

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*,¹ 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*² 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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¹ 27 U.S. 253 (1829).

² 128 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."³ 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."⁴ 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."⁵ 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

³ 27 U.S. at 315.

⁴ *Id.* at 314.

⁵ 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.”⁶ 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.”⁷ 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.”⁸

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.⁹ 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.”¹⁰

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 multifaceted tests to evaluate whether a treaty or treaty provision was self-executing.¹¹ 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.”¹² 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.¹³ The Court rejected this multifaceted 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.”¹⁴

At the same time, the difference between the multifaceted 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

⁶ 128 S.Ct. at 1358.

⁷ *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.

⁸ *Id.* at 1359.

⁹ *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”).

¹⁰ 128 S.Ct. at 1373 (Stevens, J., concurring).

¹¹ *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).

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

¹³ 128 S.Ct. at 1382 (Breyer, J., dissenting).

¹⁴ *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."¹⁵ 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.¹⁶

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.¹⁷

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.¹⁸ 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.¹⁹ 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."²⁰

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.²¹ One could add that in some countries treaties are never self-executing, and that even among the countries that give direct effect to

¹⁵ *Id.* at 1362.

¹⁶ *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).

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

¹⁸ *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).

¹⁹ 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).

²⁰ 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).

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

treaties a wide range of approaches can be found.²² 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.”²³ 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.”²⁴ 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.’”²⁵

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.²⁶

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.”²⁷ 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.”²⁸ That assertion may or may not be persuasive with respect to the treaties at issue in *Medellin*,²⁹ 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

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

²³ 128 S.Ct. at 1366 (emphasis added).

²⁴ *Id.* at 1364 (emphasis added).

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

²⁶ See *id.* at 1361 n.9.

²⁷ *Id.* at 1362.

²⁸ *Id.* at 1369.

²⁹ 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.³⁰ 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.³¹

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,³² 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.”³³ 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.³⁴ 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.³⁵ 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,”³⁶ 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.³⁷ 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

³⁰ *Accord* Vázquez, *supra* note 18.

³¹ 128 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.

³² *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).

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

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

³⁵ *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.

³⁶ U.S. CONST. Art. VI, cl. 2 (emphasis added).

³⁷ 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.³⁸ 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.³⁹ Yoo goes so far as to argue that courts should presume that treaties are non-self-executing.⁴⁰

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.”⁴¹

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,’”⁴² the decision made clear that no “‘talismanic words’” are required for self-execution,⁴³ 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.’”⁴⁴ 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.’”⁴⁵ The Court’s invocation of deference to the executive branch with respect to self-execution was also formulated in treaty-specific terms.⁴⁶

³⁸ Yoo, *Treaties and Public Lawmaking*, *supra* note 37, at 2240.

³⁹ 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).

⁴⁰ 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.

⁴¹ 128 S.Ct. at 1366.

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

⁴³ *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).

⁴⁴ *Id.* at 1365.

⁴⁵ *Id.* at 1364.

⁴⁶ 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.”⁴⁷

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.⁴⁸

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.⁴⁹ 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.⁵⁰ 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.⁵¹

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

⁴⁷ 128 S.Ct. at 1363–64.

⁴⁸ 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.

⁴⁹ 128 S.Ct. at 1388 (Breyer, J., dissenting).

⁵⁰ 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).

⁵¹ 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.⁵² A non-self-executing treaty, said the Court, “does not by itself give rise to domestically enforceable federal law.”⁵³ The Court also expressly distinguished the issue of self-execution from the issue of private rights of action.⁵⁴

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.⁵⁵ On the other hand, it also contains statements that equate non-self-execution simply with lack of judicial enforceability,⁵⁶ and the Court’s test for self-execution appears to focus on whether a treaty is a “directive to domestic courts,”⁵⁷ not whether it has the status of domestic law. This ambiguity, which also appears in the State of Texas’s brief in *Medellín*,⁵⁸ 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.⁵⁹

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

⁵² 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).

⁵³ 128 S.Ct. at 1356 n.2.

⁵⁴ *Id.* at n.3.

⁵⁵ 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.”).

⁵⁶ 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).

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

⁵⁸ 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> (“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.”).

⁵⁹ 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.⁶⁰

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.⁶¹ 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.⁶²

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)*.⁶³ 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.⁶⁴

⁶⁰ 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.

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

⁶² 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).

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

⁶⁴ 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*.⁶⁵ 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*.⁶⁶

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*."⁶⁷ 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."⁶⁸ 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

⁶⁵ 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").

⁶⁶ 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.

⁶⁷ 128 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").

⁶⁸ 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.⁶⁹ 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,”¹ 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*.² 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),³ the Court invalidated the president’s memorandum directing Texas and other errant states to comply.⁴

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,⁵ the Court makes it harder for itself to see the legal justification for enforcing the president’s determination requiring compliance.

⁶⁹ 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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¹ *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 439 (1838).

² *Medellín v. Texas*, 128 S.Ct. 1346 (2008).

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

⁴ 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).

⁵ 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.