

## AGORA: MEDELLÍN

### MEDELLÍN'S NEW PARADIGM FOR TREATY INTERPRETATION

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Much of the scholarly attention given to the U.S. Supreme Court's March 2008 decision in *Medellín v. Texas*<sup>1</sup> has focused on the Court's supposed ruling as to the presumptive non-self-execution of international agreements entered into by the United States, and the power of the president to implement such agreements without an act of Congress.<sup>2</sup> Less heed has been paid to the impact and implications of the Court's reasoning and analysis in interpreting the four international agreements at issue in the case: the 1945 United Nations Charter and Statute of the International Court of Justice, and the 1963 Vienna Convention on Consular Relations<sup>3</sup> and its Optional Protocol.<sup>4</sup> Although the Court's analysis of the self-execution questions is beyond the scope of my contribution to this Agora, I acknowledge that the jurisprudence of treaty interpretation fits uncomfortably with the calculus of an international agreement's self-execution into U.S. law. And while it may seem obscure to view the *Medellín* decision through the lens of treaty interpretation, that is what truly brings its importance into focus, so that its impact may ultimately be seen as clarifying the established norms of U.S. foreign relations law, particularly in the selection of appropriate sources for treaty construction and the deference to be granted to various foreign relations actors and institutions.

I have written elsewhere on the canons of construction that the U.S. Supreme Court has employed in interpreting treaties, the extent to which such canons are consistent with the norms and hermeneutics for other kinds of legal texts (especially statutes and contracts), and the nature of the judiciary's deference to the interpretive positions advanced by the executive branch in cases decided by the Rehnquist Court from 1986 to 1993.<sup>5</sup> The topic of treaty interpretation in U.S. courts has since spawned a vast literature,<sup>6</sup> which has considered (in great

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<sup>1</sup> 128 S.Ct. 1346 (2008).

<sup>2</sup> See, for example, in this Agora, Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AJIL 540 (2008); Steve Charnovitz, *Revitalizing the U.S. Compliance Power*, 102 AJIL 551 (2008); Carlos Manuel Vázquez, *Less Than Zero?* 102 AJIL 563 (2008). See also Mark E. Wojcik, *The United States, the International Court of Justice, and the Vienna Convention on Consular Relations: Introductory Note to Medellín v. Texas*, 47 ILM 281 (2008); Margaret E. McGuinness, *Three Narratives of Medellín v. Texas*, 31 SUFFOLK TRANSNAT'L L. REV. 227 (2008); Margaret E. McGuinness, Case Report: *Medellín v. Texas*, in 102 AJIL 622 (2008).

<sup>3</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261 [hereinafter VCCR].

<sup>4</sup> Optional Protocol to the Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 UST 325, 596 UNTS 487 [hereinafter VCCR Optional Protocol].

<sup>5</sup> David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994).

<sup>6</sup> See, e.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723 (2007); Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116

depth) whether there is a distinctive “American” approach to the subject, one at variance with international expectations, especially the rules of interpretation enshrined in the 1969 Vienna Convention on the Law of Treaties.<sup>7</sup>

I do not propose to trod that well-surveyed terrain here because I believe the *Medellin* decision signifies a substantial break with previous disputations between members of the Supreme Court as to the proper modalities of treaty interpretation, and fashions a new paradigm for treaty construction with respect to three essential matters: the legitimate sources that judges may use in treaty interpretation, the degree of their deference to U.S. executive branch positions, and the general canons (or default rules) to be followed when construing treaties. In this essay, I explore these three clusters of issues, not only in the context of the *Medellin* decision (and the positions taken by the parties), but also with reference to the trajectory of jurisprudence seen in the later years of the Rehnquist Court and the decisions of the new Roberts Court. While *Medellin*'s new paradigm offers judges greater flexibility in selecting materials they might use in treaty interpretation, and serves as a cautionary tale for those who might reflexively follow executive branch positions, it does relatively little to articulate clear canons of construction and may actually further muddle the distinctions between international agreements as contracts between nations and as essentially legislative texts.

## I. TEXTUALISM AND THE LEGITIMATE SOURCES OF TREATY INTERPRETATION

For nearly the entire tenure of the Rehnquist Court, a battle raged among the Justices as to whether extratextual sources of treaty interpretation were appropriate materials to be consulted. In large measure, this debate featured Justice Antonin Scalia (at times joined by Justice Clarence Thomas and Chief Justice William H. Rehnquist) in an effort to limit treaty interpretation to purely textual sources and methods, consistent with those Justices' views about the proper modalities for statutory construction.<sup>8</sup> Other Justices, during this period, stoutly resisted the purely textualist approach espoused by Justice Scalia and his brethren; Justice William J. Brennan went so far as to call it a “self-affixed blindfold that prevents the Court from examining anything beyond the treaty language itself.”<sup>9</sup> In the Kabuki play that sometimes characterizes the internal jurisprudential schisms within the Court, treaty interpretation cases had become a surrogate for larger questions of judicial authority and interpretive methods for all legal texts,<sup>10</sup> but especially of federal statutes and the Constitution itself.

Happily, that desultory drama is now over, and the *Medellin* decision may well be regarded as its final curtain. The reason lies in the opening words of the Court's characterization of the

YALE L.J. 824 (2007); John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law*, 42 VA. J. INT'L L. 163 (2001); Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777 (2008); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998); Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885 (2005).

<sup>7</sup> Vienna Convention on the Law of Treaties, Arts. 31, 32, *opened for signature* May 23, 1969, 1155 UNTS 331 [hereinafter VCLT].

<sup>8</sup> See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Chan v. Korean Air Lines*, 490 U.S. 122 (1989); *United States v. Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring); *O'Connor v. United States*, 479 U.S. 27 (1986).

<sup>9</sup> *Chan*, 490 U.S. at 136 (Brennan, J., concurring, joined by Marshall, Blackmun, & Stevens, JJ.).

<sup>10</sup> See Bederman, *supra* note 5, at 975–91.

general enterprise of treaty construction, written by Chief Justice John G. Roberts on behalf of the majority:

The interpretation of a treaty, like the interpretation of a statute, begins with its text. *Air France v. Saks*, 470 U.S. 392, 396–397 (1985). Because a treaty ratified by the United States is “an agreement among sovereign powers,” we have also considered as “aids to its interpretation” the negotiation and drafting history of the treaty as well as “the post-ratification understanding” of signatory nations. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996); see also *United States v. Stuart*, 489 U.S. 353, 365–366 (1989); *Choctaw Nation v. United States*, 318 U.S. 423, 431–432 (1943).<sup>11</sup>

With these well-formulated sentences—and, just as importantly, well-chosen citations—the Court has indicated (with Justices Scalia, Anthony M. Kennedy, Thomas, and Samuel A. Alito joining the majority) a new readiness to accept eclecticism in the selection of materials relevant to a treaty’s interpretation. The actual text of an international agreement may be the alpha of hermeneutics—the proverbial starting point—but, at least as understood in traditional international law doctrine, it is not necessarily the omega by way of a definitive conclusion about the treaty’s true meaning.<sup>12</sup> Some may see Chief Justice Roberts’s statement as an obvious cliché, but in the context of debates among the Justices running over the past two decades, it is actually an armistice of sorts.

Two difficult questions are raised by the *Medellín* Court’s general pronouncement on the sources and materials to be employed in treaty interpretation. First, when is it appropriate to break from the treaty text and consult extratextual sources? Second, aside from the two baskets of materials mentioned by Chief Justice Roberts in his summary (“negotiation and drafting history of the treaty as well as ‘the post-ratification understanding’ of signatory nations”<sup>13</sup>), what other sources and methods of interpretation are fair game? Implicitly addressing the first question, the Court was compelled to engage the meaning of the provision in Article 94 of the UN Charter that “[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.”<sup>14</sup> The Court acknowledged this task as having resulted from the U.S. accession to the VCCR Optional Protocol and the issuance of the ICJ’s *Avena* judgment<sup>15</sup> pursuant to that compromissory clause.<sup>16</sup> The Court held that “[t]he most natural reading” of the Optional Protocol was “as a bare grant of jurisdiction” that “says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment. The Protocol is similarly silent as to any enforcement mechanism.”<sup>17</sup>

<sup>11</sup> *Medellín*, 128 S.Ct. 1346, 1357–58 (2008).

<sup>12</sup> See DAVID J. BEDERMAN, CLASSICAL CANONS: RHETORIC, CLASSICISM AND TREATY INTERPRETATION 180–319 (2001); ILMAR TAMMELLO, TREATY INTERPRETATION AND PRACTICAL REASON: TOWARD A GENERAL THEORY OF LEGAL INTERPRETATION (1967); TSUNE-CHI YÜ, THE INTERPRETATION OF TREATIES (photo reprint 1968) (1927); Maarten Bos, *Theory and Practice of Treaty Interpretation (Part One)*, 27 NETH. INT’L L. REV. 3 (1980); Charles Fairman, *The Interpretation of Treaties*, 20 TRANSACTIONS GROTIUS SOC’Y 123 (1935); Charles Cheney Hyde, *Interpretation of Treaties by the Permanent Court of International Justice*, 24 AJIL 1 (1930); Paul Pic, *De l’interprétation des traités internationaux*, 17 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1 (1910); Quincy Wright, *The Interpretation of Multilateral Treaties*, 23 AJIL 94 (1929).

<sup>13</sup> *Medellín*, 128 S.Ct. at 1357 (quoting *Zicherman v. Korean Air Lines*, 516 U.S. 217, 226 (1996)).

<sup>14</sup> UN CHARTER Art. 94(1).

<sup>15</sup> *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 ICJ REP. 12 (Mar. 31).

<sup>16</sup> See 128 S.Ct. at 1353–54, 1358.

<sup>17</sup> *Id.* at 1358.

While the Court's emphasis on a "natural reading" of the text is unobjectionable—and entirely consistent with the emphasis of the Vienna Convention on the Law of Treaties on the "ordinary meaning" of a treaty passage<sup>18</sup>—it will certainly be contested whether Chief Justice Roberts's observation is correct that "submitting to [the] jurisdiction [of an international court] and agreeing to be bound are two different things."<sup>19</sup> That, after all, is the logical predicate for the Court's holding that neither the VCCR Optional Protocol nor the UN Charter imposes an affirmative obligation on the United States, at least in its domestic law, to implement and enforce ICJ judgments.<sup>20</sup>

*Medellín's* textualism is largely exhibited through the Court's gloss of the "undertakes to comply" provision of Charter Article 94.<sup>21</sup> Chief Justice Roberts noted that the language "does not provide that the United States 'shall' or 'must' comply with an ICJ decision."<sup>22</sup> The Court majority bolstered this textual interpretation with a cross-reading of other, nearby provisions of the Charter,<sup>23</sup> including the language of Article 94(2):

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

And, if that was not enough textual proof (at least for the majority), Chief Justice Roberts discussed the general language under Article 59 of the ICJ Statute suggesting that since ICJ proceedings involve only states and ICJ decisions have "no binding force except between the parties and in respect of that particular case,"<sup>24</sup> individuals cannot directly benefit from that Court's judgments, even in the context of diplomatic protection.<sup>25</sup> The majority's emphasis on textualism was perhaps to be expected, precisely because the matter to be divined was self-execution or non-self-execution of an international agreement, and the Supreme Court's examination of a treaty's text to make that determination has a long pedigree. As Chief Justice Roberts observed, "The interpretive approach employed by the Court today—resorting to the text—is hardly novel,"<sup>26</sup> dating back to the *locus classicus* of the treaty self-execution doctrine in *Foster and Percheman*.<sup>27</sup>

<sup>18</sup> VCLT, *supra* note 7, Art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

<sup>19</sup> *Medellín*, 128 S.Ct. at 1358.

<sup>20</sup> *Cf.* Brief for the United States as Amicus Curiae Supporting Petitioner at 22, *Medellín v. Texas*, 128 S.Ct. 1346 (2008) (No. 06-984), 2007 WL 1909462 (citing ICJ Statute Art. 59, & [UN CHARTER] Art. 94(1) ("Under the Optional Protocol and the U.N. Charter, the *Avena* decision . . . continues to impose a treaty-based obligation on the United States 'to comply with the decision' without regard to the merits of the treaty interpretation that led to the decision.")).

<sup>21</sup> *See* text at note 14 *supra*.

<sup>22</sup> *Medellín*, 128 S.Ct. at 1358.

<sup>23</sup> *See id.* at 1359 & n.6 (quoting UN CHARTER Art. 94(2)).

<sup>24</sup> ICJ Statute Art. 59.

<sup>25</sup> *Medellín*, 128 S.Ct. at 1360–61 (quoting ICJ Statute Arts. 34(1) & 59, and discussing the ICJ's diplomatic protection cases).

<sup>26</sup> *Id.* at 1362.

<sup>27</sup> *Id.* (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87, 89 (1833)); *cf.* *Medellín v. Dretke*, 544 U.S. 660, 686 (2005) (O'Connor, J., dissenting) ("To ascertain whether Article 36 [of the VCCR] confers a right on individuals, we first look to the treaty's text as we would with a statute's.").

Of course, utterly absent from the majority opinion in *Medellín* is any acknowledgment that the language of Charter Article 94(1) might be ambiguous, and thus require extratextual means of interpretation, as per the VCLT's formulation.<sup>28</sup> This was a major innovation of the Vienna Convention,<sup>29</sup> creating a certain tolerance for textual ambiguity—but only up to a point. It was only in Justice John Paul Stevens's concurrence in *Medellín* that the awful truth was revealed: the “undertake to comply” language of Charter Article 94(1) may well be ambiguous, insofar as it may (or may not) grant self-executing effect to ICJ judgments in United States law.<sup>30</sup> But whereas neither the Court majority, nor Justice Stevens's concurrence, cared to look deeper into the text of Article 94,<sup>31</sup> it is only in Justice Stephen G. Breyer's dissent (joined by Justices David H. Souter and Ruth Bader Ginsburg) that the “undertake to comply” language is truly dealt with. And although Justice Breyer disputed Justice Stevens's contention that the language of Article 94 is “perfectly ambiguous,”<sup>32</sup> his preferred means of resolving textual ambiguity was to engage in basic interpretive methods: consulting dictionary definitions of terms<sup>33</sup> and cross-reading the English text of an agreement with those in other authentic languages as a clue to meaning.<sup>34</sup>

The majority's textual handling of Charter Article 94 might be justly criticized for its hyper-technical emphasis on the need for a clear statement of self-executing effect, and the Court's refusal to read implied terms (especially those impelled by good faith) into a treaty provision.<sup>35</sup> In this respect, the *Medellín* decision strongly parallels what was probably the most controversial treaty interpretation case of the Rehnquist Court, the decision in *United States v. Alvarez-Machain* that inasmuch as the 1978 U.S.-Mexico Extradition Treaty<sup>36</sup> did not expressly prohibit the forced rendition of criminal suspects,<sup>37</sup> it was a permissible practice. Likewise, the

<sup>28</sup> VCLT, *supra* note 7, Art. 32 (a), (b) (such extratextual means appropriate where a textual reading “leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly absurd or unreasonable”).

<sup>29</sup> See BEDERMAN, *supra* note 12, at 200–14; see also ARNOLD MCNAIR, *THE LAW OF TREATIES* (1961); Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation*, 22 *CURRENT LEGAL PROBS.* 205 (1969); Ian Sinclair, *The Vienna Conference on the Law of Treaties*, 19 *INT'L & COMP. L.Q.* 47 (1970).

<sup>30</sup> *Medellín*, 128 S.Ct. at 1373–74 (Stevens, J., concurring) (quoting *Foster*, 27 U.S. (2 Pet.) at 314) (“But this concern counsels in favor of reading any ambiguity in Article 94(1) as leaving the choice of whether to comply with ICJ judgments, and in what manner, ‘to the political, not the judicial department.’”).

<sup>31</sup> Justice Stevens did resort to a cross-reading with Articles 36(1) and 59 of the ICJ Statute, but, like the majority, reached indeterminate results, which do not change his ultimate conclusion that ICJ judgments are not self-executing with binding effect for U.S. courts. *Id.* at 1374.

<sup>32</sup> *Id.* at 1384 (Breyer, J., dissenting).

<sup>33</sup> *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2770 (2d ed. 1939) (for entry on “undertake”)).

<sup>34</sup> *Id.* (citing *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88–89 (1833)) (quoting Spanish version of the UN Charter, in an interpretive move meant expressly to resonate with the Supreme Court's revisiting of the self-execution issue in *Percheman* after examining the Spanish text of the 1819 treaty).

<sup>35</sup> See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 437–38 (2006) (applying a literalist interpretation to the 1971 UN Convention on Psychotropic Substances, Feb. 21, 1971, 32 UST 543, 1019 UNTS 175). Compare *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 72 (1821) (Story, J.) (“[T]his Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise.”), with *Maximov v. United States*, 373 U.S. 49, 54 (1963) (the clear language of a treaty controls unless “application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of the signatories”).

<sup>36</sup> Extradition Treaty, U.S.-Mex., May 4, 1978, 31 UST 5059.

<sup>37</sup> See *United States v. Alvarez-Machain*, 504 U.S. 655, 664–70 (1992); see also Bederman, *supra* note 5, at 982–83.

*Medellin* opinion builds on the Court's 2006 ruling in *Sanchez-Llamas v. Oregon*,<sup>38</sup> regarding the underlying interpretation of VCCR Article 36 on consular notification and access as not barring what would otherwise be procedural default of suppression and postconviction remedies.<sup>39</sup> In this regard, the textualism espoused by the *Medellin* majority might be uncharitably viewed as a cramped and unreflective version of the VCLT's full-throated recognition of treaty text, not only in the specific context of related treaty provisions, but also in light of the "object and purpose" of the instrument.<sup>40</sup>

## II. THE CALCULUS OF DEFERENCE

Most often, when scholars write of deference in the realm of treaty interpretation, it exclusively involves a court's unquestioning acceptance of the interpretive positions of the executive branch in a particular litigation. Indeed, I may be most responsible for that conflation, along with the quip that judicial deference to executive branch positions "is the single best predictor of interpretive outcomes in American treaty cases."<sup>41</sup> The Supreme Court's *Medellin* decision provides a needed respite from such jurisprudential caricature, largely because the calculus of deference, at least in the Supreme Court's view, has come to be equated with a new willingness to consider and evaluate nontextual sources for treaty construction.

And it is not just paying respect to executive branch positions that marks this new phenomenon. Rather, deference has been extended to the views of other foreign relations actors: the Senate (in its consideration of advice and consent for an instrument), our treaty partners (as they fashion a "negotiation and drafting history of the treaty as well as [their] ' . . . postratification understanding[s]'"<sup>42</sup>), and international tribunals (that might have occasion to give an authoritative interpretation of a treaty provision). To a surprising degree, *Medellin* features a sustained and coherent discussion not only of the propriety of even consulting these extratextual materials, but of the degree of deference that should be paid to them.

Perhaps the most astonishing interpretive move in *Medellin* is the Court's ready acceptance, after years of absence from its decisions, of the probative impact of Senate ratification debates and understandings in creating a "legislative history" for international agreements. This question had previously been another flash point of internal debate within the Court. After some occasions on which Senate advice-and-consent proceedings—particularly the president's transmittal documents, hearing testimony in the Senate Foreign Relations Committee, and

<sup>38</sup> *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006).

<sup>39</sup> See *id.* at 2681, 2685–86 (critiquing ICJ's textual analysis on this point), 2691–92, 2698–99 (Breyer, J., dissenting) (glossing Article 36).

<sup>40</sup> See *supra* note 18; see also Bederman, *supra* note 5, at 972–75.

<sup>41</sup> Bederman, *supra* note 5, at 1015 (noting that of ten Rehnquist Court cases surveyed in the article, in all but one the Supreme Court followed the interpretive position of the executive branch, as enunciated in party or amicus briefs presented in the case); see also David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1442–45 (1999). For literature testing the limits of my thesis, see Bradley, *supra* note 6, at 701–02; Alex Glashauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 37 (2005); David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT'L L. 20, 33 (2006); Tim Wu, *Treaties' Domain*, 93 VA. L. REV. 571, 643 (2007).

<sup>42</sup> See text at note 11 *supra* (quoting *Medellin*) and cited cases.

debates—were routinely cited by the Court,<sup>43</sup> this practice stopped once the squabble between Justices Scalia and Brennan erupted in *United States v. Stuart*, where the majority opinion liberally cited ratification materials.<sup>44</sup> These references drew a response, in Justice Scalia’s concurrence, characterizing the use of such materials as “unprecedented.”<sup>45</sup> Irrespective of whether this assertion was correct,<sup>46</sup> Justice Scalia arrayed quite a number of arguments against the use of Senate ratification materials as an extrinsic aid to treaty interpretation, including the illegitimacy of relying on the U.S. unilateral positions, and the problematic constitutionality of depending on Senate understandings of treaty meaning in the face of (perhaps contrary) executive branch positions.<sup>47</sup> Whether because this debate exposed a critical fracture in the Court’s hermeneutic jurisprudence and was not to be exacerbated, or because subsequent treaty interpretation cases did not feature international agreements with a fully developed “legislative history,” citations to Senate ratification debates simply ceased after *Stuart*.

That is, they ceased until *Medellín*, in which Chief Justice Roberts made reference to the ratification proceedings for the United Nations Charter, and generally elevated the importance of the Senate’s understandings of the meaning of a treaty text at the time of its advice and consent. In construing Charter Article 94, the *Medellín* majority relied extensively on the Senate’s 1945 and 1946 hearings and debates.<sup>48</sup> Examining such materials was necessary to the Court’s conclusion that “the President and Senate were undoubtedly aware in subscribing to the U.N. Charter and [VCCR] Optional Protocol” that “the United States retained the unqualified right to exercise its veto of any Security Council resolution” purporting to enforce an ICJ judgment.<sup>49</sup> Chief Justice Roberts even put a sharper point on this contention: “In light of the U.N. Charter’s remedial scheme, there is no reason to believe that the President and Senate signed up for” a result in which ICJ judgments would be “regarded as automatically enforceable domestic law . . . immediately and directly binding on state and federal courts pursuant to the Supremacy Clause.”<sup>50</sup>

<sup>43</sup> See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 713–14 (1988) (Brennan, J., concurring) (relying on transmittal and submittal letters, committee testimony, and U.S. delegation reports); *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 530–38 (1987) (citing transmittal letter and hearing testimony).

<sup>44</sup> *United States v. Stuart*, 489 U.S. 353, 366–68 (1989) (Brennan, J., for the majority) (citing S. EXEC. REP. NO. 77-3 (1942), and 88 CONG. REC. 4714 (1982), to construe tax treaty with Canada).

<sup>45</sup> *Id.* at 373 (Scalia, J., concurring).

<sup>46</sup> See Detlev F. Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AJIL 546 (1989); see also Bederman, *supra* note 5, at 999–1002.

<sup>47</sup> *Stuart*, 489 U.S. at 374–76 (Scalia, J., concurring); see also *id.* at 367–68 n.7 (for Justice Brennan’s response).

<sup>48</sup> See 128 S.Ct. at 1359–60 (citing *The Charter of the United Nations for the Maintenance of International Peace and Security: Hearings Before the Senate Comm. on Foreign Relations*, 79th Cong. 124–25, 286 (1945) (statement of Leo Paslovsky, special assistant to the secretary of state for international organizations and security affairs); *A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before a Subcomm. of the Senate Comm. on Foreign Relations*, 79th Cong. 142 (1946) (statement of Charles Fahy, legal adviser of the Department of State)).

<sup>49</sup> *Id.* at 1359; see also Brief for Respondent at 20–24, *Medellín v. Texas*, 128 S.Ct. 1346 (2008) (No. 06-984), 2007 WL 242837 (for detailed briefing on ratification history).

<sup>50</sup> 128 S.Ct. at 1360; see also *id.* at 1358 (reasoning that “the Senate that ratified the U.N. Charter [did not] intend[ ] to vest ICJ decisions with immediate legal effect in domestic courts”), 1362 (“The dissent’s understanding of the treaty route, depending on an ad hoc judgment of the judiciary without looking to the treaty language—the very language negotiated by the President and approved by the Senate—cannot readily be ascribed to those same Framers.”).

Finally, the *Medellin* majority observed that textualism as a prime directive of treaty interpretation is necessary because “treaty language . . . is after all what the Senate looks to in deciding whether to approve the treaty.”<sup>51</sup> This paean to the paramountcy of Senate understandings of treaty meaning at the time of advice and consent may well make sense as a reason to employ such extratextual materials as an aid to interpretation. But where is Justice Scalia here, and, one wonders, why did he not vigorously renew his objections to the use of such sources, as presented nearly twenty years before in *Stuart*? One reason may be that the Senate’s understanding of Charter Article 94 in 1946 arguably accords with that of both the Truman administration (at the time of ratification) and today’s Bush administration (at the time of interpretation). But what if this were not the case and there was a real disconnect between a Senate’s understanding of a treaty and that of a submitting administration, or (even more likely) that of a subsequent administration? This is not an extravagant scenario, as reflected in the debates on the Anti-ballistic Missile Treaty<sup>52</sup> and issues of construction regarding more pedestrian treaties.<sup>53</sup> The *Medellin* majority opinion interestingly opens the door to an interpretive and constitutional debate that seemed to have been closed for a generation.

The second broad set of materials that the Supreme Court has now consistently endorsed as a legitimate source for the extrinsic interpretation of treaties revolve around the expectations of the U.S. treaty partners, as reflected both in “the negotiation and drafting history of the treaty” and in “the post-ratification understanding’ of signatory nations.”<sup>54</sup> The Supreme Court has long recognized the use of an international agreement’s *travaux préparatoires* as proper. As I have written elsewhere,<sup>55</sup> the Court’s employment of such material has largely been haphazard and inconsistent with the VCLT’s command that recourse to *travaux* should be truly limited as a “supplemental means of interpretation,” to be invoked only where a textual reading leaves the meaning ambiguous or obscure, or leads to an absurd or unreasonable result.<sup>56</sup> Nevertheless, the use of treaty-negotiating history has become a fixture in Supreme Court doctrine.<sup>57</sup> But it is curiously absent from *Medellin*, where in both the

<sup>51</sup> *Id.* at 1362.

<sup>52</sup> For commentary, see Bederman, *supra* note 5, at 958–59 & n.19; Michael J. Glennon, *Interpreting “Interpretation”: The President, the Senate, and When Treaty Interpretation Becomes Treaty Making*, 20 U.C. DAVIS L. REV. 913 (1987); Malvina Halberstam, *The Use of Legislative History in Treaty Interpretation: The Dual Treaty Approach*, 12 CARDOZO L. REV. 1645 (1991); David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353 (1989); W. Michael Reisman, *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 YALE J. INT’L L. 316 (1990).

<sup>53</sup> See, e.g., *Rainbow Navigation v. Dep’t of the Navy*, 686 F.Supp. 354, 357–58 (D.D.C. 1988) (interpretation of provision in military cargo agreement with Iceland).

<sup>54</sup> See text at note 11 *supra*.

<sup>55</sup> Bederman, *supra* note 5, at 992–96.

<sup>56</sup> VCLT, *supra* note 7, Art. 32, *quoted in* note 28 *supra*.

<sup>57</sup> See, e.g., *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 184–87 (1993) (consulting *procès verbaux* at the diplomatic conference adopting the Refugees Convention); *Eastern Airlines v. Floyd*, 499 U.S. 530, 543–46 (1991) (using documentation prepared by the Comité International Technique d’Experts Juridiques Aériens); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700–04 (1988) (placing emphasis on successive texts of Hague Evidence Convention and failed amendments), 711–13 (Brennan, J., concurring) (employing the official treaty commentary prepared by the Hague Conference on Private International Law). *But see* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 437–38 (2006) (rejecting interpretive conclusion drawn from the use of an official commentary to the UN Convention on Psychotropic Substances, but also holding—unrelated to the interpretation issue—that “[t]he fact that *hoasca* is covered by the Convention . . . does not automatically mean that the Government has demonstrated a compelling interest in applying the Controlled Substances Act, which implements the Convention”).

majority and the dissenting opinions rarely a reference is made to the detailed *travaux* of the United Nations Charter and ICJ Statute at the San Francisco Conference on International Organization of 1945. Whether this omission can be attributed to a failure of imagination in the briefing of the case, or a deliberate move by the Court to deemphasize negotiating history in a high-profile treaty interpretation case, it is perplexing given the Court's at least notional acceptance of the relevance of "negotiating and drafting history" to the construction of an international agreement.<sup>58</sup>

Ironically, the Supreme Court's use of the postratification understandings of U.S. treaty partners on a particular instrument has become a leading agent for ensuring consistency of interpretations and fidelity to this nation's international commitments. When the Court has found a treaty to be unclear, it has had "recourse . . . [to the contracting parties'] . . . own practical construction of it."<sup>59</sup> This approach has led the Court to consider materials as diverse as treaties containing language identical to that of the instrument under review,<sup>60</sup> diplomatic correspondence between two treaty parties,<sup>61</sup> subsequent amendatory protocols,<sup>62</sup> and (most frequently of all) case law of foreign courts shedding light on a disputed provision.<sup>63</sup> Sometimes the Court has been disposed to accord its treaty constructions with those of our treaty partners (assuming that such positions can be adequately proved), but sometimes not.<sup>64</sup> *Medellín* appears to be an instance where, at best, the evidence of foreign court practice on the direct implementation and enforcement of ICJ decisions was inconclusive.<sup>65</sup> And although the majority's conclusion on this point seems somewhat tenuous,<sup>66</sup> at least it does not dispute the potential relevance of foreign court decisions as indicative of the postratification understandings of the treaty parties on the meaning of a certain provision.

<sup>58</sup> *Medellín*, 128 S.Ct. at 1357, 1367 (observing that "[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status"), 1382 (Breyer, J., dissenting) (noting that "[d]rafting history is also relevant" to an analysis of whether a treaty was intended to be self-executing).

<sup>59</sup> *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); see also *Bederman*, *supra* note 5, at 1002–06.

<sup>60</sup> *Tucker v. Alexandroff*, 183 U.S. 424, 430 (1902).

<sup>61</sup> *United States v. Stuart*, 489 U.S. 353, 369 (1989); *O'Connor v. United States*, 479 U.S. 27, 33 n.2 (1986); *Factor v. Laubenheimer*, 290 U.S. 276, 295–96 (1933); *United States v. Reynes*, 50 U.S. (9 How.) 127, 147–48 (1850).

<sup>62</sup> *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 257–58 (1984).

<sup>63</sup> *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2678 n.3 (2006); *Olympic Airways v. Husain*, 540 U.S. 644, 655 n.9 (2004); *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 175–76 (1999); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995); *Eastern Airlines v. Floyd*, 499 U.S. 530, 538–40 & nn.6, 7 (1991); *Tucker*, 183 U.S. at 442–43.

<sup>64</sup> For an opinion taking an affirmative position, see *Tseng*, 525 U.S. at 175 ("Decisions of the courts of other Convention signatories corroborate our understanding of the Convention's preemptive effect."). For one taking a negative position, see *Husain*, 540 U.S. at 655 n.9 (distinguishing English and Australian decisions), 658–63 (Scalia, J., dissenting) (relying on those opinions).

<sup>65</sup> See *Medellín*, 128 S.Ct. at 1363 ("[N]either *Medellín* nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts.").

<sup>66</sup> See *id.* at 1363 n.10 (disagreeing with conclusion of the Brief of International Court of Justice Experts as *Amici Curiae* in Support of Petitioner at 20 n.31, *Medellín v. Texas*, 128 S.Ct. 1346 (2008) (No. 06-984), 2007 WL 1886207, that Moroccan courts directly enforce ICJ decisions, by citing a decision of the then Court of Appeal for the International Territory of Tangier, *Mackay Radio & Tel. Co. v. Lal-La Fatma Bent si Mohamed el Khadar*, 21 ILR 136 (Ct. App. Int'l Juris. Tangier 1954)).

For the past decade the main issue of interpretive deference in treaty cases has concerned those constructions offered by international tribunals. While most recently the issue has been considered in the context of the ICJ's interpretations of the VCCR, this form of deference is older in provenance.<sup>67</sup> But at least with its decision in *Breard v. Greene*, the Court has held that it should "give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret" the agreement.<sup>68</sup> As individual justices have explained, deference to such interpretations by international tribunals promotes uniformity of treaty application and is consistent with the wide ambit of permissible sources of international law as applied in United States courts.<sup>69</sup> And even though the Court's 2006 *Sanchez-Llamas* decision categorically rejected the ICJ's substantive interpretation of VCCR Article 36,<sup>70</sup> and indicated that the Supreme Court would not be bound by an ICJ ruling that seemed to fly in the face of the treaty text at issue,<sup>71</sup> the *Medellin* decision did not entirely shut the door to recourse to international tribunals' constructions of a disputed treaty provision.<sup>72</sup> The *Medellin* majority simply observed, in construing Charter Article 94, that "nothing suggests that the ICJ views its judgments as automatically enforceable in the domestic courts of signatory nations."<sup>73</sup>

That leaves the form of deference most commonly associated with the Court's treaty interpretation decisions: respect for the position taken by the executive branch in the subject litigation. And while *Medellin* has been touted as a rare defeat for presidential power in the foreign relations field, that viewpoint applies exclusively to the Court's rejection of the president's power to implement an ICJ decision (or, for that matter, any non-self-executing treaty provision) unilaterally, in the absence of an act of Congress.<sup>74</sup> On the treaty interpretation issues discussed in this essay, the Bush administration took the position that the "undertake to comply" language of Charter Article 94 did not make ICJ judgments automatically enforceable in U.S. courts.<sup>75</sup> The *Medellin* majority expressly concurred with this interpretation,<sup>76</sup> and indicated that it is "well settled that the United States' interpretation of a treaty 'is entitled to great weight.'"<sup>77</sup> The *Medellin* decision actually extends

<sup>67</sup> See *id.* at 1364–65 & n.11 (discussing *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899)).

<sup>68</sup> 523 U.S. 371, 375 (1998) (per curiam); see also *Sanchez-Llamas*, 126 S.Ct. at 2683, 2685.

<sup>69</sup> See *Sanchez-Llamas*, 126 S.Ct. at 2700–01 (Breyer, J., dissenting) (quoting *Husain*, 540 U.S. at 660 (Scalia, J., dissenting)) ("[I]t is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently"); and *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("[T]rustworthy evidence of what [international] law really is' can be found in 'the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat'"); *id.* at 2701–02 (collecting a variety of cases in which U.S. courts have relied on ICJ and other international tribunal decisions to construe treaties).

<sup>70</sup> *Id.* at 2683–86 (majority opinion).

<sup>71</sup> *Id.* at 2685.

<sup>72</sup> *Medellin*, 128 S.Ct. at 1361 n.8.

<sup>73</sup> *Id.* at 1361 n.9 (quoting *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 ICJ REP. 12, 72 (Mar. 31)).

<sup>74</sup> See *id.* at 1367–72.

<sup>75</sup> Brief for the United States as Amicus Curiae Supporting Respondent at 34, *Medellin v. Dretke*, 544 U.S. 916 (2005) (No. 04-5928), 2005 WL 504490 [hereinafter U.S. Amicus Brief].

<sup>76</sup> 128 S.Ct. at 1358 (quoting U.S. Amicus Brief, *supra* note 75, at 34), 1361 ("The Executive Branch has unflinchingly adhered to its view that the relevant treaties do not create domestically enforceable federal law.").

<sup>77</sup> *Id.* at 1361 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982); and citing *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 168 (1999)).

the winning streak for the executive branch's interpretive positions in treaty cases before the Supreme Court.<sup>78</sup>

How, then, does *Medellín* solve the complex calculus of deference in treaty interpretation cases? For starters, it seems that all factors in the equation are in play—no categorical restrictions limit recourse to such materials as Senate ratification history, *travaux préparatoires*, subsequent practice of our treaty partners, constructions by international tribunals, or executive branch litigation positions. Some of these factors may well weigh more in the balance, but nothing in *Medellín* necessarily places a judicial thumb on the scales, privileging one set of sources over another. A mix of parochial elements (Senate ratification understandings and positions of contemporary administrations) are obviously blended with more internationalist means of treaty interpretation (*travaux*, postratification practice, and tribunal decisions). Moreover, while the use of some of these might be intensely problematic in later cases (especially Senate materials and interpretations of international tribunals), they were not in *Medellín*.

### III. MEDELLÍN'S ANTICANONS OF CONSTRUCTION

Perhaps what is most notable about the *Medellín* majority's approach to treaty interpretation is the extent to which it eschews formalism. Despite the occasional invocation of "general principles of interpretation,"<sup>79</sup> and the broad canon that "'interpretation of [a treaty] . . . must, of course, begin with the language of the [t]reaty itself,'"<sup>80</sup> these were seemingly confined to the analysis of differentiating a self-executing from a non-self-executing treaty provision, and ostensibly focused on the necessity of a rule for a clear statement of self-execution in the treaty text itself.<sup>81</sup> Nowhere in the *Medellín* opinions are the most difficult aspects of contemporary treaty interpretation<sup>82</sup> grappled with: When is it appropriate to break from the treaty text? How high should an interpreter's tolerance for ambiguity be? Are all extratextual sources of construction to be treated equally? What intentions matter in treaty interpretation (those of the original treaty drafters or those generated by subsequent practice)? What role is there for a supervening canon of good faith in treaty interpretation so as to ensure that a selected construction does not result in a material breach of the agreement?

*Medellín*'s high-profile federalism conflict (between state criminal procedures and federal foreign relations prerogatives), as well as its subliminal separation-of-powers consequences (between the executive branch's supposed and inherent authority to implement treaties and Congress's plenary authority), may well make it an unsuitable case for refashioning our understanding of these essential inquiries for treaty interpretation. *Medellín* might be an exception that rather proves the rule—whether of pure textualism in treaty interpretation or wholesale deference to executive branch positions. In short, some might readily assume that *Medellín* is *sui generis*: a high-profile foreign-relations powers case that is only tangentially about treaty interpretation.

<sup>78</sup> See, e.g., *Tseng*, 525 U.S. at 167–68 & n.10, 171–72; *Spector v. Norwegian Cruise Line*, 545 U.S. 119, 135–36 (2005); see also *Bederman*, *supra* note 5, at 1015–19 (for earlier cases).

<sup>79</sup> 128 S.Ct. at 1363.

<sup>80</sup> *Id.* at 1364 (quoting *Sumitomo Shoji*, 457 U.S. at 180).

<sup>81</sup> See *id.* at 1380 (Breyer, J., dissenting).

<sup>82</sup> See *Bederman*, *supra* note 5, at 1024–33.

I think that would be an erroneous take on *Medellin*'s broader import. The real impact of the *Medellin* decision may well reside in the subtle maturation of thinking it reflects for treaty interpretation. Treaties are no longer regarded, for purposes of construction, as some weird hybrid of contracts and statutes. The proxy bouts of old—in which treaty interpretation cases were used as a form of “shadowboxing” for the “main event” of statutory construction jurisprudence—are now at an end. Textualism is placed as a first principle of construction, but with the recognition that text has limits of meaning in treaties, as in other forms of legal writing. A new eclecticism in the selection of extrinsic sources for treaty interpretation is confirmed. Wholesale judicial deference to executive branch positions in treaty interpretation is modulated and, to some degree, restrained. All in all, these are positive moves for the jurisprudence of treaty interpretation, particularly in the context of the contentious debates of the last three decades. *Medellin* leaves open, of course, many further questions and problems of analysis for future treaty interpretation cases, but it does chart a positive course for this important area of U.S. foreign relations law.

#### INTENT, PRESUMPTIONS, AND NON-SELF-EXECUTING TREATIES

By Curtis A. Bradley\*

Ever since the Supreme Court's 1829 decision in *Foster v. Neilson*,<sup>1</sup> it has been settled that some treaties ratified by the United States are “non-self-executing” and thus are not enforceable in U.S. courts unless implemented by Congress. Despite its pedigree, both the theory behind the self-execution doctrine and its mechanics have long befuddled courts and commentators. There is significant uncertainty, for example, concerning the materials that are relevant to the self-execution analysis, whose intent should count in determining self-executing status, the proper presumption that should be applied with respect to self-execution, and the domestic legal status of a non-self-executing treaty.

The Supreme Court's recent decision in *Medellin v. Texas*<sup>2</sup> suggests answers to some of the questions that have plagued the self-execution doctrine. The Court employed a text-centered approach to self-execution and rejected a multifaceted balancing analysis similar to one that had been adopted by some lower courts. The Court also appears to have concluded that it is the intent of the U.S. treaty makers that should be determinative of self-execution, although the Court was somewhat unclear on this point. Finally, the Court implicitly rejected the argument, made by the *Restatement (Third) of Foreign Relations Law* and some commentators, that there should be a strong presumption in favor of treaty self-execution.

Both critics and supporters of the decision may be tempted to read even more into it—critics to show how unprecedented it is, and supporters to claim that it implicitly resolves issues that were not presented. In particular, some commentators may claim that the decision supports a strong presumption *against* self-execution, and that as a result many treaties that would formerly have been treated as self-executing will now be treated as non-self-executing. A careful

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<sup>1</sup> 27 U.S. 253 (1829).

<sup>2</sup> 128 S.Ct. 1346 (2008).

reading of the decision suggests that this is not a fair construction. Instead, the decision is best read as requiring self-execution to be resolved on a treaty-by-treaty basis, without resort to any general presumption. To the extent that the Court applied a presumption in *Medellín*, it was simply a presumption against giving direct effect to decisions of the International Court of Justice (ICJ), a presumption that does not entail any significant change from past practice.

The most ambiguous part of *Medellín* concerns not the extent to which treaties will be determined to be non-self-executing, but the consequences of that determination. Various statements in the decision suggest that non-self-executing treaties have no domestic law status at all, but other statements suggest that non-self-executing treaties are simply not judicially enforceable. This distinction might be particularly relevant to the authority and obligation of the executive branch to take actions outside the courts to enforce treaty obligations. Discerning the Court's position on this issue is complicated by the fact that the case concerned not only the domestic status of various treaties but also the domestic status of an international decision, which is not itself a treaty. The narrower interpretation of the decision, that non-self-executing treaties are simply not judicially enforceable, appears to be preferable because it is easier to reconcile with the text of the Supremacy Clause of the U.S. Constitution, which provides that "all" treaties made under the authority of the United States shall be the supreme law of the land. Some support for this narrower interpretation can also be found in the presidential power portion of the Court's decision.

### I. TEXTUAL APPROACH TO SELF-EXECUTION

When a treaty provision expressly provides for legislative implementation or addresses a matter within the exclusive regulatory prerogatives of Congress (such as the appropriation of money), there is little dispute that it is non-self-executing. In other cases, the determination of whether a treaty provision is self-executing can depend on the phrasing and context of the provision.

In *Foster*, the Court concluded that a provision in a treaty between the United States and Spain stipulating that land grants made by Spain before the treaty "shall be ratified and confirmed" was non-self-executing because it was phrased in "the language of contract."<sup>3</sup> The Court explained that "when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."<sup>4</sup> The Court later changed its mind about the effect of this treaty provision after examining the Spanish version, the English translation of which stated in relevant part that the prior land grants "shall remain ratified and confirmed."<sup>5</sup> The Court nevertheless employed a text-centered approach in both instances.

As in *Foster*, the Court in *Medellín* focused heavily on the text of the relevant treaties in considering whether they were self-executing. In particular, the Court construed the phrase "undertakes to comply" in Article 94(1) of the United Nations Charter, a phrase that is

<sup>3</sup> 27 U.S. at 315.

<sup>4</sup> *Id.* at 314.

<sup>5</sup> See *United States v. Percheman*, 32 U.S. 51, 88–89 (1833).

addressed to potential ICJ judgments that may or may not be rendered with respect to a particular state, as not being “a directive to domestic courts.”<sup>6</sup> As the Court noted, Article 94(1) “does not provide that the United States ‘shall’ or ‘must’ comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts.”<sup>7</sup> The Court also observed that the remainder of Article 94, which provides for potential enforcement of ICJ decisions through the UN Security Council, “does not contemplate the automatic enforceability of ICJ decisions in domestic courts.”<sup>8</sup>

There is nothing new about treating future-oriented treaty language that is directed generically at the states parties rather than at their courts as suggestive of non-self-execution. The Supreme Court did precisely that in *Foster*, and lower courts have also pointed to future-oriented language as evidence of non-self-execution.<sup>9</sup> The fact that Justice John Paul Stevens concurred with the majority on this point in *Medellin*, despite his strong sympathy for the dissent, further suggests that it was not a novel approach. As Justice Stevens reasoned, the phrase “undertakes to comply” in Article 94(1) of the UN Charter, especially when read in context, is best construed as “contemplat[ing] future action by the political branches.”<sup>10</sup>

Although not a departure from Supreme Court precedent, the Court’s approach to self-execution in *Medellin* is a departure to some extent from the approach that had been adopted by several lower courts starting in the 1970s. These courts had applied multifactor tests to evaluate whether a treaty or treaty provision was self-executing.<sup>11</sup> The following list of factors is illustrative: “the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range consequences of self- or non-self-execution.”<sup>12</sup> The dissenters in *Medellin* advocated something like this approach, pursuant to which courts would rely on “practical, context-specific criteria” in determining whether a treaty provision was self-executing.<sup>13</sup> The Court rejected this multifactor inquiry on the grounds that it would be too indeterminate and would improperly “assign to the courts—not the political branches—the primary role in deciding when and how international agreements will be enforced.”<sup>14</sup>

At the same time, the difference between the multifactor approach and the majority’s approach in *Medellin* should not be overstated. Many of the factors that the dissent in *Medellin* proposed for consideration, such as the subject matter of the treaty, the level of specificity of the treaty provision, and the views of the political branches, are likely to be relevant even under

<sup>6</sup> 128 S.Ct. at 1358.

<sup>7</sup> *Id.* The Court should have said that the Senate “gave its advice and consent” to the UN Charter, since the president, not the Senate, ratifies treaties for the United States.

<sup>8</sup> *Id.* at 1359.

<sup>9</sup> See, e.g., *Robertson v. Gen. Elec. Co.*, 32 F.2d 495, 500 (4th Cir. 1929) (citing “language of futurity” as evidence of non-self-execution); *Sei Fujii v. California*, 242 P.2d 617, 622 (Cal. 1952) (finding UN Charter provisions to be non-self-executing because, among other things, they were “framed as a promise of future action by the member nations”).

<sup>10</sup> 128 S.Ct. at 1373 (Stevens, J., concurring).

<sup>11</sup> See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); *United States v. Postal*, 589 F.2d 862, 877 (5th Cir. 1979); *People of Saipan v. U.S. Dep’t of Interior*, 502 F.2d 90, 97 (9th Cir. 1974).

<sup>12</sup> *Postal*, 589 F.2d at 877 (quoting *Saipan*, 502 F.2d at 97).

<sup>13</sup> 128 S.Ct. at 1382 (Breyer, J., dissenting).

<sup>14</sup> *Id.* at 1363.

the majority's approach, which (as explained below) looks to whether the president and the Senate intended the treaty to be self-executing. What the majority appears to have been objecting to was not these factors per se, but rather their application in a way that would render a treaty provision self-executing in some cases but not self-executing in others. The Court notes, for example, that "[i]t is hard to believe that the United States would enter into treaties that are sometimes enforceable [in U.S. courts] and sometimes not."<sup>15</sup> A multifaceted approach, however, could be applied more categorically, so that a treaty provision would be either self-executing or not in all cases, avoiding this concern.<sup>16</sup>

## II. WHOSE INTENT?

Although the Court in *Medellín* focused heavily on treaty text, it did not adopt a purely textualist approach to self-execution. Rather, it treated the self-execution issue as a question of intent and viewed text as an especially good indication of such intent. The ultimate issue, the Court suggested, is whether the treaty "conveys an intention" of self-execution.<sup>17</sup>

One of the longstanding questions about the self-execution doctrine is whose intent counts in discerning whether a treaty is self-executing—the intent of the U.S. treaty makers or that of all the parties to the treaty. Some courts and commentators have argued that self-execution is to be determined by the collective intent of the treaty parties.<sup>18</sup> These courts and commentators in effect treat the issue of self-execution as governed by the same principles that would govern the interpretation of the substantive terms of the treaty.<sup>19</sup> Some commentators rely on the Supremacy Clause in support of this view, on the theory that this clause "allocates to the courts the duty to enforce treaties just as they enforce the Constitution and federal statutes unless *the parties* to the treaty stipulate otherwise."<sup>20</sup>

By contrast, the *Restatement (Third) of Foreign Relations Law* argues that the intent of the U.S. treaty makers should be dispositive for this issue. The *Restatement* reasons that whether a treaty is self-executing concerns a matter of internal implementation and thus is normally something to be decided by each country individually.<sup>21</sup> One could add that in some countries treaties are never self-executing, and that even among the countries that give direct effect to

<sup>15</sup> *Id.* at 1362.

<sup>16</sup> *Cf.* *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168–69 (2004) (rejecting case-by-case approach to determining whether comity factors supported the application of U.S. antitrust law to independent foreign injury).

<sup>17</sup> 128 S.Ct. at 1356 (quoting *Igartua-De la Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005)).

<sup>18</sup> *See, e.g., Postal*, 589 F.2d at 876; *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976); Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601 (2008).

<sup>19</sup> Many of the self-execution factors that have been applied by the lower courts, however, have had little to do with the intent of the parties, and courts applying these factors have often looked heavily to indicia of U.S. intent. *See* David H. Moore, *An Emerging Uniformity for International Law*, 75 GEO. WASH. L. REV. 1, 12–14 (2006).

<sup>20</sup> Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AJIL 695, 708 (1995); *see also, e.g.,* Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?* 74 AJIL 892, 900–01 (1980) ("A treaty provision which by its terms and purpose is *meant* to stipulate the immediate and not merely progressive creation of rights, privileges, duties, and immunities cognizable in domestic courts and is *capable* of being applied by the courts without further concretization *is* self-executing by virtue of the constitutional mandate of Article VI of the U.S. Constitution."). It is far from clear, however, that the Supremacy Clause's reference to treaties, which was designed to increase the national government's control over foreign affairs, should be construed as restricting the national government's flexibility with respect to treaty enforcement. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 448–49 (2000).

<sup>21</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111 cmt. *b* (1987).

treaties a wide range of approaches can be found.<sup>22</sup> This variation makes the formulation of a collective intent with respect to this issue unlikely, especially in multilateral treaties, and indeed self-execution is rarely the subject of negotiation.

Although somewhat unclear on this point, *Medellin* appears to adopt the *Restatement's* position. The Court stated that “[o]ur cases simply require courts to decide whether a treaty’s terms reflect a determination *by the President who negotiated it and the Senate that confirmed it* that the treaty has domestic effect.”<sup>23</sup> The Court also noted that “we have held treaties to be self-executing when the textual provisions indicate that *the President and Senate* intended for the agreement to have domestic effect.”<sup>24</sup> And, in summarizing its finding of non-self-execution, the Court explained that “[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the *President or Senate* intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by ‘many of our most fundamental constitutional protections.’”<sup>25</sup>

It should be acknowledged, however, that the Court sent mixed signals in this regard. It began its self-execution analysis by referring to Supreme Court decisions that have looked to the intent of the parties in interpreting substantive treaty terms. The Court also asserted that its finding of non-self-execution was confirmed by the postratification understandings of the treaty parties, something that would not be particularly relevant under an intent-of-the-U.S. approach. The Court even considered in a footnote whether the ICJ had views on the self-execution issue, while expressing uncertainty about whether such views would be relevant.<sup>26</sup>

On balance, though, the Court’s decision is best interpreted as endorsing an intent-of-the-U.S. approach. In addition to the direct statements to this effect quoted above, the Court relied on the U.S. ratification history for the UN Charter rather than on the collective negotiating history. The Court also explained its heavy reliance on the treaty text by stating: “That is after all what the Senate looks to in deciding whether to approve the treaty.”<sup>27</sup> Furthermore, in the presidential power portion of its decision, the Court expressed the view that if the executive branch could make a non-self-executing treaty binding on domestic courts, it would be acting “in conflict with the implicit understanding of the ratifying Senate.”<sup>28</sup> That assertion may or may not be persuasive with respect to the treaties at issue in *Medellin*,<sup>29</sup> but the key point is that the Court focused here and elsewhere on the Senate’s and the president’s intent.

This interpretation of the decision also helps make sense of the Court’s test for self-execution. As noted above, for a treaty to be self-executing, the Court required that the treaty “convey[ ] an intention” to that effect. If the relevant intent were the collective intent of the parties, treaties would almost never be self-executing, since, as noted above, there is almost never such

<sup>22</sup> See Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, in NATIONAL TREATY LAW AND PRACTICE 1, 40–47 (2005).

<sup>23</sup> 128 S.Ct. at 1366 (emphasis added).

<sup>24</sup> *Id.* at 1364 (emphasis added).

<sup>25</sup> *Id.* at 1367 (emphasis added) (quoting *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2687 (2006)).

<sup>26</sup> See *id.* at 1361 n.9.

<sup>27</sup> *Id.* at 1362.

<sup>28</sup> *Id.* at 1369.

<sup>29</sup> Even if the Senate thought that ICJ decisions would not have direct effect in U.S. courts, or that the United States would have the ability to use its veto to block Security Council enforcement of ICJ decisions, see *id.* at 1359–60, that would not necessarily mean that the Senate wanted to preclude the president from being able to give effect to ICJ decisions when he or she wished to do so.

a collective intent.<sup>30</sup> Yet the Court denied that its test would have any such drastic effect on U.S. treaty enforcement. Indeed, the Court emphasized that even though an ICJ judgment may not be self-executing, this “does not mean the particular underlying treaty is not,” and proceeded to cite several prior self-execution decisions with approval.<sup>31</sup>

An intent-of-the-U.S. approach also helps explain the validity of the non-self-execution declarations that the Senate sometimes attaches to its advice and consent to treaties. Lower courts have consistently enforced those declarations,<sup>32</sup> and the Supreme Court observed in a recent decision that, because the United States had ratified a treaty with a non-self-execution declaration, the treaty “did not itself create obligations enforceable in the federal courts.”<sup>33</sup> If self-execution were a matter of the parties’ collective intent, then, for the declarations to be valid, they would have to be understood as becoming, in effect, part of the collective intent when they are submitted with the U.S. instrument of ratification.<sup>34</sup> This proposition is debatable, however, and is unnecessary under an intent-of-the-U.S. approach.

### III. PRESUMPTION FOR OR AGAINST SELF-EXECUTION?

Some commentators, and the *Restatement (Third) of Foreign Relations Law*, contend that courts should apply a strong presumption in favor of treaty self-execution.<sup>35</sup> They offer two principal arguments for this presumption, both of which relate to the U.S. Constitution’s Supremacy Clause. The first argument holds that, in declaring that “*all Treaties* made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land,”<sup>36</sup> the Supremacy Clause does not seem to allow for any doctrine of non-self-execution. *Foster*, under this view, is in tension with the Supremacy Clause and thus should be applied narrowly. According to the second argument, the United States is more likely to comply with treaties if they are self-executing, and the Supremacy Clause embodies a strong constitutional policy in favor of treaty compliance.

Other commentators, most notably John Yoo, have contested this purported presumption.<sup>37</sup> In addition to making an originalist case against treaty self-execution, Yoo argues that the increasing overlap of treaties with traditional areas of congressional authority suggests that many treaties should not be self-executing. Non-self-execution, under this view, can promote democratic values by including the House of Representatives in the process of changing domestic law. As Yoo states: “Non-self-execution . . . better promotes democratic government in the

<sup>30</sup> *Accord* Vázquez, *supra* note 18.

<sup>31</sup> 128 S.Ct. at 1365. As it had done in *Sanchez-Llamas v. Oregon*, the Court also assumed for the sake of argument that the underlying treaty obligation at issue in the ICJ’s *Avena* decision—Article 36 of the Vienna Convention on Consular Relations—is self-executing. *See id.* at 1357 n.4; *see also* Vienna Convention on Consular Relations, Art. 36, Apr. 24, 1963, 21 UST 77, 596 UNTS 261.

<sup>32</sup> *See, e.g.*, *Igartua-De la Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 137 (2d Cir. 2005); *Auguste v. Ridge*, 395 F.3d 123, 132 & n.7 (3d Cir. 2005).

<sup>33</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

<sup>34</sup> For an argument to this effect, see, for example, Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2186–88 (1999).

<sup>35</sup> *See, e.g.*, RESTATEMENT (THIRD), *supra* note 21, §111 reporters’ n.5; LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 201 (2d ed. 1996); Vázquez, *supra* note 34.

<sup>36</sup> U.S. CONST. Art. VI, cl. 2 (emphasis added).

<sup>37</sup> John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter *Treaties and Public Lawmaking*].

lawmaking process by requiring the consent of the most directly democratic part of the government, the House of Representatives, before the nation can implement treaty obligations at home.”<sup>38</sup> In this respect, the argument for non-self-execution resembles the one that is sometimes made in support of increased use of congressional-executive agreements.<sup>39</sup> Yoo goes so far as to argue that courts should presume that treaties are non-self-executing.<sup>40</sup>

The Court in *Medellin* appears to have rejected any strong presumption in favor of self-execution. It did not mention any such presumption, and, in concluding that the treaties in question were non-self-executing, it did not require clear evidence of an intent to preclude domestic judicial enforcement. Instead, it carefully examined the text, structure, and ratification history of the treaties to discern whether they were self-executing. The Court also emphasized that “Congress is up to the task of implementing non-self-executing treaties.”<sup>41</sup>

It would be over-reading the decision, however, to conclude that it supports a presumption against self-execution. Although the Court quoted the *Head Money Cases* for the proposition that a treaty is “primarily a compact between independent nations” that ordinarily “depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it,”<sup>42</sup> the decision made clear that no “talismanic words” are required for self-execution,<sup>43</sup> and that self-execution should be determined on a treaty-by-treaty basis. The Court stated, for example, that “under our established precedent, some treaties are self-executing and some are not, depending on the treaty.”<sup>44</sup> In addition, the Court observed that prior decisions that have found treaties to be self-executing “stand only for the unremarkable proposition that some international agreements are self-executing and others are not.”<sup>45</sup> The Court’s invocation of deference to the executive branch with respect to self-execution was also formulated in treaty-specific terms.<sup>46</sup>

<sup>38</sup> Yoo, *Treaties and Public Lawmaking*, *supra* note 37, at 2240.

<sup>39</sup> See, e.g., Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

<sup>40</sup> See Yoo, *Treaties and Public Lawmaking*, *supra* note 37, at 2254–57. Yoo argues on originalist grounds that all treaties that overlap with Congress’s Article I powers should be deemed non-self-executing. Recognizing, however, that this claim is inconsistent with judicial practice, Yoo argues in the alternative that there should at least be a presumption against self-execution.

<sup>41</sup> 128 S.Ct. at 1366.

<sup>42</sup> *Id.* at 1357 (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)).

<sup>43</sup> *Id.* at 1366. Although not applied in the decision, the Court did state in a footnote that there is a presumption that “international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.” *Id.* at 1357 n.3 (quoting RESTATEMENT (THIRD), *supra* note 21, §907 cmt. a).

<sup>44</sup> *Id.* at 1365.

<sup>45</sup> *Id.* at 1364.

<sup>46</sup> See *id.* at 1361 (“The Executive Branch has unfailingly adhered to its view *that the relevant treaties* do not create domestically enforceable federal law.”) (emphasis added). The desirability of the Court’s treaty-by-treaty approach depends on considerations beyond the scope of this essay. If it were possible to generalize about the preferences of the Senate and the president with respect to self-execution, it might make sense for the Court to adopt a default rule generally consistent with those preferences, either in favor of or against self-execution. Even if it were not possible to make this generalization, it might make sense for the Court to adopt a default rule designed to prompt the Senate and the president to provide more information about their preferences when they approve treaties (in declarations of self-execution or non-self-execution, for example), although that would depend on the level of costs that such a rule would generate. For a discussion of the conditions under which courts should adopt such default rules in the context of statutes, see EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008).

If the Court was applying any presumption in *Medellín*, it was probably just a presumption against giving direct effect to ICJ judgments. Indeed, the only hint of a clear statement requirement (which can reflect a strong presumption) came in the context of discussing the effect of such judgments. The Court noted that, “[g]iven that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended.”<sup>47</sup>

A presumption against giving direct effect to ICJ judgments can easily be defended without resort to any general presumption against treaty self-execution. ICJ judgments concern disputes between nations that will often be politically sensitive. As a result, there are good reasons to think that the political branches would want flexibility in deciding how to implement these judgments after they are issued. Direct judicial enforcement of these judgments might even raise constitutional concerns in some cases, relating, for example, to the Article III authority of the federal courts, or to the role of the states in the U.S. federal system.<sup>48</sup>

The Court’s decision in *Medellín* will probably mean, as the dissenters asserted, that ICJ judgments issued pursuant to other ICJ clauses in treaties will also be deemed to be non-self-executing in the United States.<sup>49</sup> This issue will rarely arise, however, in view of the infrequency with which the ICJ issues judgments involving the United States. Moreover, few other nations (if any) give direct effect to ICJ judgments, so the United States will hardly be alone in failing to do so.<sup>50</sup> Nor does *Medellín* entail a significant change in U.S. practice: U.S. courts have never given direct effect to an ICJ judgment, and, in fact, the U.S. Court of Appeals for the District of Columbia Circuit held twenty years ago that such judgments were not enforceable in U.S. courts at the behest of private parties.<sup>51</sup>

#### IV. DOMESTIC STATUS OF NON-SELF-EXECUTING TREATIES

Although *Medellín* need not be read as entailing any substantial changes in the extent to which treaties will be found to be self-executing, the decision is highly ambiguous about the domestic status of a non-self-executing treaty. The Court seems to be clearly rejecting the argument that had been made by some commentators that a non-self-executing treaty merely fails to provide a private right of action and thus can be enforced by courts when such a cause of action is not necessary, such as when a treaty is invoked defensively in a criminal case or when

<sup>47</sup> 128 S.Ct. at 1363–64.

<sup>48</sup> *Cf. Medellín, id.* at 1364 (expressing concern that, under the petitioner’s interpretation of the relevant treaties, “there is nothing to prevent the ICJ from ordering state courts to annul criminal convictions and sentences, for any reason deemed sufficient by the ICJ”); *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2684 (2006) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (“If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department,’ headed by the ‘one supreme Court’ established by the Constitution.”). The Court in *Medellín* made clear, however, that it was “not suggest[ing] that treaties can never afford binding domestic effect to international tribunal judgments.” 128 S.Ct. at 1364–65.

<sup>49</sup> 128 S.Ct. at 1388 (Breyer, J., dissenting).

<sup>50</sup> *See id.* at 1363 (majority opinion) (observing that “neither *Medellín* nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts”); *see also* A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT’L L. 877, 886–87 (2000) (finding little support in other countries for giving ICJ decisions binding force in domestic courts).

<sup>51</sup> *See* Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937–38 (D.C. Cir. 1988).

a statute, such as 42 U.S.C. §1983, provides for a general cause of action.<sup>52</sup> A non-self-executing treaty, said the Court, “does not by itself give rise to domestically enforceable federal law.”<sup>53</sup> The Court also expressly distinguished the issue of self-execution from the issue of private rights of action.<sup>54</sup>

The opinion leaves unclear, however, whether a non-self-executing treaty is simply judicially unenforceable, or whether it more broadly lacks the status of domestic law. On the one hand, the opinion contains many statements, including in a footnote purporting to set forth the Court’s view of self-execution, that equate non-self-execution with lack of domestic law status.<sup>55</sup> On the other hand, it also contains statements that equate non-self-execution simply with lack of judicial enforceability,<sup>56</sup> and the Court’s test for self-execution appears to focus on whether a treaty is a “directive to domestic courts,”<sup>57</sup> not whether it has the status of domestic law. This ambiguity, which also appears in the State of Texas’s brief in *Medellín*,<sup>58</sup> may have been carried forward from the brief into the Supreme Court’s opinion-drafting process. Importantly, the solicitor general of Texas, who was counsel of record on the brief and argued the case for the state before the Supreme Court, made clear in an online debate shortly after the decision that he equated non-self-execution only with judicial unenforceability, and that in his view non-self-executing treaties do in fact constitute domestic law.<sup>59</sup>

It is possible that the Court was not focused on the distinction, since, *from a judicial perspective*, domestic law status largely comes down to judicial enforceability. Yet the distinction might matter

<sup>52</sup> See, e.g., David Sloss, *Ex parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103 (2000). There is currently a conflict in the circuits over whether section 1983 confers a cause of action for breaches of Article 36 of the Vienna Convention on Consular Relations, *supra* note 31. Compare *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007) (allowing the cause of action), with *De Los Santos Mora v. New York*, 524 F.3d 183 (2d Cir. 2008) (not allowing the cause of action), and *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007) (same).

<sup>53</sup> 128 S.Ct. at 1356 n.2.

<sup>54</sup> *Id.* at n.3.

<sup>55</sup> See, e.g., *id.* at 1356 (“This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law.”) (emphasis added); *id.* at 1356 n.2 (“What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law.”); *id.* at 1365 (“[T]he particular treaty obligations on which *Medellín* relies do not of their own force create domestic law.”).

<sup>56</sup> See, e.g., *id.* at 1356 (“[N]ot all international law obligations automatically constitute binding federal law enforceable in United States courts.”) (emphasis added); *id.* (“The question we confront here is whether the *Avena* judgment has automatic domestic legal effect such that the judgment of its own force applies in state and federal courts.”) (emphasis at end added); *id.* at 1361 (“The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through direct enforcement in domestic courts . . . .”) (emphasis added).

<sup>57</sup> See *id.* at 1358 (stating that Article 94 of the UN Charter is not self-executing because it is not such a directive).

<sup>58</sup> See, e.g., Brief for Respondent, *Medellín v. Texas* at 14, 128 S.Ct. 1346 (2008) (No. 06-984) (footnote omitted), available at <[http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/06-984\\_Respondent.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/06-984_Respondent.pdf)> (“Accordingly, where a treaty does not ‘by its own force’ create law cognizable in domestic courts, the President and the Senate have made a decision that the treaty remains unenforceable in the courts without further congressional action. Thus, unless the text of the treaty reflects an agreement between the President and the Senate to create domestic law, no such law is made.”).

<sup>59</sup> See Ted Cruz, Remarks, Federalist Society Online Debate, *Medellín v. Texas*, Part I: Self-Execution (Mar. 28, 2008), at <<http://www.fed-soc.org/debates/dbtid.17/default.asp>> (“Of course, all three treaties at issue (including Article 94 of the UN Charter) are ‘federal law,’ because all treaties are ‘federal law.’ That wasn’t the question before the Court. The question was whether the treaties were ‘self-executing,’ by which the Court meant judicially enforceable in U.S. courts.”).

in some contexts. It might matter, for example, if the executive branch seeks to take action to enforce a non-self-executing treaty and does not have an independent constitutional or statutory basis for doing so. As noted below, the Court in *Medellín* disallowed one type of executive branch action in this context—the creation of a binding rule of decision for the courts—but it did not rule out other possible actions. The distinction might also matter in debates within the executive branch over whether the president is obligated to comply with a non-self-executing treaty.<sup>60</sup>

To be sure, the difference may not be very significant for some types of non-self-executing treaties. In particular, if a treaty can be implemented only by Congress, it may not mean much to say that it is supreme law of the land even though not judicially enforceable, given Congress's well-settled constitutional authority to override treaties for purposes of U.S. law.<sup>61</sup> Even in that context, however, one can imagine a debate in Congress over whether there is an obligation *either* to implement the treaty or to enact overriding legislation. The distinction might also be relevant to the application of the canon of construction pursuant to which statutes are to be interpreted, where possible, to avoid treaty violations.<sup>62</sup>

In interpreting the decision, it is important to keep in mind the distinction between the underlying treaties in *Medellín* and the ICJ's judgment in *Avena and Other Mexican Nationals (Mexico v. United States)*.<sup>63</sup> To the extent that the Court in *Medellín* was saying that the latter is not part of the supreme law of the land, it was surely correct. The Supremacy Clause by its terms encompasses the Constitution, federal laws, and treaties, not international judgments rendered pursuant to treaties. While a judgment could become judicially enforceable in the United States as a result of an underlying treaty obligation, that would depend on whether the underlying treaty obligation was self-executing. The judgment by itself would not constitute U.S. domestic law.<sup>64</sup>

<sup>60</sup> See, e.g., Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?* 90 CORNELL L. REV. 97, 158 (2004) (arguing that “the President’s duty under the Take Care Clause includes a duty to execute treaties that are the law of the land”). The Take Care Clause of the Constitution provides that the president is obligated to take care that the “Laws” are faithfully executed. The government did not rely on that clause as a source of authority in *Medellín*, and the Court briefly dismissed the clause’s relevance at the end of its opinion, on the ground that the clause “allows the President to execute the laws, not make them,” and that “the *Avena* judgment is not domestic law.” 128 S.Ct. at 1372. The Court did not say there that non-self-executing treaties do not constitute “Laws” for purposes of the Take Care Clause.

<sup>61</sup> See, e.g., *Breard v. Greene*, 523 U.S. 371, 376 (1998).

<sup>62</sup> See *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 880 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (arguing that this canon should not apply to non-self-executing treaties, “which have no force as a matter of domestic law”). On the other hand, if the canon is designed to avoid unintended violations of international law, that purpose would apply as long as a treaty was binding on the United States under international law, regardless of whether it had domestic law status. For a discussion of the canon and its possible rationales, see Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

<sup>63</sup> 2004 ICJ REP. 12 (Mar. 31), reprinted in 43 ILM 581 (2004).

<sup>64</sup> Contrary to the dissent’s argument in *Medellín*, it is not possible to circumvent the issue of whether Article 94 of the UN Charter and related treaty provisions are self-executing by relying directly on the treaty obligation interpreted by the ICJ in *Avena*—that is, Article 36 of the Vienna Convention on Consular Relations, *supra* note 31. According to the dissent, the provisions of Article 36 could be construed “as if (between the parties and in respect to the 51 individuals at issue [in *Avena*]) they contain words that encapsulate the ICJ’s decision.” 128 S.Ct. at 1386 (Breyer, J., dissenting). However, even if Article 36 is self-executing (an issue left open by the Court, which assumed without deciding that Article 36 was self-executing and created an individually enforceable right, *see id.* at 1357 n.4), there would still need to be a rule that mandated acceptance of the ICJ’s interpretation of that article over the Supreme Court’s own interpretation (which, as we know from *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006), is contrary to the ICJ’s with respect to the issue of procedural default). To the extent that there is such a rule, it is in the treaty provisions that the Court found to be non-self-executing.

If the Court's decision is interpreted more broadly as holding that non-self-executing treaties do not have any domestic law status, it may be difficult to reconcile with the text of the Supremacy Clause, which states that "all" treaties made under the authority of the United States are part of the supreme law of the land. While, as noted above, not all supreme law of the land is judicially enforceable, it may be problematic to conclude that a treaty is supreme law of the land and yet has no domestic legal status at all. A possible way around this textual problem would be to construe the Supremacy Clause as saying in effect that treaties are to be the supreme law of the land *only to the extent that they are properly construed as having domestic law status*.<sup>65</sup> This sort of implied addition or corollary to the text of the Supremacy Clause would be unnecessary, however, if non-self-execution merely means judicially unenforceable. Moreover, this reading of the Supremacy Clause assumes that the U.S. treaty makers have the constitutional authority to make a binding international legal commitment while at the same time depriving that commitment of any domestic legal effect, a controversial proposition that the Court did not specifically discuss in *Medellin*.<sup>66</sup>

The presidential power portion of the Court's decision provides additional support for the narrower reading. The Court makes clear there that the president is not precluded from taking actions to enforce a non-self-executing treaty, and that its decision only disallows the president from "unilaterally making the treaty *binding on domestic courts*."<sup>67</sup> This statement is consistent with the approach to non-self-execution taken in *Foster*, where the Court stated that a non-self-executing treaty must be implemented by legislation "before it can become a rule for the Court."<sup>68</sup> Under this approach, a non-self-executing treaty is supreme law of the land but does not create a rule of decision for U.S. courts. By analogy, some constitutional law is nonjusticiable and thus not enforceable in court, but is still considered part of the supreme law of the land. Similarly, some statutes, such as those that delegate regulatory authority to administrative agencies or appropriate money, may not be judicially enforceable, yet they are also considered part of the supreme law of the land.

## V. CONCLUSION

*Medellin* is the Supreme Court's most significant decision on treaty self-execution since *Foster*. Although it does not embrace the expansive approach to self-execution that had been advocated by

<sup>65</sup> For an articulation of this view, see the postings by Nick Rosenkranz in the Federalist Society Online Debate, *supra* note 59. See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §141 cmt. a (1965) (asserting that "a treaty has immediate domestic effect as the supreme law of the land under Article VI, Clause 2 of the Constitution only if it is self-executing").

<sup>66</sup> If an international instrument is not intended to create obligations under international law, it is not a "treaty," see ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 20–21 (2d ed. 2007), and thus would not constitute supreme law of the land under the Supremacy Clause. The more difficult question is whether, in light of the Supremacy Clause, a treaty that *is* intended to create international legal obligations can be ratified by the United States without having any domestic legal status.

<sup>67</sup> 128 S.Ct. at 1371 (emphasis added); see also *id.* at 1367 n.13 (suggesting that there might be situations in which the president could set aside state law to implement a non-self-executing treaty). A president might have the authority, for example, to implement non-self-executing treaties within the executive branch as long as such implementation does not violate any federal statute. Cf. Implementation of Human Rights Treaties, Exec. Order No. 13,107, 63 Fed. Reg. 68,991, 68,991, 68,993 (Dec. 15, 1998) (ordering executive departments to perform their functions "so as to respect and implement" obligations in non-self-executing human rights treaties, but also making clear that the order "does not supersede Federal statutes and does not impose any justiciable obligations on the executive branch").

<sup>68</sup> 27 U.S. at 314; see also HENKIN, *supra* note 35, at 203 ("Whether [a treaty] is self-executing or not, it is supreme law of the land. If it is not self-executing, Marshall said [in *Foster*], it is not 'a rule for the Court'; he did not suggest that it is not law for the President or for Congress.").

some commentators, the decision need not be read as entailing a significant reduction in the extent to which treaties will be enforced by U.S. courts. In recent years, the lower courts had, if anything, been applying a presumption against self-execution, especially for modern multilateral treaties.<sup>69</sup> The Supreme Court stopped short of adopting any such presumption in *Medellín* and instead left the issue to be resolved at a retail level on a treaty-by-treaty basis. While *Medellín* certainly does not resolve all the issues surrounding the self-execution doctrine, and in fact is highly ambiguous about the domestic status of non-self-executing treaties, it does shed some long overdue light on a confusing area of the law. Whether one finds that light pleasing or harsh depends, of course, on other considerations.

## REVITALIZING THE U.S. COMPLIANCE POWER

*By Steve Charnovitz\**

Although “[t]reaties are the law of the land, and a rule of decision in all courts,”<sup>1</sup> the president and the courts may sometimes be powerless to achieve compliance with a U.S. treaty. That was the puzzling outcome of *Medellín v. Texas*.<sup>2</sup> Even though the Supreme Court declared that the United States has an international obligation to comply with the *Avena* judgment of the International Court of Justice (ICJ),<sup>3</sup> the Court invalidated the president’s memorandum directing Texas and other errant states to comply.<sup>4</sup>

This essay offers a commentary on *Medellín* and considers how the U.S. compliance power can be revitalized. Part I critiques the approach taken by the Court and shows that there was an alternative interpretation of the United Nations Charter and the U.S. Constitution. Part II considers the implications of the majority, concurring, and dissenting opinions for future U.S. implementing legislation and treaty design.

### I. HOW THE U.S. COURT COULD HAVE UPHELD THE EFFORT TO COMPLY

By the way that it structures its analysis, the Court tilts the outcome in the direction of undermining U.S. compliance. First, the Court lays out for itself a much broader question than the true issue before it. Second, by bifurcating its analysis,<sup>5</sup> the Court makes it harder for itself to see the legal justification for enforcing the president’s determination requiring compliance.

<sup>69</sup> See Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1588 n.147 (2003) (collecting cases).

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<sup>1</sup> *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 439 (1838).

<sup>2</sup> *Medellín v. Texas*, 128 S.Ct. 1346 (2008).

<sup>3</sup> *Id.* at 1356 (“No one disputes that the *Avena* decision . . . constitutes an *international* law obligation on the part of the United States.”), 1367 (2008).

<sup>4</sup> George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), *reprinted in* John R. Crook, *Contemporary Practice of the United States*, 99 AJIL 489 (2005).

<sup>5</sup> In the *Medellín* opinion, following the introductory part I, part II considers the treaty obligations at issue. The legal effect of the president’s memorandum is considered separately in part III of the opinion.

One of the many puzzles about the Court's decision is its use of the words "automatic" and "automatically."<sup>6</sup> For example, "The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect . . ."<sup>7</sup> The Court uses "automatic" or "automatically" in this context thirteen times in its opinion.<sup>8</sup> The insinuation of that word into the opinion cannot be explained as a response to the claim of the petitioner because the word does not appear in his brief. In seven of the thirteen instances, the Court uses the words "automatic" or "automatically" in a more sweeping way, that is, by considering what the implications would be "[i]f ICJ judgments were instead regarded as automatically enforceable domestic law."<sup>9</sup>

Suppose rather that the Court had focused exclusively on the matter before it and posed this question: "Is the *Avena* judgment enforceable against Texas in view of the fact that the president has determined that the United States shall comply?" Had the Court proceeded to address this narrower question, the Justices could have avoided getting tangled in extraneous hypotheticals such as (1) the status of ICJ judgments other than *Avena*; (2) a refusal by the president to comply with an ICJ judgment;<sup>10</sup> and (3) an ICJ decision judging a federal law<sup>11</sup> to be a treaty violation. Nevertheless, because the Court posed too broad a question, its reasoning went astray.

The Court also skewed its analysis by omitting to use the president's memorandum as a prism for analyzing the enforceability of the *Avena* judgment. To wit, the Court considered the memorandum only after deciding that the relevant treaty provisions were non-self-executing. Once it reached its decision that the *Avena* judgment itself was not automatically enforceable by a court, the Court should have gone on to consider whether the president's memorandum on *Avena* saves Article 94(1) of the UN Charter,<sup>12</sup> in this instance, from being relegated to the status of a non-self-executing treaty obligation.

Is such an outcome—predicated on the elective act of a president—possible under the self-execution doctrine articulated in *Foster v. Neilson*?<sup>13</sup> A ready answer might be no, that a "self-executing" treaty needs to have that character without regard to the action or views of the executive after the treaty has been ratified. Yet *Foster* is hardly dispositive on that point because no executive branch view was before the Court as to the direct effect of the stipulation in the Adams-Onís Treaty of 1819 between the United States and Spain.<sup>14</sup> Moreover, the *Restatement (Third) of the Foreign Relations Law of the United States* seems to suggest that executive

<sup>6</sup> 128 S.Ct. at 1360 ("automatically enforceable domestic law," "automatically enforceable as domestic law," "*Avena* does not automatically constitute federal law . . ."). In a computer search of previous Supreme Court cases adjudicating self-execution of a treaty, this author could not find any use of the word "automatic" in that context.

<sup>7</sup> *Id.* at 1356.

<sup>8</sup> *Id.* at 1356 (three instances), 1356 n.2, 1357, 1359, 1360 (three instances), 1361 n.9, 1364, 1365 (two instances).

<sup>9</sup> *Id.* at 1360; *see also id.* at 1359–60, 1361 n.9, 1364, 1365 (two instances).

<sup>10</sup> *See id.* at 1360 ("Noncompliance with an ICJ judgment through exercise of the Security Council veto—always regarded as an option by the Executive and ratifying Senate during and after consideration of the U.N. Charter, Optional Protocol, and ICJ Statute—would no longer be a viable alternative.")

<sup>11</sup> *Id.* at 1364 ("contrary federal law" could receive "same fate" as state law). Of course, if the Court had reversed the Texas judgment, and the case had returned to federal courts, there would have been an issue of the implications of a federal law, the Antiterrorism and Effective Death Penalty Act of 1996.

<sup>12</sup> Article 94(1) states: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." UN CHARTER Art. 94(1).

<sup>13</sup> *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

<sup>14</sup> Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AJIL 695, 702 n.35 (1995).

action can be relevant to whether a treaty is self-executing. The *Restatement* says: “In general, agreements that can be readily given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, unless a contrary intention is manifest.”<sup>15</sup>

To consider the meaning of *Foster*, one should start with the Court’s holding in 1829:

Do these words [“ratified and confirmed”] act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

. . . .

. . . Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to the act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.<sup>16</sup>

The key to (re)interpreting *Foster* is to appreciate that, in the 1829 litigation, the executive had not claimed that it had already acted to perform the U.S. obligations in the treaty.<sup>17</sup> Because there was no such claim, the *Foster* Court considered whether the treaty stipulation “operates of itself without the aid of any legislative provision.” After ruling that the treaty did not so operate, the Court reasoned that the political department addressed by the treaty was the legislature.<sup>18</sup> The *Foster* Court gave no consideration to the possibility that the promised act was performable by the other political department, the executive, after which it would become a rule for the Court.

In the related *Percheman* case handed down four years later, the Court pointed to two potential interpretations of the treaty provision being contested: one is that the provision “stipulat[es] for some future legislative act”;<sup>19</sup> and the other is that it acts “by force of the instrument itself.”<sup>20</sup> On the basis of its Spanish text, the Court concluded that the treaty provision at issue matched the second category.<sup>21</sup> But the opinion does not say that every treaty provision has to fit in one of those two categories.

Under this (re)reading of *Foster* and *Percheman*, the *Medellín* Court might have approached its task by recognizing the possibility of an intermediate category. This category would include treaty commitments that can be carried out only in the future and yet do not require legislation. Article 94(1) exemplifies that category. Immediate compliance with (or performance of) Article 94(1) in 1945 was impossible for the United States or any country because the ICJ had not yet been constituted. U.S. compliance with *Avena* was not possible until the judgment was handed down in March 2004. After the president agreed to U.S. compliance in February 2005,

<sup>15</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111 reporters’ n.5 (1987).

<sup>16</sup> *Foster*, 27 U.S. at 314.

<sup>17</sup> Indeed, prior federal law would have precluded such executive action. Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in *INTERNATIONAL LAW STORIES* 151, 167 (John E. Noyes, Laura A. Dickinson, & Mark W. Janis eds., 2007).

<sup>18</sup> *Foster*, 27 U.S. at 315.

<sup>19</sup> *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

<sup>20</sup> *Id.*

<sup>21</sup> Vázquez, *supra* note 14, at 701.

the force of the instrument of Article 94(1) should have led to a court judgment upholding the president's action. Such a result is not foreclosed by *Foster*.

Unlike *Foster*, the *Medellín* case involves an ICJ judgment against the United States and what the Supreme Court calls an "unprecedented action"<sup>22</sup> by the president. A more cautious Court might have reflected as to whether these circumstances could be distinguished from the two categories identified in *Foster*. A Court more respectful of international law might have started with a presumption<sup>23</sup> in favor of upholding U.S. compliance with ICJ judgments involving U.S. treaty violations by states. Under this standard of review, the Court could have looked to Texas to explain why its interests deserve supremacy over the national interests at stake.<sup>24</sup>

The Court reached its conclusion that Article 94(1) is non-self-executing by examining the text of that provision, its context within Article 94, statements by the Truman administration to the U.S. Senate during the ratification debates of 1945, and the text of the ICJ Statute. The Court explains that a self-executing treaty "has automatic domestic effect as federal law upon ratification."<sup>25</sup> This statement seems to imply that self-executing status is locked in at the time of U.S. ratification. The Court repeatedly suggests that the self-executing status of a treaty can be ascertained from material sourced in the U.S. ratification process, which, for the UN Charter, occurred in 1945.<sup>26</sup>

Nevertheless, the Court entertains a more nuanced view of treaty interpretation by stating that the determination of self-executing status may be based on factors that occur after U.S. ratification. For example, the Court recalls its case law holding that the view of the executive "is entitled to great weight," and then references the brief of the Bush administration stating that the relevant treaties in *Avena* do not create domestically enforceable law.<sup>27</sup> In addition, the Court characterizes the "postratification understanding" of signatory nations and "practice among signatory nations" as legitimate interpretive factors.<sup>28</sup> Having looked at foreign practice, the Court avers that "the lack of any basis for supposing that any other country would treat

<sup>22</sup> 128 S.Ct. at 1372 (quoting Brief for the United States as Amicus Curiae Supporting Respondents at 29–30, *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006) (Nos. 05-51, 04-10566), 2006 WL 271823).

<sup>23</sup> Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioner at 25, *Medellín v. Texas*, 128 S.Ct. 1346 (2008) (No. 06-984), 2007 WL 1886207 (suggesting a "presumption in favor of compliance with international obligations"); SHABTAI ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE* 88–89 (1957) ("The duty to carry out, or comply with, such a judgment [by the ICJ] is imposed upon the courts of a State party to litigation before the International Court no less than it is incumbent upon the other organs of that State . . .").

<sup>24</sup> *See* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (suggesting that when a state acts within its traditional competence, a conflict with national policy must be shown that would vary with the strength or the traditional importance of the state concern asserted); Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AJIL 697, 703 (1998) (suggesting that the Supreme Court exercise "searching scrutiny" of states' actions affecting U.S. foreign relations that may provoke consequences for the nation as a whole); Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AJIL 832, 838 (1989) (suggesting that preemption would follow if the adverse effects of the decision being made by the state would fall upon the entire nation and not be merely localized within the state).

<sup>25</sup> 128 S.Ct. at 1356 n.2.

<sup>26</sup> *See id.* at 1356 ("and is ratified on these terms" (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005)), 1358 ("Senate that ratified"), 1364 ("President and Senate intended"), 1366 ("determination by the President who negotiated it and the Senate that confirmed it"), 1367 ("President or Senate intended"), 1369 ("[o]nce a treaty is ratified"), ("ratified with the understanding").

<sup>27</sup> *Id.* at 1361 (quoting *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

<sup>28</sup> *Id.* at 1357 (quoting *Zicherman v. Korean Air Lines*, 516 U.S. 217, 226 (1996)), 1367.

ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts.”<sup>29</sup> In particular, the Court notes that at least one local court in Morocco has held that ICJ judgments are not binding as a matter of municipal law.<sup>30</sup>

Logically, the Court cannot have it both ways. Either a U.S. treaty is immutably self-executing (or not) at its birth, or there is a possibility that the status of a treaty can evolve over time. If birth determines destiny, then the current voice and action of the executive branch is irrelevant. Although the decisions of foreign courts could be relevant in elucidating the intent of the original treaty makers, the reliability of such decisions would depend on the intent-based doctrine followed in the foreign court.

Consider some counterfactual situations that elucidate the Court’s analytical approach: Suppose that the Bush administration had argued that Article 94(1) was self-executing. Or suppose that other countries did provide for direct enforcement of ICJ judgments. Presumably, then the Court’s analysis in *Medellín* would have been more nuanced and might have come out the other way.<sup>31</sup> Because the Court acknowledged postratification practice to be relevant to a treaty’s status in U.S. law, one cannot read *Medellín* as saying that the meaning of Article 94(1) was frozen by the expectations held by the president and the Senate in 1945.

The Court does not mention the president’s memorandum in part II of its opinion, the part that adjudges Article 94(1) to be non-self-executing. As a result, the Court does not even consider that the memorandum may be a relevant postratification understanding of how Article 94(1) operates.<sup>32</sup> Had the Court done so, it might have accorded greater weight to the U.S. president’s determination in 2005, pursuant to his constitutional authority as he perceived it, than to what other countries did or did not do under their respective constitutions. The proposition that the president’s memorandum is probative of the self-executing status of Article 94(1) in this particular judgment was accepted in Justice Stephen G. Breyer’s dissenting opinion, which found self-execution based on seven reasons taken together. One of those reasons was that “the President favors enforcement of this judgment.”<sup>33</sup>

If one reads *Medellín* as saying that an action by the president to give effect to an ICJ judgment cannot be a factor in ascertaining treaty self-execution, then there is a problematic inconsistency in the Court’s analysis. The *Medellín* Court recalls its holding in the predecessor *Sanchez-Llamas* case that ICJ interpretations are not conclusive on U.S. courts, and then

<sup>29</sup> *Id.* at 1363.

<sup>30</sup> *Id.* at 1363 n.10. The Court took issue with the portrayal of municipal implementation in an amicus brief filed by ICJ experts, *supra* note 23, in particular as regards *Rights of Nationals of the United States of America in Morocco* (*Fr. v. U.S.*), 1952 ICJ REP. 176 (Aug. 27).

<sup>31</sup> Or perhaps it would not have done so. Most of the Court’s discussion of the postratification understanding of nations appears in part II.C of the opinion after the Court has concluded that ICJ judgments are not directly enforceable in domestic courts. Moreover, the Court says that its conclusion is “confirmed by” the postratification understanding. 128 S.Ct. at 1363. Thus, a narrower reading of the Court’s opinion might be that the foreign practice discussed was only relevant to confirm the majority’s conclusion and would not have been mentioned if foreign practice had called the conclusion into question. If so, that would constitute a selective and biased use of foreign legal sources.

<sup>32</sup> The Court seems to have been thrown off by the fact that the Bush administration argued that Article 94(1) and *Avena* were not self-executing. Thus, the Court did not consider possibilities for holding that Article 94(1) could be enforced by the Court as a result of the president’s memorandum.

<sup>33</sup> 128 S.Ct. at 1389 (Breyer, J., dissenting); *see also id.* at 1385 (including within the first reason that the president seeks to enforce the ICJ obligation).

explains that “[g]iven that holding, it is difficult to see how that same structure and purpose [of the ICJ] can establish, as Medellín argues, that *judgments* of the ICJ nonetheless were intended to be conclusive on our courts.”<sup>34</sup> The holding in *Sanchez-Llamas* was partly premised on the Court’s observation that “it is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States.”<sup>35</sup> What the Court was referring to was the executive branch’s withdrawal in March 2005 from the Optional Protocol to the Vienna Convention on Consular Relations (VCCR). Yet that withdrawal happened decades after the United States ratified the UN Charter, which includes the ICJ Statute. So if a presidential action to withdraw U.S. agreement to give the ICJ jurisdiction is relevant to the domestic law status of an ICJ (interpretation and) judgment, it seems contradictory to overlook the relevance of the same president’s action to comply with an ICJ judgment.

The Court does not question the proposition “that the President’s constitutional role ‘uniquely qualifies him’ to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision and ‘to do so expeditiously.’”<sup>36</sup> Yet if so, one wonders why the Court did not place the president’s decision on compliance at the center of its analysis as to whether Article 94(1) is self-executing with respect to *Avena*. If the president is uniquely qualified to resolve sensitive policy decisions, then the Court should have shown more modesty in deciding whether to invalidate the president’s resolution of *Avena*.

In its analysis of the status of Article 94(1), the Court draws conclusions from the UN enforcement structure, but those conclusions are misplaced. The Court avers that Article 94(1) precludes enforcement by national courts on the grounds that Article 94(2)<sup>37</sup> provides for non-judicial enforcement through the Security Council.<sup>38</sup> As the dissent points out, that deduction makes no sense because Article 94(2) concerns situations where a UN member refuses to comply with an ICJ decision.<sup>39</sup> Article 94(2) does not give meaning to Article 94(1) when the scoff-law state agrees to comply.

The inference this author draws from the Court’s opinion is that in seeking to preserve policy space for a presidential decision to withhold compliance with a treaty obligation, the Court thinks that it must deny space for a president’s affirmative decision to comply. One wonders why there is not room under the U.S. Constitution for a presidential decision either to comply or not to comply.<sup>40</sup> The Court’s solicitousness about noncompliance cannot be easily reconciled with its holding that the reasons justifying the president’s decision to comply are “plainly

<sup>34</sup> 128 S.Ct. at 1364.

<sup>35</sup> *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2685 (2006).

<sup>36</sup> 128 S.Ct. at 1367 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 11, 12, *Medellín v. Texas*, 128 S.Ct. 1346 (2008) (No. 06-984), 2007 WL 1909462).

<sup>37</sup> Article 94(2) provides: “If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council . . .” UN CHARTER Art. 94(2).

<sup>38</sup> 128 S.Ct. at 1359 (ascribing an “express diplomatic—that is, nonjudicial—remedy” to drafters of Article 94); 1360 (automatic enforceability is “fatally undermined by the enforcement structure established by Article 94”), (petitioner’s construction of Article 94 “would eliminate the option of noncompliance”).

<sup>39</sup> *Id.* at 1385 (Breyer, J., dissenting).

<sup>40</sup> Of course, if Congress had legislated to forbid compliance with *Avena* (or to require it), that would be a different matter.

compelling,”<sup>41</sup> or with the Court’s own statement that “the ability of the political branches to determine whether and how to comply with an ICJ judgment” are “sensitive foreign policy decisions” that should not be “transferred to state and federal courts.”<sup>42</sup>

The Court seems to have overlooked the compelling U.S. interest of assuring uniformity in U.S. foreign policy. In its analysis of self-execution, the Court omits reference to an important line of cases affirming the primacy of the national government in foreign relations. In the *Belmont* case, the Court stated: “Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.”<sup>43</sup> In the *Garamendi* case involving executive agreements, the Court ruled that contrary state law was preempted, and explained:

There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the “concern for uniformity in this country’s dealings with foreign nations” that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place.<sup>44</sup>

An interpretive road not taken in *Medellín* was to respect these precedents on the conduct of U.S. foreign relations.

By affirming the judgment of the Texas court, the Supreme Court has unlocked the door for every state to make its own decision regarding compliance with the *Avena* judgment. Indeed, the states have already diverged in responding to *Avena*.<sup>45</sup> The Court did not consider whether this reappearance of state lines had reached the point where an exercise of state power that touches on foreign relations should yield. The Court ought to have weighed Texas’s interest in light of the plainly compelling national interest.<sup>46</sup> Could it really be that under modern federalism, Texas has a constitutional right to flout the nation’s treaty obligations regarding the treatment of aliens?<sup>47</sup>

<sup>41</sup> 128 S.Ct. at 1367. The interests noted by the Court are “ensuring the reciprocal observance” of the Vienna Convention on Consular Relations, “protecting relations with foreign governments, and demonstrating commitment to the role of international law.” *Id.*

<sup>42</sup> *Id.* at 1360.

<sup>43</sup> *United States v. Belmont*, 301 U.S. 324, 331 (1937). *Medellín* differs from *Belmont* because the latter involved a diplomatic agreement and claim assignment pursuant to the recognition of the Soviet Union.

<sup>44</sup> *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). The dissent in *Garamendi* would have upheld the California law and noted that it would “reserve foreign affairs preemption for circumstances where the President, acting under statutory or constitutional authority, has spoken clearly to the issue at hand.” *Id.* at 442 (Ginsburg, J., dissenting). In *Garamendi*, the position of the executive branch had been announced by subcabinet officials, not by the president, and the executive agreements at issue had not expressly preempted state law. By contrast, in *Medellín*, the president announced the position of the executive branch in his memorandum and expressly addressed the state courts.

<sup>45</sup> Susan L. Karamanian, *Briefly Resuscitating the Great Writ: The International Court of Justice and the U.S. Death Penalty*, 69 ALBANY L. REV. 745, 758–61 (2006); John R. Crook, *Contemporary Practice of the United States*, 100 AJIL 462 (2006).

<sup>46</sup> *See Garamendi*, 539 U.S. at 420 (suggesting that “it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted”). The State of Texas’s interest was presented to the Supreme Court by the solicitor general of Texas.

<sup>47</sup> *See Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) (posing the question and answering no as to whether the Constitution has “done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement

In interpreting Article 94(1), the Court expresses agreement with the executive branch's construction of that provision as "a *commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision."<sup>48</sup> Yet when the Bush administration finally did so, the Court averred that the power to comply is allocated to Congress<sup>49</sup> rather than to the other political branch, the president. The Court does not reconcile its holding for executive branch impotence with its statement that the executive branch has the "lead role"<sup>50</sup> in foreign policy. Indeed, the Court goes so far as to hold that the non-self-executing character of Article 94 "constrains"<sup>51</sup> the president's ability to comply with an ICJ judgment. The Court does not explain how Article 94(1) can have sufficient domestic effect to constrain the president if that provision lacks any domestic effect.<sup>52</sup>

Although arguments were offered that the UN Charter gave the president authority to implement ICJ judgments, the Court disagreed because "the terms of a non-self-executing treaty can become domestic law only in the same way as any other law," that is, through enactment by Congress.<sup>53</sup> In reaching its conclusion, however, the Court did not consider the possibility that even if non-self-executing, Article 94(1) may address the executive sufficiently to clothe it with authority to preempt state law or practice. Important arguments have been made along these lines in the academy.<sup>54</sup>

Before concluding part I, the author should respond to two potential criticisms. One is the argument that having U.S. courts enforce ICJ judgments affecting state law is problematic because too much authority is yielded to the International Court. That argument was reflected in the Supreme Court's concern that "there is nothing to prevent the ICJ from ordering state courts to annul criminal convictions and sentences, for any reason deemed sufficient by the ICJ."<sup>55</sup>

Under the thesis put forward in this essay, however, several safeguards exist: First, an ICJ judgment can do no more than ask the United States to fulfill an international obligation it

renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible").

<sup>48</sup> 128 S.Ct. at 1358 (quoting Brief for the United States as Amicus Curiae Supporting Respondent at 34, *Medellín v. Dretke*, 544 U.S. 916 (2005) (No. 04-5928), 2005 WL 504490). As the Court explains, the "undertakes to comply" language confirms that further action to give effect to an ICJ judgment was contemplated." *Id.* at 1359 n.5. But further action does not necessarily mean legislative action.

<sup>49</sup> Or it normally is. The Court admitted that it was not saying that the power of Congress to implement a treaty is exclusive and that the president would never have power pursuant to a treaty to set aside state law. *Id.* at 1367 n.13.

<sup>50</sup> *Id.* at 1367 (quoting *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972)); see also *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (noting the "customary policy of deference to the President in matters of foreign affairs"). *Jama* was cited in the *Medellín* dissenting opinion, but not the majority opinion. 128 S.Ct. at 1389 (Breyer, J., dissenting).

<sup>51</sup> 128 S.Ct. at 1371 (majority opinion).

<sup>52</sup> See *id.* at 1365 (stating that the UN Charter does not afford binding domestic effect).

<sup>53</sup> *Id.* at 1369.

<sup>54</sup> See, e.g., Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, available at <<http://ssrn.com/abstract=1118063>>, revised in 122 HARV. L. REV. (forthcoming 2008) (noting that if Article 94 were considered non-self-executing, it could reasonably be interpreted as authorizing the president to decide whether and when the nation would comply with it). Edward Swaine has raised concerns about the view that Article 94 delegates authority to the president. Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 354, 373-77 (2008). Instead, Swaine suggests that the president's memorandum could be justified under the "Take Care" Clause of the U.S. Constitution. The clause states that the president "shall take Care that the Laws be faithfully executed." U.S. CONST. Art. II, §3.

<sup>55</sup> 128 S.Ct. at 1364.

already has.<sup>56</sup> Second, the president decides whether compliance with an ICJ judgment promotes the interest and honor of the United States. Third, in the unlikely event that the president orders compliance with an ICJ judgment that requires an unconstitutional act, then U.S. courts would not enforce it.

The other criticism is that the self-executing status of Article 94 should be a legal judgment that does not turn on the ad hoc actions of a president. Further to this point, the *Medellín* Court criticized an interpretive approach where a treaty obligation is “sometimes enforceable and sometimes not.”<sup>57</sup> Such criticisms of a case-by-case approach have merit. But it is unclear why the nature of a particular ICJ decision or the reparation imposed cannot be a factor in determining whether Article 94(1) is self-executing. The Supreme Court could have found that under the Constitution’s Supremacy Clause, which states that treaties are the supreme law of the land, the Article 94(1) obligation in *Avena* is self-executing against Texas because the president had agreed to give effect to the ICJ judgment, which was itself an international law obligation of the United States.

## II. CRAFTING IMPLEMENTING LEGISLATION AND REVISING TREATIES

An editorial in the *Dallas Morning News* called on Congress to “fix that loophole” created by the Supreme Court’s *Medellín* decision.<sup>58</sup> The decision seems clear that Congress can pass a law requiring compliance with *Avena*. Although it could be a law “that reaches deep into the heart of the State’s police powers,”<sup>59</sup> nowhere does the *Medellín* Court suggest that such a law is beyond Congress’s authority to enact. Instead, the Court says the opposite. Several times it calls attention to the constructive role of federal implementing legislation.<sup>60</sup> Such a law not only could remedy America’s predicament in *Avena*, but also could put procedures in place for future ICJ decisions.<sup>61</sup>

Individual state legislatures and state courts could also take action to implement *Avena*. Indeed, Justice John Paul Stevens suggested in his concurring opinion that “the ICJ’s decision falls on each of the States as well as the Federal Government.”<sup>62</sup> One could even imagine an

<sup>56</sup> Moreover, as Sean Murphy has noted, “The International Court is unlikely to issue a decision that . . . is regarded by international lawyers generally as misguided, or by the global community at large as politically unacceptable.” Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, in THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS (Cesare P. R. Romano ed., forthcoming 2008).

<sup>57</sup> 128 S.Ct. at 1362; see also *id.* at 1363 (“sometimes has the effect of domestic law and sometimes does not”). The majority opinion further criticized the dissenting opinion by stating that its “contrary approach would assign to the courts—not the political branches—the primary role in deciding when and how international agreements will be enforced.” *Id.* at 1363. Yet under the thesis offered here, the courts would follow the decisions made by political branches.

<sup>58</sup> Editorial, *How to Treat a Treaty: Texas Murder Case Has International Ramifications*, DALLAS MORNING NEWS, Mar. 27, 2008, at 12A.

<sup>59</sup> 128 S.Ct. at 1372.

<sup>60</sup> See, e.g., *id.* at 1365 (Congress could elect to give ICJ judgment “wholesale effect”), 1366 (“Congress knows how to accord domestic effect”), 1368–69 (“requirement that Congress, rather than the President, implement a non-self-executing treaty”), 1369 (“absence of congressional legislation”).

<sup>61</sup> See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AJIL 310, 323–29 (1992) (discussing the benefits of transformational legislation over direct application of treaties).

<sup>62</sup> 128 S.Ct. at 1374 (Stevens, J., concurring).

initiative to adopt model legislation for states. In 1962 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Foreign Money-Judgments Recognition Act, and thirty-one states have now adopted it or its 2005 update.<sup>63</sup> As the *Medellin* Court notes, however, this uniform act applies only to certain types of monetary judgments and not to injunctive relief.<sup>64</sup> Moreover, this uniform act covers judgments of foreign courts, not judgments of international courts. Devising such a uniform act would therefore be a wholly new project.

This author hopes that the *Medellin* Court is correct that “Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes.”<sup>65</sup> Such legislation could authorize the president to implement ICJ judgments or could establish an expedited procedure to gain legislative approval of compliance.<sup>66</sup> In considering such legislation concerning the ICJ, Congress could draw on its experience with statutory implementing legislation regarding judgments of the World Trade Organization (WTO) and other trade agreements.

Under the statutory framework in the Uruguay Round Agreements Act, U.S. law declares that U.S. federal law is to prevail in the event of a conflict with WTO law.<sup>67</sup> The Act does not assert a hierarchical relationship between state (i.e., subnational) law and WTO law, but provides that “[n]o State law, or the application of such a State law, may be declared invalid as to any person or circumstance . . . except in an action brought by the United States for the purpose of declaring such law or application invalid.”<sup>68</sup> Furthermore, the Act states that the “United States shall have the burden of proving” that the state law or application of that law “is inconsistent with the [WTO] agreement in question.”<sup>69</sup> That is, the Act provides that the federal government may bring suit against a state in federal court to ask that the state law be invalidated on the grounds that it is inconsistent with the WTO Agreement. These provisions imply that the rule of decision is that the WTO treaty displaces state law.<sup>70</sup> Yet the Act does not accord equal status to judicial decisions emerging from the WTO. Rather, the Act states that when a federal court considers such a suit against a state, reports of WTO panels and the Appellate

<sup>63</sup> For the Act and updated information on it, see the Web site of the National Conference of Commissioners on Uniform State Laws, <<http://www.nccusl.org/Update/>>.

<sup>64</sup> 128 S.Ct. at 1366–67.

<sup>65</sup> *Id.* at 1366.

<sup>66</sup> Some precedents exist in the trade field for presidential compliance actions following international panel decisions adverse to the United States. When Congress enacted implementing legislation for the Tokyo Round multilateral trade agreements in 1979, the law authorized the president to submit legislation to Congress to amend, repeal, or enact statutes to implement requirements or recommendations under the trade agreements. The legislation was to be considered under a fast-track arrangement where an up-or-down vote was guaranteed. 19 U.S.C. §2504(c) (2006). These provisions were never used. Another example is the Forest Resources Conservation and Shortage Relief Act, which bans the export of unprocessed timber from public lands and authorizes the president to suspend this provision in the event that a dispute panel finds that it violates a U.S. trade agreement. 16 U.S.C. §620c(a), (g) (2006).

<sup>67</sup> 19 U.S.C. §3512(a)(1) (2006).

<sup>68</sup> 19 U.S.C. §3512(b)(2)(A) (2006).

<sup>69</sup> 19 U.S.C. §3512(b)(2)(B)(ii) (2006).

<sup>70</sup> In *Crosby v. NFTC*, the Supreme Court referred to this provision and to the possibility of challenging state law “based on inconsistency with any of the ‘Uruguay Round Agreements.’” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 386 n.24 (2000).

Body “shall not be considered as binding or otherwise accorded deference.”<sup>71</sup> Although one WTO case concerned U.S. subnational law, so far no WTO decision has held the United States to be in violation of the WTO Agreement because of state law.

Is the WTO framework a useful model for how the U.S. courts would respond to an ICJ judgment? If the procedure in the Act were used, the federal court would consider whether the state law violates the WTO Agreement. If this same implementation framework applied to *Avena*, the federal court would decide whether Texas law and practice violates the VCCR without according any deference to the *Avena* decision. In view of the recent history of VCCR cases in federal courts, using the WTO framework for ICJ cases could allow states to continue to enforce procedural default rules. So if the goal is to achieve U.S. compliance with ICJ judgments, the WTO implementing legislation is not a promising model for ICJ implementing legislation because it does not direct U.S. courts to defer to international judgments against the United States.

As regards treaty design, the *Medellin* Court repeatedly notes the possibility of crafting treaty provisions to give the results of international adjudication domestic effect in national courts.<sup>72</sup> By contrast, the dissenting opinion expresses skepticism about the prospects for including such domestic enforcement provisions in treaties.<sup>73</sup> The skepticism is based on the thesis that it could be difficult to agree upon uniform language that works for all countries given the variety of national legal systems. Difficult or not, devising such language will be an important new frontier of international law in the twenty-first century.

One of many foresighted ideas of Michael Reisman, his “Draft Protocol for the Enforcement of I.C.J. Judgments” proposed in 1969, may serve as a useful starting point:

1. The undersigned States parties to this protocol, in the interests of ensuring enforcement of the judgments of the International Court of Justice, declare that
  - a. The enforcement of an international judgment is the obligation of all States parties to the Statute.
  - b. A judgment of the International Court creates rights and duties, automatically enforceable under international law and, without any incorporation, reception or such procedure, in municipal law.
  - c. No claim of sovereign immunity can avail against the execution, in any forum, of a judgment of the International Court of Justice.
2. Accordingly, signatories to this protocol undertake
  - a. to take all general or particular measures which are necessary and appropriate for the enforcement of international judgments, in all cases in which such enforcement is sought in State organs;

<sup>71</sup> 19 U.S.C. §3512(b)(2)(B)(i) (2006). On the other hand, the Statement of Administrative Action (SAA) explains that a court may consider the view expressed in WTO panel reports. Statement of Administrative Action, in H.R. DOC. NO. 103-316, vol. 1, at 656, 675 (1994). The SAA was approved by Congress as an “authoritative expression” for any judicial proceeding. 19 U.S.C. §3512(d) (2006).

<sup>72</sup> 128 S.Ct. at 1369 (“If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented ‘in mak[ing] the treaty . . .’”), 1361, 1363–65.

<sup>73</sup> *Id.* at 1381, 1383 (Breyer, J., dissenting).

b. to enact such internal legislation as is necessary to require domestic courts and tribunals to enforce international judgments, and rights arising thereon, solely and exclusively upon certification of the authenticity of said judgment.<sup>74</sup>

Would such a protocol be self-executing under *Medellin*? Given the language in paragraph 2, the protocol would not be self-executing, despite the language in paragraph 1(b), because paragraph 2 uses the word “undertake” and refers to the enactment of implementing legislation if needed.

Two approaches could be used to harden the protocol’s legal effect. First, the protocol could be made statutelike, but that would not work for dualist systems even though it could succeed in the United States. Second, paragraph 2 could be rewritten not as a commitment to “undertake,” but as a certification that implementing authority already exists. For example: “Each signatory to this protocol agrees that before depositing its ratification, it has in place constitutional or statutory law sufficient to require enforcement of ICJ judgments by its courts.”<sup>75</sup> This second option would seem to work and be consistent with *Medellin*.

One principle illustrated by Professor Reisman’s draft protocol is that new treaty language can be designed as an optional protocol rather than as a requirement for all parties. This optional approach serves as an answer to the skepticism in the dissenting opinion about requiring all signatories to adopt “uniform” domestic law treatment.<sup>76</sup> One example of a U.S. treaty that features nonuniform enforcement commitments is the North American Agreement on Environmental Cooperation of 1993 between Canada, Mexico, and the United States. In that Agreement, Canada alone agreed to adopt procedures that could make international panel determinations an order of a Canadian court of competent jurisdiction.<sup>77</sup>

In conclusion, the continuing U.S. delinquency in the *Avena* matter could have been avoided if the Supreme Court had given more respectful consideration to the Supremacy Clause. The world community is now watching to see whether Congress will act to implement the ICJ judgment. If it fails to act, that inaction would confirm the Court’s skepticism about the political acceptability of giving ICJ judgments direct effect in U.S. law. This essayist hopes that Congress is up to the task of implementing the UN Charter. As Edward S. Corwin noted nearly a century ago, “[T]he United States cannot afford to multiply the occasions of its accountability before the world’s tribunal by the crassest sort of negligence to provide the proper legal machinery for carrying its treaty obligations into effect.”<sup>78</sup>

<sup>74</sup> W. M. Reisman, *The Enforcement of International Judgments*, 63 AJIL 1, 27, app. 2 (1969).

<sup>75</sup> See C. WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 716 (1964) (discussing how international instruments might cover implementation of international decisions).

<sup>76</sup> 128 S.Ct. at 1383 (Breyer, J., dissenting).

<sup>77</sup> North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., Art. 36 & Annex 36A, Sept. 14, 1993, 32 ILM 1480, 1482 (1993). So far, no environmental dispute panel has been established; therefore, this treaty provision has not been tested.

<sup>78</sup> EDWARD S. CORWIN, *NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER* 285–86 (1913). Corwin gives an example of a state’s violation of treaty rights of aliens. Corwin’s reference to tribunals refers to international arbitral tribunals agreed to by the United States.

## LESS THAN ZERO?

By Carlos Manuel Vázquez\*

*Medellín v. Texas*<sup>1</sup> is the first case in which the Supreme Court has denied a treaty-based claim solely on the ground that the treaty relied upon was non-self-executing. In *Foster v. Neilson*,<sup>2</sup> the only other case in which the Court had denied relief on this ground,<sup>3</sup> the Court offered its view that the treaty was non-self-executing as an alternative ground for denying relief.<sup>4</sup> The Court soon thereafter disavowed its conclusion that the treaty involved in *Foster* was non-self-executing,<sup>5</sup> and, in the intervening years, it repeatedly declined invitations to deny relief on this or related grounds.<sup>6</sup> Many observers (including me) thought that the Court would again skirt a ruling on non-self-execution in *Medellín* because the president had issued a memorandum ordering compliance with the judgment of the International Court of Justice (ICJ) in *Avena*.<sup>7</sup> After all, the Court in *American Insurance Ass'n v. Garamendi* had recently struck down a California law on the ground that it conflicted with a "policy" reflected in certain sole executive agreements.<sup>8</sup> The president in *Medellín* seemed to be standing on stronger ground, as he was insisting that state law give way to an obligation imposed by a treaty that had received the consent of the Senate and was accordingly the supreme law of the land.<sup>9</sup> But the Court defied this expectation, with potentially regrettable results for the law of treaties.

My comments here will focus on the path the Court might have taken to avoid a self-execution holding. Bush's memorandum ordering compliance with the *Avena* judgment bears

\* Of the Board of Editors.

<sup>1</sup> 128 S.Ct. 1346, 1357 (2008).

<sup>2</sup> *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

<sup>3</sup> *Id.* at 314. In his dissent in *Medellín*, Justice Breyer noted that *Foster* and *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39 (1913), were the only cases in which the Supreme Court had denied relief on this ground. *Medellín*, 128 S.Ct. at 1379 (Breyer, J., dissenting) (citing Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AJIL 695, 716 (1995) [hereinafter Vázquez, *Four Doctrines*]). The majority did not dispute the point. 128 S.Ct. at 1366 n.12. In the article cited by the dissent for this point, I noted, out of an excess of caution, that *Cameron Septic Tank* may have denied relief on non-self-execution grounds, but, if so, it was ambiguous in doing so. Vázquez, *Four Doctrines*, *supra*, at 716 n.96. I now do not regard *Cameron Septic Tank* as having based its holding on a conclusion that the treaty was non-self-executing. See Brief for Louis Henkin et al. as Amici Curiae Supporting Petitioner at 16 n.10, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) ("[In *Cameron*,] this Court noted but did not endorse the apparent view of Congress . . . that the treaty of Brussels of 1900 was not self-executing. Instead, it ruled against the plaintiff on the merits . . .") (I was a coauthor of this brief).

<sup>4</sup> See generally Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in INTERNATIONAL LAW STORIES 151 (John E. Noyes, Laura A. Dickinson, & Mark W. Janis eds., 2007) [hereinafter Vázquez, *Story of Foster and Percheman*].

<sup>5</sup> *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

<sup>6</sup> Compare *Hamdan v. Rumsfeld*, 548 U.S. 557, 627 (2006), with Brief for the Respondents at 31, *Hamdan*, 548 U.S. 557 (No. 05-184) (arguing that treaties are presumptively to be enforced diplomatically rather than judicially); compare *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 179 (1993) (construing Article 33 of Refugee Convention not to apply to aliens beyond U.S. borders), with Brief for the Petitioners at 38 n.24, *Sale*, 509 U.S. 155 (No. 92-344) (arguing that Article 33 is not judicially enforceable); compare *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (construing U.S.-Mexico Extradition Treaty not to prohibit unilateral abductions), with Brief for United States at 34, *Alvarez-Machain*, 504 U.S. 655 (No. 91-712) (arguing that individuals lack standing to invoke extradition treaty in court).

<sup>7</sup> *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 ICJ REP. 12 (Mar. 31).

<sup>8</sup> *Am. Ins. Ass'n v. Garamendi* 539 U.S. 396, 425 (2003).

<sup>9</sup> I refer here to Article 94 of the United Nations Charter [hereinafter Article 94], by which the United States undertook to comply with judgments of the ICJ in cases to which it is a party.

some resemblance to a proposal I made in these pages a decade ago<sup>10</sup> when the ICJ ordered the United States to stay the execution of Angel Breard pending resolution of the proceeding brought by Paraguay on his behalf at the ICJ.<sup>11</sup> Given the failure of Bush's memorandum to garner a single vote in *Medellin*, it seems fitting to revisit the issue. As discussed below, the majority's reasons for rejecting the president's action rest on its idiosyncratic and countertextual views about what it means for a treaty to be non-self-executing. As a result, the majority's analysis of the president's memorandum in *Medellin* tells us little about the president's power to displace state law to promote foreign policy interests unrelated to non-self-executing treaties. (The majority itself disclaimed broad implications for its presidential power holding by inserting a this-day-and-train-only footnote<sup>12</sup> reminiscent of its similar disclaimer in *Bush v. Gore*.<sup>13</sup>) But the majority's analysis of the presidential power issue offers some basis for resolving some ambiguities in the Court's analysis of the self-execution issue: interpreting the majority's non-self-execution holding narrowly is the only way to avoid reducing the majority's presidential power analysis to absurdity.

#### I. PRESIDENTIAL POWER IN *BREARD*

When the ICJ issued an order of provisional measures in *Paraguay v. United States*, requiring a stay of Virginia's execution of Angel Breard, the solicitor general took the position that, under our Constitution, the responsibility for deciding whether to comply with the ICJ's order rested with the governor of Virginia.<sup>14</sup> It seemed clear to me at the time that the solicitor general's position was untenable. One of the principal reasons for the adoption of a new Constitution to replace the Articles of Confederation was the states' repeated violations of treaty obligations during the period before the Constitution, which resulted in serious foreign relations problems for the fledgling nation. The founders were unanimous in believing that the new Constitution had to place responsibility for treaty compliance in the hands of the federal government.<sup>15</sup>

The real question in *Breard* was not whether the federal government had the power to require compliance with the ICJ's order but, rather, whether the power rested with the judicial, executive, or legislative branches. The answer to that question was complicated by the uncertainty that existed at the time about whether ICJ orders of provisional measures were binding as a matter of international law. The ICJ later held that such orders are binding,<sup>16</sup> but at the time of *Breard*, the United States took the position that they were

<sup>10</sup> See Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AJIL 683, 689–90 (1998) [hereinafter Vázquez, *Breard and Federal Power*].

<sup>11</sup> Vienna Convention on Consular Relations (Para. v. U.S.), 1998 ICJ REP. 248, 258 (Nov. 10) (“The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.”).

<sup>12</sup> The *Medellin* majority denied that it was holding that “in the exercise of his Article II powers pursuant to a ratified treaty, the President can *never* take action that would result in setting aside state law,” 128 S.Ct. at 1367 n.13, and it stressed that it was addressing only the “far more limited [questions] of whether he may unilaterally create federal law by giving effect to the judgment of this international tribunal pursuant to this non-self-executing treaty, and, if not, whether he may rely on other authority under the Constitution to support the action taken in this particular case.” *Id.*

<sup>13</sup> *Bush v. Gore*, 531 U.S. 98, 109 (2000) (limiting consideration “to the present circumstances”).

<sup>14</sup> Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8214).

<sup>15</sup> See generally Vázquez, *Four Doctrines*, *supra* note 3, at 698–700; Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1108–10 (1992).

<sup>16</sup> *LaGrand* (FRG v. U.S.), 2001 ICJ REP. 446 (June 27).

not.<sup>17</sup> I argued that, even assuming that ICJ orders of provisional measures were not binding as a matter of international law, and for that reason were not directly enforceable in our courts, an act of the legislature was not needed: the president had the power to issue an executive order requiring Virginia to comply with the ICJ's order.<sup>18</sup> After all, the United States was party to one treaty submitting the case to the compulsory jurisdiction of the ICJ and another that gave the ICJ the authority to issue orders of provisional measures. Under the Supremacy Clause, those treaties were the supreme law of the land, and, under Article II, the president had the duty to take care that they were faithfully executed. Even if ICJ orders of provisional measures were not binding under international law (and for that reason not directly enforceable in our courts), the treaties contemplated that parties would *generally* comply. It was thus reasonable, I argued, to construe the treaties as implicitly delegating to the president the authority to require compliance.<sup>19</sup> Because provisional measures orders are by their nature provisional, their effect on individual liberty or on the prerogative of the states would be temporary. More important, provisional measures are by their nature emergency measures.<sup>20</sup> Thus, holding that compliance with those orders must await legislative action would render the treaty's authorization of those orders completely inefficacious given the significant obstacles to federal legislation built into our constitutional system.<sup>21</sup>

## II. THE PRESIDENT'S MEMORANDUM IN *MEDELLÍN*

Fast forward to 2005, after the ICJ's judgment in *Avena*.<sup>22</sup> Because *Avena* was a concededly binding final judgment, the case for direct judicial enforcement was stronger than in *Breard*, as a third treaty—the United Nations Charter—obligates parties to comply with ICJ final

<sup>17</sup> Brief for the United States, *supra* note 14, at 51; LaGrand at 507–08, paras. 112, 115.

<sup>18</sup> Vázquez, *Breard and Federal Power*, *supra* note 10, at 685–86.

<sup>19</sup> Although I also suggested that the president's power to "Take Care" that the relevant treaties be faithfully executed would have supported a presidential order to comply with a (hypothetically) binding order of provisional measures even if it were regarded as not directly enforceable for political question reasons, *see* Vázquez, *Breard and Federal Power*, *supra* note 10, at 685, I regarded the delegation rationale as narrower and sufficient to sustain an executive order staying *Breard*'s execution. For a careful and persuasive argument that the president's memorandum in *Medellín* was a valid exercise of his "Take Care" power, *see* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 372–86 (2008). Although Swaine argues that a "Take Care" rationale would be narrower than a delegation rationale, *id.* at 377, he does not seem to be referring to the delegation argument discussed here and in my prior article, which was specific to orders of provisional measures. His article discusses the validity of the president's order requiring compliance with the final judgment in *Avena*. *Id.* at 337–42. As discussed below, my delegation argument would not necessarily apply to such an order.

<sup>20</sup> Bernard H. Oxman, *Jurisdiction and the Power to Indicate Provisional Measures*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 323, 323 (Lori F. Damrosch ed., 1987) ("Urgency is a basic characteristic of those situations.").

<sup>21</sup> *See* Vázquez, *Breard and Federal Power*, *supra* note 10, at 689 & n.37. Of course, the treaty authorizing such measures does not say expressly that it delegates such power to the president. Treaties generally do not address details of domestic enforcement (nor can they, given the diversity of constitutional systems covered by multilateral treaties of this sort). My argument was that treaties authorizing emergency measures of this sort should be construed as implicitly authorizing action by domestic officials who have the ability to act expeditiously and who otherwise can be delegated power to perform the contemplated acts. *See id.* at 689 n.37. In countries with a more streamlined legislative process, compliance through legislation might be appropriate, but in a legal system such as ours, which imposes significant obstacles to legislation, executive action is necessary.

<sup>22</sup> *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 ICJ REP. 12 (Mar. 31).

judgments against them.<sup>23</sup> In *Medellín*, the Bush administration argued that the ICJ judgment was not directly enforceable in court,<sup>24</sup> but it concluded that the president had the power to require the states to comply; the president accordingly issued what he called a “memorandum,” effectively requiring the state courts to provide the hearings called for by the *Avena* judgment.<sup>25</sup>

Some commentators believed that the case for a presidential order requiring state compliance was stronger in *Medellín* than in *Breard* because the former involved a concededly binding final judgment. In my view, the constitutional case for Bush’s order is, if anything, slightly weaker. An order requiring compliance with a final judgment cannot be characterized as a temporary measure. Had the hearing required by *Avena* been held, and the requisite prejudice been found, the state court would presumably have been required to order an effective remedy, such as a new trial or a new sentence for *Medellín*. More important, unlike provisional measures, final judgments are not necessarily emergency measures. Thus, awaiting action by Congress would not completely gut the treaty provisions authorizing such judgments and requiring compliance. The solicitor general in *Medellín* made an argument along the lines of my defense of a *Breard* executive order, noting that compliance might often require swift action.<sup>26</sup> This argument might support the conclusion that the president has the power to order compliance with final judgments in certain situations, but, if this were the only basis for upholding presidential power, it might be countered that the president should only have the power to maintain the status quo for the time necessary to give Congress a chance to consider the matter. By contrast, provisional measures will always be temporary emergency measures, so it is reasonable to interpret the treaty authorizing such measures to grant the president the power to require full compliance.

In the end, the strength of the argument for a presidential power to require compliance with an international tribunal’s judgment depends on the reasons for concluding that the judgment is not directly enforceable in the courts. If Article 94 had provided that the states parties agreed to take action *through their legislatures* to comply with any judgment against them rendered by the ICJ, then the treaty would clearly have contemplated action by Congress. The treaty would have been a “stipulation for a future legislative act,” which is what the Court in *United States v. Percheman* regarded as the archetype of a non-self-executing treaty.<sup>27</sup> Critics of President Bush’s memorandum worried that, if the president were recognized to have the power to require compliance with ICJ orders pursuant to Article 94, he would have the power to execute any non-self-executing treaty.<sup>28</sup> That would certainly be a very broad power, given the broad scope of existing human rights treaties that have been deemed non-self-executing.<sup>29</sup> But

<sup>23</sup> The Spanish version of UN Charter Article 94 indicates that the parties “agree[d] to comply” with the judgments of the ICJ. See *Medellín*, 128 S.Ct. at 1384 (Breyer, J., dissenting) (quoting Spanish counterpart to “undertakes to comply”—“compromete a cumplir”—which translates most directly as “agrees to comply”).

<sup>24</sup> Brief for the United States as Amicus Curiae Supporting Respondent 33–38, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928).

<sup>25</sup> George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), reprinted in John R. Crook, Contemporary Practice of the United States, 99 AJIL 489 (2005).

<sup>26</sup> *Supra* note 24, at 45–46; Brief for the United States as Amicus Curiae Supporting Petitioner at 23–24, *Medellín v. Texas*, 128 S.Ct. 1346 (2008) (No. 06-984).

<sup>27</sup> 32 U.S. (7 Pet.) 51, 88–89 (1833).

<sup>28</sup> Brief of Constitutional and International Law Scholars as Amicus Curiae Supporting Respondent at 11–12, *Medellín*, 128 S.Ct. 1346 (2008) (No. 06-984).

<sup>29</sup> These treaties include the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, 6 ILM 368; the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21,

upholding the president's memorandum need not have had such broad ramifications. To paraphrase the *Medellín* majority, some treaties delegate power to the president and some do not, depending on the treaty.<sup>30</sup> If the human rights treaties are indeed non-self-executing, it is because they were so declared by the United States through "declarations" appended to the instruments of ratification.<sup>31</sup> Whether these treaties confer execution power on the president thus depends on whether the declarations of non-self-execution can be so construed. In my view, these declarations are best read to require legislation.<sup>32</sup>

Article 94 contains no express or even implied requirement of legislative action. The article provides that each party "undertakes" or "agrees"<sup>33</sup> to comply with ICJ judgments. The Supremacy Clause gives that obligation the force of supreme federal law and instructs state courts to give it effect, notwithstanding the laws of the states. In the absence of some constitutional impediment to judicial implementation, the Court should have concluded that the *Avena* judgment was directly enforceable by virtue of Article 94 and the Supremacy Clause, as the dissenters argued. A constitutional impediment to direct judicial enforcement of an ICJ judgment might have existed, for example, if the judgment had required the appropriation of money<sup>34</sup> or the criminalization of conduct.<sup>35</sup> The Due Process Clause would have been an additional impediment to the direct judicial enforcement of a hypothetical ICJ judgment requiring that state officials who had violated Article 36 of the Vienna Convention be imprisoned.<sup>36</sup> Separation-of-powers problems of a "political question" sort might impede direct judicial enforcement of ICJ judgments in politically charged cases, such as the case the United States lost to Nicaragua in the 1980s.<sup>37</sup>

Nothing in the Constitution impedes the courts from affording the hearing that the ICJ called for in *Avena*. I had thus thought that, if the *Avena* judgment were to be found not to be directly enforceable in the courts, it would have been on the basis of a different sort of constitutional concern—a concern that giving legal effect to such judgments would be an unconstitutional delegation of legislative power to international tribunals. Unlike a treaty that

1965, GA Res. 2106 (XX), 660 UNTS 195; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85.

<sup>30</sup> Cf. *Medellín*, 128 S.Ct. at 1365 ("[S]ome treaties are self-executing and some are not, depending on the treaty.")

<sup>31</sup> See generally Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, available at <<http://ssrn.com/abstract=1118063>>, revised in 121 HARV. L. REV. (forthcoming 2008) (manuscript at 48–75) [hereinafter Vázquez, *Treaties as Law*].

<sup>32</sup> See *id.* at 70–75.

<sup>33</sup> As noted by the dissent, the equally authoritative Spanish version provided that the parties "agreed" to comply with ICJ judgments. See *supra* note 23.

<sup>34</sup> See Vázquez, *Four Doctrines*, *supra* note 3, at 718–19.

<sup>35</sup> See *id.*

<sup>36</sup> This was one of the hypotheticals posed by Chief Justice John Roberts at the *Medellín* oral argument, apparently to raise concerns about an interpretation of Article 94 requiring compliance with ICJ judgments without exception. Transcript of Record at 4, *Medellín v. Texas*, 128 S.Ct. 1346 (2008) (No. 06-984). In addition to the due process problem with any attempt at direct judicial enforcement of such a (highly unlikely) ICJ judgment, it is worth noting that enforcement could in any case be precluded through a subsequent federal statute forbidding compliance.

<sup>37</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 ICJ REP. 14 (June 27). *But cf.* *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 932 (D.C. Cir. 1988) (rejecting "political question" rationale for dismissing action seeking to enforce ICJ *Nicaragua* judgment, but dismissing on other grounds).

imposes determinate obligations on the United States, a treaty agreeing to comply with judgments of an international tribunal imposes commitments that are not fully known at the time of ratification. Scholars have suggested that such commitments may constitute unconstitutional delegations of legislative power and that the constitutional solution is to regard such judgments as non-self-executing under domestic law.<sup>38</sup> If this had been the reason for concluding that the *Avena* judgment was not directly enforceable, however, the constitutional problem would be resolved by treating the judgment as enforceable if the president so orders. There would clearly be no constitutional problem with an express delegation of such authority to the president. It is well established that the limitations on Congress's power to delegate authority to the president, weak as they are in the domestic context, are even weaker in the international context.<sup>39</sup> It is also well established that rule-making power can be delegated to the president by treaty.<sup>40</sup> If there is no constitutional impediment to a treaty's delegating to the president the power to require compliance with the judgments of international tribunals (assuming the judgments do not themselves raise constitutional problems) and if the only reason for finding the *Avena* judgment not to be directly enforceable in court is a constitutionally based nondelegation concern, then the obvious solution would be to regard the treaty as a delegation to the president of the authority to determine whether to require compliance. Insisting on legislative action would compromise the goal of compliance considerably further than necessary to meet the constitutional concern.

In the end, the *Medellin* Court did not conclude that nondelegation principles impeded direct judicial enforcement of the *Avena* judgment.<sup>41</sup> Rather, the majority declared the *Avena* judgment to be unenforceable for a reason that I had thought (and still believe) to be ruled out by the plain text of the Constitution. It said that Article 94, though a valid treaty imposing binding international obligations on the United States, lacks the force of domestic law.<sup>42</sup> My argument for a presidential power to require compliance with the *Breard* order was based, in part, on the understanding that the order was authorized by treaties that, even if not directly enforceable in the courts, were still the supreme law of the land. The argument for a presidential power to require compliance with final ICJ judgments is similarly based on the understanding that Article 94, even if not self-executing, is the law of the land. Thus, even if for some reason not directly enforceable in court, the Article 94 obligation could operate as a delegation to the executive of the power to require compliance. The question would be one of interpretation of the treaty (e.g., does it by its terms require legislative action?) or application of domestic separation-of-powers principles (e.g., is the obligation suitable for judicial enforcement?). The Court appeared to obviate any

<sup>38</sup> Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587–95 (2003).

<sup>39</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

<sup>40</sup> See Vázquez, *Breard and Federal Power*, *supra* note 10, at 689 n.35.

<sup>41</sup> Indeed, the Court appears to have rejected a delegation objection to an agreement to give domestic legal force to the judgments of international tribunals. See 128 S.Ct. at 1364–65 (“We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments.”).

<sup>42</sup> I share the view, noted elsewhere in this Agora, that the position that non-self-executing treaties lack domestic law status would be difficult to reconcile with the text of the Supremacy Clause. See Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AJIL 540, 550 (2008). For this reason, and for the additional reasons set forth below and in Vázquez, *Treaties as Law*, *supra* note 31, *Medellin* should be read in a way that would preserve the domestic law status of valid non-self-executing treaties. Notwithstanding the aspects of *Medellin*'s analysis that I discuss in the next several paragraphs, the majority opinion as a whole is susceptible to a narrower reading. See generally Vázquez, *Treaties as Law*, *supra* note 31.

such inquiry by decreeing that the Constitution's declaration that "all" treaties have the force of domestic law does not apply to Article 94 and other non-self-executing treaties.<sup>43</sup>

If the treaty lacks the force of domestic law, the conclusion that an act of legislation is required to displace otherwise applicable state law follows as a matter of course. An instrument that lacks any force as domestic law cannot delegate any sort of authority to the president. As the majority saw it, the president was claiming nothing short of the power to "create domestic law."<sup>44</sup> Resolving the presidential power issue thus required no greater sophistication than that of Justice Black's opinion in *Youngstown*: "[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."<sup>45</sup>

The glaring flaw in that analysis is, of course, the fact that the Constitution declares that all treaties are domestic law. The majority appears to have drawn a negative inference from *Foster*'s dictum that a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."<sup>46</sup> But, in *Foster*, Chief Justice Marshall did not say that *only* treaties that operate of themselves are to be regarded by courts as equivalent to acts of the legislature. If one were nevertheless to draw a negative inference from Marshall's statement, it would be that only such treaties are equivalent to legislative acts, not that only such treaties have the force of domestic law. And even if Marshall (and the other Justices in *Foster*) had intended the negative inference that the majority drew in *Medellín*, dicta in an alternative holding on an issue not briefed or argued,<sup>47</sup> which were subsequently overruled and never since relied on by the Court as the basis for denying relief, are a slim reed on which to rest a view so directly in conflict with the constitutional text. One hopes that the majority will soon clarify that it did not mean to read treaties out of the Supremacy Clause. Otherwise, *Medellín* would provide grounds to suspect that even our most textualist Justices are, at best, fair-weather textualists (which is to say, not textualists at all).

But the Court did not stop there. Its analysis suggests that it regarded non-self-executing treaties as not just nonlaw, but as antilaw, their force as domestic law less than zero. In deciding whether the president had the power to require the states to comply with the *Avena* judgment, the majority applied Justice Jackson's familiar tripartite analysis from *Youngstown*.<sup>48</sup> The president's power is at its apex when he is acting in accordance with the will of the legislature. Had the majority acknowledged that Article 94 was domestic law, it might have concluded that President Bush's action fell within this first category, as the president was acting in accordance with a law by which the nation agreed to comply with ICJ judgments. If Article 94 lacked the force of domestic law, one might have expected the majority to place the president's action in Jackson's middle, twilight category for conduct taken by the president in the face of legal

<sup>43</sup> This analysis would appear to rule out presidential action requiring compliance with provisional measures orders as well, if the obligation to comply with such measures (now recognized to be binding) derives from Article 94. Insofar as the obligation to comply with provisional measures orders derives from other treaty provisions, *cf.* LaGrand (FRG v. U.S.), 2001 ICJ REP. 446, 505–06 (June 27) (noting that Article 94 "confirm[s] the binding nature of provisional measures"), the president's power to require compliance would turn, as a threshold matter, on whether those treaty provisions are self-executing under the majority's test.

<sup>44</sup> *Medellín v. Texas*, 128 S.Ct. 1346, 1371 (2008).

<sup>45</sup> *Id.* at 1369 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

<sup>46</sup> *Id.* at 1356 (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)).

<sup>47</sup> See Vázquez, *Story of Foster and Percheman*, *supra* note 4, at 166–67.

<sup>48</sup> *Youngstown*, 343 U.S. at 634–55 (Jackson, J., concurring).

silence. But the Court found that the existence of a non-self-executing treaty placed the president's action in the third category, in which presidential power is at its weakest.<sup>49</sup> In other words, according to the majority, the president would have had *greater* power to require the states to comply with the ICJ's judgment if the United States had *not* ratified a treaty agreeing to comply with the judgments of the ICJ!

The purported basis for this counterintuitive holding was the idea that “[a] non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force.”<sup>50</sup> The treaty thus reflects, in the majority's view, “the implicit understanding of the ratifying Senate” that implementing legislation was necessary.<sup>51</sup> But, according to the immediately preceding paragraph, the majority deemed Article 94 to be non-self-executing because it was “ratified without provisions clearly according it domestic effect.” This is one of several statements in the opinion suggesting that the majority believed treaties to be presumptively non-self-executing.<sup>52</sup> If so, then the need for legislative implementation resulted from the *absence* of affirmative evidence that the treaty was intended to have domestic effect—evidence that the president and the Senate might have been forgiven for regarding as superfluous, given the constitutional text. Insisting on evidence of an intent to give the treaty domestic legal force is itself problematic in light of constitutional text purporting to do that work. Treating the absence of such intent as evidence of an affirmative intent to require legislative action, leaving the president with less power to require compliance than if there had been no treaty obligation to comply, would take the majority's analysis into the realm of the absurd.

### III. AVOIDING ABSURDITY

Despite the language quoted above, there is substantial ground for rejecting a reading of *Medellín* as requiring evidence that the treaty was intended to have the force of domestic law. If such evidence were required, few, if any, treaties—and no multilateral treaties—would be self-executing. States rarely, if ever, address a treaty's status as domestic law in the treaty itself.<sup>53</sup> Such a test would accordingly conflict with many, many Supreme Court decisions, stretching back to the 1790s, that have applied unexecuted treaties,<sup>54</sup> including decisions the majority in

<sup>49</sup> *Medellín*, 128 S.Ct. at 1369.

<sup>50</sup> *Id.*

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

<sup>52</sup> *Id.* For a sampling of other indications that the majority believed a treaty to be self-executing only if its text affirmatively conveys an intent that it have the force of domestic law, see *Medellín*, 128 S.Ct. at 1356 (“In sum, while treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.’” (alteration in original) (quoting *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc))); *id.* at 1369; see also *id.* at 1364 (“[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.”); *id.* at 1366 (“Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.”).

<sup>53</sup> *Accord* Bradley, *supra* note 42.

<sup>54</sup> See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236–37 (1796), discussed in Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 8 NOTRE DAME L. REV. 1601, 1621–22 (2008) [hereinafter Vázquez, *Safeguard of Nationalism*]; see also Vázquez, *Treaties as Law*, *supra* note 31, at 40 n.191 (citing other cases).

*Medellín* purported not to disturb.<sup>55</sup> The portions of the majority opinion purporting to require affirmative evidence of an intent to give the treaty domestic legal force are thus in conflict with the portions of the same opinion recognizing that “some international agreements are self-executing”<sup>56</sup> and purporting not to disturb decisions enforcing treaties that lack “provisions clearly according [them] domestic effect.”<sup>57</sup> Avoidance of the absurdities that would otherwise be produced by its *Youngstown* analysis is another reason to reject the test and to interpret the opinion instead to regard treaties as non-self-executing only if they contain evidence of an intent to require legislation. In the absence of such evidence, there would be no basis for placing the president’s memorandum in Jackson’s third category.

Admittedly, the affirmative evidence the majority cited in support of its conclusion that Article 94 contemplated implementing legislation was weak. First, the Court read the language of Article 94—“undertakes to comply”—as “confirm[ing] that further action to give effect to an ICJ judgment was contemplated.”<sup>58</sup> But, while the term “undertake” may, in colloquial usage, suggest a soft, attenuated obligation, in international law, an “undertaking” is understood to be a hard, immediate obligation.<sup>59</sup> Moreover, the need for “further action” does not explain why that further action might not come from the president or even from the courts. The majority also appeared to perceive a pertinent, though apparently inarticulable, similarity between the “undertakes to comply” language in Article 94 and the “shall be ratified” language in the treaty involved in *Foster*.<sup>60</sup> It overlooked the fact that the Court in *Percheman* later concluded that this same language was consistent with self-execution.<sup>61</sup> (Indeed, by ignoring the Spanish version of the treaty, the Court repeated the error it committed in *Foster*, although this time with its eyes wide open.)

As an additional reason for concluding that Article 94(1) was not automatically enforceable in our courts, the majority also relied on “Article 94(2)—the enforcement provision—[which] provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state.”<sup>62</sup> The Court noted that, because the United States retained a veto in the Security Council, it was effectively immune from Security Council resolutions against it. The veto made any purported obligation of the United States to comply with ICJ judgments illusory. The United States always retained the option of “[n]oncompliance with an ICJ judgment through exercise of the Security Council veto.”<sup>63</sup> Because direct enforceability would remove this “option” of noncompliance, the majority regarded Article 94(2) as

<sup>55</sup> See *Medellín*, 128 S.Ct. at 1365–66 (discussing *Kolovrat v. Oregon*, 366 U.S. 187, 191, 196 (1961), and *Clark v. Allen*, 331 U.S. 503, 507–11, 517–18 (1947), and noting with approval that the Court had found self-executing “a number of the ‘Friendship, Commerce, and Navigation’ Treaties cited by the dissent”).

<sup>56</sup> *Id.* at 1364.

<sup>57</sup> *Id.* at 1369.

<sup>58</sup> *Id.* at 1359 n.5.

<sup>59</sup> See Vázquez, *Treaties as Law*, *supra* note 31, at 35 n.172.

<sup>60</sup> *Medellín*, 128 S.Ct. at 1358.

<sup>61</sup> The Court in *Percheman* wrote that “[a]lthough the words ‘shall be ratified and confirmed,’ are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they ‘shall be ratified and confirmed,’ by force of the instrument itself.” *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

<sup>62</sup> *Medellín*, 128 S.Ct. at 1359.

<sup>63</sup> *Id.* at 1360.

affirmative evidence that Article 94(1) was not intended to be directly enforceable in our courts.<sup>64</sup>

This argument produces absurdities of its own, however. The veto is only relevant because the UN Charter creates a formal international enforcement mechanism. For the nations holding the veto, it just makes that enforcement mechanism ineffective. Most treaties, however, including many that the Court has found to be self-executing, include no formal international enforcement mechanism at all. If a treaty that establishes an enforcement mechanism but gives the United States a veto is non-self-executing because of the veto, then, a fortiori, a treaty that does not establish an effective international enforcement mechanism would be non-self-executing. In other words, the majority's analysis suggests that a treaty is self-executing only if it creates a formal international enforcement mechanism that would be effective against the United States. That, of course, has never been a requirement for self-execution.

In short, the majority's reasons for concluding that Article 94 affirmatively reflects an intent to require legislative implementation are unconvincing. Still, interpreting *Medellín* to rest on a questionable construction of Article 94 would be preferable to interpreting it to establish that treaties are self-executing only if they affirmatively indicate that they were intended to have the force of domestic law. The latter would conflict with constitutional text, history, and long-standing Supreme Court precedent.<sup>65</sup> The majority's analysis of the presidential power issue—specifically, its conclusion that the existence of a non-self-executing treaty places presidential action in the third *Youngstown* category—provides additional support for the view that *Medellín* rests on a construction of Article 94(1) as affirmatively contemplating implementing legislation.

#### IV. CONCLUSION

The majority's rejection of the president's memorandum appears to have been based on its countertextual view that non-self-executing treaties lack the force of domestic law and hence require legislative action to acquire domestic legal force. As a result, its analysis of the presidential power issue has little to say about presidential action unrelated to non-self-executing treaties. Ironically, the Court's claim that the existence of a non-self-executing treaty on point places presidential action in *Youngstown*'s third category provides some basis for rejecting the majority's highly problematic suggestion that a treaty is self-executing only if its text affirmatively indicates that it was intended to have the force of domestic law. The absence of such an intent cannot be said to indicate that the Senate meant to require legislation. To rely on the absence of such evidence, therefore, would be to treat ratified treaties as negative law. Avoiding this absurd result should lead us to treat the opinion as having held that a treaty is self-executing unless it affirmatively indicates that it was "ratified with the understanding that it is not to have domestic effect of its own force."<sup>66</sup> So understood, the majority's error was in finding that Article 94 reflected such an understanding.

<sup>64</sup> *Id.*

<sup>65</sup> See generally Vázquez, *Treaties as Law*, *supra* note 31; Vázquez, *Safeguard of Nationalism*, *supra* note 54.

<sup>66</sup> *Medellín*, 128 S.Ct. at 1369.