By the stipulation that the Constitution and treaties were the supreme law of the land, similar rights under the Contracts Clause and treaties were protected.

\textsuperscript{73} Supra notes 12 and 13; see also Vazquez, Laughing, supra note 7, at 2157 (arguing for a presumption of self-execution that could be overcome by clear statement).

\textsuperscript{74} Bradley, The Treaty Power, supra note 2, at 420 (indicating that treaty provisions concerning matters typically regulated by the states “regulated only the treatment of aliens, in return for similar treatment of U.S. citizens residing abroad. In that sense, the treaties were quite naturally viewed as regulating the county’s inter-national relations”); id. at 410 (indicating that the historical record reveals fairly consistent understanding that the treaty power was limited by subject matter, states’ rights, or both); see also White, supra note 63, at 9-10 (discussing that the federal foreign relations power, like other federal powers, operated within its sphere, with a residual sphere of state powers, and that judges would delineate the boundaries).

\textsuperscript{75} Compare Wythe Holt, To Establish Justice: Politics, the Judiciary Act of 1789, and the Invention of Federal Courts, 1989 DUKE L.J. 1422, 1461 (noting that problems of “debits and paper money, tender and other laws enacted by states in response to debtor pressure lay heavy over the whole proceedings of the Convention”).

\textsuperscript{76} The 1783 treaty provided, inter alia, that British creditors were to meet “no lawful impediments to recovery of full value, in sterling money, of all bona fide debts, heretofore contracted,” and “that all persons who have an interest in confiscated land, by debts, should meet with no lawful impediment in the prosecution of their just rights.” Ware v. Hylton, 3 U.S. (3 Dall.) 199, 239 (1796) (Op. of Chase, J.).

\textsuperscript{77} See, e.g., id. at 238-39 (discussing various forms of state debtor protective legislation that had been impetus to provisions in 1783 peace treaty). In Ware, the Court effectively allowed the 1783 treaty to operate retroactively to annul the confiscation of a debt under Virginia law by payment to the state. Id. at 235. It is doubtful, however, that much unfairness arose from this retroactivity. Id. at 238-39 (indicating that it was well known that some British debts had been paid into state treasuries with currency of very little value, either under laws confiscating the debts or authorizing the payment in paper money and discharging the debtors, and that the 1783 treaty had addressed this problem).
Concerns about debtor-protective legislation violative of the Contracts Clause and treaties underpinned the constitutional and statutory grants of diversity jurisdiction for out-of-staters and aliens.\textsuperscript{78} Diversity provided an early means to raise such federal questions, although only as they arose in ordinary causes of action such as actions to collect debts between diverse parties. Diversity proved, in fact, an effective means to enforce the Contracts Clause,\textsuperscript{79} and treaties,\textsuperscript{80} for the federal courts looked favorably on the anti-redistribution norm embodied in both.\textsuperscript{81}

The other concern of the early treaties with Great Britain was to restrict land confiscations by the states.\textsuperscript{82} The Constitution did not contain a general anti-takings norm applicable against the states until such protections were read into the Due Process Clause late in the

\textsuperscript{78} See, e.g., Holt, supra note 75, at 1455-58 (concluding that the national court system was created in large part because the state courts could not be trusted to handle creditors' claims); see also Woolhandler, Common Law Origins, supra note 23, at 85 (discussing that diversity was intended to address many constitutional claims).

\textsuperscript{79} Woolhandler, Common Law Origins, supra note 23, at 85-92.

\textsuperscript{80} See, e.g., Ware, 3 U.S. at 235 (Op. of Chase J.); Hopkirk v. Bell, 7 U.S. (3 Cranch) 454 (1806) (holding that under the 1783 treaty, the Virginia statute of limitations was not a bar to the British creditors' claim); Hicks v. Rogers, 8 U.S. (4 Cranch) 165 (1807) (later proceedings in same case); Hamilton v. Eaton, 11 F. Cas. 336 (C.C.N.C. 1792) (No. 5,980) (upholding rights of British creditors under treaty despite state confiscation of debts); cf. Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 405 (1792) (instructing jury in state/foreign citizen diversity case that the restoration of peace as well as the treaty revied the debt due to the British citizen); Hughes v. Edwards, 22 U.S. (9 Wheat.) 489, 496 (1824) (upholding rights of alien mortgagees to collect debt or alternatively to foreclose on property). Direct review also was important to the protection of rights under treaties. See, e.g., Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 243-46 (1830) (reversing state supreme court decision that British subject who was also American citizen could not take land by descent because she was not protected by the 1794 treaty); Hauenstein v. Lynham, 100 U.S. 483 (1879) (holding on direct review that under treaty, Swiss heirs of Swiss decedent should get proceeds of land that state claimed by escheat due to alienage).

\textsuperscript{81} Ware, 3 U.S. at 253, 255-56 (Op. of Chase, J.) (suggesting that debt confiscations were unjust and disreputable, and that the treaty provision protecting debts deserved the "utmost latitude of exposition"); Hughes, 22 U.S. (9 Wheat.) at 496-97 (indicating that the demand of the creditors, being of a personal nature, would have been protected even without the treaty). 82 The 1783 treaty provided that "no future confiscations shall be made." The Jay Treaty of 1794 provided that

British subjects who now hold lands in the territories of the United States... shall continue to hold them and may grant, sell or devise the same to whom they please, in like manner as if they were natives... and neither they nor their heirs and assigns shall, so far as respects the said land and legal remedies incident thereto, be considered aliens.

Fallon et al., Hart & Wechsler's The Federal Courts and the Federal System 495 (4th ed. 1996); see also Golove, supra note 8, at 1132 (summarizing problems of enforceability of treaties at time of the framing). The anticonfiscation norm for land resembled the anticonfiscation norm for debts; cf. Ware, 3 U.S. at 239 (Op. of Chase, J.) (discussing state laws allowing confiscation of British debts and payment in devalued currency as among the legal impediments to British debt addressed by the 1783 treaty).
nineteenth century. But long before this development, the federal courts in diversity and other cases of proper jurisdiction enforced a general law constitutional principle forbidding naked transfers of property from A to B. This domestic norm paralleled treaty protections. Thus, in a case protecting under a treaty the property of a British charitable corporation from state confiscation, the Court cited a domestic case protecting under general constitutional law the Alexandria Episcopal Church properties from state confiscation. This general law anti-confiscation norm would later seamlessly transform into Fourteenth Amendment protections.

In addition, the individual, self-enforcing rights of treaties were often within the same complement as those protected judicially under Article IV’s Privileges and Immunities Clause. This provision was designed to remove the disabilities of alienage as to certain rights for citizens of one state when in another state. Corfield v. Coryell provided the classic statement of the rights as to which equality of out-of-state citizens was granted under the Privileges and Immunities Clause:

83. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897); see also Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that Fifth Amendment’s taking provision was inapplicable to the states).


85. See, e.g., United States v. Percheman, 32 U.S. (7 Pet.) 51, 86, 89 (1833) (observing that “the sense of justice felt by the whole civilized world would be outraged” if private property were confiscated in cases of conquest or changes in sovereignty, and that such rights would have been preserved even without treaty stipulations).

86. Society for the Propagation of the Gospel in Foreign Parts v. New Haven, 21 U.S. (8 Wheat.) 464, 481 (1823) (in case of attempted state confiscation of property of a corporation existing under British law, the court cited Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815), and Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), as cases involving domestic entities as to which the court held that the revolution did not destroy existing civil rights).


88. HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREASURY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES 144-65 (1915) (discussing that treaty cases merely enforced power of the federal government to remove badges of alienage by treaty and did not change state law); cf. William E. Mikell, The Extent of the Treaty-Making Power of the President and Senate of the United States (Pt. II), 57 U. Pa. L. Rev. 528, 538 (1909) (noting that it “is usual to give citizens of a nation, by treaties, the rights of citizens of the most favored nation,” but not to give them rights greater than those of citizens).


The enjoyment of life and liberty, with the right to acquire and possess property of every kind . . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise... to take, hold and dispose of property, either real or personal; and exemption from higher taxes and impositions than are paid by other citizens of the state.91

Treaties sometimes used the language of “privileges and immunities”92 and protected similar rights93 to hold real property,94 to engage in the common callings,95 and to avoid discriminatory taxes.96 The privileges and immunities guarantees of both the Constitution and the treaties, rather than fundamentally changing state law, provided a sort of limited equal protection guarantee.97

91. Id. at 551-52.
92. In re Ah Fong, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102) (Field, Circuit Justice) (referring to treaty with privileges and immunities language).
93. In re Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880) (Op. of Hoffman, J.) (indicating that privileges and immunities language of Chinese treaty had similar meaning as Article IV language); cf. Shackelford Miller, The Treaty Making Power, 41 AM. U. L. REV. 527, 547 (1907) (referring to provisions protecting aliens’ right to inherit: “Treaties of this kind do not confer any thing or right upon the foreigner; they merely permit foreigners to take that which is their own”).
94. See, e.g., Fairfax’s Devissee v. Hunter’s Lessee, 11 U.S. (7 Cranch) 603, 627-28 (1813) (holding that Denny Fairfax’s land did not escheat to the state on his death, because under the 1794 treaty, British citizens were not to be considered aliens as to holding land); Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259, 270, 275 (1817) (protecting rights under treaty with France that their nationals not be treated as aliens with respect to property and inheritance); Geoffroy v. Riggs, 133 U.S. 258, 266-67 (1890) (referring to the treaty power as extending, inter alia, to the removal of the “disability of aliens to hold, transfer and inherit property”).
95. See, e.g., Asakura v. City of Seattle, 265 U.S. 332 (1924) (invalidating under treaty local law that did not allow non-citizens to acquire pawnbroker license); Jordan v. Tashiro, 278 U.S. 123, 127, 129-30 (1928) (interpreting treaty with Japan to authorize Japanese citizens to own land for business purposes, including for a hospital); Baker v. Portland, 2 F. Cas. 472, 474 (C.C.D. Ore. 1879) (No. 777) (although dismissing action due to lack of standing of contractor/citizen/taxpayer plaintiffs, stating that state cannot legislate to prevent Chinese from laboring on street improvements, since the right to make this country home under treaty encompassed right to labor); cf. Elkison v. Deliesseline, 8 F. Cas. 493, 494-95 (C.C.D. S.C. 1823) (No. 4,366) (Johnson, Circuit Justice) (indicating relief would be given to black seaman confined under state law while ship was in the state, under commercial convention granting reciprocal liberty of commerce with Great Britain and under United States commerce power).
97. Cf. Asakura v. City of Seattle, 265 U.S. 332, 341, 342 (1924) (noting that the treaty provided a rule of equality); Ah Fong, 1 F. Cas. at 218 (in habeas case protecting rights under treaty of Chinese immigrant, noting that equality of privilege is a constitutional right of all citizens and equality of protection is a constitutional right of all persons.); Tiburcio Parrott, 1 F. at 506 (Op. of Sawyer, J.) (in case granting relief to director of mining company who had been imprisoned under California law forbidding corporations from employing Chinese, indicating that corporation’s due process rights were violated); see also id. at 510 (noting that Fourteenth
Professor Golove has argued that *Missouri v. Holland*—generally seen as expanding the treaty power—reflected no break with the past, given the consistent enforceability of treaties as to matters such as alien real estate holdings that were within reserved state powers. In *Holland*, an equity case brought by the State of Missouri against a federal game warden, Justice Holmes upheld both a migratory bird treaty and implementing legislation that at the time exceeded congressional domestic legislative powers. The nineteenth-century treaty cases, however, unlike the *Holland* Court's allowing federal regulation of migratory birds, almost universally enforced norms that the federal courts were prepared to enforce independently of treaties for domestic litigants.

Such parallel rights included those under the Contracts Clause and the Privileges and Immunities Clause. For both these clauses, federal implementing power lay primarily with the federal judiciary rather than Congress; the Constitution did not explicitly grant Congress authority to enforce these provisions and it was uncertain that Congress had such power. Clearly, however, issues of compliance with the Contracts Clause and the Privileges and Immunities Clause were matters within federal power, but primarily as exercised by the judiciary.

It was unsurprising, then, that the Court would find that extending similar protections to aliens was within the treaty power, and that such
treaties were self-executing just as the coordinate constitutional rights were.\textsuperscript{102} Even to the extent treaties protected rights such as nonconfiscation of land that were not yet of federal constitutional dimension as applied to the states, the courts were enforcing rights that they saw as part of general constitutional law in diversity, and that would eventually become full-fledged constitutional protections. The nineteenth-century cases thus provide little support for federal power to use the treaty power to expand domestic rights beyond what would otherwise be within congressional power. Rather, they demonstrate a willingness to provide aliens with rights comparable to those that the courts were willing to enforce for domestic litigants.

While the history may not definitively resolve the modern scope of the treaty power, it suggests at a minimum that modern human rights treaties should not be considered presumptively self-executing.\textsuperscript{103} The aim of arguing for self-execution of modern human rights treaties is to effect an extension of rights in the domestic arena, unlike the treaty rights recognized in the past that accorded equality as to already existing domestic rights. What is more, modern treatymakers generally have not intended such rights to be self-executing to the extent they go beyond those recognized domestically.\textsuperscript{104} If the treatymakers wish to test the limits of the treaty power by making treaties self-executing, the courts should require a clearer statement of their intent to do so.\textsuperscript{105}

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102. Ware v. Hylton, 3 U.S. 199, 239 (1796) (Op. of Chase, J.) (indicating that the courts were the only proper authorities to decide whether a case was within the operation of the treaty provisions protecting British creditors).

103. If reserved power limitations restrict the treaty power, implementing legislation would have to come from state legislatures in some cases.

104. See generally Bradley & Goldsmith, \textit{Conditional Consent}, supra note 7, at 420 (discussing intent of treatymakers); see also Yoo, \textit{Textual and Structural Defense}, supra note 7, at 2219 (arguing that historically, treaties were not necessarily thought to be self-executing when they covered matters within congressional power, and that non-self-execution offers a way to avoid the structural difficulties wrought by globalization). In addition, many treaty provisions are sufficiently vague that one would not lightly infer an intent by treatymakers to create new fonts of domestically enforceable rights. Bradley & Goldsmith, \textit{Conditional Consent}, supra note 7, at 414-15 (discussing problems of treating vague provisions as self-executing).

105. Yoo, \textit{Textual and Structural Defense}, supra note 7, at 2220 (suggesting that treatymakers should provide clear statements if they want treaties to be self-executing). Professor Caleb Nelson in his comment on this article questions the use of the clear statement principle in the treaty context, because countries entering treaties are presumptively agreeing to the same thing, including rules of interpretation. Caleb Nelson, \textit{The Treaty Power and Self-Execution: A Comment on Professor Woolhandler’s Article}, 42 Va. J. Int’l L. 801, 815 (2002). Other countries will not have agreed on use of a clear statement principle relative to the treaty provisions that may exceed constitutional treaty powers. \textit{Id.} It is likely, however, that there are many aspects of multilateral human rights treaties as to which countries expect local variability as to interpretation and rules of interpretation.
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III. PUBLIC LAW LITIGATION AND FOREIGN AFFAIRS

A. Expanded Justiciability in the Domestic Sphere

Professor White has pointed out that Missouri v. Holland and other broad interpretations of the foreign affairs power preceded the New Deal expansion of federal power. Another perhaps surprisingly early doctrinal change appears in Holland—a change in standing doctrine. While the early twentieth-century Court has sometimes been characterized by scholars as having adhered to a common law baseline for standing, Holland’s recognition of Missouri’s standing to sue shows the increasing acceptance of what we would now call a public law model of litigation by the Court.

State standing to sue in federal court in the past had been largely limited to a state’s vindicating its own common law interests. In Holland, the state in accordance with traditional jurisprudence had based its claim for an injunction against the federal game warden on his interference with its ownership interest in the birds. Justice Holmes, however, deemphasized property rights as the basis for standing, stating that it was enough that the case was “a reasonable and proper means to assert the alleged quasi-Sovereign rights of the state.” Holmes apparently saw state litigation in federal court as a means for the state to raise directly its claims that the federal government had invaded the state’s constitutional powers to govern, rather than as a means for vindicating a limited set of common law rights.

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106. White, supra note 63, at 119, 147. In addition, he shows that the impetus for the expansive view of the treaty power did not follow liberal and conservative lines on the Court, and was based on a notion of the foreign affairs power as being outside of normal constitutional strictures. Id. at 119.


108. The Supreme Court had previously recognized a state’s proprietary interest in wild game. Geer v. Connecticut, 161 U.S. 519, 529, 534-35 (1896) (stating that the authority of the state over wild game is derived from common ownership by the people and that the state could restrict possession with intent to transport in interstate commerce). But cf. Hughes v. Oklahoma, 441 U.S. 322 (1979) (overruling Geer’s holding that the theory of state ownership exempted state regulation of wild animals from Commerce Clause scrutiny).


110. Id.; see also South Carolina v. Katzenbach, 383 U.S. 301 (1966) (allowing state to contest whether Congress could set voter qualifications in state and federal elections under the Fifteenth Amendment, presumably based on the state’s asserting its own constitutional rights to make and apply law concerning participation in elections).
Holland presaged further expansions of governmental and individual standing to sue in federal courts. Individuals could increasingly sue for the vindication of shared and attenuated interests. And states could sue to vindicate interests of their citizens, under parens patriae or under an expanded view of the state's own injury.

The broadening of standing brought with it an expansion of justiciable duties in constitutional and administrative cases, in that the executive's illegally subsidizing or under-regulating another party could more frequently create a justiciable duty to those who suffered some minimal injury from the government's noncompliance with law. Although a mere interest in seeing the law enforced was insufficient for standing, the focus of litigation increasingly became the breach of constitutional or statutory duty by the defendant rather than the injury to the plaintiff.

These expansions of standing and justiciable duties were manifestations of the public law model of litigation. The public law model allows, inter alia, for claims based on nontraditional and widely shared injuries by way of enhanced standing and aggregation of claims, and for claims whose primary aim is the vindication of constitutional


One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as parens patriae is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.

Id. at 608. In allowing parens patriae, the Court often finds that the state has its own interest in addition to its citizens'. Maryland v. Louisiana, 451 U.S. 725, 738-39 (1981) (allowing states to challenge Louisiana tax on natural gas based on states' proprietary interest as well as economic injury to their citizens).

113. See, e.g., Wyoming v. Oklahoma, 502 U.S. 437 (1992) (allowing Wyoming to contest Oklahoma legislation requiring Oklahoma coal-fired plants to use at least 10% Oklahoma-mined coal, based on Wyoming's loss of severance tax revenues on coal); cf. United States v. Arlington County, 669 F.2d 925, 929, 935 (4th Cir. 1982) (allowing the United States to sue to enjoin county from taxing in contravention of agreement an apartment building used by persons in the German Democratic Republic's diplomatic mission; holding that the United States was suing to vindicate its own sovereignty and did not need a proprietary or financial interest), cert. denied, 459 U.S. 801 (1982).

duties and statutory policies rather than traditional private rights. As discussed above, cases seeking to protect traditional interests in property and personal security were the primary means of raising issues of constitutional duties in the past. The aim of the newer model is to secure defendant's greater compliance with constitutional and statutory norms, even when the plaintiff lacks a common law injury and such vindication calls for institutional reforms and other complex affirmative injunctive relief.

Some commentators objected that the expansion of justiciability improperly encroached on the realm of the political branches. Nevertheless, this expansion of standing and duty was in the service of assuring governmental compliance with domestic law, and thus reinforced the presumptive justiciability of duties to comply with the Constitution and statutes.

B. The Problematic Attempt to Extend the Public Law Model to Foreign Affairs and Foreign Government Suits

There have been numerous attempts to apply versions of the public law model of litigation, with its expansion of justiciable injuries and duties, to the foreign affairs context. First, nations and individuals have attempted to use expanded standing to compel the United States to comply with broad nation-to-nation treaty obligations. Second, governments have sought to use expanded standing as a means of bolstering claims of individuals. Foreign nations have sued in their own

115. See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282-84, 1290-91 (1976) (describing the public law model). In her commentary on this article, Ann Althouse has questioned whether the Supreme Court has adopted the public law model for standing in domestic litigation. Ann Althouse, A Response to Professor Woolhandler's "Treaties, Self-Execution, and the Public Law Litigation Model," 42 Va. J. Int'l L. 789, 796 (2002). But while there are areas of contest at the margins, standing overall remains readily available for those challenging governmental action without their meeting traditional private law requirements for standing. See, e.g., Department of Commerce v. United States House of Representatives, 525 U.S. 316, 331-32 (1999) (recognizing standing of voters to challenge use of statistical sampling for census, when voters lived in a state likely to lose a representative).

116. Chayes, supra note 116, at 1284. Chayes also sees the model as responding to the "durable demand for justice." Id. at 1314. An alternative manifestation of the public law model seeks to aggregate small claims that would not be viable individually due to their small worth (although large claims are now routinely aggregated as well), also with a view to bringing the defendant's conduct in compliance with law. Kenneth Scott, Two Models of the Civil Process, 21 Stan. L. Rev. 937, 937-45 (1975) (describing a traditional plaintiff-focused conflict resolution model and a more recent defendant-focused behavior modification model).


118. Scalia, supra note 114, at 892-93 (arguing that enhancing standing causes encroachments on the political branches by increasing the issues that can be litigated as well as the occasions for judicial intervention).
names in support of individuals’ claims of treaty violations; in addition, governments have sought in non-treaty cases to raise claims effectively on behalf of groups of their citizens.

Although the courts have not generally encouraged attempts greatly to extend justiciability in these foreign affairs contexts, some scholars have argued that enforceability of treaties should presumptively be as broad as enforceability of domestic constitutional and statutory norms.\(^{119}\) Indeed, some suggest that the domestic public law model of litigation should apply largely unmodified in the foreign affairs arena.\(^{120}\) They argue that the federal courts’ wholesale refusal to entertain suits by foreign governments would erode Article III’s provision for jurisdiction over all cases arising under treaties.\(^{121}\)

I. Governmental and Individual Attempts to Litigate the Broad Nation-to-Nation Obligations of Treaties

Unencumbered by traditional claims for relief, governmental and private litigants have sometimes sought to employ the public law model to compel the United States to implement its own broad nation-to-nation treaty obligations, or to enforce treaty obligations against other nations. For example, citizens of Namibia and of the United States attempted to enjoin federal government officials from allegedly violating a UN security counsel resolution to embargo South Africa due to that country’s occupation of Namibia.\(^{122}\) In another suit, Panamanian

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\(^{119}\) Cf. Vazquez, *Laughing*, supra note 7, at 2215 (arguing that the political question doctrine, being construed narrowly as to constitutional and statutory norms, should also be construed narrowly in the treaty context).

\(^{120}\) Koh, *supra* note 3, at 2347, 2362 (1991) (citing rise of domestic public law litigation model as support for a transnational public law litigation model). Koh characterizes some individual suits for damages as public law litigation, because such suits seek judicial articulation of a norm “with an eye toward using that declaration to promote a political settlement in which both governmental and nongovernmental entities will participate” *id.* at 2349, 2368.

\(^{121}\) Bederman, *supra* note 4, at 1481 (arguing that broad restrictions on foreign countries’ ability to bring treaty claims would “have resulted in a marked erosion of judicial power allocated under the Constitution”); cf. Damrosch, *supra* note 44 (arguing that there was no present reason why foreign states should not be able voluntarily to submit their treaty claims to U.S. courts).

\(^{122}\) Diggs v. Richardson, 555 F.2d 848, 849 (D.C. Cir. 1976). The American citizens claimed to have been denied entry into Namibia, and a Namibian citizen alleged he would be subject to arrest if he returned. In addition, an organizational plaintiff sought to promote Namibian independence. See also Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972) (attempt by Rhodesians and Americans who could not enter Rhodesia to compel the United States to enforce UN embargo); Greenpeace USA v. Stone, 748 F. Supp. 749, 767 (D. Haw. 1990) (seeking to stop U.S. military movement of munitions through West Germany to be destroyed at Johnston Atoll Chemical Agent Disposal Center, as a violation, *inter alia*, of Basel Convention); cf. Japan Whaling Ass’n v. American Cetacean Soc’y, 478 U.S. 221, 230 (1986) (entertaining an ultimately unsuccessful action by conservation groups who were seeking to require the Secretary of Commerce to certify under statute that Japan not complying with a whaling treaty); Coordination
businesses sought damages for violations of the Hague Convention based on the alleged failure of the United States to provide sufficient police protection after the invasion of Panama. Such efforts are in line with scholars’ suggestions that a public law model of litigation should be used “to reform United States foreign policy.” These cases resemble domestic public law cases where constitutional or regulatory beneficiaries sue to enforce executive compliance with constitutional or statutory law.

The expansion of justiciability in the domestic arena, however, does not inevitably suggest enhanced litigability of nation-to-nation treaty compliance, because treaties start from a different baseline of enforceability from domestic law. While treaties are said to have the status of statutes, they do not create judicially enforceable obligations to the same extent, because of the traditional principle that the duties of one country to another are primarily matters for diplomacy and force. It followed from this principle that the federal courts’ Article III role in enforcing treaties was generally to apply provisions protecting individual rights, such as rights to enforce contracts and hold property, in individual cases. Thus, broad statements that the federal courts should seek to assure United States treaty compliance bear qualification.

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123. Goldstar v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (unsuccessful attempt by Panamanian businesses to hold United States liable for negligently failing to provide sufficient police protection after invading Panama, alleging, inter alia, violation of Hague Convention).

124. Koh, supra note 3, at 2369.

125. Lea Brilmayer, International Law in American Courts: A Modest Proposal, 100 YALE L.J. 2277, 2302 (1991) (indicating that individuals should not be able to use litigation to present “far-reaching foreign policy issues touching on horizontal relations between states”); id. at 2312-13 (suggesting that international law cases might more properly remain within a private, rather than public, law model of litigation).

126. The Head Money Cases, 112 U.S. 580, 598-99 (1884).

127. Vazquez, Treaty-Based Rights, supra note 11, at 1116, 1134 (indicating that standing law and the desirability of enforcing United States treaty obligations, rather than the self-execution doctrine, should normally determine when treaties create judicially enforceable rights and remedies); Vazquez, Laughing, supra note 7, at 2180 (“It cannot be said that the Constitution allocates enforcement of treaties generally to a branch other than the judiciary, but perhaps a court could say treaties as to certain subjects like arms control are beyond the enforcement powers of the courts.”); Vazquez, Four Doctrines, supra note 6, at 699 (stating that the purpose of the Supremacy Clause was to avert treaty violations attributable to the United States); Sloss,
Traditional justifications for the political question doctrine, moreover, revolve around the greater propriety of other branches' decision of an issue, and encompass concerns that the judiciary may be unable to confer a manageable and enforceable decree. These concerns often have more weight in the treaty enforcement context than in the domestic context. Arguments for use of a "transnational public law model" seem to reaffirm these concerns. According to the model's main proponent, such cases do not so much seek enforceable judgments as to obtain declarations that would serve as "political constraints upon the defendant's future conduct," or "to provoke judicial articulation of a norm, with an eye toward using that declaration to promote a political settlement," or "to create a bargaining chip to use in other political fora."

These aims suggest that the cases are not the traditional cases of a "judiciary nature" contemplated by Article III. Even the most expansive versions of public law litigation in domestic cases require redressability as a prerequisite for justiciability. The entry of unenforceable decrees as to matters traditionally treated as largely outside the realm of judicially determined law strains the judicial function, and does little to enhance the rule of law either nationally or internationally. Enforcement of the broad nation-to-nation aspects of treaties should largely remain a matter for the determination of the political branches, and for diplomacy and force.

supra note 5, at 1115 (arguing that not treating treaties as creating domestic law even when consistent with treaty-makers' intent would be "inconsistent with the goal of ensuring United States compliance with its international obligations").

128. Treaties with domestic Indian tribes seem appropriately to be treated similarly to domestic statutes. See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (deciding on merits suit by Indian band and individual Indians to enforce usufructuary rights under treaty). 129. Cherokee Nation v. Georgia, 30 U.S. 1, 29-30 (1831) (Johnson, J., dissenting) (addressing the President's refusal to use federal forces to protect treaty rights of Cherokees from Georgia's aggression).

130. See supra notes 123-24. This is not to say that the courts have not gone too far in some of their applications of the political question doctrine or other practices of deference in the foreign affairs context. See, e.g., United States v. Pink, 315 U.S. 203 (1942), discussed in White, supra note 63, at 120-34.

131. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 817-18 (D.C. Cir. 1984) (Bork, J., concurring) (noting the limited role of law in the international realm).

132. Koh, supra note 3, at 2369.

133. Id. at 2349.

134. Id.

135. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911) (James Madison's comment indicating that Article III was "limited to cases of a Judiciary nature"); Brilmayer, supra note 125, at 2312 (arguing that declaration of international legal principles is not an end in itself but part of performance of traditional duty to protect individuals).

2. *Government Attempts to Enforce Rights Belonging to Individuals*

Foreign nations have also brought cases alleging violations of their own treaty rights in aid of their nationals who have raised their own claims.\(^{137}\) For example, several nations have attempted to sue in their own right for particular violations of consular notification provisions for criminal defendants.\(^{138}\) Foreign governments have also brought non-treaty claims on behalf of individuals, either by asserting the government’s own rights or by employing parens patriae standing.\(^{139}\) For example, in *Estados Unidos Mexicanos v. DeCoster Egg Farm*,\(^{140}\) the Mexican government claimed standing to sue to address conditions of Mexican and Mexican-American migrant laborers under American statutes. Such cases have been lauded by many in the international law community.\(^{141}\)

Granted, expansive foreign governmental standing could often be justified by reference to the expansions of state standing\(^{142}\) discussed above, as well as to consuls’ sometimes asserting claims on behalf of individuals. Nevertheless, there is little to recommend enhancing the ability of foreign governments to sue to vindicate their citizens’ claims. Some courts have limited foreign governmental standing based on the

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\(^{137}\) See, e.g., *Bread v. Green*, 523 U.S. 371 (1998) (rejecting Paraguay’s attempt to assert violations of consular convention); *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (per curiam) (unsuccessful attempt by Germany to stay execution of German national pending International Court of Justice adjudication of Vienna Convention claim); *United Mexican States v. Woods*, 126 F.3d 1220, 1221-24 & n.3 (9th Cir. 1997) (not reaching justiciability issues, in holding that the Eleventh Amendment barred Mexico’s claims of violation of consular notification provisions and its claims that execution of mentally retarded Mexican national would violate treaties and customary international law); see also Curtis A. Bradley, *Bread*, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 557 (1999) (describing scholars’ arguments in *Bread* that treaty claims asserted by foreign governments should be subject to the usual standard of judicial review).

\(^{138}\) *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (collecting cases raising consular notification claims).


\(^{141}\) See, e.g., *Damrosch*, *supra* note 44, at 700 (arguing that United States courts should be able to entertain foreign nations’ claims of treaty violations).

\(^{142}\) In *DeCoster*, the Mexican government relied on *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 337 (1982), which recognized Puerto Rico’s standing to sue private companies for alleged discrimination against some of its citizens seeking employment on the mainland. *Id.* at 608.
foreign governments' having retained, unlike states, the right to use force. But perhaps an even better reason for not extending broad standing to foreign governments is that such an extension would duplicate many of the faults of expansive state standing.

First, individual rights properly should be asserted by individuals, thus reinforcing their status as rightsholders. In the past, individuals were the primary parties to assert claims under treaties. Indeed, in many modern cases brought by governments, individuals have raised overlapping claims that the federal courts are prepared to resolve. Thus, arguments that the federal courts are ignoring their obligations under Article III by refusing to hear foreign governments’ cases of treaty violations are overblown.

Governmental standing, moreover, frequently represents an attempt to evade existing defenses to individual cases—defenses that presumably exist for appropriate reasons such as procedural regularity, remedial proportionality, and the proper allocation of fault. While modern aggregation of claims may lessen some problems of costs and proof of individual claims, suits in which the government claims its own injury often seek entirely to side-step individual defenses. For example, cases in which foreign governments allege violations of their own treaty rights by failure of state officials to implement consular notification provisions seek to circumvent the criminal defendant’s procedural defaults and the lack of prejudicial error. Domestic and foreign governmental tobacco cases are also partly designed to avoid individual defenses, such as the lack of individual reliance on tobacco company misrepresentations that smoking was non-addictive.

Problems with individual cases sometimes arise due to the government’s own failure to address through legislation the problem it

143. DeCoster, 229 F.3d at 337-38 (reasoning that states could bring claims because they had given up certain aspects of their sovereignty in joining the union, and that suits were an alternative to force); see also id. at 339 (further distinguishing Alfred L. Snapp, in that Puerto Rico not only had standing based on its interest in protecting its citizens, but also based on its interest in equal participation in a federal employment scheme).

144. Id. at 334 (indicating that private plaintiffs had sued for themselves and others). Governmental standing to sue on behalf of individuals may raise problems of extinguishing private claims, or more generally of undermining the concept of individual rights enforcement. Woolhandler & Collins, supra note 22, at 439-40, 512.

145. See, e.g., Breaux, 523 U.S. at 373 (discussing the defendant’s procedural defaults). In the past, state and foreign government suits on state bonds were attempts to circumvent sovereign immunity defenses that were available against individuals suing on bonds. New Hampshire v. Louisiana, 108 U.S. 76 (1883) (rejecting state attempt to sue on bonds for its citizens); cf. Monaco v. Mississippi, 292 U.S. 313 (1934) (holding that state could assert sovereign immunity as to claims on bonds owned by Monaco, after donation by a private party). But cf. South Dakota v. North Carolina, 192 U.S. 286 (1904) (allowing one state to sue another on bonds donated by a private party).
now seeks to address by litigation.\textsuperscript{146} This phenomenon is particularly present in governmental civil suits for damages. For example, in India's Bhopal case—hailed by some as a shining example of transnational public law litigation\textsuperscript{147}—the government sought to escape deficiencies of its own regulatory and remedial systems by using American substantive and procedural standards.\textsuperscript{148} Foreign governmental tobacco litigation to recover health related costs in United States courts, like cases filed by domestic governments, seeks to avoid the effects of the government's own failure to regulate due to a lack of political consensus. And to the extent governmental civil litigation often substitutes for effective prospective legislation and enforcement in instances like the Bhopal and tobacco litigation, it raises problems of undue retroactivity and, in the case of foreign governments, related problems of extraterritoriality.\textsuperscript{149} It may be objected that retroactivity goes along with the program of litigation. But when governments use lawsuits with unexpected choices of law or novel theories in pursuit of remedies for the many, the retroactivity exceeds that of traditional cases.

\textsuperscript{146} In re Tobacco/Governmental Health Care Costs Litigation, 83 F. Supp. 2d 125, 126 (D.D.C. 1999) (noting that "Guatemala claims that it failed to regulate the use of tobacco products by its citizens adequately because of the tobacco industry's continued misrepresentations."); Complaint, Florida v. American Tobacco Company (Fla. 15th Jud'l Cir. Civil Action No. 95-1466, filed Feb. 21, 1995), at 82, para. 145 (on file) ("The defendants have avoided regulation and have been and are able legally to promote the sale of their cigarettes and other tobacco products to the residents of Florida by continuing to misinform the federal and State authorities about the true carcinogenic, pathologic and addictive qualities of cigarettes and other tobacco products.").

\textsuperscript{147} Koh, supra note 3, at 2369-70.

\textsuperscript{148} In re Union Carbide Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842, 847-49 (S.D.N.Y. 1986) (noting plaintiffs' arguments as to the inadequacies of the Indian legal system, including its tort law); id. at 862 (noting plaintiff and amici arguments that "American courts should administer justice to the victims of the Bhopal plant disaster as they would to potential American victims of industrial accidents"). As much could be said of foreign governments' suing under United States antitrust laws. Pfizer v. Government of India, 434 U.S. 308, 326-27 (1978) (Burger, C.J., dissenting) (objecting to standing of India to sue for its own losses under U.S. antitrust laws, because governments could enact and enforce their own antitrust statutes). Even Mexico's attempt to represent its workers under United States law in \textit{DeCoster}—despite the fact that the particular problem could not have been addressed by Mexican legislation—was perhaps an attempt to distract from that country's own poor record of regulating the conditions of farmworkers within its borders. Ginger Thompson, \textit{At Home, Mexico Mistreats Its Migrant Farmhands}, N.Y. TIMES, May 6, 2001, at 1 ("President Vicente Fox has been an outspoken advocate of Mexican laborers in the United States, pressing Washington to improve their working conditions. But in his five months in office, he has not devoted a speech to the cases of migrant farmworkers at home.").

\textsuperscript{149} In re Gas Plant Disaster, 634 F. Supp. at 862 (addressing double standard argument).
** CONCLUSION **

The pre-modern cases dealing with treaty issues, like those addressing constitutional issues, followed a private law model of litigation, and vindicated rights similar to those that the federal courts protected for domestic litigants under the Constitution and general common law. These cases do not provide strong support for using treaties to establish rights that otherwise exceed federal domestic competency, nor do they suggest that treaties adding to domestic rights should be presumptively self-executing. And while the public law model has supplemented the private law model as a means to litigate many constitutional and statutory issues, the public law model should not be applied wholesale to the foreign relations context where the Court has consistently recognized the lesser role of judicially enforced law than in the domestic sphere.