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# TREATIES AS LAW OF THE LAND: THE SUPREMACY CLAUSE AND THE JUDICIAL ENFORCEMENT OF TREATIES

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*Courts in recent years have perceived threshold obstacles to the enforcement of treaties deriving from their nature as contracts between nations that generally depend for their efficacy on the interest and honor of the parties, rather than on domestic adjudication. This approach to treaty enforcement is in tension with the Constitution's declaration that treaties are part of the law of the land and its instruction to judges to give them effect. The Founders understood that treaties depended on interest and honor on the international plane, but they made treaties enforceable in our courts anyway in order to avoid the international friction that could be expected to result from treaty violations and to capture the benefits of a reputation for treaty compliance. The Supremacy Clause gives treaties a domestic judicial sanction that they would otherwise lack. It makes treaties enforceable in the courts in the same circumstances as the other two categories of norms specified in the clause — federal statutes and the Constitution itself.*

*The sole exception to this rule is for treaties that are non-self-executing in the sense contemplated by the Court in Foster v. Neilson. The concept of a non-self-executing treaty fits uneasily with the Supremacy Clause, as reflected in the common but untenable view that non-self-executing treaties lack the force of domestic law. According to Foster, a non-self-executing treaty is not enforceable in the courts because it is addressed to the political branches. But determining which treaties are so addressed has been challenging. Treaties generally leave the question of domestic implementation to the domestic laws of the states-parties, and our domestic law (the Supremacy Clause) directs judges to give them effect. I argue that the Supremacy Clause establishes a default rule that treaties are directly enforceable in the courts like other laws, rebuttable only by a clear statement that the obligations imposed by the treaty are subject to legislative implementation.*

*If the stipulation had to appear in the text of the treaty, the clear statement rule would present problems for U.S. treaty-makers seeking to control the domestic consequences of multilateral treaties. To address this problem, the treaty-makers have developed a new form of clear statement, the "declaration" of non-self-execution. However, scholars have questioned the compatibility of such declarations with the Supremacy Clause. I conclude that the treaty-makers have the power to limit the domestic effects of treaties through declarations of non-self-execution. On the other hand, if the Constitution were understood to establish a default rule of non-self-execution, declarations of self-execution would stand on more tenuous ground. Thus, a default rule of self-execution is not only more consistent with the constitutional text and structure and with Supreme Court precedent, it is also normatively attractive because it leaves the treaty-makers with the power to control the domestic consequences of the treaties they conclude.*

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## INTRODUCTION

Treaties are being invoked increasingly in the courts, both in cases connected to the “war on terror”<sup>1</sup> and in cases that would not otherwise be regarded as particularly international in nature.<sup>2</sup> When confronted with treaties, the courts often address as a threshold question whether a treaty is “judicially enforceable.” Often, though not always, they will address this question in the context of deciding whether the treaty is “self-executing.” The Supreme Court introduced this concept as the basis of an alternative holding in *Foster v. Neilson*<sup>3</sup> in 1829, but, after disavowing its *Foster* holding four years later in *United States v. Percheman*,<sup>4</sup> the Court all but abandoned the field for the next 174 years. In the meantime, the lower courts confessed to being confounded by the “self-execution” question.<sup>5</sup> The Supreme Court reentered the field last Term in *Medellín v. Texas*,<sup>6</sup> its first case ever to deny relief solely<sup>7</sup> on the ground that the treaty relied upon was non-self-executing.<sup>8</sup> Although *Medellín* contains the Court’s first extended discussion of the self-execution doctrine since *Percheman*, the Court’s opinion raises more questions than it answers.

This Article argues that our Constitution establishes a straightforward rule on this subject: the Supremacy Clause declares treaties to be the “supreme Law of the Land,” just as the Constitution and federal

<sup>1</sup> E.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); see also Petition for Writ of Certiorari at i, *Al Odah v. United States*, 128 S. Ct. 2229 (2008) (No. 06-1196), available at <http://www.scotusblog.com/movabletype/archives/AOCert.pdf> (presenting, inter alia, the question whether petitioners were entitled to the protection of the Geneva Conventions).

<sup>2</sup> E.g., *Medellín v. Texas*, 128 S. Ct. 1346 (2008); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).

<sup>3</sup> 27 U.S. (2 Pet.) 253, 314–15 (1829).

<sup>4</sup> 32 U.S. (7 Pet.) 51, 88–89 (1833).

<sup>5</sup> At least the more perspicacious of them. See, e.g., *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979) (declaring self-execution among the “most confounding” doctrines in treaty law).

<sup>6</sup> 128 S. Ct. 1346 (2008).

<sup>7</sup> As discussed *infra* pp. 647–48, there is some basis in the opinion for regarding the non-self-execution rationale as an alternative basis for denying relief, as it was in *Foster*.

<sup>8</sup> 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 AM. J. INT’L L. 695, 716 (1995) [hereinafter Vázquez, *Four Doctrines*]). The majority did not dispute the point. See *id.* at 1366 n.12 (majority opinion). In the article cited by the dissent for this point, I noted 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 regard *Cameron Septic Tank* as not having based its holding on a conclusion that the treaty was non-self-executing. The Court noted but did not endorse the apparent view of Congress that the relevant treaty was non-self-executing; it denied relief on the merits. See *Cameron Septic Tank*, 227 U.S. at 50.

statutes are, and instructs judges to give them effect.<sup>9</sup> By virtue of this clause, treaties are presumptively enforceable in court in the same circumstances as constitutional and statutory provisions of like content. This requirement of equivalent treatment is subject to a single exception, namely, for treaties that are non-self-executing in the sense contemplated by the Supreme Court in *Foster v. Neilson*. *Foster* illustrates only one of several ways in which a treaty might be non-self-executing. A treaty might be non-self-executing for constitutional reasons, either because it purports to do what may only be done by statute, or because it imposes an obligation that requires the exercise of nonjudicial discretion.<sup>10</sup> *Foster*-type non-self-execution is distinctive in that the need for legislative implementation derives from what the treaty itself has to say on the question. I argue that the Supremacy Clause is best read to create a presumption that treaties are self-executing in the *Foster* sense, a presumption that can be overcome only through a clear statement that the obligations in a particular treaty are subject to legislative implementation.<sup>11</sup>

This Article's twin claims — that the Constitution establishes a presumption that treaties are self-executing in the *Foster* sense and that a self-executing treaty is enforceable in the courts in the same circumstances as statutory or constitutional provisions of like content — are supported by the text of the Constitution and by the Supreme Court's decision in *Percheman*. *Medellín* looks the other way, but is best understood to have found the treaty at issue non-self-executing because the treaty imposed an obligation that required the exercise of nonjudicial discretion. So read, *Medellín* would be consistent with an interpretation of the Supremacy Clause as creating a presumption that treaties are self-executing in the *Foster* sense.

To say that treaties are to be treated by courts like statutory and constitutional provisions does not mean, of course, that treaty enforcement will always be simple. Attempts to enforce the Constitution

<sup>9</sup> The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

<sup>10</sup> For further discussion of the different types of non-self-execution, see Vázquez, *Four Doctrines*, *supra* note 8; *infra* pp. 629–31.

<sup>11</sup> For ease of exposition, I shall assume in this Article that a non-self-executing treaty is “addressed to” the lawmakers and that enactment of a statute is required to establish a judicially enforceable obligation. I do not mean to deny, however, that a treaty may be “addressed to” the executive branch. Such a treaty could be understood as a delegation of rule-making power to the executive. For an argument that the treaty involved in *Medellín* should have been construed this way, see Carlos Manuel Vázquez, *Less Than Zero?*, 102 AM. J. INT’L L. 563 (2008).

and federal statutes in court often generate impressive difficulties. In any given case, it may be uncertain whether the person invoking the provision has standing to do so. It may be uncertain whether the remedy sought is appropriate. There may be questions about whether the provision is sufficiently determinate to be amenable to judicial enforcement.<sup>12</sup> Answering these questions in cases involving statutory or constitutional provisions is often difficult.

But in cases involving treaties, the lower courts have concocted additional obstacles to enforcement. Consider the decision of the D.C. Circuit in *Hamdan v. Rumsfeld*.<sup>13</sup> Salim Hamdan, who had been designated for trial by military commission, argued that the procedures that the Secretary of Defense had established for such commissions did not conform to Common Article 3 of the Geneva Conventions, which requires that any trials use procedures “recognized as indispensable” by civilized nations.<sup>14</sup> Had this provision appeared in a statute, no court would have hesitated to enforce it. There is little question that a person being subjected to particular procedures in a criminal trial has standing to assert a legal entitlement to better procedures.<sup>15</sup> The court did not claim that the requirements of Common Article 3 were too vague for judicial enforcement. To the extent that Hamdan needed a positive legal basis for the relief he sought (release through habeas corpus), the habeas statute provided such authorization, as the Court of Appeals correctly observed.<sup>16</sup>

The court instead denied relief on the distinct ground — anterior to all of the above, and unknown in non-treaty cases — that the law Hamdan relied upon was not “judicially enforceable.”<sup>17</sup> The court wrote:

<sup>12</sup> See, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (constitutional and statutory norms judicially enforceable under 42 U.S.C. § 1983 if “not ‘too vague and amorphous’” (quoting *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431 (1987))); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (constitutional norms may not be judicially enforceable if there is a “lack of judicially discoverable and manageable standards”).

<sup>13</sup> 415 F.3d 33 (D.C. Cir. 2005), *rev’d*, 126 S. Ct. 2749 (2006).

<sup>14</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 3 ¶ 1(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3].

<sup>15</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992) (noting that, when “the plaintiff is himself an object of the [government’s] action (or foregone action),” he ordinarily has standing to challenge it).

<sup>16</sup> See *Hamdan*, 415 F.3d at 40 (“The availability of habeas may obviate a petitioner’s need to rely on a private right of action . . .”). Thus, there was no need to find a private right of action in the treaty itself. There would also be no need to find a private right of action in the treaty if a party were to invoke the treaty defensively. For a discussion of whether the Military Commissions Act of 2006 is constitutional insofar as it purports to preclude individuals from invoking the Geneva Conventions defensively in their trials before military commissions, see Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT’L L. 73 (2007).

<sup>17</sup> *Hamdan*, 415 F.3d at 40.

As a general matter, a “treaty is primarily a compact between independent nations,” and “depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.” If a treaty is violated, this “becomes the subject of international negotiations and reclamation,” not the subject of a lawsuit.<sup>18</sup>

Thus, without finding the treaty to be non-self-executing,<sup>19</sup> the court found the treaty not to be judicially enforceable, even though a statute of like content clearly would have been.<sup>20</sup> The Court of Appeals’s analysis closely tracked the government’s brief,<sup>21</sup> which in turn was almost identical on this issue to the briefs the government has filed — and continues to file — in virtually every case involving treaties.<sup>22</sup> Numerous other lower courts confronted with treaty-based claims or defenses have adopted the same analysis,<sup>23</sup> requiring a threshold showing of “judicial enforceability”<sup>24</sup> beyond what is required for statutory

<sup>18</sup> *Id.* at 38–39 (quoting *The Head Money Cases*, 112 U.S. 580, 598 (1884)) (citation omitted).

<sup>19</sup> The court did rely in part on dictum in a footnote of *Johnson v. Eisentrager* to the effect that “responsibility for observance and enforcement of [Geneva Convention] rights is upon political and military authorities.” 339 U.S. 763, 789 n.14 (1950), quoted in *Hamdan*, 415 F.3d at 39. Neither the *Hamdan* court nor the *Eisentrager* Court explicitly invoked the concept of non-self-execution. Some commentators have suggested, nevertheless, that either or both decisions were in reality applying the doctrine of non-self-execution. See, e.g., Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT’L L. 322, 337–38 (2007). If so, then these cases illustrate the need for clarification of this doctrine. The Court’s suggestion that the Geneva Conventions are not enforceable in domestic courts because the state parties to the Conventions contemplated resolving state-to-state disputes through diplomatic channels, *Eisentrager*, 339 U.S. at 789 n.14, conflicts with the Supremacy Clause. See *infra* Part I. The Founders made treaties the “supreme Law of the Land” in order to avoid treaty violations by the United States that would trigger such state-to-state dispute resolution mechanisms. They were particularly concerned about triggering one such mechanism — war. See *infra* p. 617.

<sup>20</sup> See *supra* p. 603.

<sup>21</sup> Compare Reply Brief for Appellants at 13, *Hamdan*, 415 F.3d 33 (No. 04-5393), available at <http://www.law.georgetown.edu/faculty/nkk/documents/REPLY-BRIEF.pdf> (“While treaties are regarded as the law of the land, they ‘are not presumed to create rights that are privately enforceable.’” (citation omitted) (quoting *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992)) (citing U.S. CONST. art. VI, cl. 2)), with *Hamdan*, 415 F.3d at 38 (“‘Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.’ Even so, this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights.” (citation omitted) (citing U.S. CONST. art. VI, cl. 2)).

<sup>22</sup> See, e.g., Brief for Respondents at 30–34, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), available at [http://www.oyez.org/cases/2000-2009/2005/2005\\_05\\_184/briefs/Respondent%27s%20Brief.pdf](http://www.oyez.org/cases/2000-2009/2005/2005_05_184/briefs/Respondent%27s%20Brief.pdf); Brief of the United States as Amicus Curiae in Support of Defendants-Appellees at 5–7, *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007) (No. 05-56202), 2006 WL 3623163.

<sup>23</sup> See, e.g., *Gandara v. Bennett*, 528 F.3d 823, 826–29 (11th Cir. 2008); *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008); *Cornejo*, 504 F.3d at 863; *Cardenas v. Dretke*, 405 F.3d 244, 253 (5th Cir. 2005) (alternative holding); *United States v. Duarte-Acero*, 296 F.3d 1277, 1281–82 (11th Cir. 2002); *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 195–98 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60–62 (1st Cir. 2000); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001); *State v. Sanchez-Llamas*, 108 P.3d 573, 575–76 (Or. 2005); *Kasi v. Commonwealth*, 508 S.E.2d 57, 64 (Va. 1998).

<sup>24</sup> The cases cited *supra* note 23 involved Article 36 of the Vienna Convention on Consular Relations (VCCR), which provides that the states-parties shall notify certain persons of their right

and constitutional provisions and in addition to the requirement of “self-execution” that the Court recognized in *Foster*.<sup>25</sup>

This Article argues that, when a treaty binds the United States to behave in a given way towards a particular individual, the treaty is “judicially enforceable” by the individual just as any statute or constitutional provision would be, unless the treaty is non-self-executing in the *Foster* sense. A treaty might be unenforceable in court because it is too vague, or otherwise calls for judgments of a political nature, or is unconstitutional, just as statutes and constitutional provisions might be. But no additional threshold showing of the treaty’s “judicial enforceability” is required.

It is true that treaties are contracts between nations. It is also true that, as a matter of international law, the breach of a treaty by one party is generally a matter to be pursued by the other parties. At the time of the Framing of the Constitution, the mechanisms for enforcing treaties were primarily diplomacy and, as a last resort, war. Under traditional international law, individuals generally lacked standing to complain of a nation’s treaty violation or to seek any remedy on the international plane. Moreover, treaties were not enforceable in domestic courts solely by virtue of the treaty itself. Under international law and under the domestic laws of the countries then in existence, judges could enforce treaties only if authorized to do so by domestic law.<sup>26</sup>

The Framers of the Constitution were acutely aware of these characteristics of treaties, which had led to significant problems for the United States under the Articles of Confederation.<sup>27</sup> In order to avoid the foreign relations difficulties that would result from treaty violations, and to capture the benefits of a reputation for treaty compliance,

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to consult with their consuls if those persons are detained. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Article 36]. In these cases, the lower courts have framed the issue as whether Article 36 creates “judicially enforceable rights.” See, e.g., *Cardenas*, 405 F.3d at 253. Since Article 36 plainly gives detainees a right to be notified of their right to consult with their consuls, see Article 36 ¶ 1(b), the question whether it creates “judicially enforceable rights” reduces to the question whether the rights created by the provision are judicially enforceable.

<sup>25</sup> In the VCCR cases, see *supra* note 23, the relevant treaty was conceded to be self-executing. See *infra* p. 623. In *Hamdan*, the D.C. Circuit did not base its “judicial enforceability” holding on a claim that the Geneva Conventions were non-self-executing. See *Hamdan*, 415 F.3d at 38–40. The lower courts are divided on whether the Geneva Conventions are self-executing. Compare *United States v. Khadr*, CMCR 07-001 at 4 n.4 (Ct. Mil. Comm’n Rev. 2007) (Geneva Conventions “generally viewed as self-executing treaties”), and *United States v. Lindh*, 212 F. Supp. 2d 541, 553 n.20 (E.D. Va. 2002) (Geneva Conventions self-executing), with *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003) (Geneva Conventions non-self-executing), *rev’d on other grounds*, 542 U.S. 507 (2004).

<sup>26</sup> For elaboration of some of these features of traditional international law, see Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1086–97 (1992) [hereinafter Vázquez, *Treaty-Based Rights*].

<sup>27</sup> See *infra* pp. 616–18.

the Founders gave treaties the force of domestic law enforceable in domestic courts. The Supremacy Clause thus *supplements* international law mechanisms for enforcing treaties by adding domestic mechanisms. It assimilates treaties to federal statutes and the Constitution, thus obviating the differences in enforcement mechanisms that would otherwise exist between these forms of law. Among other things, the Supremacy Clause makes treaties enforceable in court at the behest of individuals.<sup>28</sup>

The one exception the Supreme Court has recognized to the rule of equivalent treatment comes from its holding in *Foster v. Neilson* that some treaties are non-self-executing because of what they have to say about the need for legislative implementation.<sup>29</sup> The concept of a non-self-executing treaty — a treaty that, while valid and in force, cannot be enforced in the courts until implemented by Congress — appears at first glance to be in significant tension with the Supremacy Clause, which declares “all” treaties to be “the supreme Law of the Land” and instructs judges to give them effect.<sup>30</sup> Indeed, non-self-executing treaties are sometimes described as treaties that lack the force of domestic law.<sup>31</sup> Of course, the plain text of the Supremacy Clause rules out the possibility that a treaty might be valid and in force yet lack the force of domestic law.<sup>32</sup> *Foster* itself offers a basis for reconciling the concept with the constitutional text: a non-self-executing treaty has the force of domestic law, but it is a law “addressed to” Congress. Such a

<sup>28</sup> Because it refers to “Judges,” the clause clearly contemplates that courts will enforce treaties, and, indeed, “[t]he province of the court is, solely, to decide on the rights of individuals.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). For elaboration on when treaties can be said to create rights for individuals, see Vázquez, *Treaty-Based Rights*, *supra* note 26.

<sup>29</sup> See 27 U.S. (2 Pet.) 253, 314–15 (1829).

<sup>30</sup> See Jordan J. Paust, *Self-Executing Treaties*, 82 AM J. INT’L L. 760, 782–83 (1988) (arguing that the doctrine of non-self-execution should be rejected on this ground).

<sup>31</sup> This idea has now arguably been endorsed by the Supreme Court. See *Medellín v. Texas*, 128 S. Ct. 1346, 1356–57 n.2 (2008). For a pre-*Medellín* sampling of such statements, see *Payne-Barahona v. Gonzales*, 474 F.3d 1, 3 (1st Cir. 2007); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 155 (1972); J.W. PELTASON, *CORWIN & PELTASON’S UNDERSTANDING THE CONSTITUTION* 194–95 (14th ed. 1997); Alona E. Evans, *Some Aspects of the Problem of Self-Executing Treaties*, 45 AM. SOC’Y INT’L L. PROC. 66, 68 (1951). Compare *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (concluding that because “the [Warsaw] Convention is a self-executing treaty,” “no domestic legislation is required to give [it] the force of law in the United States”), with *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (suggesting that a treaty’s self-executing character and its having “the force of law” are separate questions).

<sup>32</sup> For a discussion of whether *Medellín* should be read to have endorsed this countertextual view, see *infra* pp. 648–50. The assertion in the text assumes that a treaty that has been superseded by a conflicting statute is not “in force” as a matter of domestic law, even though it may well continue to bind the United States as a matter of international law. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (articulating last-in-time rule).

treaty is not judicially enforceable because, in our constitutional system, the courts lack power to order the legislature to legislate.<sup>33</sup>

Chief Justice Marshall in *Foster* recognized that our Constitution, specifically the Supremacy Clause, establishes the general rule that treaties are enforceable in U.S. courts, just as the Constitution and federal statutes are.<sup>34</sup> He recognized an exception where the treaty “addresses itself” to the political branches, and he looked to the language of the treaty to answer this question.<sup>35</sup> Following *Foster*, lower courts seeking to determine whether a treaty is or is not self-executing have searched for the intent of the parties about whether the treaty’s obligations are addressed to the legislative or judicial branch. Unsurprisingly, the search has usually been fruitless. Nations generally leave such questions to be governed by the domestic law of the parties. Domestic constitutional rules on treaty enforcement, in turn, differ widely among states. Thus, except in the rarest of cases, courts searching for a common intent of the parties regarding the need for implementing legislation do so in vain. A court that relies on the particular wording of a treaty provision as reflecting the parties’ intent to require legislative implementation is almost certainly attributing to the parties a nonexistent intent.

Chief Justice Marshall appears to have learned this lesson quickly. Four years after introducing the concept of a non-self-executing treaty in *Foster*, the Court was confronted with the same provision of the same treaty in *Percheman*.<sup>36</sup> The Chief Justice acknowledged in the later case that he had been too hasty in reading the text of the provision as contemplating legislative implementation. He belatedly recognized that the text of the provision was as consistent with self-execution as with non-self-execution.<sup>37</sup> Chief Justice Marshall also clarified in *Percheman* that a treaty is non-self-executing when it “stipulat[es] for some future legislative act.”<sup>38</sup> *Percheman* is best read to recognize that the Supremacy Clause establishes a strong presumption that treaties are enforceable in court in the same circumstances as provisions of statutes and the Constitution of like content, and that overcoming the presumption requires a clear statement — a stipulation — that the obligations the treaty establishes are “addressed to” the

<sup>33</sup> See *Printz v. United States*, 521 U.S. 898, 975 (1997) (Souter, J., dissenting) (“[T]he essence of legislative power, within the limits of legislative jurisdiction, is a discretion not subject to command.”). Justice Souter may have meant that the law itself cannot command a legislature to legislate. If that were true, the very concept of a non-self-executing treaty would be problematic.

<sup>34</sup> *Foster*, 27 U.S. (2 Pet.) at 314.

<sup>35</sup> *Id.* at 314–15.

<sup>36</sup> *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

political branches. Of the available approaches to the issue, a presumption of self-execution accords best with the constitutional text and is most consistent with *Percheman* and with the Supreme Court's later decisions.

In *Medellín*, the Court closely followed the analysis in *Foster*, apparently overlooking the lessons learned in *Percheman*. Parts of the Court's analysis in *Medellín* could be read to adopt a presumption that treaties are non-self-executing. This reading, however, would conflict not only with constitutional text and prior precedent, but also with other portions of the Court's analysis in *Medellín*. If read to establish a presumption of non-self-execution, *Medellín* would be a radical holding indeed, requiring rejection of the holdings of many Supreme Court decisions. Because the Court in *Medellín* disclaimed any intent to upset settled law, this reading should be rejected if another plausible reading is available. Fortunately, the opinion supports an alternative reading, under which *Medellín* can be understood to have found the relevant treaty to be non-self-executing because the obligation it imposed required the exercise of nonjudicial discretion. So read, *Medellín* is an example of an entirely distinct form of non-self-execution, and is thus consistent with a reading of *Percheman* as having established a presumption that treaties are self-executing in the *Foster* sense.

Under a presumption of self-execution or non-self-execution, if U.S. treaty-makers<sup>39</sup> wish to control the domestic enforceability of a treaty, they need merely insist on the inclusion of a "stipulat[ion]" that its obligations are or are not subject to legislative implementation. With respect to bilateral treaties of the sort involved in *Foster* and *Percheman*, the burden should be manageable. However, the inclusion of such a stipulation in multilateral treaties would be difficult, if not impossible. Multilateral treaties are typically negotiated at global conferences and framed in terms applicable generally to all nations that may ratify or accede to them. Any suggestion that the treaties be framed so as to require or dispense with implementing legislation would disrupt possibly delicate negotiations with discussion of an issue that is likely to be of no concern to most other states. A rule requiring a clear statement of either self-execution or non-self-execution in the treaty would thus leave U.S. negotiators with little control over the domestic enforceability of the multilateral treaties they conclude.

Beginning in 1977, the U.S. treaty-makers began attaching to certain multilateral treaties a "declaration" of non-self-execution, seemingly to serve the same purpose as a *Percheman* "stipulat[ion]" for some

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<sup>39</sup> The treaty-makers are the President and two-thirds of the Senators present. U.S. CONST. art. II, § 2.

future legislative act.” Since their inception, however, such declarations have been controversial. Although the validity of these declarations is a difficult question, I conclude that the treaty-makers do have the power under our Constitution to render treaties non-self-executing by attaching declarations of non-self-execution. The availability of this mechanism alleviates any concern that the *Percheman* clear statement rule poses significant problems for U.S. treaty-makers in today’s world of multilateral treaties.

On the other hand, declarations of self-execution stand on more tenuous ground. If the latter declarations are not valid, adoption of a presumption of non-self-execution would leave the U.S. treaty-makers with far less control of the domestic enforceability of multilateral treaties than they would have under a presumption of self-execution. Indeed, given the difficulty of including a clear statement of self-execution in the text of a multilateral treaty, a default rule of non-self-execution would effectively deny treaty-makers the option of making self-executing multilateral treaties. This denial would, in turn, render the treaty-making provision of Article II superfluous for multilateral treaties that contemplate domestic enforcement. The likely invalidity of declarations of self-execution thus strengthens the normative and textual/structural case for a default rule of self-execution.

Part I of this Article shows that the text of the Constitution, as properly interpreted by the Supreme Court, establishes a general rule that treaties are judicially enforceable to the same extent as provisions of the Constitution and federal statutes of like content. Part II examines the single exception to this general rule — relating to treaties “addressed to” the political branches — and concludes that the Supremacy Clause, as properly construed in *Percheman*, establishes a presumption of self-execution that can be overridden only through a clear statement that the treaty is subject to legislative implementation. This Part considers six possible readings of the recent decision in *Medellín* and concludes that the opinion is best read to have found the relevant treaty to be non-self-executing on justiciability grounds. Part III considers whether the U.S. treaty-makers may validly control the domestic enforceability of the treaties through declarations regarding self-execution. It concludes that declarations of non-self-execution are valid and effective if the default rule is one of self-execution, but declarations of self-execution are unlikely to be regarded as binding if the default rule is non-self-execution.

Before proceeding, a brief word on methodology is in order. I begin with a discussion of the constitutional text and how the Founders understood that text. For some scholars, if original meaning is clear,

the analysis ends there.<sup>40</sup> For others, the original meaning of the text is just one of several factors to be considered in interpreting the Constitution<sup>41</sup> — one that can be trumped by other factors, such as judicial precedent.<sup>42</sup> With respect to the requirement of equivalent treatment, I need not join that debate. As shown in Part I, the text, the original public meaning, and the Supreme Court's construction of the Supremacy Clause all support that requirement. The doctrine of non-self-execution presents a more complex methodological question. *Foster*-type non-self-execution is in tension with the constitutional text, and scholars have argued that the concept is in conflict with the Supremacy Clause's original public meaning and should be rejected.<sup>43</sup> I accept the existence of the concept because I am a faint-hearted originalist who accepts that original meaning can be trumped by entrenched precedent.<sup>44</sup> One might argue that even a faint-hearted originalist should reject non-self-execution, as *Foster* remains the only case in which the Supreme Court has unambiguously denied relief on this ground, and its specific holding was subsequently overruled. But, for reasons discussed in Part II, I conclude that it is too late to reject *Foster*-type non-self-execution entirely.

In Part III, I consider whether a presumption in either direction would present practical problems for U.S. treaty-makers today that they would not have faced at the time of the Founding. If a presumption would pose such problems, the question would arise whether original meaning may give way to practical considerations caused by changed circumstances. Once again, the difficult methodological question can be avoided, but this time only by confronting a difficult doctrinal question. The difficult doctrinal question concerns the validity of an innovative form of *Percheman* stipulation — the declaration of non-self-execution (and its post-*Medellín* counterpart, the declaration of self-execution). Depending on how one understands the term “treaty” in Article II, this new form of *Percheman* stipulation might itself violate the constitutional text and structure — specifically, the Constitution's establishment of only three methods of enacting su-

<sup>40</sup> See, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006); Randy E. Barnett, *Trumping Precedent With Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMM. 257 (2005).

<sup>41</sup> See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); DENNIS PATTERSON, *LAW AND TRUTH* (1996); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

<sup>42</sup> See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

<sup>43</sup> See, e.g., Paust, *supra* note 30; David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 7 (2002); Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1469–70 (2006) (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005)).

<sup>44</sup> Cf. Scalia, *supra* note 42.

preme federal law. On the other hand, as explained in Part III, refusal to recognize the validity of declarations of non-self-execution would produce an absurd doctrinal result. I conclude that, as long as the declarations are deposited along with the United States's instruments of ratification, they can plausibly be regarded for Article VI purposes as part of the treaties to which they relate. Thus, the constitutional text can be given its intended effect without rejecting judicial precedent, producing absurd results, or creating unanticipated practical problems for U.S. treaty makers. On the other hand, declarations of self-execution would present more significant constitutional problems, and rejecting them would not produce doctrinal absurdity.

### I. THE REQUIREMENT OF EQUIVALENT TREATMENT

This Article maintains that, by virtue of the Supremacy Clause, treaties are presumptively enforceable in court in the same circumstances as constitutional and statutory provisions of like content. Explaining how the courts should resolve the many treaty enforceability issues that could arise in litigation would require (and largely duplicate) treatises on issues such as standing and remedies. This Part will instead seek to rebut a particular approach to treaty enforceability reflected in prominent lower court decisions and in executive branch briefs. According to these decisions and briefs, treaties are very different from the other forms of law mentioned in the Supremacy Clause. They are contracts between nations that generally depend on interest and honor, not litigation before domestic courts, for their enforcement. This Part explains that these characteristics of treaties do not affect their enforceability in the courts of this country.

Although this Article does not discuss in detail all the legal implications of the requirement of equivalent treatment, it is useful at the outset to clarify some points of law and dispel potential misconceptions. First, I do not maintain that the content of a treaty is to be determined by recourse to the same rules that determine the content of constitutional or statutory provisions. The rules of treaty interpretation of course differ from the rules of statutory or constitutional interpretation.<sup>45</sup> Second, I do not claim that the three forms of federal law listed in the Supremacy Clause are of equivalent stature. The Constitution is, of course, superior to federal statutes and treaties. Under current doctrine, treaties and federal statutes are regarded as having equivalent stature, so that the last in time prevails in the event of a con-

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<sup>45</sup> For one thing, these rules are supplied by international law. For a restatement, see Vienna Convention on the Law of Treaties arts. 31–32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

flict.<sup>46</sup> The last-in-time rule has been disputed by scholars, some of whom claim that treaties are superior to statutes<sup>47</sup> and others the reverse.<sup>48</sup> This Article takes no position on this question.<sup>49</sup> The requirement of equivalent treatment concerns the consequences for domestic courts of treaties that are in force as a matter of domestic law. The last-in-time rule concerns whether a treaty is in force as a matter of domestic law.

In general, the requirement of equivalent treatment takes the content of a treaty provision as given. However, as to both the obligations and the rights and remedies conferred by a treaty, the treaty's effect under domestic law differs subtly from its effect under international law. As a matter of international law, treaties generally impose obligations on the United States as a corporate entity, not on any particular subnational units or officials. However, international law also includes rules for attributing the acts of subnational units and officials (and even nationals in certain circumstances) to the nation.<sup>50</sup> As I have explained elsewhere, the Supremacy Clause, by declaring treaties to be domestic law, transforms the obligations of the United States under a treaty into the obligations of all domestic law-applying officials whose conduct would be attributable to the United States under international law, unless a narrower category is specified.<sup>51</sup>

The Supremacy Clause achieves a similar transformation with respect to the correlative rights of individuals. As a matter of international law, treaties generally confer rights only on the states-parties in the sense that only states-parties have the power to set in motion the machinery of international law, such as it is, for responding to violations of international law. Individuals do not generally have such a power, but they do have what might be called "primary rights" under treaties. That is, treaties often obligate the states-parties to behave in particular ways towards individuals. When treaties impose such obligations, the individuals involved may be said to have a primary right to be treated in such ways, even though they lack secondary or reme-

<sup>46</sup> See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); see also Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005).

<sup>47</sup> See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 870-72 (1987); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1096-1101 (1985) (offering evidence that the Framers held this view).

<sup>48</sup> See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 302-07 (2005); Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479 (2006).

<sup>49</sup> Cf. Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2189 (1999) [hereinafter Vázquez, *Laughing*] (assuming validity of last-in-time rule because it is entrenched).

<sup>50</sup> See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. Doc. A/Res/56/83/Annex (Dec. 12, 2001), available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf).

<sup>51</sup> See Vázquez, *Treaty-Based Rights*, *supra* note 26.

dial rights under international law.<sup>52</sup> The Supremacy Clause annexes secondary rights under domestic law to the primary rights that U.S. treaties confer on individuals.<sup>53</sup>

Recognizing this effect of the Supremacy Clause leaves open potentially difficult questions about which individuals may seek enforcement of which treaties when, and what remedies they may be awarded. My claim here is that courts should address these questions by applying the rules they apply to decide these questions in statutory and constitutional cases. As a rule of thumb, courts confronted with treaty-based claims should imagine that the content of the treaty provision being invoked appeared in a statute or in the Constitution. Constitutional provisions will usually provide the closest analogy. Like treaties, the Constitution generally applies to state action and often confers primary rights without specifying particular enforcement mechanisms.<sup>54</sup> Some federal statutes fit this description as well.

Determining the appropriate approach under the requirement of equivalent treatment will sometimes be difficult, and the requirement may not help much when the courts apply a different approach to the particular issue for the Constitution than for federal statutes.<sup>55</sup> But recognizing the requirement of equivalent treatment will simplify the courts' task significantly in many cases and avoid erroneous results. And, of course, accepting the requirement of equivalent treatment does not preclude arguing that the courts' approach to the issue in the statutory or constitutional contexts is mistaken. Sections A–C present the textual and historical case for the requirement of equivalent treatment. Section D discusses some lower court decisions taking a contrary approach, explains that they rest on a misreading of the Supreme Court decisions on which they purport to rely, and shows that *Medellín* is consistent with prior Supreme Court decisions in regarding non-self-execution as the sole exception to the requirement of equivalent treatment.

#### A. *The Supremacy Clause and the British Rule*

Article VI of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the

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<sup>52</sup> On the distinction between primary and secondary rights, see *id.* at 1089–92.

<sup>53</sup> See *id.* at 1087–97.

<sup>54</sup> See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 495 (5th ed. 2003).

<sup>55</sup> For example, the Supreme Court appears to apply a more stringent approach to implying private rights of action under statutes than under the Constitution. See Vázquez, *Treaty-Based Rights*, *supra* note 26, at 1155–56 (suggesting a third approach for treaties).

Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>56</sup>

The bare text of this clause establishes that treaties are to be given effect by judges. It strongly suggests that treaties are to be applied by judges in the same circumstances as federal statutes and (leaving aside the question of hierarchy) the Constitution.<sup>57</sup> The clause's reference to judges contradicts the claim that treaties, being contracts between independent nations, "depend[] for the enforcement of [their] provisions on the interest and the honor of the governments which are parties to [them]"<sup>58</sup> rather than on lawsuits. Although treaties may depend on "interest and honor" on the international plane, under the Constitution, the treaty obligations of the United States are also enforceable in court.

To understand the effect of the clause's text, it is useful to consider the status of treaties under the constitutional law of Great Britain, whose approach we would presumably have inherited had our Constitution not adopted a different rule. In Britain, treaties are made by the Crown. Since the Glorious Revolution of 1688, however, the "absolute rule" has been that

the assent of Parliament is needed for any exercise of the [royal] prerogative which involves either a charge upon the people or an alteration in the law.

The fact that this absolute rule involved a limitation of the treaty-making power of the Crown was recognized in the year after the [Glorious] Revolution . . . [in a formal legal opinion of] the Chief Justices of the King's Bench and Common Pleas, the Judge of the Court of Admiralty, the attorney and solicitor-general, and the advocate-general.<sup>59</sup>

It was sometimes said that the Crown should not make a treaty that purported to alter domestic law without first obtaining Parliament's assent.<sup>60</sup> Thus, "[a]t the close of the American War of Independence it was necessary to give statutory powers to enable the Crown to make the treaties of Paris and Versailles, because the terms of the treaties involved an alteration of the law affecting the American colonies."<sup>61</sup> But

<sup>56</sup> U.S. CONST. art. VI, cl 2.

<sup>57</sup> See Paul B. Stephan, *Private Remedies for Treaty Violations After Sanchez-Llamas*, 11 LEWIS & CLARK L. REV. 65, 86 (2007); Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 577-78 (2007).

<sup>58</sup> *Edye v. Robertson*, 112 U.S. 580, 598 (1884).

<sup>59</sup> 14 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 67 (1964). The opinion provided, inter alia, that "if any ship or goods be taken by a foreign privateer and be brought into any port of this kingdom, and such ship or goods shall be here claimed by your Majesty's subjects as belonging to them, they have a right by law to have a warrant out of your Majesty's court of Admiralty to arrest the same, in order to try their claimers; and no article in any treaty can exclude them from such their right, or disable your Majesty's court to proceed therein." *Id.* at 67-68 (quoting 2 DOCUMENTS RELATING TO LAW AND CUSTOM OF THE SEA 125-26 (R.G. Marsden ed., Lawbook Exch. 1999) (1916)).

<sup>60</sup> *Id.* at 69 (discussing Lord Loughborough and others who took this view).

<sup>61</sup> *Id.* at 68 (citing 22 Geo. 3, c. 46, § 2 (1782)).

it was also understood that, if a treaty were made that did purport to alter domestic law, the treaty would not have the effect of altering such law. The law in force, entitled to enforcement in the courts, would remain as before until Parliament passed a statute implementing the treaty.<sup>62</sup>

In short, from the time of the Glorious Revolution, treaties in Great Britain were not regarded as having the force of domestic law and were not enforceable in the courts unless implemented by Parliament. Instead, treaties imposed obligations on the nation as a matter of international law, enforceable at the state-to-state level through diplomatic means or military force. As Professor Frederick Maitland explained in his lectures on British constitutional history, “a treaty made by the king has in general no legal effect whatever. . . . Suppose that under [an extradition] treaty a person was arrested and brought before one of the courts by habeas corpus; the treaty would have been treated as waste-paper.”<sup>63</sup> And, in a phrase that has been recently seized upon by writers in the field, Maitland observed, “until a statute has been passed [implementing a treaty,] one may . . . laugh at the treaty.”<sup>64</sup>

Reading the constitutional text against this background yields some straightforward conclusions. Article II gives the treaty-making power to the President and one house of the legislature, a supermajority of which must approve any treaty.<sup>65</sup> Article VI then declares that treaties, once made, have the force of supreme federal law and instructs

<sup>62</sup> Thus, a 1728 legal opinion by the attorney general and solicitor general “clearly lays down the rule that the Crown, by an exercise of its treaty making power, cannot affect the legal rights of its subjects, because the law cannot be changed by the prerogative.” 11 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 253 (1938) (citing 2 *OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE* 339–42 (George Chalmers ed., 1858)). And “in 1764 the law officers and the advocate-general advised that the Crown could not legally enter into, or enforce the regulations of a projected treaty between England and France . . . because they were contrary to a statute of William III’s reign.” 14 HOLDSWORTH, *supra* note 59, at 68 (citing 2 *OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE*, *supra*, at 343–44).

<sup>63</sup> F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 424–25 (1909).

<sup>64</sup> *Id.* (quoted in John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2227 (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*]). Professor Yoo goes on to argue, implausibly, that the Framers attempted to “continue the British system.” Yoo, *Treaties and Public Lawmaking*, *supra*, at 2230; see also John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2087–91 (1999) [hereinafter Yoo, *Globalism and the Constitution*]. It is difficult to understand how a system in which courts and citizens may laugh at treaties may be said to be a system in which treaties are the “supreme Law of the Land.” See generally Vázquez, *Laughing*, *supra* note 49 (responding to Yoo). Scholars who agree about little else have uniformly rejected Yoo’s claim that the Constitution makes all or most treaties non-self-executing. See Martin J. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties As “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095, 2099 n.19, 2151 (1999); Kesavan, *supra* note 48, at 1488–89; Ramsey, *supra* note 43, at 1469–73; Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 907–17 (2004).

<sup>65</sup> U.S. CONST. art. II, § 2, cl. 2.

judges to give them effect notwithstanding inconsistent state law. The clause thus represented a clear break from the British approach. It established new and different rules as a matter of U.S. constitutional law with respect to both the making and the enforcement of treaties. By requiring the consent of two-thirds of the Senators present, the Founders gave a role to a part of the legislature in the making of treaties. By declaring them to be the law of the land once made, they dispensed with the need for an additional act of the legislature. Because this new rule had no analogue in British practice, British practice could furnish no guidance to U.S. courts in determining when and how to apply treaties. The constitutional text was the only guide available on that question — and it simply instructed judges to apply treaties as law, just as they apply federal statutes and the Constitution itself.<sup>66</sup>

*B. The Purpose and Original Public Meaning  
of the Supremacy Clause*

The history of the Supremacy Clause's adoption, and the Supreme Court's early decisions construing it,<sup>67</sup> confirm that the clause makes treaties judicially enforceable even though they are contracts between nations that, on the international plane, depend on interest and honor for their efficacy. The Founders understood that these were character-

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<sup>66</sup> Professor Martin Flaherty has noted that some Founders during the ratification debates defended the Supremacy Clause by maintaining that treaties were directly enforceable in England, relying on Blackstone's statement that "[i]t is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes . . . [which are] binding upon the whole community . . . . Whatever contracts . . . he engages in, no other power in the kingdom can legally delay, resist, or annul." WILLIAM BLACKSTONE, 1 COMMENTARIES 249 (Univ. of Chi. Press, photo. reprint 1979) (1st ed. 1765), noted in Flaherty, *supra* note 64, at 2136, 2145. These Founders probably misunderstood Blackstone, who elsewhere wrote:

[T]he consent of all three [of the component parts of Parliament (the King, the House of Lords and the House of Commons)] is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three is no statute; and to it no regard is due, unless in matters relating to their own privileges.

1 BLACKSTONE, *supra*, at 155. If Blackstone did mean that treaties in England were directly applicable as law, he "was not quite accurate . . . [;] when he wrote, English constitutional law had imposed some limitations" on the royal prerogative, including the principle that a treaty could not itself effect a charge on the people or an alteration of the law. 10 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 374 (1938) (citing 11 HOLDSWORTH, *supra* note 62, at 253, 268). In any event, that some Founders may have believed that treaties in Britain were directly enforceable is perfectly consistent with my claim that the Supremacy Clause made treaties (or confirmed that treaties were) directly applicable by courts. See Vázquez, *Laughing*, *supra* note 49, at 2158 n.14. Although these Founders' statements do present a challenge to the "clear break" thesis, they do not furnish an alternative basis for doctrine concerning the circumstances in which treaties are or are not directly enforceable in court. Neither Blackstone nor the Founders who relied on him or otherwise claimed that the British rule was self-execution went beyond making general statements on that question. The only detailed analyses of the effect of treaties as domestic law in Britain came from those who noted, correctly, that treaties categorically lacked such effect. See, for instance, Justice Iredell's analysis in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), discussed *infra* pp. 619–21.

<sup>67</sup> See *infra* notes 85–104 and accompanying text.

istics of all treaties, yet they declared treaties to be the law of the land in order to “show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure [their] performance no longer nominally, for the judges of the United States will be enabled to carry [them] into effect.”<sup>68</sup>

The Supremacy Clause was the Founders’ solution to one of the principal “vices” or “evils” of the Articles of Confederation.<sup>69</sup> The Articles gave Congress the power to conclude treaties, but they did not establish a mechanism for their enforcement.<sup>70</sup> (This was part of a broader problem with the Articles — their failure to provide for the enforcement of any of the acts of the federal government.) Congress had concluded a number of treaties, most importantly the Treaty of Peace with Great Britain,<sup>71</sup> but the states violated them, causing significant problems for the fledgling nation.<sup>72</sup> Most importantly, the Treaty of Peace gave British creditors specific rights against their American debtors, but the states had passed laws making it difficult or impossible for the British to recover in court.<sup>73</sup> The Continental Congress, in its waning days, passed a resolution urging the states to repeal these laws,<sup>74</sup> but a majority of states failed to do so.<sup>75</sup>

There was general agreement at the Constitutional Convention that the new Constitution had to empower the federal government to enforce treaties. The Founders were anxious to avoid treaty violations because such violations threatened to provoke wars and otherwise complicate relations with more powerful nations.<sup>76</sup> The Founders also wanted to establish a reputation for treaty compliance to induce other

<sup>68</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (photo. reprint 1987) (Jonathan Elliott ed., 2d ed. 1888) (statement of James Wilson).

<sup>69</sup> See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., rev. ed. 1966) (recording James Madison’s speech listing “violations of the law of nations & of Treaties” as an “evil” against which the Articles of Confederation did not provide); James Madison, Vices of the Political System of the United States (April 1787), in 9 THE PAPERS OF JAMES MADISON 345, 349 (Robert A. Rutland & William M.E. Rachal eds., 1975) (listing “[v]iolations of the law of nations and of treaties” as a “vice” of the Articles of Confederation).

<sup>70</sup> See ARTICLES OF CONFEDERATION art. XI; Vázquez, *Treaty-Based Rights*, *supra* note 26, at 1101–02.

<sup>71</sup> Definitive Treaty of Peace, U.S.–Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

<sup>72</sup> See 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 781–874 (1934) (reprinting the extensive report by Secretary of Foreign Affairs John Adams on the British to the Continental Congress, reporting on, and discussing the merits of, British complaints about state violations of the Treaty of Peace).

<sup>73</sup> See the discussion of the Virginia statute at issue in *Ware v. Hylton*, *infra* pp. 619–21.

<sup>74</sup> See 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 124–25, 177–84 (1934).

<sup>75</sup> 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1411 n.11 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

<sup>76</sup> See sources cited in Vázquez, *Treaty-Based Rights*, *supra* note 26, at 1102–03.

nations to conclude beneficial treaties with the new nation.<sup>77</sup> They considered several options. For example, the Virginia Plan would have empowered Congress to “negative” state laws that contravened federal treaties<sup>78</sup> — an approach that would have been consistent with the British approach because, presumably, judges and citizens could have continued to laugh at treaties until “negatived” by Congress. In the end, the Founders adopted the Supremacy Clause. The mechanism they adopted thus relied on a judicial negative rather than a legislative one.<sup>79</sup> By virtue of the Supremacy Clause, treaties became enforceable in court without the need for prior legislative implementation or incorporation into domestic law.

The Founders were aware that treaties were contracts between nations that, as a matter of international law, operated only on nations and depended for their efficacy on either military force or the good faith of the parties (“interest” and “honor”). Their recognition of these characteristics of treaties comes through most clearly in their discussions of the Articles of Confederation, which they regarded as defective precisely for these reasons. They described the Articles as a “mere treaty” because they operated on the thirteen states as political bodies and were “dependent on the good faith of the parties”<sup>80</sup> or on the “force of arms.”<sup>81</sup> Madison, for example, described the Articles as “in fact nothing more than a treaty of amity of commerce and of alliance, between independent and sovereign States.”<sup>82</sup> The Framers opted for a judicial sanction to give efficacy to the new Constitution, as well as federal statutes and treaties. They manifested this intent in the Supremacy Clause’s declaration that all three would be “the supreme Law of the Land.” They understood that “law,” in contrast to treaties, was operative on individuals, compulsory, and enforceable at the behest of individuals through “the mild and equal energy of the magistracy.”<sup>83</sup> By declaring treaties to be “law,” and instructing judges to give them effect, the Founders made them operative as a matter of domestic law on the individuals protected by them, and enforceable by such individuals in the courts. In this way, they made irrelevant for

<sup>77</sup> See sources cited in *id.* at 1103 n.81.

<sup>78</sup> See *id.* at 1104.

<sup>79</sup> See SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 48–49 (1904).

<sup>80</sup> THE FEDERALIST NO. 33, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1999); see also THE FEDERALIST NO. 15 (Alexander Hamilton), *supra*, at 79–80.

<sup>81</sup> William Samuel Johnson, Speech in the Connecticut Ratifying Convention (Jan. 4, 1788), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 248–49 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

<sup>82</sup> James Madison, Observations (Apr. 1787), in 2 THE WRITINGS OF JAMES MADISON 361, 363 (Gaillard Hunt ed., 1901).

<sup>83</sup> Johnson, *supra* note 81, at 249.

domestic purposes the characteristics of treaties that, in the Founders' view, distinguished them from laws.<sup>84</sup>

In short, the Founders recognized the limited effect, and limited efficacy, of treaties *under international law*. To achieve certain purposes they regarded as important to the nation, they gave the treaties concluded by the nation additional force as *a matter of domestic constitutional law*.

### C. Early Judicial Construction<sup>85</sup>

1. *Ware v. Hylton on the Supremacy Clause's Reversal of the British Rule.* — The effect of the Supremacy Clause with respect to treaties received extensive consideration in an important early case, *Ware v. Hylton*.<sup>86</sup> The case involved an article of the Treaty of Peace with Great Britain providing that "[i]t is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."<sup>87</sup> The plaintiffs were British creditors; the defendants were debtors from Virginia. The defendants had paid the debt into the Virginia treasury, which, according to a Virginia wartime statute, constituted a bar to any further proceedings to collect the debt.<sup>88</sup>

Justice Iredell, on circuit, considered first whether a treaty provision of this nature would have been enforceable in the British courts without prior legislative implementation, and he concluded that it would not be:

[I]t is an invariable practice in that country, when the King makes any stipulation of a legislative nature, that it is carried into effect by an act of Parliament. The Parliament is considered as bound, upon a principle of moral obligation, to preserve the public faith, pledged by the treaty, by passing such laws as its obligation requires; but until such laws are passed, the system of law, entitled to actual obedience, remains *de facto*, as before.<sup>89</sup>

<sup>84</sup> The points made in this paragraph are developed at greater length, with additional citations, in Vázquez, *Treaty-Based Rights*, *supra* note 26, at 1097–1110.

<sup>85</sup> The early judicial construction of the Supremacy Clause's effect is relevant not just *qua* Supreme Court doctrine, but also as evidence of the original public meaning of the clause. Justice Iredell and Chief Justice Marshall were themselves Framers. Later cases are of course less probative of original meaning. *Cf.* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2810 (2008) (post-Civil War discussions of Second Amendment "do not provide as much insight into its original meaning as earlier sources").

<sup>86</sup> 3 U.S. (3 Dall.) 199 (1796).

<sup>87</sup> Definitive Treaty of Peace, *supra* note 71, at art. IV.

<sup>88</sup> *Ware*, 3 U.S. at 200–01.

<sup>89</sup> *Id.* at 274 (opinion of Iredell, J.).

This was so regardless of how the treaty provision was phrased. Thus, even if a treaty itself purported to set a tariff at a given level, an act of Parliament would be necessary to set the tariff at that level.<sup>90</sup>

Justice Iredell then considered whether any different result would have obtained in the United States before the adoption of the Constitution, and he concluded that the rule would have been the same as in Great Britain, “the very country from which we derive the rudiments of our legal ideas.”<sup>91</sup> During this period, he reasoned:

[N]o suit was ever maintained in any court in the *United States*, merely on the footing of the treaty when an act of the l[e]gi[s]lature stood in the way. It was to remove the obstacle arising from [the British rule], that Congress recommended the repeal of all acts inconsistent with the due execution of the treaty. And I must with due submission say, that in my opinion without such a repeal, no *British* creditor could have maintained a suit in virtue of the treaty, where any legislative impediment existed, until the present constitution of the *United States* was formed.<sup>92</sup>

According to Justice Iredell, the Founders adopted the Supremacy Clause to address the “embarrassments” that resulted from the state courts’ adherence to the British rule and the state legislatures’ failure to implement the treaty.<sup>93</sup> Under the Articles, treaties were

binding in *moral obligation*, but could not be constitutionally carried into effect (at least in the opinion of many,) so far as acts of legislation then in being constituted an impediment, but by a repeal. The extreme inconveniences felt from such a system dictated the remedy which the constitution has now provided, “that all treaties made or which shall be made under the authority of the *United States*, shall be *the supreme law of the land*; and that the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.” Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of *moral obligation*, it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the *supreme law* in the new sense provided for, and it was so before in a *moral sense*.

... [W]hen this constitution was ratified, the case as to the treaty in question stood upon the same footing, as if every act constituting an impediment to a creditor’s recovery had been expressly repealed, and any further act passed, which the public obligation had before required, if a repeal alone would not have been sufficient.<sup>94</sup>

Justice Iredell’s opinion confirms that the purpose and effect of the Supremacy Clause was to reverse the British rule, which we would

<sup>90</sup> *Id.* at 275.

<sup>91</sup> *Id.* at 276.

<sup>92</sup> *Id.* Justice Iredell was referring to an act of the Continental Congress expressing concern about state violations of the Treaty of Peace and urging state legislatures to enact laws requiring compliance. See 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 176–84; see also *supra* p. 617.

<sup>93</sup> *Ware*, 3 U.S. at 277 (opinion of Iredell, J.).

<sup>94</sup> *Id.*

otherwise have inherited. Under the British rule, all treaty provisions, no matter how phrased, required implementation by Parliament. Before the adoption of the Constitution, the same rule prevailed in the United States, causing major embarrassments. The Supremacy Clause was adopted to solve this problem. It did so by dispensing with the need for implementing legislation. The Supremacy Clause serves to “execute” treaties in advance.<sup>95</sup>

Justice Iredell went on to hold that the treaty did not revive debts that had been discharged under state law before the treaty entered into force.<sup>96</sup> The Supreme Court reversed Justice Iredell on this point.<sup>97</sup> The other Justices believed that Justice Iredell had interpreted the treaty too narrowly. No Justice expressed a narrower view regarding the effect of treaties under the Constitution.

Justice Story’s analysis of the Supremacy Clause’s effect with respect to treaties in his *Commentaries on the Constitution* was to similar effect. In the United States, he stressed, treaties are not just compacts between nations. They are also laws to be enforced by courts:

It is . . . indispensable, that [treaties] should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws. . . . The difference between considering them as laws, and considering them as executory, or executed contracts, is exceedingly important in the actual administration of public justice. If they are supreme laws, courts of justice will enforce them directly in all cases, to which they can be judicially applied . . . . If they are deemed but solemn compacts, promissory in their nature and obligation, courts of justice may be embarrassed in enforcing them, and may be compelled to leave the redress to be administered through other departments of the government.<sup>98</sup>

Like Justice Iredell, Justice Story understood that, by virtue of the Supremacy Clause, treaties were not *just* “solemn compacts” among independent nations. They also had the force of domestic law and were accordingly enforceable in courts like the other forms of supreme federal law.

2. *Foster and the Requirement of Equivalent Treatment.* — *Foster v. Neilson*<sup>99</sup> is usually cited for the proposition that treaties sometimes do require implementation by Congress before they may be enforced in the courts. Exactly which treaties the *Foster* Court had in mind will be considered in Part II. But *Foster* also provides further support for

<sup>95</sup> Although Justice Iredell was writing about a treaty that pre-dated the Constitution, his opinion offers no basis for thinking that the Supremacy Clause would operate any differently for treaties concluded after the Constitution’s adoption.

<sup>96</sup> *Ware*, 3 U.S. at 279–80 (opinion of Iredell, J.).

<sup>97</sup> See *id.* at 245 (opinion of Chase, J.); *id.* at 285 (opinion of the Court).

<sup>98</sup> 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 640–41 (photo. reprint 2001) (3d ed. 1858).

<sup>99</sup> 27 U.S. (2 Pet.) 253 (1829).

the idea that a treaty's domestic enforceability is not affected by the fact that it is a compact among nations that, under international law, depends for its efficacy on the good faith of the parties or military force. As Justice Iredell did in *Ware*, Chief Justice Marshall began his analysis of this issue by describing the effect of treaties on the international plane and in countries that did not have a Supremacy Clause:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.<sup>100</sup>

Lower courts and commentators have relied on this language in arguing that treaties are not generally enforceable in domestic courts.<sup>101</sup> In doing so, they have overlooked the significance of the sentences that immediately follow:

In the United States a different principle is established: Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.<sup>102</sup>

The Court thus made it clear that the "principle" established for the United States by the Supremacy Clause is "different" from the "general[]" rule under international law and in nations that do not have a Supremacy Clause. For the latter, a treaty is merely a "contract between two nations" that "in its nature" does not "of itself" effect "the object to be accomplished." For the United States a treaty is also the "law of the land." Thus, according to Chief Justice Marshall, self-executing treaties are "to be regarded in courts of justice as equivalent to an act of the legislature."<sup>103</sup> As Chief Justice Marshall put it more than a quarter century earlier, even though a treaty is a "contract between nations," "where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress."<sup>104</sup>

<sup>100</sup> *Id.* at 314.

<sup>101</sup> *E.g.*, *Hamdan v. Rumsfeld*, 415 F.3d 33, 38–39 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006); Yoo, *Globalism and the Constitution*, *supra* note 64, at 2087–91.

<sup>102</sup> *Foster*, 27 U.S. at 314.

<sup>103</sup> *Id.* The statement can be found in numerous other Supreme Court decisions as well. *See, e.g.*, *Valentine v. United States*, 299 U.S. 5, 10 (1936); *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902); *De Lima v. Bidwell*, 182 U.S. 1, 195 (1901); *United States v. Rauscher*, 119 U.S. 407, 418 (1886); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876); *Lessee of Pollard's Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 416 (1840) (Baldwin, J., concurring); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 747 (1838).

<sup>104</sup> *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109–10 (1801).

### D. The Contrary View

Despite its pedigree, the requirement of equivalent treatment has largely been overlooked by the lower courts. The problem is well illustrated by decisions of the state and lower federal courts involving the Vienna Convention on Consular Relations<sup>105</sup> (VCCR).<sup>106</sup> Because the executive branch had told the Senate that the VCCR was self-executing,<sup>107</sup> no one seriously claimed in any of these cases that the VCCR was non-self-executing.<sup>108</sup> It was also undisputed that the VCCR obligated state and local officials to notify the individuals involved that they had a right to consult with their consuls, and that officials had violated this obligation. In some of these cases, the individuals involved had been convicted and argued that the state's violation of the VCCR entitled them to relief from their convictions or sentences if they could show that the state's violation prejudiced them.<sup>109</sup> In other cases, the individuals involved sought relief at trial, such as the exclusion of evidence.<sup>110</sup>

In response, the states argued, inter alia, that the provision of the VCCR entitling individuals to such notice was not enforceable in domestic courts at the behest of such individuals.<sup>111</sup> If the right to receive such notice had had its source in the Constitution or a federal statute, the intended recipient of such notice would clearly have had standing to invoke the right in court, and judicial enforceability would not otherwise have been an issue. (Whether the law authorized any particular remedy would be a separate question, and the courts in these cases correctly considered it separately.) Yet many of the state and federal courts faced with this issue concluded that the treaty provision was not judicially enforceable, accepting the argument of the

<sup>105</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

<sup>106</sup> See cases cited *supra* note 23.

<sup>107</sup> See S. EXEC. REP. NO. 91-9 app. at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration).

<sup>108</sup> See, e.g., *Medellin v. Dretke*, 544 U.S. 660, 686 (2005) (O'Connor, J., dissenting) ("Article 36 of the Vienna Convention on Consular Relations is, as the United States recognizes, a self-executing treaty."). *Medellin v. Texas* specifically reserved this question. 128 S. Ct. 1346, 1357 n.4 (2008).

<sup>109</sup> See, e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2676-77 (2006) (describing argument of petitioner Bustillo); *Villagomez v. Sternes*, 88 F. App'x 100 (7th Cir. 2004).

<sup>110</sup> See, e.g., *State v. Sanchez-Llamas*, 108 P.3d 573, 574 (Or. 2005), *aff'd*, 126 S. Ct. 2669 (2006).

<sup>111</sup> See Brief for Respondent at 10-11, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984), available at <http://www.debevoise.com/publications/pdf/TexasrespondentsbriefMedellin2007.PDF>; Brief for Respondent State of Oregon at 10-12, *Sanchez-Llamas*, 126 S. Ct. 2669 (No. 04-10566), available at [http://www.oyez.org/cases/2000-2009/2005/2005\\_04\\_10566/briefs/Brief%20for%20Oregon.pdf](http://www.oyez.org/cases/2000-2009/2005/2005_04_10566/briefs/Brief%20for%20Oregon.pdf); Respondent's Brief at 25, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928), available at [http://www.oyez.org/cases/2000-2009/2004/2004\\_04\\_5928/briefs/Respondent%27s%20brief.pdf](http://www.oyez.org/cases/2000-2009/2004/2004_04_5928/briefs/Respondent%27s%20brief.pdf).

states and the federal executive branch<sup>112</sup> that treaties are contracts between nations generally enforceable only through international diplomacy or other state-to-state mechanisms.<sup>113</sup> As we have seen, this is generally true of treaties as a matter of international law and of unimplemented treaties in nations that follow the British rule. In the United States, however, it is true of unimplemented treaties only if they are non-self-executing.

When the issue reached the Supreme Court in *Sanchez-Llamas v. Oregon*,<sup>114</sup> Chief Justice Roberts's majority opinion left the question of judicial enforceability open. A majority ruled against Sanchez-Llamas on the ground that the remedy he was seeking — exclusion of evidence — was not authorized by the treaty.<sup>115</sup> (The four Justices who reached the issue concluded that the relevant provision of the VCCR was judicially enforceable.<sup>116</sup>) Before becoming Chief Justice, however, then-Judge Roberts had joined the majority of the court of appeals in *Hamdan*, which found the Geneva Conventions not to be judicially enforceable. In doing so, the court accepted the Bush Administration's reading of several Supreme Court decisions as establishing that treaties are "compact[s] between . . . nations" that "depend for [their] enforcement . . . [on] interest and honor" rather than on judicial proceedings.<sup>117</sup>

These decisions, however, support the opposite conclusion. The court of appeals's misreading of *Foster* has already been noted.<sup>118</sup> The other standard citation for the Administration's now-standard argument that treaties are not generally judicially enforceable is this statement from the *Head Money Cases*:<sup>119</sup>

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by

<sup>112</sup> See Brief for the United States as Amicus Curiae Supporting Petitioner at 27–29, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984), available at <http://www.debevoise.com/publications/pdf/medellincertstagemrd2.pdf>; Brief for the United States as Amicus Curiae Supporting Respondents at 7, *Sanchez-Llamas*, 126 S. Ct. 2669 (No. 04-10566), 2006 WL 271823; Brief for the United States as Amicus Curiae Supporting Respondent at 18–19, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928), [hereinafter U.S. Amicus Brief in *Medellin v. Dretke*], available at <http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.pdf>.

<sup>113</sup> See cases cited *supra* note 23.

<sup>114</sup> 126 S. Ct. 2669.

<sup>115</sup> *Id.* at 2681–82. In a companion case, the majority held that petitioner Bustillo had forfeited his rights under the VCCR by failing to raise the issue at his trial. *Id.* at 2682–87.

<sup>116</sup> See *id.* at 2688 (Ginsburg, J., concurring); *id.* at 2690–91 (Breyer, J., dissenting).

<sup>117</sup> *Hamdan v. Rumsfeld*, 415 F.3d 33, 38–39 (D.C. Cir. 2005) (quoting *The Head Money Cases*, 112 U.S. 580, 598 (1884)) (internal quotation marks omitted).

<sup>118</sup> See *supra* notes 101–103 and accompanying text.

<sup>119</sup> 112 U.S. 580.

actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.<sup>120</sup>

Rather than suggesting that treaties are not generally judicially enforceable, the Court was here discussing whether the courts could grant relief on the basis of a treaty in the face of subsequent legislation requiring a different result. The Court applied the last-in-time rule, under which treaties and federal statutes are deemed to have equivalent status, and hence the last in time prevails in the event of a conflict.<sup>121</sup> In the quoted passage, the Court merely noted that, *in the face of congressional action in breach of a treaty*, the sole remedy for the breach lies in “international negotiations and reclamation.”<sup>122</sup> That conclusion is unexceptional in light of the understanding that such congressional action negates the domestic force of the treaty.

That the *Head Money Cases* are fully consistent with the proposition that self-executing treaties are to be enforced by the courts just like legislative acts is made clear in other portions of the opinion. Immediately following the passage quoted above, the Court wrote:

But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that “this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.” A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.<sup>123</sup>

That the court of appeals in *Hamdan* misconstrued the *Head Money Cases* is made clear by the Supreme Court’s own decision two years later in *United States v. Rauscher*.<sup>124</sup> There, the Court explained that the “interest and honor” passage from the *Head Money Cases* addressed the “difference between the judicial powers of the courts of Great Britain and of this country in regard to treaties.”<sup>125</sup> The language from the *Head Money Cases* addressed “the effect of a

<sup>120</sup> *Id.* at 598.

<sup>121</sup> *See id.* at 599.

<sup>122</sup> *Id.* at 598.

<sup>123</sup> *Id.* at 598–99.

<sup>124</sup> 119 U.S. 407 (1886).

<sup>125</sup> *Id.* at 417–18. As discussed above, treaties in Great Britain are not regarded as the law of the land and are never applied by courts in the absence of implementing legislation.

treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations.”<sup>126</sup> The Court stressed in *Rauscher* that because the Constitution declares treaties to be the supreme law of the land, “the courts are bound to take judicial notice of [them,] and to enforce in any appropriate proceeding the rights of persons growing out of [them].”<sup>127</sup> Thus, far from contradicting anything in *Ware* or *Foster*, the *Head Money Cases* reaffirm that treaties in the United States are not just contracts between independent nations to be enforced only through international diplomacy and other state-to-state mechanisms. They are also the supreme law of the land, and thus they are generally to be applied by the courts as “rule[s] of decision for the case[s] before [them]”<sup>128</sup> just like statutes and constitutional provisions of like content.

*Medellín* confirms the irrelevance for self-executing treaties of the fact that treaties are contracts between nations that, as a matter of international law, depend for their enforcement on “interest” and “honor.” Although the opinion begins inauspiciously in this regard by quoting the “interest and honor” language from the *Head Money Cases*,<sup>129</sup> its later analysis makes clear that these characteristics of treaties are relevant only to non-self-executing treaties. Specifically, in concluding that the treaty relied upon by *Medellín* was non-self-executing, the Court cited the fact that it “reads like ‘a compact between independent nations’ that ‘depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.’”<sup>130</sup> If a treaty is non-self-executing, it is, indeed, not judicially enforceable and thus does depend on “interest” and “honor” for its efficacy. By understanding *Head Money*-like language as signifying non-self-execution, *Medellín* confirms that the idea that treaties are contracts between nations depending on interest and honor for their efficacy has no relevance to treaties that are self-executing.<sup>131</sup>

<sup>126</sup> *Id.* at 418.

<sup>127</sup> *Id.* at 419.

<sup>128</sup> *Id.* at 599.

<sup>129</sup> *Medellín v. Texas*, 128 S. Ct. 1346, 1357 (2008). The Court also cited Hamilton’s distinction between a “law” and a “mere treaty” without noting that Hamilton was referring to the effect of treaties in the absence of a constitutional provision declaring them to be “law.” *Id.*; see *supra* p. 618.

<sup>130</sup> *Medellín*, 128 S. Ct. at 1358–59 (quoting *The Head Money Cases*, 112 U.S. 580, 598 (1884)).

<sup>131</sup> In a footnote, the Court cited a number of lower court cases that “have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary” even if self-executing. *Id.* at 1357 n.3. The Court did not say that it was endorsing the proposition that it was attributing to these cases. If it did mean to endorse it, the endorsement would be dictum and (if broadly understood) would be erroneous for the reasons set forth in this Part. In each of these cases, the court relied on the “interest and honor” language from the *Head Money Cases*, which the Court now regards (correctly) as relevant only to non-self-executing treaties. In any event, the Court’s description of some of *United States v. Li* was inaccurate, see *Li*, 206 F.3d 56, 63 (1st Cir. 2000) (en banc) (recognizing that “nontextual sources” can be consulted if “the

As noted, the requirement that self-executing treaties be treated by courts as equivalent to federal statutory and constitutional provisions does not mean that treaty enforcement will be simple. It leaves us with all of the sometimes very difficult questions that arise when federal statutes and the Constitution are invoked by individuals in our courts. The rule of equivalent treatment tells us that it is these, and only these, questions that courts should be asking when they are confronted with a self-executing treaty. If a treaty requires the states-parties to treat particular individuals in particular ways, the courts should not decline to enforce the obligation on the ground that the treaty is a contract between states, was intended to confer rights only on states, or sets forth an international enforcement mechanism.<sup>132</sup> I

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treaties' terms are ambiguous"), and the relevant discussion in *United States v. Emuegbunam*, 268 F.3d 377, 389–90 (6th Cir. 2001), was dictum. The other cases cited are reconcilable with the requirement of equivalent treatment because they involved the implication of a private right of action or of an exclusionary remedy or the waiver of the United States' sovereign immunity. See *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001) (exclusion of evidence); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) (sovereign immunity); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (sovereign immunity); *Manning Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979) (private right of action). These are all issues for which the courts apply a similar presumption in the statutory context. See *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (applying a similar presumption for implied rights of action under statutes); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (noting that the Court finds waiver of state sovereign immunity "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'" (alteration in original) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909))); *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961) (avoiding "a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result"). The presumption referred to in *Medellín's* footnote dictum should not be understood to extend beyond these contexts.

The Court's citation of the Restatement (Third) of Foreign Relations Law in the same footnote (also in dicta) for a "background presumption" that even self-executing treaties "generally do not create private rights or provide for a private cause of action in domestic courts," should also be approached with caution. See *Medellín*, 128 S. Ct. at 1357 n.3 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS]). First, the Restatement comment does not refer to a presumption of any sort, but instead makes a factual statement about the proportion of treaties that create private rights or rights of action. (The term "background presumption" comes from the *Medellín* majority.) Second, while it is true that treaties *as international instruments* do not generally confer rights on private parties enforceable in domestic courts, see *supra* p. 605, this is not relevant to their enforceability in our courts. As we have seen, the Supremacy Clause generally makes treaties enforceable in our courts in the same circumstances as statutory and constitutional provisions of like content.

<sup>132</sup> This last point is one that the lower courts in VCCR cases have gotten right. None of these courts suggested that the VCCR was unenforceable in U.S. courts because the VCCR establishes an international judicial mechanism for settling disputes among states-parties. But cf. *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) (suggesting that the rights afforded by the 1929 Geneva Conventions are not enforceable in domestic courts because the parties "obvious[ly]" contemplated an enforcement regime based on state intervention). The existence of an international enforcement mechanism does not suggest the unavailability of domestic enforcement. The Founders authorized our courts to enforce treaties in order to avoid violations by the United States that might trigger international enforcement mechanisms, such as war. See *supra* pp. 617–18.

leave a more detailed exploration of the requirement of equivalent treatment for another day.

## II. THE NON-SELF-EXECUTION EXCEPTION

The significance of the requirement of equivalent treatment depends on the scope of its sole exception, that for “non-self-executing” treaties. The Court introduced the concept in *Foster* as a subsidiary alternative basis for denying relief, and, as noted, it suggested that only self-executing treaties were to be regarded in the courts as equivalent to acts of the legislature. What exactly makes a treaty non-self-executing has long been a matter of great uncertainty. The Court overruled *Foster* in *United States v. Percheman*, which found the same treaty provision to be self-executing. After *Foster*, the Court never again, until very recently, denied relief on this basis. In the meantime, the lower courts seeking to apply the doctrine had candidly pronounced themselves confounded by it.<sup>133</sup>

The Court’s recent decision in *Medellín v. Texas* is its first to deny relief on non-self-execution grounds since *Foster*, and the first ever to do so solely on this basis. The majority seemed unburdened by uncertainty about the self-execution doctrine. Unfortunately, the Court’s opinion does little to clarify the doctrine for the rest of us.

This Part seeks to make sense of the non-self-execution exception in light of the text and original public meaning of the Supremacy Clause and the Court’s precedents. It argues that the term “non-self-executing” has been used to describe treaties that are not enforceable in the courts without prior legislative implementation for a variety of distinct reasons. Three of these reasons are consistent with the requirement of equivalent treatment. Only the fourth category of non-self-execution, the one introduced in the *Foster* decision, can be said to reflect a doctrine unique to treaties and an exception to the requirement of equivalent treatment. This category of the doctrine, however, is problematic at its core because it appears to be based on a mistake about the nature of treaties under international law. *Percheman* refined the *Foster* doctrine in a way that significantly alleviated the problem. *Medellín* can be read in a way that would resurrect — and, indeed, aggravate — the original problem, but it is also amenable to a reading that would avoid the problem entirely.

Section A summarizes the four distinct categories of non-self-executing treaties. The first three consist of treaties that are not judicially enforceable for reasons that apply equally to constitutional and statutory provisions. Only the fourth — which consists of treaties that

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<sup>133</sup> See, e.g., *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979).

require prior implementation because of what the treaty itself has to say about the need for legislative implementation — is unique to treaties. Section B examines in greater depth the conundrum posed by this fourth version of non-self-execution and discusses *Percheman*'s solution to the problem. The problem stems from the fact that treaties will virtually never have anything relevant to say about whether judicial enforcement must be preceded by legislative implementation. To look for an answer to that question in the treaty is to engage in a snark hunt, as the dissenting Justices in *Medellín* correctly noted.<sup>134</sup> I argue that *Percheman* alleviated this problem by establishing that a treaty is self-executing in the *Foster* sense unless it "stipulat[es] for some future legislative act."<sup>135</sup> Section C considers several possible readings of the Court's recent decision in *Medellín*, explains the problems that would be posed if *Medellín* were read as an example of *Foster*-type non-self-execution, and argues that the opinion is best read as an example of the nonjusticiability version of the doctrine. So read, the decision is consistent with the requirement of equivalent treatment and with the proposed reading of *Percheman*.

#### A. Four Versions of Non-Self-Execution<sup>136</sup>

Although non-self-execution has rarely been the basis of a Supreme Court decision, the concept has been the subject of numerous lower court decisions and a great deal of scholarly commentary. These sources, and Supreme Court dicta,<sup>137</sup> show that the term has been used to describe at least four distinct types of reasons why treaties might not be judicially enforceable without prior legislative implementation, notwithstanding the Supremacy Clause's instruction to judges to give them effect. The first three sets of reasons apply equally to constitutional and statutory provisions and thus do not represent an exception to the requirement of equivalent treatment.

First, the term "non-self-executing" is often used to describe treaties that do not create a private right of action.<sup>138</sup> If a litigant seeks damages for an alleged treaty violation and the treaty does not create a right to damages, the courts will sometimes say that the treaty is non-self-executing. Of course, the fact that a treaty does not create a pri-

<sup>134</sup> *Medellín*, 128 S. Ct. at 1381 (Breyer, J., dissenting); cf. LEWIS CARROLL, *THE HUNTING OF THE SNARK: AN AGONY IN EIGHT FITS* (1876).

<sup>135</sup> *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

<sup>136</sup> For a more detailed examination of the four types of non-self-execution, see Vázquez, *Four Doctrines*, *supra* note 8.

<sup>137</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004); *INS v. Stevic*, 467 U.S. 407, 428–29 n.22 (1984); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 46 (1851).

<sup>138</sup> Vázquez, *Four Doctrines*, *supra* note 8, at 719–22.

vate right of action for damages does not mean that the treaty is judicially unenforceable. Other forms of relief may be available, and even damages may be available if another law authorizes them. Additionally, the treaty may be enforceable defensively; a defendant need not establish a private right of action, as he is not seeking to maintain an action. To be sure, a treaty will not entitle a litigant to a particular remedy if it does not authorize the remedy, either expressly or by implication,<sup>139</sup> and no other law authorizes it. But, in this respect, treaties are no different from the other two forms of federal law, which sometimes do not give rise to particular remedies or rights of action.

In contrast to the first category, the second and third categories of non-self-execution result in the treaty being completely unenforceable in court in the absence of implementing legislation. But, here too, the reasons the treaty is not directly enforceable in court correspond to reasons for which constitutional and statutory provisions may similarly be unenforceable. Both flow from the Constitution's allocation of powers among the branches of the federal government.

The second category of non-self-executing treaties consists of treaties that purport to accomplish something for which the Constitution requires a statute.<sup>140</sup> For example, although the Constitution does not say so expressly, the courts have concluded that only a statute may criminalize conduct.<sup>141</sup> As a result, a treaty purporting to criminalize conduct would not be effective in criminalizing the conduct. Congress would have to implement the treaty before anyone could be criminally prosecuted. Such a treaty may be described as "non-self-executing," but it is non-self-executing by virtue of the Constitution's allocation of powers between the treaty-makers and the lawmakers. Another example is the appropriation of money.<sup>142</sup> Treaties purporting to criminalize conduct or appropriate money are unconstitutional and hence invalid because they purport to accomplish what only a statute may do.<sup>143</sup> Because such treaties are invalid, they lack the force of domestic law, just as an unconstitutional statute does.

The third category of non-self-execution is also based on the Constitution, but this one reflects a constitutional disability of courts. This

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<sup>139</sup> *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2680 (2006) ("[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.").

<sup>140</sup> I call this the constitutionality doctrine. See generally Vázquez, *Four Doctrines*, *supra* note 8, at 718–19.

<sup>141</sup> See, e.g., *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980); *The Over The Top*, 5 F.2d 838, 845 (D. Conn. 1925); see also *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 131, § 111 cmt. i.

<sup>142</sup> *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 131, § 111 cmt. i. But see Paust, *supra* note 30, at 775, 778, 780–781.

<sup>143</sup> *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 131, § 111 cmt. i.

category consists of treaties that impose obligations that are nonjusticiable because they call for judgments of a nonjudicial nature.<sup>144</sup> Examples include treaties that call on parties to “use their best efforts” to accomplish certain ends.<sup>145</sup> Determining what is the “best” the nation can do under the circumstances requires the balancing of numerous conflicting goals the nation may have, or of various conflicting demands on its resources. These are of course judgments for the political branches, not the courts. A treaty might also raise nonjusticiable questions if it is “too vague for judicial enforcement.”<sup>146</sup> To the extent of the ambiguity, the treaty implicitly leaves the states-parties with discretion about how to comply. Determining how to exercise that discretion is a decision for the political branches. Treaties that are not enforceable in court for these reasons are no different from constitutional and statutory provisions that are regarded as nonjusticiable for similar reasons. For example, the Court’s canonical decision on nonjusticiability lists among the reasons supporting the nonjusticiability of a dispute “a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>147</sup> Vague treaties fall in the first category; “best efforts” treaties in the second.

Like the previous two versions of the doctrine, the *Foster* version of non-self-execution results in a treaty being entirely unenforceable without prior legislative implementation, but it differs from them in that the need for implementing legislation has its source in the treaty itself. In applying the first two versions, judges must interpret the treaty to determine the nature of the obligation, but the need for implementation comes from the Constitution. Legislative implementation is needed either because the treaty requires something that cannot be accomplished by treaty or because the treaty imposes an obligation that requires judgments that, in our constitutional system, are not for

<sup>144</sup> See generally Vázquez, *Four Doctrines*, *supra* note 8, at 710–18.

<sup>145</sup> For instance, article 34 of the Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, provides that “[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees” and that “[t]hey shall make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” The Supreme Court in *INS v. Stevic*, 467 U.S. 407 (1984), described this article as “precatory and not self-executing.” *Id.* at 429 n.22. Another example would be a treaty that stipulates that the parties shall respond to a particular problem in one of two specified ways. Even if one of the two options, or both, would involve the courts, the treaty is “addressed to” the political branches because only they can make the initial choice between the two options. (I am grateful to Judge John Rogers of the U.S. Court of Appeals for the Sixth Circuit for this example.)

<sup>146</sup> *People of Saipan v. United States Dep’t of Interior*, 502 F.2d 90, 99 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); see also *Frolova v. USSR*, 761 F.2d 370, 374 (7th Cir. 1985) (treaty phrased in “broad generalities”); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (treaty did not provide “specific standards”); *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (“language . . . of a broad and general nature”).

<sup>147</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

the courts to make. In applying the *Foster* category, on the other hand, judges look to the treaty to see what it says about the need for legislative implementation.<sup>148</sup> Of the four versions of non-self-execution, only the *Foster* category is unique to treaties.<sup>149</sup>

### B. Non-Self-Execution in *Foster* and *Percheman*

*Foster* was a dispute concerning ownership of a tract of land in what is now eastern Louisiana. Plaintiffs *Foster* and *Elam* sued *Neilson* in ejectment.<sup>150</sup> They claimed title through an 1804 Spanish grant, relying on article 8 of an 1819 treaty between Spain and the United States, which provided that certain Spanish grants “shall be ratified and confirmed” by the United States.<sup>151</sup> A majority of the Court concluded that the 1804 grant to *Foster*’s predecessor was not covered by article 8 because the land in question had been ceded by Spain to France in 1800 and by France to the United States in 1803.<sup>152</sup> The Court could have stopped there, but Chief Justice Marshall proceeded

<sup>148</sup> Even with respect to *Foster*-type non-self-execution, the need for legislation comes in part from the Constitution. This is so at least in a negative sense. The Supremacy Clause might have been read to establish a rule of self-execution inalterable by treaty language, just as the British rule of non-self-execution is inalterable by treaty language. See Vázquez, *Four Doctrines*, *supra* note 8, at 702–03. Indeed, Justice Iredell appears to have read the Supremacy Clause that way. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 277 (1796) (noting that, because of the Supremacy Clause, treaties are to be enforced as if “any . . . act [had been] passed” that would have been necessary to make the treaty enforceable under the British rule). Instead, the Court held in *Foster* that a treaty might require legislation because of what it has to say on that question. Still, under the interpretation of *Foster* proposed in section II.B.3, it is the Constitution that precludes direct judicial enforcement, not the treaty. The difference between *Foster*-type non-self-execution and the previous two types is that, for *Foster*-type non-self-execution, the constitutional need for legislative implementation is triggered by treaty language relating to the need for implementing legislation, whereas, with respect to the constitutionality and nonjusticiability categories of non-self-execution, the need for legislation comes from the Constitution’s allocation of powers among the three branches of the federal government and is not tied to treaty language relating to the need for legislative implementation.

<sup>149</sup> Some have argued that a treaty that is non-self-executing in the *Foster* sense is no different from a statute that delegates rulemaking power to the executive branch. See, e.g., *United Shoe Mach. Co. v. Duplessis Shoe Mach. Co.*, 155 F. 842, 845 (1st Cir. 1907). There is much to the analogy, see Vázquez, *Treaty-Based Rights*, *supra* note 26, at 1125–29, but there are also important differences. Most importantly, statutes delegating rulemaking power to agencies are enforceable in court in certain circumstances, see *id.* at 1153, whereas treaties that are “addressed to the legislature” are not. In any event, the analogy supports a default rule of self-execution. After all, statutes are not thought to delegate rulemaking power to an agency unless they are written that way. See *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (requiring a “clear mandate in the Act” before concluding that Congress intended to delegate lawmaking authority); *United Shoe Mach.*, 155 F. at 845.

<sup>150</sup> *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 299 (1829).

<sup>151</sup> *Id.* at 310 (quoting Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty (Adams-Onís Treaty), U.S.-Spain, art. 8, Feb. 22, 1819, 8 Stat. 252 [hereinafter Adams-Onís Treaty]).

<sup>152</sup> See *id.* at 301, 310.

to offer an alternative holding, one that apparently had not been proposed by Neilson or briefed by either party.<sup>153</sup> He concluded that article 8 did not itself ratify and confirm the Spanish grants. Rather, article 8 was “addresse[d] . . . to the political, not the judicial department.”<sup>154</sup> Consequently, “the legislature must execute the contract before it can become a rule for the Court.”<sup>155</sup>

The Court’s analysis leaves no doubt that it regarded the distinction between a self-executing and a non-self-executing treaty as turning on the language of the treaty. It framed the question before it by asking, “Do [the] words [of the treaty] 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?”<sup>156</sup> The Court indicated that the treaty would have been self-executing had it provided that the grants “shall be valid” or that the grants were “hereby confirmed.”<sup>157</sup> “Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it . . . .”<sup>158</sup> But the actual language of article 8 — “shall be ratified and confirmed” — contemplated, in the Court’s view, an act of ratification or confirmation. Such an act, the Court concluded, had to come from Congress.

1. *The Foster Conundrum.* — The Court’s distinction has proved difficult to apply, and the reason is not difficult to discern. As a rule, nations negotiating treaties do not concern themselves with details of domestic implementation. Specifically, they do not concern themselves with whether enforcement by domestic officials (including judges) must be preceded by legislative implementation. As we have seen, the nations of the world have very different constitutional rules on this question. Since the Glorious Revolution, the rule in Great Britain has been that treaties always require legislative implementation before they may be applied by the courts.<sup>159</sup> According to Justice Iredell, the British rule was the prevailing one among nations at the time the Framers self-consciously adopted a different one for the United States.<sup>160</sup> Today, many nations of the Commonwealth retain this con-

<sup>153</sup> See *id.* at 256–99 (reporting the arguments of the parties).

<sup>154</sup> *Id.* at 314.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 314–15.

<sup>159</sup> See *supra* p. 614–15.

<sup>160</sup> See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1796) (Iredell, J.) (“The present Constitution of the United States, affords the first instance of any government . . . saying [that] treaties should be the supreme law of the land . . .”).

stitutional rule.<sup>161</sup> As recognized in both *Ware* and *Foster*, the United States would have inherited this rule if the Constitution had not established a different one. Our different rule generally dispenses with the need for legislative implementation, but, as we have seen, the Constitution still requires implementation of certain types of treaty obligations.<sup>162</sup> Other nations have rules requiring implementation for certain types of treaties but not others.

Because of the diversity of constitutional rules on the subject among the nations of the world, general international law does not address the particular types of domestic officials — legislative, executive, or judicial — who will be responsible for achieving compliance with international obligations. It leaves this issue to the domestic law of each nation.<sup>163</sup> This is what is meant by the notion that international law is generally concerned with ends and not means.<sup>164</sup>

General international law can be modified by treaty. It is thus conceivable that nations will agree by treaty that particular types of domestic officials shall be obligated to perform particular acts or have particular responsibilities. Today, international agreements increasingly assign particular responsibilities to particular types of officials, such as judges or executive officials.<sup>165</sup> But this was rarely the case at the time of the Constitution's adoption. Even today, treaties will rarely address the specific issue that concerns us here, that is, whether the involvement of judicial or executive officials must be preceded by legislative action. As we have seen, for some countries legislative implementation will always be required, and for others it will be required for some types of obligations but not others, regardless of what the treaty provides. If a multilateral treaty did mandate domestic enforcement without prior legislative implementation, many nations of

<sup>161</sup> See, e.g., N.J. Botha, *South Africa*, in NATIONAL TREATY LAW AND PRACTICE 590–92 (Duncan B. Hollis et al. eds., 2005) (noting that, in South Africa, the British rule applies to all treaties that are “not technical, administrative or executive”); Maurice Copithorne, *Canada*, in NATIONAL TREATY LAW AND PRACTICE, *supra*, at 100–01; see also *infra* p. 679.

<sup>162</sup> These include treaty provisions that require criminalization of conduct or appropriation of money and vague or precatory provisions. See *supra* pp. 630–31.

<sup>163</sup> See 1 OPPENHEIM'S INTERNATIONAL LAW 82–83 (Sir Robert Jennings & Sir Arthur Watts eds., Longman 9th ed. 1992) (1905); Stephan, *supra* note 57, at 81.

<sup>164</sup> See, e.g., IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 241 (1983); Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371 (1999).

<sup>165</sup> See, e.g., Trade Promotion Agreement, U.S.-Peru, arts. 17.2, 17.4–17.5, Apr. 12, 2006, available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Peru\\_TPA/Final\\_Texts/asset\\_upload\\_file73\\_9496.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file73_9496.pdf) (specifically requiring enactment of legislation); Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) (holding that the VCCR requires a hearing in court rather than in a discretionary proceeding such as a clemency proceeding); see also *infra* notes 323, 324 (discussing article 9 of the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]).

the world would be precluded from acceding, and other nations would be able to comply with respect to some types of provisions but not others.

The particular approach to resolving this question endorsed by the Court in *Foster* — close scrutiny of the treaty text — is particularly likely to lead judges astray. Because nations negotiating treaties rarely, if ever, select the wording of a treaty with the question of legislative implementation in mind, judges who draw conclusions about this question from treaty text are very likely attributing to the words a meaning that was not intended by the parties. Indeed, to the extent the parties had this issue in mind when they selected the treaty language, they are likely to have chosen language compatible with either direct or indirect enforcement.<sup>166</sup> Thus, either the language will have been chosen for entirely unrelated reasons or it will likely be ambiguous on the point.

Consider the treaty language that, in the view of the *Foster* Court, unambiguously signified self-execution and non-self-execution. The Court said that a treaty providing that the grants were “hereby” confirmed would be self-executing, whereas a treaty providing that the parties shall “pass acts” ratifying the grants would be non-self-executing. The question was whether the actual phrasing — “shall ratify” — resembled one or the other more closely.

But even a treaty provision phrased as a “hereby” obligation would not necessarily require direct, as opposed to indirect, enforcement. The treaty provision involved in *Ware* comes as close as one can imagine to being a “hereby” obligation;<sup>167</sup> yet it is clear that this provision did not require direct enforcement of this obligation. The provision imposed the same obligation on both parties, yet, in Great Britain, the provision would not have been enforceable in the courts without implementing legislation. Indeed, at the time the treaty was concluded, the United States followed the British rule as well. Thus, the provision could not have been intended to be directly enforceable in the courts of *either* party. That the treaty, as framed, purported to “act[] directly on the subject”<sup>168</sup> did not mean that the treaty required direct, as opposed to indirect, judicial enforcement. Yet the Court in *Ware*

<sup>166</sup> I use the term “direct enforcement” to mean enforcement by domestic officials without implementing legislation, and “indirect enforcement” to mean enforcement by domestic officials only after legislative implementation.

<sup>167</sup> It provided that “[i]t is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts, heretofore contracted.” Definitive Treaty of Peace, *supra* note 71, at art. 4.

<sup>168</sup> *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

found it to be directly enforceable in our courts by virtue of the Supremacy Clause.<sup>169</sup>

Nor does a treaty framed as an obligation to “pass acts” accomplishing certain ends necessarily require indirect, as opposed to direct, enforcement. Assume that a country had a constitutional rule under which all treaties, no matter how framed, were directly enforceable without implementing legislation. It is inconceivable that such a country would be found to be violating a “pass acts” provision if its officials gave effect to the underlying obligation in the absence of implementing legislation.<sup>170</sup> It is true that such a provision explicitly permits indirect enforcement, but, as we saw, even a “hereby” treaty implicitly permits indirect enforcement.

In short, virtually all treaties, no matter how phrased, permit but do not require either direct or indirect judicial enforcement.<sup>171</sup> *Ware* establishes that a treaty is not non-self-executing just because it *permits* indirect enforcement. Thus, if *Foster*-type non-self-execution turns on the content of the treaty with respect to the need for legislation, it must turn on whether it *requires* or *forbids* direct enforcement. Yet virtually no treaty will do either. Thus, almost all treaties will have no relevant content on the question.<sup>172</sup> As the dissenters in

<sup>169</sup> For the same reason, *Ware* establishes that there is no requirement of mutuality of obligation with respect to *Foster*-type self-execution. *Contra* David H. Moore, *An Emerging Uniformity for International Law*, 75 GEO. WASH. L. REV. 1, 23–24 (2006) (arguing that mutuality of obligation should be relevant in determining whether a treaty is self-executing). A treaty can be self-executing for the United States even if it is not self-executing for other states-parties.

<sup>170</sup> It is possible that a “pass acts” treaty might require legislation to supplement direct enforcement, on the theory that legislation would make the treaty even more effective or compliance even more likely. This appears to have been the case with respect to the U.S.-Peru Trade Promotion Agreement, *supra* note 165. The requirement of legislation appears to have been inserted at the behest of the United States to strengthen, rather than to attenuate, the efficacy of Peru’s commitment. H.R. REP. NO. 110-421, at 1–2 (2007) (“[T]he Peru FTA has become the first U.S. free trade agreement to include, in its core text, fully-enforceable commitments by the Parties to adopt, maintain, and enforce basic international labor standards, as stated in the 1988 ILO Declaration on Fundamental Principles and Rights at Work. . . . These changes make the Peru FTA the strongest free trade agreement ever to be considered by the Committee with regard to basic internationally recognized labor standards.”); *cf.* CONSTITUCIÓN POLÍTICA DEL PERÚ art. 55 (providing that treaties are part of national law). But, if legislation were required as a supplement to direct enforcement, direct enforcement would not violate the treaty.

<sup>171</sup> As discussed in Part III, there is nothing in international law that would prevent states from concluding a treaty requiring direct or indirect judicial enforcement. My point is that, because of the diversity of constitutional rules on the subject, it would be impracticable for states to do so and, in any event, as a factual matter, it is rarely done.

<sup>172</sup> I use the formulation “no *relevant* content” to avoid the suggestion that the parties’ failure to negotiate over direct versus indirect enforcement or to address the issue expressly in the treaty itself means that there is a gap in the treaty to be filled in through interpretation (for example, by asking how the parties might have resolved the issue had they thought about it). Treaties *do* have content on the question: Except in the exceedingly rare circumstances in which they provide otherwise, treaties permit either direct or indirect enforcement, and require neither. This content is not relevant to the self-execution question under *Foster* because, as we have seen, treaties that permit indirect enforcement are not for that reason non-self-executing.

*Medellín* correctly noted, to seek an answer to that question in the treaty is to “hunt[] [for] the snark.”<sup>173</sup>

If *Foster*-type non-self-execution turns on the content of the treaty on the question of direct versus indirect enforcement, it is crucial to specify a default rule. Because treaties almost never have any relevant content on that question, the answer to the self-execution question will almost always be the one specified by the default rule. If the default rule were that treaties are non-self-executing unless they require direct judicial enforcement, then almost no treaties would be self-executing. This result would be in significant tension with the constitutional text, which clearly contemplates that judges will generally apply treaties. (When a treaty is non-self-executing, judges apply the implementing statute, not the treaty itself.)<sup>174</sup> Moreover, that result is inconsistent with the many cases, stretching back to *Ware*, in which the Court has applied unimplemented treaties even though the United Kingdom and other nations following the British rule have been parties.<sup>175</sup> As we have seen, such treaties cannot be read to require direct judicial enforcement, as nations following the British rule do not allow such enforcement, and no one has ever claimed that they have been in violation for this reason. It is also inconsistent with the many, many cases in which the Supreme Court has directly applied treaties over the years, only one of which involved a treaty that required direct enforcement.<sup>176</sup>

If the default rule were that treaties are self-executing in the *Foster* sense unless they prohibit direct judicial enforcement, then few, if any, treaties would be non-self-executing in this sense. This would not con-

<sup>173</sup> *Medellín v. Texas*, 128 S. Ct. 1346, 1381 (2008) (Breyer, J., dissenting).

<sup>174</sup> See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 131, § 111 cmt. h. If the Supremacy Clause had contemplated that judges would apply treaties only if implemented by statutes, treaties could have been omitted from that clause. See Vázquez, *Laughing*, *supra* note 49, at 2170–71.

<sup>175</sup> See, e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2694 (2006) (Breyer, J., dissenting) (“[I]t is common ground that the [Vienna Convention on Consular Relations] is ‘self-execut[ing].’”); *Medellín v. Dretke*, 544 U.S. 660, 686 (2005) (O’Connor, J., dissenting) (“Article 36 of the Vienna Convention on Consular Relations is, as the United States recognizes, a self-executing treaty.”); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699–700 (1988) (the Hague Service Convention is self-executing); *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 533 (1987) (the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is self-executing); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (the Warsaw Convention “is a self-executing treaty”); see also Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT’L L. & BUS. 165, 166 (1995) (“In the United States, CISG is a self-executing treaty with the preemptive force of federal law. Unless otherwise agreed, CISG applies to ‘contracts for sale of goods between parties whose places of business are in different States . . . when the States are Contracting States.’” (quoting U.N. Convention on Contracts for the International Sale of Goods art. 1(a), Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 1489 U.N.T.S. 3) (alteration in original)).

<sup>176</sup> See *infra* note 249.

flict with the constitutional text or with Supreme Court case law (with the possible exception of *Medellín*, to be discussed below). But it would conflict with the understanding, based on *Foster*, that there exists a category of treaty that is non-self-executing because of what it has to say about the need for legislative implementation. This understanding has been relied upon by the U.S. treaty makers in negotiating treaties over the years, and has become the foundation of their recent practice of addressing the self-executing nature of treaties through “declarations” regarding self-execution (a development addressed in Part III). Thus, it may be too late in the day to adopt a presumption that would eliminate the *Foster* category of non-self-executing treaties.

In short, because virtually all treaties permit but do not require or prohibit direct or indirect judicial enforcement, the issue cannot turn on the content of the treaty on this question. If the *Foster* version of non-self-execution is to be retained as a distinct category, the distinction will have to turn on some other feature of the treaty’s language.

2. *Intent of the U.S. Treaty makers?* — Recognizing that treaties rarely have any relevant content on the question of direct versus indirect judicial enforcement, some commentators have argued that the issue turns on the intent of the U.S. treaty makers (the President and Senate) rather than that of the parties.<sup>177</sup> Some of these commentators rely on a comment to the Restatement (Third) of Foreign Relations Law, which reasons as follows:

In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement.<sup>178</sup>

However, if we assume that the treaties in question have no relevant content on the question of direct versus indirect enforcement, as these commentators (correctly) do,<sup>179</sup> then the constitutional basis for consulting statements made by the President or the Senate on the question during the negotiation or ratification process is unclear, to say the least.

<sup>177</sup> E.g., Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540 (2008).

<sup>178</sup> RESTATEMENT OF FOREIGN RELATIONS, *supra* note 131, § 111 cmt. h.

<sup>179</sup> See Bradley, *supra* note 177, at 544–45 (“there is almost never . . . a collective intent” of treaty parties regarding self-execution).

In interpreting statutes, courts often consult statements made during the legislative process (although some members of the *Medellin* majority have strenuously objected to the practice).<sup>180</sup> But, when they do so, it is to illuminate the meaning of the statute — that is, to determine the content of the statute on the particular question before them.<sup>181</sup> Courts might similarly consult statements made by the President or the Senate during the negotiation or ratification process to interpret ambiguous treaty provisions. Such statements might even be relevant in answering some versions of the self-execution question. They might help illuminate whether the treaty requires the criminalization of conduct or the appropriation of money, or imposes a firm or a discretionary obligation.<sup>182</sup> But where it is clear that the treaty *has no relevant content* on the issue, as it will be for *Foster*-type non-self-execution in all but rare circumstances, the basis for consulting the statements of the President and Senate disappears.

To regard the views of the President and Senate on this question as binding, or even relevant, would be to recognize a form of federal law-making not specified in the Constitution. The Constitution sets forth three methods of making federal law: amendment of the Constitution pursuant to Article V, making of statutes pursuant to Article I, and making of treaties pursuant to Article II.<sup>183</sup> Statements of the President and Senate regarding the direct judicial enforceability of treaties are obviously neither constitutional amendments nor statutes. Nor are they treaties. Treaties require not just the approval of the President and Senate, but the agreement of another nation. A treaty, in fact, consists of the mutual agreements reached by two (or more) nations.<sup>184</sup>

<sup>180</sup> See, e.g., *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 999 (2008) (Scalia, J., concurring in part).

<sup>181</sup> See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008) (“‘Legislative history,’ of course, refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding.”).

<sup>182</sup> I conclude below that this last question is the one decided by the Court in *Medellin*. If so, then its reliance on statements by the President and Senate was proper. See *infra* pp. 662–63.

<sup>183</sup> On the exclusivity of these methods of making federal law, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1331–32 (2001). But cf. Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1635–37 (2008) (arguing that fidelity to the original design may require a departure from the exclusivity of these three forms of lawmaking to compensate for other departures that may have come to be accepted).

<sup>184</sup> See *United States v. Stuart*, 489 U.S. 353, 374 (1989) (Scalia, J., concurring in the judgment) (“The question before us in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to. And to answer that question accurately, it can reasonably be said, whatever extratextual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history) rather than a unilateral understanding.”) (citing *New York Indians v. United States*, 170 U.S. 1, 23 (1898)).

But, as we have seen, the treaty itself will almost never have any relevant content on the question of direct enforceability. Therefore, the statements of the President and Senate on the question cannot be regarded as part of the treaty or relevant to its interpretation. They merely reflect the President and Senate's preferences on a question that the treaty itself does not address.

The Restatement's rationale for consulting such statements is singularly unpersuasive. It is true that "it is ordinarily for the United States to decide how it will carry out its international obligations." But this tells us nothing about how the decision of the United States on this question is to be made. Justice Iredell appeared to believe that the Founders made the decision for all treaties when they adopted the Supremacy Clause.<sup>185</sup> The Court in *Foster* recognized an exception for some treaties, but the Court's analysis makes clear that the exception turns on the text of the treaty, which reflects the intent of the parties, not just of the United States. The answer to the question of whether the preferences of the President and Senate are binding, or relevant, where the treaty has no relevant content on the question, is not in the least suggested by the fact that the decision is to be made by the United States. The "United States" similarly makes statutes, yet it is clear that it must follow the procedure set forth in Article I to do so.

Defenders of the "intent of the treaty-makers" view also claim support in the treaty-makers' practice of attaching declarations of non-self-execution to some treaties.<sup>186</sup> These declarations are statements deposited along with the United States's instruments of ratification "declaring" the relevant treaties to be non-self-executing.<sup>187</sup> If in fact the treaties involved had no relevant content on the question, then these declarations would appear to be nothing more than the statements of the President and Senate on the issue. Thus, scholars have argued that, if these declarations are valid, then so too are similar statements made by the President and Senate during the ratification process but not formally communicated to the other parties along with the United States' instruments of ratification.<sup>188</sup>

This is the strongest argument for the "intent of the treaty-makers" view. Some scholars would respond by denying that declarations of non-self-execution are valid.<sup>189</sup> As will be discussed in Part III, I re-

<sup>185</sup> See *supra* pp. 620-21.

<sup>186</sup> See Bradley, *supra* note 177, at 545.

<sup>187</sup> See, e.g., David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 131 & n.13 (1999) (noting that declarations of non-self-execution were deposited with the instruments of ratification for the ICCPR, the Torture Convention, and the Race Convention).

<sup>188</sup> See Bradley, *supra* note 177, at 544-45.

<sup>189</sup> See *infra* section III.A.1.

gard the declarations as valid, although I think the issue is closer than most defenders of these declarations appear to believe. Nevertheless, as discussed in section III.A, there are powerful coherence-based reasons for upholding such declarations and, at least when they are formally communicated to the other parties along with the instruments of ratification, they may plausibly be regarded as parts of the treaties to which they are attached. Less formal statements made by members of the executive branch or the Senate regarding a matter not addressed in the treaty, on the other hand, cannot plausibly be regarded as parts of the treaties to which they relate. They are naked acts of lawmaking by officials to whom the Constitution does not give lawmaking power.<sup>190</sup>

3. *Salvaging Foster*. — *Foster*-type non-self-execution could be salvaged in a manner tolerably consistent with the constitutional text if the Supremacy Clause were interpreted to require implementing legislation for certain treaty provisions framed as obligations to “pass acts” accomplishing certain ends, even if such provisions do not forbid direct judicial enforcement. If that were our constitutional rule, then our rule would not turn on the content of the treaty with respect to the need for legislative implementation. It would instead be a domestic-law requirement of implementing legislation triggered by language in the treaty conveying that indirect enforcement was affirmatively contemplated, even if the treaty did not go so far as to forbid direct enforcement.

The Court in *Foster* plainly contemplated that a treaty provision would require implementing legislation if framed as a commitment to “pass acts” accomplishing certain ends, but not if its words “act directly” upon the subject.<sup>191</sup> The Court did not offer a rationale for requiring legislation in the first case but not the second, even though, as we have seen, both provisions permit but do not require indirect judicial enforcement as a matter of international law.<sup>192</sup> There are, nevertheless, differences between the obligations imposed by the two types of provisions that might justify a domestic-law rule requiring implementing legislation for one but not the other.

A treaty providing that the grants are “hereby” confirmed would be violated if a judge failed to recognize a grant as valid the moment the

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<sup>190</sup> To be sure, this lawmaking is of a negative character; it limits the effect the treaty would otherwise have under the Supremacy Clause. For this reason, I conclude below that accepting a power in the treatymakers, acting jointly through a declaration of non-self-execution, is less problematic than accepting a declaration of self-execution (if our default rule were non-self-execution). But it is still lawmaking and thus problematic unless it takes the form of a statute or treaty.

<sup>191</sup> *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

<sup>192</sup> The Court may have been under the misconception that it was merely giving effect to the international-law content of the provision regarding the need for legislation.

treaty entered into force. A provision stating that the parties shall "pass acts" confirming the grants implicitly gives states-parties a reasonable time to enact the contemplated legislation.<sup>193</sup> A requirement of implementing legislation might be justified in the second case on the theory that it is for the political branches to determine what a reasonable time for enactment of implementing legislation is. If this were the sole rationale for requiring implementing legislation for "pass acts" treaties, however, the *Foster* category of non-self-execution could be subsumed within the "justiciability" category.<sup>194</sup>

But this rationale would not explain the need for implementing legislation if the treaty required the states-parties to "pass acts" by a specified date. In such a case, there would be no doubt about the time by which law-applying officials would be required to recognize the grants as valid. Yet, although there are no other Supreme Court cases on point, such a treaty would appear to be among those that *Foster* regarded as non-self-executing. If so, then the inability of the courts to enforce such a treaty after the specified date would have to be justified on other grounds.

The justification should take account of the reasons the Founders decided to alter the British rule and to establish as the American rule that treaties generally do not require implementing legislation. As we saw, the Founders' decision to give treaties the force of domestic law was their response to the problem of treaty violations by the States during the period of the Articles of Confederation.<sup>195</sup> They authorized the courts to enforce treaties without awaiting legislative implementation in order to avoid the international friction that they expected would result from treaty violations attributable to the United States. Non-self-executing treaties would be problematic from this perspective because the courts' power to enforce them would depend on subsequent action by the House, which was not involved in the treaty-making process. The danger would exist that treaty violations would occur and be unremediable by the courts between the time the treaty was made and the time it was implemented.

Given this purpose of the Supremacy Clause, one might justify a requirement of implementing legislation for treaties affirmatively stat-

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<sup>193</sup> See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 131, § 111 cmt. h ("If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement. The United States would have a reasonable time to do so before it could be deemed in default.").

<sup>194</sup> Constitutional norms have been held to be nonjusticiable for similar reasons. *Cf.* *Coleman v. Miller*, 307 U.S. 433, 452-54 (1939) (explaining that in order to be valid, amendments to the U.S. Constitution must be ratified by states within a reasonable time of their submission to states by Congress, but holding that the question of what is a reasonable time is a political question).

<sup>195</sup> See *supra* section I.B.

ing that the obligations were subject to implementing legislation because such language signals to the other parties that compliance will depend on action by a legislative body. The actions of a legislative body cannot generally be taken for granted. The presence of this language might be expected to reduce the international friction that could result from a violation by preparing states-parties for the increased likelihood that the treaty would be violated. To be sure, a state-party's failure to enact the legislation does not excuse non-compliance,<sup>196</sup> but it might have been thought that the violation of an obligation addressed to the legislature would be likely to give rise to less friction than the violation of a provision purporting to "act upon the subject."

But *Foster* is reconcilable with the constitutional text only if accompanied by a strong presumption of self-execution, one that can be overridden only through a clear statement that the obligations imposed by the treaty are subject to legislative implementation. The Supremacy Clause declares "all" treaties to be the law of the land and instructs judges to give them effect. The clause's text can accommodate an exception for treaties "addressed" solely to the legislature, but, as we have seen, most treaties are addressed to no domestic officials in particular. The parties generally leave such matters to domestic law, and our domestic law is the Supremacy Clause, which instructs judges to give effect to treaties. At a minimum, it should take a clear statement to countermand that instruction. Moreover, if the purpose of the Supremacy Clause, with respect to treaties, was to reduce international friction resulting from treaty violations, then a clear statement of the need for legislation would appear to be required to overcome the default rule established by that clause. In the absence of such language, the Supremacy Clause would actually *exacerbate* the problem by producing an expectation in our treaty partners that treaties would be enforced in our courts without implementing legislation. Even language affirmatively calling for legislation would be insufficient. The parties may have called for legislation as a supplement to direct judicial enforcement — that is, in order to strengthen rather than attenuate the obligation.<sup>197</sup> If the need for legislation were justified by the belief that the legislature's violation of an obligation to pass legislation would produce less international friction than the violation of a provision that purports to "act upon the subject," then a provision that requires legislation as a supplement to direct enforcement or to strengthen rather than attenuate the obligation would not qualify.

<sup>196</sup> Vienna Convention on the Law of Treaties, *supra* note 45, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

<sup>197</sup> For an example, see *supra* note 170.

In short, to overcome the default rule established by the Supremacy Clause, what is needed is a clear statement that the treaty is subject to legislative implementation. *Ware* establishes that a treaty provision that implicitly permits indirect judicial enforcement is not enough. If implicit permission of indirect enforcement is not enough, it follows that language expressly contemplating indirect enforcement as the sole or at least the principal method of enforcement is needed.<sup>198</sup>

4. *Percheman and the Presumption of Self-Execution.* — Chief Justice Marshall learned quickly. In *Percheman*, having received briefing on the issue, the Court ruled that Article 8 of the Adams-Onís Treaty was indeed self-executing. The Court justified its about-face on this issue in part by relying on the Spanish text of the treaty, which was brought to its attention by *Percheman*'s counsel.<sup>199</sup> This text left no doubt that Article 8 was intended to act upon the grants.<sup>200</sup> But the Court also recognized that it had been too casual in *Foster* in concluding that the treaty was "addresse[d] . . . to" the legislature. The English words did "not necessarily" contemplate implementing legislation.<sup>201</sup> "They may import that [the grants] 'shall be ratified and confirmed' by force of the instrument itself."<sup>202</sup> Because the words were

<sup>198</sup> A clear example would be a provision to the effect that "[t]his agreement requires implementation by legislation in each country," Agreement Relating to the Establishment of the Roosevelt Campobello International Park, U.S.-Can., art. 12, Jan. 22, 1964, 15 U.S.T. 1504. On the other hand, a treaty that requires parties to enact "the necessary legislation" would not suffice; such a provision does not tell us whether legislation is "necessary" to implement any particular obligation. See Vázquez, *Four Doctrines*, *supra* note 8, at 709 (discussing problems with lower court decisions relying on provisions of this nature to find treaties non-self-executing). Also insufficient would be provisions to the effect that the parties "may give effect to this convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation, the rules adopted under this convention," International Convention for the Unification of Certain Rules Relating to Bills of Lading, Protocol of Signature, Aug. 25, 1924, 120 L.N.T.S. 155. Such a provision merely restates the choice the parties would have if there were no provision specifically addressing the question of legislative implementation.

<sup>199</sup> *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88–89 (1833). The Court had pointed to the discrepancy between the Spanish and English texts on this issue the year before in *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 741–42 (1832), but found it unnecessary to reverse *Foster* on this point, finding *Foster* distinguishable. *Id.* at 742–43.

<sup>200</sup> As quoted by the Court in *Percheman* in English translation, the Spanish text provided that the grants "shall remain ratified and confirmed to the persons in possession of them, to the same extent." *Percheman*, 32 U.S. (7 Pet.) at 88 (internal quotation mark omitted). The original Spanish is even clearer:

Todas las concesiones de terrenos hechas por [Su Majestad Católica] ó por sus legítimas autoridades antes del 24 de Enero, de 1818, en los expresados territorios que [Su Majestad] cede á los Estados Unidos, *quedarán ratificadas y reconocidas* á las personas que esten en posesion de ellas, del mismo modo que lo serian si [Su Majestad] hubiese continuado en el dominio de estos territorios.

Adams-Onís Treaty, *supra* note 151 (emphasis added), quoted in Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in INTERNATIONAL LAW STORIES 151, 169 n.84 (John E. Noyes et al. eds., 2007).

<sup>201</sup> *Percheman*, 32 U.S. at 89.

<sup>202</sup> *Id.*

amenable to that construction, “that construction which establishes . . . conformity [with the Spanish text] ought to prevail.”<sup>203</sup>

The Court did not expressly recognize that most treaties will be equally ambiguous on the matter, but it did frame the self-execution question in a way that suggests a tightening of the test for finding a treaty to be non-self-executing. It described a self-executing treaty as one that accomplishes the desired end “by force of the instrument itself,” and a non-self-executing treaty as one that “stipulat[es] for some future legislative act.”<sup>204</sup> To similar effect, the Court also framed the question as whether the United States had “insist[ed] on the interposition of government”<sup>205</sup> to accomplish the treaty’s end. To “stipulate” is to specify or to state clearly or expressly.<sup>206</sup> Similarly, to “insist” is to “make a demand with persistent urgency.”<sup>207</sup> If a non-self-executing treaty is one that stipulates and insists that its obligations are subject to implementing legislation, then a clear statement to that effect would appear to be required. Thus, these formulations, considered alongside the Court’s implicit recognition that greater caution was required in distinguishing self-executing from non-self-executing treaties, support a reading of *Percheman* as adopting a presumption of self-execution.

If the presumption were rebuttable only by a clear statement that the treaty *requires* indirect judicial enforcement, then few if any treaties would meet the test. If the *Foster* category is to be retained as a distinct version of non-self-execution, then the presumption must be understood to be rebuttable by language indicating that the parties *contemplated* that the obligation imposed by the treaty would be accomplished through intervening acts of legislation, even if they would not object to direct judicial enforcement.<sup>208</sup> In the Court’s words, what is needed is a “stipulat[ion]” that the treaty’s goals will be accomplished through “future legislative act[s].”<sup>209</sup>

<sup>203</sup> *Id.* at 88.

<sup>204</sup> *Id.* at 89.

<sup>205</sup> *Id.* at 88.

<sup>206</sup> See, e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1704 (4th ed. 2000) (“To specify or arrange in an agreement: *stipulate a date of payment and a price.*”); THE COMPACT OXFORD ENGLISH DICTIONARY 1907 (2d ed. 1991) (“Of one of the parties to an agreement, or a person making an offer: to require or insist upon (something) as an essential condition.”); 2 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2245 (1981) (“to make an express demand for some term in an agreement”); cf. JANE AUSTEN, SENSE AND SENSIBILITY 10 (Edward Copeland ed., Cambridge Univ. Press 2006) (1811) (“He did not stipulate for any particular sum, my dear Fanny; he only requested me, in general terms, to assist them . . .”).

<sup>207</sup> THE COMPACT OXFORD ENGLISH DICTIONARY 856 (2d ed. 1991).

<sup>208</sup> See *supra* note 198.

<sup>209</sup> *Percheman*, 32 U.S. (7 Pet.) at 89.

### C. Understanding Medellín

In its recent decision in *Medellín*, the Court appears to have lost sight of the lesson learned by the Marshall Court in *Percheman*. In its first decision ever to deny relief solely on non-self-execution grounds, the Court hewed closely to the analysis in *Foster*, characterizing *Percheman* (not altogether accurately) as having overruled *Foster* “on other grounds.”<sup>210</sup> If understood as an application of the *Foster* version of non-self-execution, *Medellín* reflects many of the same problems as *Foster*, and then some. Fortunately, an alternative reading is available that avoids those problems: the Court may be understood to have held the relevant treaty to be non-self-executing in the nonjusticiability sense.

This section first considers several possible interpretations of *Medellín* if the case were understood as having applied the *Foster* version of the non-self-execution doctrine. Although each interpretation finds support in some aspects of the Court’s analysis, they all face insurmountable conflicts with the constitutional text and past Supreme Court decisions that *Medellín* either did not purport to reject or explicitly endorsed. The section then advances an alternative interpretation of *Medellín* as an example of the nonjusticiability version of non-self-execution, a reading that reconciles the opinion with the requirement of equivalent treatment and avoids the many problems inherent in a reading of *Medellín* as an example of *Foster*-type non-self-execution.

*Medellín* was the latest of the VCCR cases to reach the Supreme Court. Unlike Mr. Sanchez-Llamas and his predecessors, however, Mr. Medellín did not base his claim directly on Article 36 of the Vienna Convention.<sup>211</sup> Instead, he relied on Article 94 of the U.N. Charter, pursuant to which the United States “under[took] to comply” with judgments of the ICJ in cases to which it was a party. In *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*,<sup>212</sup> a case brought by Mexico against the United States on behalf of Medellín and 51 other Mexican nationals on death row, the ICJ ruled that Article 36 entitled Medellín to a hearing before a judicial tribunal to determine whether the violation of his right to consular notification had prejudiced him in his trial or sentencing.<sup>213</sup> Medellín argued that because Article 94 was the supreme law of the land, state courts were ob-

<sup>210</sup> *Medellín v. Texas*, 128 S. Ct. 1346, 1356 (2008).

<sup>211</sup> *Sanchez-Llamas* would have doomed any such claim as it held that rights under Article 36 were subject to state-law procedural default rules, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2687 (2006), and Medellín had defaulted in state court.

<sup>212</sup> 2004 I.C.J. 12 (Mar. 31).

<sup>213</sup> *Id.* at 60.

ligated to comply with the ICJ judgment and provide him with the requisite hearing.

The majority in *Medellín* stated that “the *Avena* decision . . . constitutes an *international* law obligation on the part of the United States.”<sup>214</sup> Nevertheless, it held that state courts are not required to provide the hearing contemplated by *Avena* because Article 94 is not self-executing.<sup>215</sup>

The opinion is not a model of clarity. Some of the reasons the Court gave for finding Article 94 not to be self-executing seem to have little to do with any version of the self-execution question. For example, the Court relied on Article 59 of the Statute of the ICJ, which provides that a judgment of the ICJ “has no binding force except between the parties and in respect of that particular case.”<sup>216</sup> Noting that the parties to the ICJ judgment were Mexico and the United States, the Court concluded that the *Avena* judgment was not binding as between the United States and Medellín.<sup>217</sup> The Court here appears to have been saying that Medellín lacked standing to enforce the *Avena* judgment, a rationale for denying relief distinct from non-self-execution. Presumably, the Court would not have denied relief on this basis if the suit had been brought by Mexico instead. *Medellín* is thus arguably, like *Foster*, a case in which non-self-execution was an alternative ground for denying relief. Unlike in *Foster*, however, in *Medellín* non-self-execution was the Court’s principal basis for denying relief. In fact, the Court in *Medellín* appeared to believe that Mr. Medellín’s lack of standing had a bearing on self-execution, though the connection between the two concepts is not evident.

With respect to the self-execution question, the opinion left numerous ambiguities, both as to what caused Article 94 to be non-self-executing and what effect this would have on its status. Although my

<sup>214</sup> *Medellín*, 128 S. Ct. at 1356.

<sup>215</sup> The opinion seems to equate the non-self-executing character of Article 94 with the non-self-executing character of ICJ decisions. But the two need not be coextensive. A treaty might in theory be non-self-executing while requiring that all ICJ decisions be automatically enforced in domestic courts. In such an event, Congress would have to enact a statute requiring courts to enforce ICJ judgments, but the statute would have to make ICJ judgments enforceable without the need for legislative implementation of each decision. Cf. *infra* note 259 (discussing British compliance with the obligation to “give effect” to the EEC Treaty). On the other hand, Article 94 itself could be self-executing in the sense that it operates directly as law (as I argue all treaties do in the United States by virtue of the Supremacy Clause), while ICJ judgments are not self-executing because Article 94 does not require that all such judgments be enforced. The latter is what I shall conclude the Court actually held in *Medellín*. See *infra* section 2.f. However, because the Court wrote as if it were determining the self-executing nature of Article 94, I will first consider the plausibility of various tests that might be derived from *Medellín* for determining whether treaties are self-executing.

<sup>216</sup> *Medellín*, 128 S. Ct. at 1360 (emphasis omitted) (quoting Statute of the International Court of Justice art. 59, June 26, 1945, 3 Bevans 1179).

<sup>217</sup> *Id.* at 1361.

principal focus is the cause of non-self-execution, I will first consider what the Court had to say about the effect of non-self-execution. Since *Foster*-type non-self-execution turns on what the treaty itself has to say on the self-execution question, its cause follows from what the treaty has to say about its effect.

1. *The Effect of Non-Self-Execution.* — The Court in *Medellín* noted that “the label ‘self-executing’ has on occasion been used to convey different meanings,” but it made clear that “[w]hat we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification.”<sup>218</sup> “Conversely, a ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law.”<sup>219</sup> This and many similar statements in the opinion suggest that the majority understood that the effect of a determination that a treaty is non-self-executing is that the obligations imposed by the treaty as a matter of international law lack the force of domestic law.<sup>220</sup> If so, the Court was endorsing a view that had been repeated by many lower courts and commentators<sup>221</sup> but had never before been endorsed by the Court itself. It is a claim that has not received the scrutiny deserved by a statement so directly at odds with the constitutional text.

The Supremacy Clause declares that “all” treaties are the “supreme Law of the Land.”<sup>222</sup> This provision thus takes the international obligations imposed on the United States by its treaties and gives them the force of domestic law. Exceptions can legitimately be interpolated for treaties that are invalid or have been superseded by subsequent statutes. For example, a treaty that purports to accomplish what is beyond the treaty power lacks the force of domestic law because, to that extent, it is invalid. Similarly, though a treaty superseded by a statute continues to bind the United States internationally, it is considered repealed as a matter of domestic law. There is no basis, however, for denying the force of domestic law to a treaty that imposes an obligation on the United States that is not beyond the treaty power or otherwise invalid and has not been superseded by a statute.

The *Medellín* majority did not attempt to square the view that non-self-executing treaties lack the force of domestic law with the text of the Supremacy Clause. As support for this characterization, it merely cited *Foster*’s statement that, if a treaty is self-executing, it must be regarded in the courts as the equivalent of an act of the legislature.<sup>223</sup> But *Foster* never said that non-self-executing treaties lack

<sup>218</sup> *Id.* at 1356 n.2.

<sup>219</sup> *Id.*

<sup>220</sup> See *infra* note 239.

<sup>221</sup> See sources cited *supra* note 31.

<sup>222</sup> U.S. CONST. art VI, cl. 2.

<sup>223</sup> *Medellín*, 128 S. Ct. at 1356 (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)).

the force of domestic law. Rather, it characterized such treaties as laws “addresse[d] to” the political branches rather than the courts.<sup>224</sup> When a treaty is addressed to the legislature, as the Court concluded in *Foster*, then it is clearly not the equivalent of an act of the legislature, as legislatures do not typically pass laws obligating themselves to pass specified other laws in the future. Moreover, such a treaty is not to be “regarded in [the] courts” at all,<sup>225</sup> because courts in our constitutional system lack the power to require the legislature to legislate. Such a treaty is thus not judicially enforceable because of the particular nature of the obligation it imposes, not because it lacks the force of domestic law.

To be sure, a treaty addressed to the legislature lacks virtually all of the attributes that we usually associate with a “law.” For example, it is not enforceable in courts, and can be violated by the norm-subject with impunity. I share the majority’s skepticism about the legal status of such a norm. But the difficulty of understanding how a non-self-executing treaty can be said to be a “law” in any recognizable sense should have led the Court to question the concept of non-self-execution, not to ignore the constitutional text. Non-self-execution, after all, originated as an alternative holding in a subsequently overruled decision and was never again the clear basis for denial of relief by the Supreme Court. The *Medellín* majority instead appeared to treat *Foster*’s alternative holding as sacrosanct and barely took notice of the constitutional text.

Notwithstanding the suggestions throughout the opinion that non-self-executing treaties lack the force of domestic law, *Medellín* is susceptible to a narrower interpretation. At several points, the Court said that non-self-executing treaties were not “enforceable” domestic law.<sup>226</sup> Only this narrower understanding of *Medellín* avoids a direct conflict with the constitutional text.<sup>227</sup> For this reason, even the Solicitor General of Texas, who argued the case on behalf of the State, disavows the broader interpretation.<sup>228</sup>

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<sup>224</sup> *Foster*, 27 U.S. (2 Pet.) at 314.

<sup>225</sup> *Id.*

<sup>226</sup> *Medellín*, 128 S. Ct. at 1356, 1359, 1361, 1365.

<sup>227</sup> See Bradley, *supra* note 177, at 541 (“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.”); cf. Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. (forthcoming 2009) (manuscript at 13, on file with the Harvard Law School Library) (discussing problem with no-domestic-force view and noting the majority’s “confusion about what self-execution means”).

<sup>228</sup> *Medellín v. Texas*, Part I: Self-Execution, Federalist Society Online Debate Series, Mar. 28, 2008 (remarks of Ted Cruz), <http://www.fed-soc.org/debates/dbtid.17/default.asp> (“I agree that

Indeed, the *Medellín* majority itself implicitly recognized that Article 94 of the U.N. Charter had *some* effect as domestic law. In deciding that the President lacked the power to order the state of Texas to comply with the ICJ's judgment in *Avena*, the majority applied Justice Jackson's familiar tripartite test from *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>229</sup> The majority concluded that the President's power was at its lowest ebb because he was acting in the face of a non-self-executing treaty, which, in its view, reflected a decision by the treaty-makers that enforcement of the treaty would require an act of legislation.<sup>230</sup> Thus, as applied by the majority, Article 94 had the domestic legal effect of *reducing* the President's power to act unilaterally. In this part of its opinion, the majority seems to reach the same conclusion regarding Article 94 of the U.N. Charter that the Court in *Foster* reached with respect to Article 8 of the Adams-Onís Treaty: in both cases, the treaty had domestic legal force but was "addressed to" the legislature and hence required legislative implementation before it could be enforced in the courts. As discussed above, this understanding reconciles *Foster*-type non-self-execution (albeit uneasily) with the constitutional text.<sup>231</sup>

One scholar who has embraced a narrow interpretation of *Medellín* on this point has suggested that the Court should be understood to have held that a non-self-executing treaty is not judicially enforceable domestic law.<sup>232</sup> This gets it almost right. If non-self-executing treaties are "laws" addressed to the political branches, then they are not judicially enforceable. But a more precise definition is required. Some treaties are not judicially enforceable because the obligation they impose is not one for the courts at all. But there was little doubt in either *Foster* or *Medellín* that compliance with the relevant obligations would require the involvement of courts at some point. The question was whether judicial enforcement had to be preceded by action from the political branches. In the words of *Medellín*, a self-executing

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treaties stand on the same footing as 'laws.' But Congress passes all the time 'laws' that are not enforceable in court . . .").

<sup>229</sup> 343 U.S. 579, 634-38 (1952) (Jackson, J., concurring); see *Medellín*, 128 S. Ct. at 1368.

<sup>230</sup> *Medellín*, 128 S. Ct. at 1368-71.

<sup>231</sup> Whether the Court was correct to conclude that the treaty was indeed addressed to the legislature is, of course, a separate question. Cf. *supra* note 11 (suggesting that some non-self-executing treaties might be addressed to the executive branch).

<sup>232</sup> Bradley, *supra* note 177, at 548.

treaty is one that is “immediate[ly]”<sup>233</sup> or “direct[ly]”<sup>234</sup> or “automatic[ally]”<sup>235</sup> enforceable in the courts. When we say that a treaty is non-self-executing in the *Foster* sense, therefore, what we mean is that such a treaty is enforceable in the courts only *indirectly* — that is, pursuant to implementing legislation or other appropriate action by the political branches. The treaty is the supreme law of the land, but it is “addressed to” the political branches rather than the courts.<sup>236</sup>

2. *The Cause of Non-Self-Execution.* — This leaves the question of determining what makes a treaty non-self-executing. As discussed above, a treaty might be addressed to the political branches by virtue of the Constitution. That is the case when a treaty purports to accomplish what is beyond the treaty-making power or imposes an obligation that requires the exercise of nonjudicial discretion. The distinctive feature of *Foster*-type non-self-execution is that the need for legislative implementation results from what the treaty itself has to say on the subject.

It is clear that the *Medellín* majority regarded the question before it as one of treaty interpretation.<sup>237</sup> This was the reason it focused on the text of the treaty, and chided the dissent for failing to do so.<sup>238</sup> But *Medellín* does not specify what judges are supposed to look for in the text or the clarity with which they should expect to find it. This section considers several alternative tests that find support in *Medellín*, if the decision is read as an example of *Foster*-type non-self-execution.

<sup>233</sup> *Medellín*, 128 S. Ct. at 1358 (Article 94 “is not ‘an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. Members . . .’” (quoting U.S. Amicus Brief in *Medellín v. Dretke*, *supra* note 112, at 34)); *id.* (Article 94 does not “indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts.”).

<sup>234</sup> *Id.* at 1361 (“The pertinent international agreements . . . do not provide for implementation of ICJ judgments through direct enforcement in domestic courts . . .”); *id.* at 1362 (referring to the dissent’s “novel approach to deciding which . . . treaties give rise to directly enforceable federal law”).

<sup>235</sup> *Id.* at 1359 (“The remainder of Article 94 confirms that the U.N. Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts.”); *id.* at 1360 (“If ICJ judgments were . . . regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause.”); *id.* (referring to *Medellín*’s view that ICJ decisions are “automatically enforceable as domestic law”); *id.* (“[T]he ICJ decision in *Avena* does not automatically constitute federal law judicially enforceable in United States courts.”).

<sup>236</sup> Professor Bradley’s formulation is also too narrow in focusing solely on enforceability in courts. A treaty that is addressed to the legislature lacks other characteristics of federal laws as well; for example, it does not preempt conflicting state laws. Thus, it is more accurate to say that such treaties are not enforceable by any domestic law-applying officials until implemented by lawmaking officials. *But cf. supra* note 11 (noting that a treaty might be non-self-executing because addressed to the executive branch).

<sup>237</sup> *See Medellín*, 128 S. Ct. at 1362 (noting “our obligation to interpret treaty provisions to determine whether they are self-executing”).

<sup>238</sup> *See id.*

Each test is consistent with some aspects of the majority's analysis but inconsistent with other aspects.

(a) *Presumption Against Self-Execution Rebuttable by Clear Statement that Treaty Has Domestic Legal Force.* — Consistent with the passages indicating that the majority understood non-self-executing treaties to lack the force of domestic law, the *Medellín* opinion at times seems to focus on what the treaty had to say about its own status as domestic law. These portions of the opinion suggest that the majority was looking for clear evidence that the parties to the treaty affirmatively intended it to have the force of domestic law. For example, the Court states that a treaty would be non-self-executing if it were “ratified without provisions clearly according it domestic effect.”<sup>239</sup> One possible reading of *Medellín*'s holding, then, is that a treaty is non-self-executing unless its text clearly specifies that it has the force of domestic law.<sup>240</sup>

This reading is problematic for a number of reasons. First, it is based on the notion that a non-self-executing treaty lacks the force of domestic law, which, as we saw earlier, is inconsistent with the constitutional text. Some scholarly defenders of this reading of *Medellín* have argued that the Supremacy Clause can be read to give domestic legal force only to treaties that purport to have domestic legal force.<sup>241</sup> But that is not how the clause reads. The Supremacy Clause does not limit its operation to treaties that state that their obligations shall have such force.<sup>242</sup>

<sup>239</sup> *Id.* at 1369; see also *id.* 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.’” (ellipsis in original) (quoting *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc))); *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>240</sup> See *Mora v. New York*, 524 F.3d 183, 202 (2d Cir. 2008) (stating that *Medellín* “adopt[ed] a clear-statement rule for determining when treaties are self-executing”).

<sup>241</sup> See, e.g., *Medellín v. Texas*, Part I: Self-Execution, Federalist Society Online Debate Series, Mar. 28, 2008 (remarks of Nick Rosenkranz), <http://www.fed-soc.org/debates/dbtid.17/default.asp>.

<sup>242</sup> An interesting question would be raised by a treaty that expressly provided that it did not have the force of domestic law. Cf. S. EXEC. REP. NO. 101-30, at 12 (1990) (stating that declaration of non-self-execution attached to Torture Convention “clarif[ies] that the provisions of the Convention [will] not of themselves become effective as domestic law”). I am not aware of any treaty containing such language in its body or even in an attached declaration. If it existed, its validity would be “controversial.” See Bradley, *supra* note 177, at 550. If valid, I suppose we would say that the treaty has domestic legal force to the extent of establishing that it lacks domestic legal force. In any event, recognizing that a treaty lacks domestic legal force if it so states is a far cry from saying that treaties lack such force even if they do not so state. The latter cannot be reconciled with the constitutional text.

Moreover, a rule under which treaties are non-self-executing unless they clearly state that they have the force of domestic law would be inconsistent with the Supreme Court's prior cases stretching back to *Ware v. Hylton* and including some cases that the *Medellín* Court endorsed. The treaty involved in *Ware* did not include language specifying that the obligations it imposed would have the force of domestic law. Indeed, as we saw, when the treaty was concluded, it could not have had the force of domestic law in either Great Britain or the United States.<sup>243</sup> Yet the treaty was found to have the force of domestic law by virtue of the Supremacy Clause. The requirement of a clear statement of domestic force would also conflict with the many cases in which the Court has found multilateral treaties to be self-executing even though the United Kingdom and other nations following the British rule were parties.<sup>244</sup> These treaties did not specify that they would have the force of domestic law in the various states-parties; in fact, they could not have had such force in many of the states-parties because of their constitutional rules.

Nor was there such language in the treaties involved in *Sumitomo Shoji America, Inc. v. Avagliano*,<sup>245</sup> *Kolovrat v. Oregon*,<sup>246</sup> or *Clark v. Allen*.<sup>247</sup> — decisions that the *Medellín* majority explicitly endorsed.<sup>248</sup> Indeed, such language was absent from all but one of the treaties involved in the innumerable other cases in which the Supreme Court has expressly or implicitly found treaties to be self-executing.<sup>249</sup> Reading *Medellín* to adopt a test under which only one treaty that the Supreme Court has ever considered would be self-executing would thus require rejection of the holdings of many, many cases. But the Court did not purport to be reversing a single self-execution decision, much less radi-

<sup>243</sup> See *supra* pp. 619–20.

<sup>244</sup> See cases cited *supra* note 175.

<sup>245</sup> 457 U.S. 176 (1982).

<sup>246</sup> 366 U.S. 187 (1961).

<sup>247</sup> 331 U.S. 503 (1947).

<sup>248</sup> *Medellín v. Texas*, 128 S. Ct. 1346, 1365–66 (2008).

<sup>249</sup> See, for example, the cases cited in Vázquez, *Four Doctrines*, *supra* note 8, at 716 nn.96, 99. The one exception is the treaty found to be self-executing in *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 159 (1940), which provides in Article 35:

The provisions of this Convention shall have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs. The Contracting States in which the fulfillment of international agreements is dependent upon the enactment of appropriate laws, on accepting in principle this Convention, agree to request of their legislative bodies the enactment of the necessary legislation in the shortest possible period of time and in accordance with their constitutional provisions.

Convention and Protocol Between the United States of America and Other American Republics for the Protection of Trade-Marks art. 35, Feb. 20, 1929, 124 L.N.T.S. 357 [hereinafter *Inter-American Trademark Convention*]. This is a truly odd provision in a number of respects. See *infra* p. 667 (discussing the difficulty of obtaining agreement on such a provision).

cally changing course.<sup>250</sup> Such a reading also conflicts with the Court's statement that "some international agreements are self-executing and others are not."<sup>251</sup> There appears to be only one U.S. treaty in force that would meet this test.<sup>252</sup> *Medellín* accordingly cannot be read to adopt a presumption of non-self-execution rebuttable by a clear statement that the treaty was intended to have the force of domestic law.

(b) *Test Turning on Whether Treaty Requires Direct Judicial Enforcement.* — Portions of the majority opinion suggest that the Court was asking whether the treaty *required* direct judicial enforcement and suggest that the Court believed that, if the treaty *permitted* indirect judicial enforcement, it was non-self-executing and hence not enforceable in the courts without prior implementation. Thus, it stated that Article 94 was non-self-executing because it "do[es] not provide for implementation of ICJ judgments through direct enforcement in domestic courts,"<sup>253</sup> and it suggested that "direct enforcement in domestic courts"<sup>254</sup> was a "particular remedy"<sup>255</sup> that must be provided for in the treaty itself and may not be imposed on the states through judicial lawmaking.<sup>256</sup>

If that had been the question, the Court's opinion could have been much briefer. Consistent with the view that international law is generally concerned with ends and not means, there is little doubt that the parties to the U.N. Charter did not intend to require direct judicial enforcement of ICJ judgments. They would certainly have been satisfied with indirect judicial enforcement, which would have been the only constitutional option for the United States with respect to ICJ judgments requiring the criminalization of conduct or the appropriation

<sup>250</sup> That the majority did not intend such a drastic change in the law is confirmed by its subsequent decision denying *Medellín* a stay of execution in part on the ground that he had had four years in which to obtain the necessary legislation. In denying the stay, the majority wrote that "Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling," *Medellín v. Texas*, 77 U.S.L.W. 3073, 3073 (U.S. Aug. 5, 2008) (per curiam), implicitly rejecting Justice Breyer's argument in dissent that "until this Court's decision in *Medellín* a few months ago, a member of Congress might reasonably have believed there was no need for legislation because the relevant treaty provisions were self-executing," *id.* at 3074 (Breyer, J., dissenting). The Court thus denied that it was changing the rules.

<sup>251</sup> *Medellín*, 128 S. Ct. at 1364.

<sup>252</sup> I refer to the Inter-American Trademark Convention, *supra* note 249.

<sup>253</sup> *Medellín*, 128 S. Ct. at 1361; *see also id.* at 1358 (expressing agreement with the executive branch's argument that Article 94 "is not 'an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. members'" (quoting U.S. Amicus Brief in *Medellín v. Dretke*, *supra* note 112, at 34)); *id.* (Article 94 non-self-executing because it does not "indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts").

<sup>254</sup> *Id.* at 1361.

<sup>255</sup> *Id.* at 1361 (quoting *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2680 (2006)).

<sup>256</sup> *Id.*

of money, and would likely be the only option for other nations in other circumstances. Neither Medellín nor any amicus supporting him argued that Article 94 required direct judicial enforcement of ICJ judgments.<sup>257</sup>

But that was not the question before the Court. The Court's very first important treaty decision, *Ware v. Hylton*, established that the Supremacy Clause could make a treaty judicially enforceable even though the treaty did not require direct judicial enforcement.<sup>258</sup> As already discussed, virtually *all* treaties permit indirect judicial enforcement. If only treaties requiring direct judicial enforcement were self-executing, then virtually no treaties would be self-executing.<sup>259</sup> This understanding of the self-execution test is thus untenable for the same reason as the previous one: it would conflict with the text of the Su-

<sup>257</sup> Medellín argued that Article 94 imposed an obligation to comply with ICJ judgments and that *the Supremacy Clause* made that obligation enforceable in the courts. Brief for Petitioner at 23–26, *Medellín*, 128 S. Ct. 1346 (No. 06-984); Reply Brief for Petitioner at 3–8, *Medellín*, 128 S. Ct. 1346 (No. 06-984).

<sup>258</sup> See *supra* p. 635. The treaty could not have required direct judicial enforcement, since both parties followed the British rule at the time it was concluded.

<sup>259</sup> Again, the Inter-American Trademark Convention, *supra* note 249, appears to be the only existing U.S. treaty that would satisfy this test, and only if “force of law” were understood to entail judicial enforcement. Although some treaties specifically require enforcement in courts, *see, e.g.*, International Covenant on Civil and Political Rights art. 9, Mar. 23, 1976, 999 U.N.T.S. 171, 6 I.L.M. 368, they do not for that reason require *direct* judicial enforcement. See *infra* note 357. Nations following the British rule would comply with such treaties by passing legislation authorizing their courts to enforce them.

The same is true of the treaty obligation cited by Justice Stevens as an example of a self-executing obligation: annex VI, article 39 of the Law of the Sea Convention, which the United States has signed but not yet ratified. See *Medellín*, 128 S. Ct. at 1373 (Stevens, J., concurring in the judgment) (citing United Nations Convention on the Law of the Sea, annex VI, art. 39, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397). This article provides that “decisions of the [Seabed Disputes] Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.” It does not provide, however, that states must give direct effect to this treaty obligation. Nations following the British rule would comply by passing statutes requiring their courts to enforce the decisions of this tribunal “in the same manner as judgments or orders of [their] highest court[s].”

Finally, the same appears to be the case for the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (EEC Treaty), another treaty to which the United States is not a party. The European Court of Justice held in Case 26/62, *Van Gend & Loos v. Neth. Inland Revenue Admin.*, 1963 E.C.R. 1, 13, that some articles of this treaty “produc[e] direct effects and creat[e] individual rights which national courts must protect” even in the absence of national legislation on the subject. The United Kingdom subsequently enacted a statute instructing its courts to enforce the provisions of the EEC Treaty that “in accordance with the Treat[y] are without further enactment to be given legal effect.” European Communities Act, 1972, c. 68, § 2(1) (Eng.). That the United Kingdom is complying with its obligation to give “direct effect” to certain provisions of the EEC Treaty through the operation of a statute directing its courts to enforce those provisions indicates that the treaty does not actually require direct, as opposed to indirect, enforcement.

premacy Clause, the Supreme Court's prior cases, and *Medellín*'s own statement that "some international agreements are self-executing."<sup>260</sup>

(c) *No Presumption*. — That the Court did not adopt a presumption against self-execution is suggested by the fact that it was not content to rely on the absence of language in the treaty about domestic legal effect or direct judicial enforceability. Instead, it relied on language in the treaty — "undertakes to comply" — that the Court understood to reflect a need for future action,<sup>261</sup> as well as the enforcement provisions of Article 94(2)<sup>262</sup> and the practice of other states-parties.<sup>263</sup> Reliance on these sources seems inconsistent with a presumption against self-execution.<sup>264</sup>

Portions of the *Medellín* opinion suggest that the majority decided the issue based on its general impression that the parties contemplated legislative implementation. For example, the Court justified its conclusion by noting that Article 94 "read[] like" a non-self-executing provision.<sup>265</sup> This impressionistic approach is reminiscent of Chief Justice Marshall's gut reading of the phrase "shall ratify and confirm" — which, indeed, the majority used as a model in this regard.<sup>266</sup> But Chief Justice Marshall soon learned the dangers of this approach.<sup>267</sup> Even the ablest of U.S. judges are often unfamiliar with international law terminology and usage. The likelihood that judges will be misled is particularly acute with respect to the self-execution question because, as explained, the language of the treaty will almost always be (purposely) ambiguous on the point. Thus, if we ask courts to decide the issue based on the impression the language leaves them with, the results will be highly unpredictable.

Relatedly, the impressionistic approach gives tremendous power to courts to determine which treaties shall be enforced and which shall not. This broad discretion is well illustrated by the fact that Article 94's "undertakes to comply" formulation "read" to the majority like a non-self-executing provision, while a treaty using virtually identical words was held by the Court in *Comegys v. Vasse*<sup>268</sup> to be self-executing. In response to the *Medellín* dissent's reliance on *Comegys*, the Court could say only that it involved a different treaty.<sup>269</sup> That

<sup>260</sup> *Medellín*, 128 S. Ct. at 1364.

<sup>261</sup> *Id.* at 1358–59.

<sup>262</sup> *Id.* at 1359–60.

<sup>263</sup> *Id.* at 1363.

<sup>264</sup> See Bradley, *supra* note 177, at 546 ("It would be over-reading the decision, however, to conclude that it supports a presumption against self-execution.").

<sup>265</sup> *Medellín*, 128 S. Ct. at 1358.

<sup>266</sup> *Id.*

<sup>267</sup> See *supra* pp. 644–45.

<sup>268</sup> 26 U.S. (1 Pet.) 193 (1828).

<sup>269</sup> *Medellín*, 128 S. Ct. at 1364–65.

the majority itself would regard such broad and unguided judicial discretion as a major problem is shown by its blistering criticism, precisely on this ground, of the approach favored by the dissent.<sup>270</sup>

As explained in section B, because treaties will almost never have any relevant content on the issue, it is essential to articulate a default rule on the question of *Foster*-type non-self-execution. Because the language of the treaty is very likely to be ambiguous, the default rule has to be one that is rebuttable only by a clear statement. With respect to a question as to which the treaty has no relevant content, a “no-presumption” approach is untenable. It would license ad hoc decisionmaking untethered to any actual intent of the parties and produce arbitrary results.

(d) *Default Rule of Self-Execution Rebuttable by Evidence of Intent To Require Implementing Legislation.* — Though the *Medellín* opinion’s tone and much of its analysis point the other way, one part of its analysis supports a reading of the opinion as embracing a default rule of self-execution rebuttable by evidence of an intent to require implementing legislation. After finding Article 94 to be non-self-executing, the Court considered whether the state courts were required to comply with the *Avena* judgment by virtue of the President’s memorandum instructing them to comply.<sup>271</sup> In applying Justice Jackson’s *Youngstown* analysis,<sup>272</sup> the Court concluded that the President’s action fell into the third category because Article 94 was a non-self-executing treaty, and “[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>273</sup> Therefore, the Court held, as a non-self-executing treaty, Article 94 prohibited the President from unilaterally enforcing its provisions.

The Court’s analysis here suggests that, for a treaty to be regarded as non-self-executing, there must be affirmative evidence of an “understanding that [the treaty was] not to have domestic effect of its own force.” If we understand the Court to have meant “not directly enforceable” as opposed to “no[] . . . domestic effect,” consistent with our analysis above,<sup>274</sup> then the Court’s reasoning here suggests that a treaty is to be regarded as non-self-executing only if there is affirmative evidence of an understanding that it was not intended to be directly enforceable. If the treaty were silent on the issue, it would be self-executing.

<sup>270</sup> See *id.* at 1362–63.

<sup>271</sup> *Id.* at 1367–72.

<sup>272</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring).

<sup>273</sup> *Medellín*, 128 S. Ct. at 1369.

<sup>274</sup> See *supra* section II.C.1.

Under the opposite default rule, the Court's *Youngstown* analysis would make no sense. If silence about the need for legislation rendered a treaty non-self-executing, then a finding of non-self-execution would place the President's action in the middle *Youngstown* category.<sup>275</sup> An alternative understanding of *Medellín's* *Youngstown* analysis would be that the Court believed that silence in a treaty was indicative of an intent to require implementing legislation *because* the Court believed there was a background presumption of non-self-execution. The problem with this interpretation is that the Court had never before articulated a background presumption of non-self-execution. Indeed, even after the *Medellín* decision, it is far from clear that there is a presumption against self-execution. Even commentators who would welcome such a presumption stop short of claiming that the Court adopted one.<sup>276</sup> It is thus difficult to attribute to the treaty-makers an affirmative intent to require implementing legislation based on their silence on the issue.

If the court were understood to have adopted a default rule of non-self-execution, rebuttable only by treaty language specifying that the treaty has direct effect, the Court's *Youngstown* analysis would lead to the absurd conclusion that the President has less power to require the states to comply with ICJ judgments if there is a treaty imposing a firm obligation to comply with such judgments but saying nothing about its direct effect, than if there had been *no* treaty imposing an obligation to comply. This absurd conclusion can be avoided only by understanding the Court to have adopted a default rule of self-execution rebuttable by affirmative evidence that the treaty contemplates implementing legislation.<sup>277</sup>

(e) *Test Turning on the Intent of U.S. Treaty-makers.* — Recognizing the significant problems with any test that turns on the intent of the parties on the question of direct judicial enforceability, some commentators have read *Medellín* to endorse the Restatement approach, under which the intent of the U.S. treaty-makers is determinative.<sup>278</sup> They point to the numerous references in the opinion to what the Senate must have intended.<sup>279</sup> Despite these references, however, the majority opinion cannot be read to have embraced the Restatement approach. In each case but one, the majority referred to the intent of the

<sup>275</sup> See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("congressional inertia, indifference, or quiescence" can put a President's action in the middle category).

<sup>276</sup> See, e.g., Bradley, *supra* note 177, at 546.

<sup>277</sup> For elaboration of this point, see Vázquez, *Less Than Zero?*, *supra* note 11, at 569–70.

<sup>278</sup> See, e.g., Bradley, *supra* note 177, at 544.

<sup>279</sup> *Id.*

Senate *as reflected in the terms of the treaty*.<sup>280</sup> The one time it did not link the Senate's presumed intent exclusively to the terms of the treaty, it referred to the treaty's "text, background, negotiating and drafting history, or practice among signatory nations."<sup>281</sup> Importantly, each of these sources reflects the intent of the parties, not the unilateral views of the U.S. treaty makers.

The majority did at one point rely on executive branch statements reflecting its belief that Article 94 was the exclusive enforcement mechanism for addressing violations of Article 94(1).<sup>282</sup> This reliance was consistent with the majority's belief that the issue before it was one of treaty interpretation.<sup>283</sup> Executive branch statements might be relevant to treaty interpretation as evidence of the intent of one of the parties. But, where it is conceded that the treaty has no relevant content on an issue, the court's role is not one of treaty interpretation. The majority's analysis does not suggest that it would have regarded it as appropriate to consult executive branch statements in such circumstances.

Indeed, the majority's opinion suggests strongly that it would not regard executive branch or Senate statements on such matters as binding, or even relevant, if the content of the treaty were clear. Echoing *Chadha*,<sup>284</sup> as well as scholars who have argued forcefully that the three forms of federal lawmaking set forth in the Constitution are exclusive,<sup>285</sup> the majority stressed that "[o]ur Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution."<sup>286</sup> These are, of course, the procedures for making the three forms of federal law listed in the Supremacy Clause. As we have seen, statements by the President or Senate on matters not addressed by a treaty do not qualify as any of those three.<sup>287</sup>

<sup>280</sup> See *Medellín v. Texas*, 128 S. Ct. 1346, 1364 (2008) ("[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." (emphasis added)); *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." (emphasis added)).

<sup>281</sup> *Id.* at 1367.

<sup>282</sup> *Id.* at 1359.

<sup>283</sup> See *id.* at 1362.

<sup>284</sup> *INS. v. Chadha*, 462 U.S. 919 (1983).

<sup>285</sup> See, e.g., Bradford R. Clark, *The Separation of Powers As a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1331–37 (2001).

<sup>286</sup> *Medellín*, 128 S. Ct. at 1362.

<sup>287</sup> It is true that the majority gave a functionalist defense of its formalist insistence on these procedures. It stressed that each of these procedures "requires joint action by the Executive and Legislative Branches," *id.* at 1369, which protects the populace against a dangerous accumulation of power in any one branch. This rationale for insisting on adherence to the constitutionally stipulated procedures for making federal law would not appear to call into question the relevance

Treatymaking requires the agreement not just of the President and Senate, but also of another nation. The requirement of another nation is far from trivial. The President and Senate were given the power to assume certain obligations as leverage to extract from other countries promises that would benefit the nation. Treaties consist of these mutual rights and obligations. These are what the Supremacy Clause declares to be the “supreme Law of the Land.” As we have seen, virtually all treaties have no relevant content on the question of direct versus indirect judicial enforceability. That leaves the Supremacy Clause’s instruction to the courts to give effect to treaties as the relevant law on the question, subject to constitutional limitations such as those limiting what may be accomplished by treaty or what may be enforced by courts. The disembodied “intent” of the President and Senate has no claim to legal status or even relevance.

(f) *Medellín as a Nonjusticiability Case.* — All but one of the foregoing readings of *Medellín* as involving *Foster*-type non-self-execution are plagued with constitutional problems. (The one that is not — interpretation *d* — is in tension with the other portions of the opinion discussed above.) An alternative interpretation avoids these problems. On this alternative reading, the Court found ICJ judgments not to be directly enforceable in U.S. courts because Article 94 left the parties to the Charter (or at least the United States) with some discretion not to comply. So understood, *Medellín* is not an example of *Foster*-type non-self-execution at all, but instead an example of non-self-execution as nonjusticiability. Such a shift in reading is not necessarily a radical one, for the two types of non-self-execution are closely related, and, indeed, on one view, *Foster* itself can be understood as a nonjusticiability holding.<sup>288</sup>

As discussed in section II.A, the nonjusticiability category includes treaties that are not enforceable in the courts because the obligations they impose call for the exercise of discretion that is clearly for the political branches and not the courts. Such treaties are not judicially enforceable without prior legislative implementation for the same reason that similarly structured constitutional and statutory provisions would not be: they require “an initial policy determination of a kind clearly

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of statements reflecting the joint or common views of the President and Senate concerning direct judicial enforceability. But the majority focused on this particular purpose of the Constitution’s lawmaking procedures because it was addressing the validity of an action that it viewed as having been taken by the President alone: the “Memorandum” requiring the states to comply with the *Avena* judgment. The majority’s analysis does not suggest that other requirements for supreme federal lawmaking do not also have an important function, or that the Court would excuse compliance with such procedures if the purpose of the requirement would not be advanced in a particular case.

<sup>288</sup> See *supra* p. 642.

for nonjudicial discretion.”<sup>289</sup> This category of non-self-execution is thus consistent with, rather than an exception to, the requirement of equivalent treatment.

One kind of treaty that is nonjusticiable for this reason is one that requires the parties to “use their best efforts” to accomplish certain goals. Such provisions are nonjusticiable because the determination of what is the “best” the nation can do under the circumstances involves a policy determination clearly for nonjudicial discretion. Compliance may require a balancing of competing demands on the nation’s resources, or even a balancing of the goals reflected in the treaty with other goals the nation may have.

The *Medellín* opinion indicates that the Court concluded that ICJ judgments are not directly enforceable in the courts because Article 94, in effect, obligates the United States to do its best to comply with ICJ judgments. Most significantly in this respect, the Court gave as its very first reason for finding Article 94 to be non-self-executing that Article 94 “does not provide that the United States ‘shall’ or ‘must’ comply.”<sup>290</sup> This initial focus suggests that the Court read Article 94 to leave the parties with discretion not to comply. This reading is further supported by the Court’s interpretation of Article 94(2),<sup>291</sup> in conjunction with the fact that the United States retained a veto in the Security Council, as establishing that the United States had retained “the option of noncompliance.”<sup>292</sup>

This reading of the opinion also helps make sense of the Court’s otherwise mystifying reliance on Article 94’s use of the term “undertakes to comply.” In international law usage, an “undertaking” is well recognized to be a hard, immediate obligation.<sup>293</sup> That Article 94 uses

<sup>289</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>290</sup> *Medellín*, 128 S. Ct. at 1358.

<sup>291</sup> *Id.* at 1359 (interpreting it as “provid[ing] the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state”).

<sup>292</sup> See *id.* at 1360. Alternatively, the Court may have meant that the veto shows that the United States had retained the *practical*, but not the legal, “option of noncompliance,” and that this practical option would be lost if ICJ judgments were directly applicable in the courts. The interpretation offered in the text is the more charitable one, however, as the alternative reading overlooks the fact that the United States in any event retained the practical option of not complying with ICJ decisions by passing a later in time statute prohibiting compliance. To be sure, if ICJ decisions were directly enforceable, the burden would be on those opposing compliance to procure the necessary legislation, but the veto tells us nothing about whether that burden was meant to lie with the proponents or opponents of compliance.

<sup>293</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 46 I.L.M. 188, 231 (Feb. 26, 2007) (“The ordinary meaning of the word ‘undertake’ is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties . . . . It is not merely hortatory or purposive. The undertaking is unqualified . . . .”); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 131, § 301 reporters’ note 2 (citing as “[a]n example of a nonbinding agreement” an instrument that “avoids words of legal undertaking”).

the term in this sense is confirmed by the Spanish version of this Article, which uses in place of this term a phrase that translates most closely as “agrees to comply.”<sup>294</sup> To the majority, the term suggested that future acts were contemplated. Of course, compliance with an ICJ judgment will necessarily require action subsequent to the ICJ’s decision (unless the judgment is purely prohibitory, in which case compliance would require future inaction). But it is not obvious why any contemplated future action would have to come from the legislature rather than the courts (that is, through future judicial rulings enforcing the ICJ judgments).

The key to this puzzle appears to lie in the fact that, in colloquial English usage, the term “undertakes” has acquired a secondary meaning denoting a “soft” obligation, a meaning along the lines of the verbs to “attempt”<sup>295</sup> or to “endeavor” or to “give it a shot.”<sup>296</sup> If the Court understood the term “undertakes” to mean “endeavor” or “try,” then it read Article 94 to leave the United States with the discretion not to comply or, in its own words, with “the option of noncompliance.”<sup>297</sup>

To be sure, this reading of *Medellín* is in tension with the Court’s recognition elsewhere in the opinion that “the *Avena* decision . . . constitutes an *international* law obligation on the part of the United States.”<sup>298</sup> If the Court meant here that Article 94 imposed a firm obligation to comply with ICJ judgments, the Article would do more than just require the parties to do their best to comply. On the other hand, if the provision did impose a firm obligation to comply, then it *would* have effectively provided that the parties “shall” or “must” comply. The Court’s reliance on the provision’s failure to employ the terms “shall” or “must” therefore *must* reflect the Court’s view that the provision does not really impose a firm obligation to comply. Since the Court said merely that *Avena* was “an *international* law obligation” without specifying the nature of the obligation, it may have meant that the United States had an obligation to endeavor to comply.<sup>299</sup>

<sup>294</sup> See *Medellín*, 128 S. Ct. at 1384 (Breyer, J., dissenting) (quoting the Spanish phrase, “compromete a cumplir”).

<sup>295</sup> See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1365 (11th ed. 2003) (listing “attempt” among meanings of “undertake”).

<sup>296</sup> See ROGET’S INTERNATIONAL THESAURUS 311 (Barbara Ann Kipfer ed., 6th ed. 2001) (listing “endeavor” and “take a shot at” as synonyms of “undertake”).

<sup>297</sup> *Medellín*, 128 S. Ct. at 1360.

<sup>298</sup> *Id.* at 1356. The nonjusticiability reading also fits uneasily with the Court’s *Youngstown* analysis, but, as noted, that portion of the opinion makes sense only if the Court were understood to have adopted a default rule of self-execution, an interpretation that is also consistent with *Percheman*.

<sup>299</sup> Alternatively, the Court might have believed that Article 94 imposed only a “moral” obligation to comply. See *id.* at 1359–60 (quoting *A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the*

If the Court held that Article 94 contemplated implementing legislation because it imposed an obligation to try to comply with ICJ judgments, then *Medellín* is an example of the nonjusticiability category of non-self-execution. To the extent *Foster* reflects a type of non-self-execution distinct from the nonjusticiability category, the *Foster* type consists of treaties that are non-self-executing because of what the treaty itself has to say about the need for legislative implementation. *Foster* calls for judges to consult the words of the treaty for what they say about that precise issue. In contrast, with respect to treaties that are non-self-executing because nonjusticiable, the treaty text is consulted to determine the nature of the obligation it purports to impose — for example, in *Medellín*, whether the treaty imposed a firm obligation to comply or only an obligation to try to comply. The need for legislation, however, comes from domestic constitutional principles, specifically principles about the sorts of decisions that are appropriate for judicial as opposed to legislative or executive officials.<sup>300</sup> Although it is likely that other nations will reach similar conclusions about the sorts of domestic officials that will be responsible for achieving compliance with particular kinds of obligations, it is important to note that the treaty itself does not designate the responsible categories of officials. Consistent with the general principle that international law is concerned with ends and not means, the treaty itself will generally be indifferent on this point. The need for implementing legislation comes from general domestic-law principles of justiciability, *not* the treaty itself.<sup>301</sup>

If the Court did conclude that Article 94(1) only obligated the parties to try their best to comply with ICJ judgments, its interpretation was almost certainly wrong. The problems with the “soft” interpretation of “undertake” have already been noted. Interpreting Article 94(2) in conjunction with the veto in the Security Council as producing that

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*S. Comm. on Foreign Relations*, 79th Cong. 142 (1946) (statement of Charles Fahy, State Department Legal Adviser) (“[W]hile parties that accept ICJ jurisdiction have ‘a moral obligation’ to comply with ICJ decisions, Article 94(2) provides the exclusive means of enforcement.”).

<sup>300</sup> Thus, if the Court was asking whether Article 94 imposed a firm or discretionary obligation to comply with ICJ judgments, the practice of other states-parties regarding the direct judicial enforceability of ICJ judgments would be suggestive of the answer, though no more than this. *Cf. Medellín*, 128 S. Ct. at 1363 (discussing the practice of other states-parties on direct judicial enforcement of ICJ judgments). On the other hand, if the Court was applying the *Foster* category of non-self-execution, the practice of other states-parties would not have been relevant. *See supra* note 169 (mutuality of obligation not a requirement of *Foster*-type self-execution).

<sup>301</sup> The nonjusticiability reading thus helps make sense of the Court’s belief that the issue before it was one of treaty interpretation. Whether the obligation to comply with ICJ judgments was firm or discretionary is an issue of treaty interpretation. On the other hand, as we have seen, treaties generally have no relevant content on the question of direct versus indirect enforcement, so there will be no occasion to interpret the treaty on that point. The need for legislation will generally be determined by the default rule.

result only for the five veto-holding nations is also problematic. Article 94(2) creates an international mechanism for giving efficacy to ICJ judgments; the practical relevance of the veto is that it renders these measures ineffective in enforcing compliance on the part of the five veto-holding nations. Most treaties, however, do not even create international enforcement mechanisms. If the veto signifies non-self-execution because it makes the enforcement mechanism provided for in the treaty ineffective, then a fortiori treaties that lack an international enforcement mechanism would be non-self-executing. Yet this has never been the rule. As discussed in Part I, the Founders were aware of the deficiencies in the international mechanisms for enforcing treaties, but they recognized the importance of treaty compliance for the nation and, to promote such compliance, they supplemented the international mechanisms with a domestic one. The point of declaring treaties to be the supreme law of the land and thus enforceable in courts was to avert or remedy violations of treaties by the United States before they triggered international enforcement mechanisms against the United States.<sup>302</sup>

If *Medellín* were to become a model for determining when a treaty imposes a firm obligation or a discretionary one, the result would be troubling. But the decision cannot be read to hold that the use of the word “undertakes” always makes a provision discretionary, as the majority recognized that treaties using that formulation are sometimes self-executing.<sup>303</sup> The precedential value of *Medellín* on this point is also diminished by the Court’s reliance on other factors, such as the veto power. The precedential value of *Medellín*’s reliance on the veto is, in turn, diminished by its reliance on the text of Article 94 and other factors. In short, the Court’s reliance on multiple arguments significantly reduces the precedential value of any one of them. Thus, if *Medellín* were understood to have found Article 94 to impose an obligation to use our best efforts to comply, its erroneous interpretation of the treaty should not have significant implications for other treaties.

In any event, of all the possible readings of *Medellín* (save the one consistent with *Percheman*), this interpretation is the soundest from the perspective of constitutional interpretation. The problems with this holding would be confined to its interpretation of Article 94 as essentially precatory. If that interpretation of the treaty were assumed to be correct, then the (constitutional) conclusion that action from the political branches was required was sound. On the other hand, if the Court were understood to have found Article 94 to be non-self-

<sup>302</sup> See *supra* p. 617; *supra* note 19; see also Flaherty, *supra* note 64, at 2147; Vázquez, *Treaty-Based Rights*, *supra* note 26, at 1102–03.

<sup>303</sup> See *supra* p. 656 (discussing majority’s treatment of *Comegys*).

executing because of what it said, or did not say, about the treaty's domestic legal force or its direct judicial enforceability, the decision would present the very significant problems discussed above.

3. *Interpreting Medellín*. — If *Medellín* had been written by Justices who believed in a Living Constitution, one might reasonably have concluded that they had revised our constitutional regime for treaty enforcement in the belief that an approach devised for a weak, fledgling nation was not suitable for a hyperpower. It is true that the Founders' decision to give treaties the force of domestic law was influenced by their fear of the international repercussions of treaty violations, which was a much greater concern for them then than it is for us now. The nation then was comparatively weak; it would certainly not have commanded anything resembling a veto on the world stage. A constitution written for a hyperpower might well make very different arrangements for both treatymaking and treaty enforcement.

But the Court did not purport to be asking what the best constitutional arrangement would be for us now. Had that been the question, the Court would have given at least passing consideration to the consequences of its holding for existing and future treaties. Part III considers the impact of a default rule of self-execution or non-self-execution for U.S. treatymakers seeking to control the domestic consequences of treaties they negotiate in the future. If only rebuttable by a clear statement in the treaty itself, both default rules would pose difficulties for U.S. treatymakers negotiating multilateral treaties, although the problems would be far more significant if the default rule were non-self-execution. As explained in Part III, for multilateral treaties, adoption of a default rule of non-self-execution would be tantamount to adoption of the British rule. That it would resurrect, for an important class of treaties, the approach that the Founders specifically rejected is an additional reason for rejecting such an interpretation of *Medellín*.

Still, the nation would adjust over time even to a default rule of non-self-execution. After all, the British have lived with the British rule for many years. We would no doubt adapt to this rule by following the British practice of not ratifying treaties until the implementing legislation were in place.<sup>304</sup> Interpreting *Medellín* to have adopted a presumption of non-self-execution would be most problematic with respect to the thousands of past treaties (both bilateral and multilateral) concluded on the opposite assumption. If the new presumption were

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<sup>304</sup> This has been our practice with respect to treaties that require implementing legislation. See Memorandum from Congressional Research Service to Senate Majority Leader George Mitchell (July 8, 1991), in 137 CONG. REC. 21,169, 21,170 (1991) ("The practice of conditioning Senate advice and consent so as to prohibit deposit of the instrument of ratification until implementing legislation is adopted is a fairly common one.").

applied retroactively, then multilateral treaties assumed by the treaty-makers to be self-executing would now require legislative implementation. Because of the passage of time, the legislative majorities that made possible the making of the treaty originally would likely be difficult to mobilize to achieve the enactment of implementing legislation now.

In any event, the question for a constitutional interpreter is not which rule makes the most practical sense today (a concern relevant largely only in choosing between otherwise equally valid interpretations), but rather which rule coheres best with the existing constitutional material, including the Constitution's text, its structure, and accumulated doctrine. The Justices in the majority no doubt believe that the question of policy is for members of a constitutional convention, not for courts.<sup>305</sup> In *Medellín*, they purported to be interpreting the Constitution we have, not the one we should have,<sup>306</sup> and so the opinion should be read in that light. Because they purported to be applying settled law, the opinion should not be read in a way that would upend the law on the subject.

For the reasons discussed above, a default rule of self-execution, rebuttable by a clear statement that the obligation is subject to legislative implementation, coheres best with the text, history, and pre-*Medellín* Supreme Court doctrine. If *Medellín* were read as an application of the nonjusticiability category of non-self-execution, it would be consistent with an interpretation of *Percheman* as adopting a presumption of self-execution for treaties potentially falling into the *Foster* category of non-self-execution. On the other hand, if read to adopt a default rule of non-self-execution, rebuttable only by a clear statement of domestic effect or direct enforceability, *Medellín* will have transformed the Constitution from one that "show[s] the world that we make the faith of treaties a constitutional part of the character of the United States"<sup>307</sup> into one that tells other nations that they must close every imaginable loophole if they expect the United States to comply with its treaties. For the reasons discussed in this Part, *Percheman* is best read to have adopted a presumption that treaties are self-

<sup>305</sup> Cf. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008) ("Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.").

<sup>306</sup> See, e.g., *Medellín v. Texas*, 128 S. Ct. 1346, 1362 (2008).

<sup>307</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (photo. reprint 1987) (Jonathan Elliott ed., 2d ed. 1888) (statement of James Wilson).

executing in the *Foster* sense, and *Medellín* is best read as an example of an entirely distinct type of non-self-execution.<sup>308</sup>

### III. DECLARATIONS REGARDING SELF-EXECUTION AS MODERN-DAY *PERCHEMAN* OR *MEDELLÍN* STIPULATIONS<sup>309</sup>

For the reasons discussed in Parts I and II, *Foster* and *Percheman* together are best read to hold that, because of the Supremacy Clause, a treaty is judicially enforceable in the same circumstances as constitutional or statutory provisions of like content, unless the treaty contains a clear statement that the obligations it imposes are subject to legislative implementation. *Medellín* is best read to leave the *Percheman* clear statement rule in place, but portions of the opinion could be read to adopt the opposite presumption. With respect to bilateral treaties of the sort involved in *Foster* and *Percheman* — the sort of treaty that has predominated for much of our history — either presumption would leave matters largely within the control of U.S. negotiators. If they wish to control the domestic consequences of such treaties, they need merely propose the inclusion of the language necessary to do so. Because states negotiating treaties generally do not concern themselves with questions of domestic enforcement, the other party should have no objection to such a provision.<sup>310</sup>

<sup>308</sup> Some scholars who believe that *Medellín* does not adopt a presumption of non-self-execution also argue that *Medellín* cannot fairly be read to adopt a presumption of self-execution. See Bradley, *supra* note 177, at 540. I agree that *Medellín* does not adopt a presumption that treaties are self-executing in the nonjusticiability sense. Indeed, this form of non-self-execution does not lend itself to a presumption either way, as the question turns on an interpretation of the treaty on an issue the treaty does address — in the *Medellín* case, whether the treaty imposes a firm obligation to comply or an obligation to try to comply. That is a question to be answered by interpreting the treaty using the recognized international law rules of treaty interpretation, see Vienna Convention on the Law of Treaties, *supra* note 45, not pursuant to any domestic law presumption. *Foster*-type non-self-execution, on the other hand, does lend itself to a presumption because the question is whether particular language in a treaty triggers a domestic law need for implementing legislation. I do not argue that *Medellín* recognizes a presumption that treaties are self-executing in the *Foster* sense. But cf. *supra* pp. 657–58 (arguing that one aspect of *Medellín*'s analysis supports a default rule of self-execution). Rather, I argue that *Medellín* is best read as a nonjusticiability case having nothing to say about *Foster*-type non-self-execution.

<sup>309</sup> Although Part II concluded that *Medellín* is best read not to adopt a presumption against self-execution, section III.B considers the validity of declarations of self-execution to overcome a presumption against self-execution. I call these “*Medellín* stipulations” because the Senate has proposed them in response to the *Medellín* decision, albeit without endorsing an interpretation of that decision as adopting a presumption of self-execution. See *infra* note 317. The analysis in section III.B provides additional reasons to reject a reading of *Medellín* as adopting a default rule of non-self-execution.

<sup>310</sup> For example, two treaties currently awaiting the Senate's consent provide in their preambles that “the provisions of this Treaty are self-executing in the United States.” Treaty Concerning Defense Trade Cooperation, U.S.-Austl., Sept. 5, 2007, S. TREATY DOC. NO. 110-10 (2007); Treaty Concerning Defense Trade Cooperation, U.S.-U.K., June 21 & 26, 2007, S. TREATY DOC. NO. 110-7 (2007).

Today, however, many of the most important treaties are multilateral. They are negotiated at global conferences in which most of the world's countries participate,<sup>311</sup> and their provisions are generally written so that they apply broadly to all states-parties. In this context, it would be difficult for the United States to press for a stipulation that the treaty's obligations shall or shall not be subject to legislative implementation. Any effort to introduce such language would complicate possibly delicate multilateral negotiations over a range of substantive issues. If the default rule were self-execution, treaty-makers wishing to enter into a non-self-executing treaty would have to obtain the introduction of language to the effect that the treaty will not be directly enforceable in states whose constitutions recognize that treaties can have such effects. In addition to complicating negotiations with an issue that states are not accustomed to addressing in treaties, any attempt to introduce such language would encounter resistance from states following the American rule that do wish the treaty to have such effect. Thus, for U.S. negotiators seeking to control the domestic consequences of a multilateral treaty, inclusion of the requisite language in the treaty itself would appear not to be a practicable option.

If the default rule were non-self-execution, the problems would be even more severe. If the treaty-makers wanted the treaty to be self-executing, they would have to introduce language to the effect that the treaty shall have the force of law (or be directly enforceable in court, or be directly applicable as law, or the like) in nations where treaties can have such effect. Such a provision would likely be resisted by states that permit direct effect in certain circumstances but do not want this particular treaty to have such effect. More importantly, such a provision would produce different results in different states, and uncertain results in any given state. The differences would not just be between states that follow the British rule and those that follow some version of the American rule, but also among states that follow different versions of the American rule. In the United States, for example, a treaty with such a clause would not be self-executing with respect to provisions that purport to criminalize conduct or appropriate money or accomplish any of the other things that can only be done by statute. Other states that permit direct effect in certain circumstances likely have different limits. Moreover, the constitutional limits in any given state may be uncertain or subject to change over time. For example, if the arguments of prominent U.S. scholars were to be accepted, a treaty

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<sup>311</sup> See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 393 (2d ed. 2007); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 74 (1991). See generally JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* ch. 6 (2005) (discussing how the presence of international organizations as permanent venues for treaty negotiations makes states more inclined to negotiate multilateral treaties).

that included the clause in question would not be self-executing to the extent it conflicted with earlier-in-time statutes<sup>312</sup> or addressed matters within the legislative power of Congress under Article I.<sup>313</sup> Thus, although such a provision would not be unprecedented at the regional level,<sup>314</sup> the disparities and uncertainties it would produce make it exceedingly unlikely to be replicated at that level, and almost impossible to conceive at the global level. Indeed, the difficulty of securing such a stipulation in a multilateral treaty is almost certainly greater than the difficulty of persuading the House to pass implementing legislation. As a result, adoption of a default rule of non-self-execution rebuttable by a contrary stipulation in the treaty itself is very likely to lead the treaty-makers to give up on the idea of self-executing multilateral treaties.

Beginning in the mid-1970s, the U.S. treaty-makers began to attach what appears to be a new form of *Percheman* stipulation to certain multilateral treaties. Upon submitting four human rights treaties to the Senate in 1977, the Carter Administration proposed that a “declaration” be attached to the United States’s instruments of ratification to the effect that the substantive provisions of the treaties were not self-executing.<sup>315</sup> Successive Presidents have proposed the same declaration for all but one of the human rights treaties they have submitted to the Senate for its advice and consent.<sup>316</sup> More recently, responding to the possibility that *Medellín* might be read to adopt a presumption of non-self-execution (but pointedly not endorsing *Medellín*’s analysis<sup>317</sup>),

<sup>312</sup> See AMAR, *supra* note 48, at 302–07; Kesavan, *supra* note 48, at 1503.

<sup>313</sup> Yoo, *Treaties and Public Lawmaking*, *supra* note 64, at 2254.

<sup>314</sup> See *supra* note 249 (citing Inter-American Trademark Convention).

<sup>315</sup> See Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. DOC. NOS. C, D, E, F, 95-2, at VI, XVIII (1978). Declarations of non-self-execution have been attached to the International Covenant on Civil and Political Rights in 1992, see 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 179, 190, U.N. Doc. ST/LEG/SER.E/25, U.N. Sales No. E.07.V.3 (2007), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1994, see *id.* at 302, 305-06, and the International Convention on the Elimination of All Forms of Racial Discrimination in 1994, see *id.* at 138, 145.

<sup>316</sup> Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 415–16, 419–22 (2000). The one exception is the Optional Protocol on the Rights of the Child, which was ratified without a declaration of non-self-execution. S. EXEC. REP. NO. 107-4, at 16–18 (2002). Declarations of non-self-execution have also been attached to treaties unrelated to human rights. See, e.g., 2 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *supra* note 315, at 236, 240 (noting that the United States attached a declaration of non-self-execution to the U.N. Convention Against Corruption).

<sup>317</sup> See, e.g., S. EXEC. REP. NO. 110-12, at 9–10 (2008). The report states:

The committee . . . proposes making such a declaration in the Resolution of advice and consent in light of the recent Supreme Court decision, *Medellín v. Texas*, 128 S. Ct. 1346 (2008), which has highlighted the utility of a clear statement regarding the self-executing nature of treaty provisions.

The committee believes it is of great importance that the United States complies with the treaty obligations it undertakes. In accordance with the Constitution, all trea-

the Senate has given its consent to at least sixty-three treaties subject to declarations of self-execution.<sup>318</sup> The intended effect of such declarations is not altogether clear, but one possibility is that they were meant to control the domestic effect of the treaties to which they are attached.<sup>319</sup>

Since their first appearance, however, declarations of non-self-execution have been controversial. As this Part discusses, a number of scholars have argued that the declarations are invalid under international law or ineffective as a matter of domestic law.<sup>320</sup> The most

ties — whether self-executing or not — are the supreme law of the land, and the President shall take care that they be faithfully executed.

<sup>318</sup> See 154 CONG. REC. S9328–S9335 (daily ed. Sept. 23, 2008); see also S. EXEC. REP. NO. 110-23, at 6 (2008); S. EXEC. REP. NO. 110-22, at 13–14 (2008); S. EXEC. REP. NO. 110-14, at 6 (2008); S. EXEC. REP. NO. 110-13, at 11 (2008); S. EXEC. REP. NO. 110-12, at 10 (2008). Most of these declarations provide simply that “[t]his treaty is self-executing.” S. EXEC. REP. NO. 110-17, at 7 (2008); S. EXEC. REP. NO. 110-16, at 8 (2008); S. EXEC. REP. NO. 110-15, at 10 (2008); S. EXEC. REP. NO. 110-14, at 6 (2008); S. EXEC. REP. NO. 110-13, at 11–21 (2008); S. EXEC. REP. NO. 110-12, at 10–20 (2008). Some, however, provide that particular articles are self-executing, and even address more specifically whether the treaty creates judicially enforceable rights. See, e.g., S. EXEC. REP. NO. 110-22, at 14 (2008) (“With the exception of Articles 7 and 8, this Protocol is self-executing. This Protocol does not confer private rights enforceable in United States courts.”). (Presumably, treaties with the latter form of declaration would be enforceable at the behest of the United States, federal and state government officials, and perhaps even foreign states.) The Senate Foreign Relations Committee has also proposed that declarations of non-self-execution be attached to five treaties. See S. EXEC. REP. NO. 110-21, at 9 (2008); S. EXEC. REP. NO. 110-20, at 9 (2008); S. EXEC. REP. NO. 110-19, at 9 (2008); S. EXEC. REP. NO. 110-18, at 10 (2008).

Although the declarations appear in the Senate’s Resolutions of Advice and Consent, see 154 CONG. REC. S9328–S9335 (daily ed. Sept. 23, 2008), it appears that the Senate does not contemplate that the declarations will be communicated to the other parties or deposited with the instruments of ratification, as the pre-*Medellín* declarations attached to human rights treaties were. See S. EXEC. REP. NO. 110-20, at 9–10 (2008) (noting that another declaration “would be included in the U.S. instrument of ratification” but not indicating that declaration of non-self-execution would be).

<sup>319</sup> The other possibility is that they were merely meant as interpretations of those treaties. If so, it is unclear what weight the declarations should be given. As noted, most treaties have the same content on the question of direct versus indirect judicial enforceability — they permit but neither require nor prohibit both direct and indirect enforcement. If a declaration of non-self-execution were intended to reflect the treaty makers’ understanding that the treaty does not require direct enforcement, the interpretation is correct but beside the point. As discussed above, it is clear that a treaty can be self-executing for the United States even if it does not require direct judicial enforcement. See *supra* p. 635. If a declaration of self-execution were intended to reflect the treaty makers’ understanding that the treaty does require direct enforcement, it is likely a mistaken interpretation. If intended to reflect the treaty makers’ understanding of the treaty’s domestic enforceability as a matter of domestic law, a declaration of self-execution would be mistaken if the Constitution were read to require a clear statement of self-execution in the treaty itself. It would be accurate under the correct interpretation of the Supremacy Clause. In either case, the declaration would not make the treaty self-executing or non-self-executing because it was not intended to. This Part assumes that the declarations were intended to make the treaties to which they have been attached self-executing or non-self-executing.

<sup>320</sup> See, e.g., M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1179–80 (1993); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT’L L. 277 (1995). Professor Louis Henkin’s position on the question is not altogether clear. He has described the declarations

relevant judicial precedent, the decision of the D.C. Circuit in *Power Authority of New York v. Federal Power Commission*,<sup>321</sup> lends substantial support to such arguments. Because declarations of self-execution are a recent phenomenon, they have not been the subject of scholarly attention, but their validity and effectiveness would appear to be vulnerable to the same objections.

If declarations regarding self-execution are invalid or ineffective, U.S. treaty-makers seeking to control the domestic consequences of the multilateral treaties they conclude would face the significant problems noted above. If either or both declarations were valid, on the other hand, the ability of the treaty-makers to control the domestic effect of the treaty through such a declaration would make it possible to achieve a far greater degree of certainty than would otherwise be possible.<sup>322</sup>

This Part considers whether declarations of non-self-execution would be valid if the default rule were self-execution, and whether declarations of self-execution would be valid if the default rule were non-self-execution. Although the validity of declarations of non-self-execution is more difficult to establish than the defenders of such declarations have recognized, I conclude that the arguments against their validity are ultimately untenable in the light of *Foster* and *Percheman*. The case for the validity of declarations of self-execution, however, faces more significant obstacles. The availability of the declaration mechanism for specifying the domestic consequences of treaties in the one case but not the other would be an additional reason for preferring a default rule of self-execution and the *Percheman* clear statement rule. Indeed, a default rule of non-self-execution not rebuttable by a declaration of self-execution would be tantamount to the adoption of the British rule for multilateral treaties, which would in turn render the process specified in Article II for making treaties superfluous with respect to such treaties. If declarations of self-execution were unavail-

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as “anticonstitutional,” an unconventional term suggesting that he regards the declarations as being in tension with constitutional values but not necessarily invalid for that reason. See Louis Henkin, *Editorial Comment: U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 349–50 (1995).

<sup>321</sup> 247 F.2d 538 (D.C. Cir. 1957), *vacated as moot sub nom.* Am. Pub. Power Ass’n v. Power Auth. of N.Y., 355 U.S. 64 (1957) (mem.).

<sup>322</sup> Note that the choice is not necessarily a binary one between self-execution and non-self-execution. If declarations were valid, they could conceivably specify that the treaty will have certain domestic consequences but not others. Thus, a declaration could accomplish something along the lines of the Uruguay Round Agreements Act, which gives domestic legal force to the agreements creating the WTO but provides that “[n]o State law . . . may be declared invalid . . . on the ground that [it] is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law . . . invalid,” 19 U.S.C. § 3512(b)(2)(A) (2006). See also *supra* note 318 (noting that some recent declarations address specific aspects of the domestic enforceability of the treaties to which they relate).

able, a default rule of non-self-execution would be normatively unattractive and inconsistent with the Constitution's text and structure.

*A. Declarations of Non-Self-Execution*

Before examining the validity of declarations of non-self-execution, it is necessary to understand exactly what these declarations (interpreted as *Percheman* stipulations) purport to do. It is clear that the treaties to which these declarations have been attached include provisions contemplating that individuals be afforded certain remedies in court.<sup>323</sup> In the absence of a stipulation of non-self-execution, individuals would be entitled to such remedies in our courts by virtue of the Supremacy Clause (assuming, as I do in this section, that the Supremacy Clause establishes a default rule of self-execution).<sup>324</sup> No legislation would be needed. A stipulation of non-self-execution neither denies nor diminishes the United States's obligation to afford those remedies to individuals in its courts. It merely stipulates that the United States will satisfy its obligation by passing statutes entitling individuals to obtain those remedies in its courts. Thus, the difference between a treaty that includes such a stipulation and a treaty that does not is that, in the latter case, individuals are able to come into court and obtain the remedies the treaty requires by invoking the treaty in court (what we have been calling "direct judicial enforcement"), whereas in the former case, individuals are able to come into court to obtain those remedies only after Congress has enacted a statute entitling them to do so ("indirect judicial enforcement").

1. *The Case Against Validity.* — The principal argument against the validity of declarations of non-self-execution is based on the notion that the declarations are not really a part of the treaties to which they have been attached — that they are merely unilateral statements of the United States regarding a matter of only domestic concern. This argument assumes that the treaty itself has no relevant content on the question of direct versus indirect enforcement. Because the declarations do not purport to qualify the United States's *international* obligations, they are not part of the treaties to which they are attached. As a result, they do not themselves have the force of law under the

<sup>323</sup> See, e.g., ICCPR, *supra* note 165, art. 9 (requiring judicial remedies in certain circumstances).

<sup>324</sup> For the reasons discussed above, by virtue of the Supremacy Clause, individuals would be entitled to enforce treaty-based rights in court even if the treaty did not specifically refer to judicial enforcement or judicial remedies. As noted, treaties have not traditionally addressed the matter of domestic enforcement. However, nations negotiating treaties can address such matters if they wish. Article 9 of the ICCPR is an example. If the treaty does specifically entitle individuals to a remedy in domestic courts, there should be no question that the individual would be entitled to such a remedy in U.S. courts in the absence of a non-self-execution stipulation. See Vázquez, *Treaty-Based Rights*, *supra* note 26, at 1151–52, 1157–58.

Supremacy Clause. They are, to be sure, statements of the President and two-thirds of the Senate, but the President and two-thirds of the Senate do not have the constitutional power to make law except pursuant to treaty, and these declarations do not constitute treaties (or parts of treaties). They are accordingly legal nullities.<sup>325</sup>

This argument derives support from the D.C. Circuit's decision in *Power Authority of New York*, in which the court struck down the famous Niagara Reservation on this ground. The Niagara Reservation was attached to a treaty between the United States and Canada in which the two countries agreed upon the allowable levels of use of the waters of the Niagara River and Niagara Falls.<sup>326</sup> The reservation, which was attached to the U.S. ratification of the treaty at the insistence of the Senate and was accepted by Canada, provided that the use by the United States of its share of the waters would be determined pursuant to a new statute to be passed by Congress.<sup>327</sup> In the absence of this reservation, the Federal Power Act, which was in place when the treaty entered into force, would have applied and would have authorized the Federal Power Commission to license public and private entities to utilize the U.S. share of the water.<sup>328</sup> The reservation thus limited the domestic legal effect of the treaty by specifying that preexisting laws would not apply to the rights created by the treaty.<sup>329</sup> It was intended to operate as a *Percheman* stipulation: it provided that certain provisions of the treaty were addressed to the legislature.

Congress, however, had great difficulty agreeing on a statute, and in the meantime, because of the reservation, the United States was unable to make use of its share of the water. In an effort to obtain a license to utilize the U.S. share, the Power Authority of New York argued that the Niagara Reservation was a legal nullity because it was not a part of the treaty under international law and hence had no claim to being the law of the land under the Supremacy Clause.<sup>330</sup> In support of its argument, the Power Authority submitted the legal opinion of two eminent professors of international law, Philip C. Jessup

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<sup>325</sup> Versions of this argument can be found in *Power Auth.*, 247 F.2d at 541-42; John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1302-04 (1993); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 599 (1991); Charles H. Dearborn, III, Note, *The Domestic Legal Effect of Declarations that Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 243-44 (1979).

<sup>326</sup> *Power Auth.*, 247 F.2d at 540.

<sup>327</sup> *Id.* at 540-41.

<sup>328</sup> *Id.* at 539.

<sup>329</sup> *Id.* at 540-41.

<sup>330</sup> *Id.* at 539-40.

and Oliver J. Lissitzyn.<sup>331</sup> The professors came forward with extensive support for the proposition that a “treaty” consists of the mutual rights and obligations of states in an international agreement. As was made clear by the United States in transmitting the reservation to Canada and by Canada in conveying its acceptance of the reservation,<sup>332</sup> the Niagara Reservation was inserted into the treaty by the United States purely for domestic purposes — to ensure the inapplicability of the Federal Power Act and provide that additional legislative action would be required to determine how the United States would make use of its share. Because the reservation did not concern the United States’s rights or obligations towards Canada, or Canada’s rights or obligations towards the United States, the professors concluded, it did not constitute part of the treaty. It therefore lacked the force of “law of the land” under the Supremacy Clause.<sup>333</sup>

The legal opinion of Professors Jessup and Lissitzyn elicited a response from Professor Louis Henkin.<sup>334</sup> Henkin cited numerous Supreme Court decisions and other authorities that, in his view, stood for the proposition that “the treaty power contains an important if limited power to legislate domestically to affect domestic rights and interests” and that this power includes “a power, where it is deemed necessary, to control or postpone the domestic consequences of a treaty at least until Congress can consider them.”<sup>335</sup> On this basis, Henkin concluded that the Niagara Reservation was valid and effective.<sup>336</sup>

The court of appeals agreed with Jessup and Lissitzyn and struck down the Niagara Reservation.<sup>337</sup> Because it was “purely domestic” in purpose and effect, the reservation was not a part of the treaty,<sup>338</sup> and it had no other claim to being part of the supreme law of the land.

The court of appeals’s conclusion that a “purely domestic” reservation lacks the force of domestic law would appear to doom declara-

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<sup>331</sup> See PHILIP C. JESSUP & OLIVER J. LISSITZYN, OPINION WITH RESPECT TO THE UNITED STATES SENATE’S ATTEMPT TO REPEAL THE FEDERAL POWER ACT IN ITS RELATION TO THE NIAGARA THROUGH THE USE OF THE TREATY-MAKING POWER (Power Auth. of the State of N.Y., 1955); see also John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law*, 42 VA. J. INT’L L. 163, 173–74 (2001).

<sup>332</sup> JESSUP & LISSITZYN, *supra* note 331, at 2.

<sup>333</sup> *Id.* at 95–96.

<sup>334</sup> Henkin was at the time a lecturer at Columbia Law School. He later succeeded Jessup as the Hamilton Fish Professor of International Law and Diplomacy at Columbia.

<sup>335</sup> Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151, 1173 (1956). Henkin was referring here to the power of the U.S. treaty-makers (the President and Senate) to make domestic law separate and apart from the law made in the treaty itself. See *id.* at 1169–75.

<sup>336</sup> See *id.* at 1173–74.

<sup>337</sup> Power Auth. of N.Y. v. Fed. Power Comm’n, 247 F.2d 538, 543–44 (D.C. Cir. 1957), *vacated as moot sub nom.* Am. Pub. Power Ass’n v. Power Auth. of N.Y., 355 U.S. 64 (1957) (mem.).

<sup>338</sup> *Id.* at 541.

tions of non-self-execution. If the treaties to which these declarations are attached do not require direct judicial enforcement, the declarations do not purport to alter any rights to which the other parties are otherwise entitled under the treaties. The declarations would thus appear to be “purely domestic” in their operation.

2. *The Inadequacy of Existing Defenses.* — To date, the lower courts have enforced declarations of non-self-execution without pausing to consider their validity. The Supreme Court in *Sosa v. Alvarez-Machain*<sup>339</sup> appeared to assume their validity in dictum.<sup>340</sup> The few scholars who have addressed the constitutionality of these declarations and found them valid have appeared to regard the question as straightforward. Some have suggested that the power to decide whether to make a treaty at all includes the lesser power of making the treaty but denying it the force of domestic law.<sup>341</sup> Others have relied on an analogy to the power of the lawmakers over the domestic effect of the statutes they enact. Just as lawmakers may enact a statute while specifying that it shall not preempt state law or confer a private right of action, so may the treaty-makers conclude a treaty and specify that it shall not have such domestic legal effects.<sup>342</sup> Finally, some scholars maintain that the sole purpose of the Supremacy Clause, with respect to treaties, was to empower the federal government to compel the States to comply and that, accordingly, the clause places no limit on the federal treaty-makers’ ability to permit noncompliance (by the states or anyone) by limiting the treaty’s domestic legal effect.<sup>343</sup>

These defenses are inadequate. The power to deny a treaty the force of domestic law is not a lesser power included in the power not to make the treaty in the first place. Even if they lacked domestic legal force, treaties would establish obligations on the international plane, and their violation could be expected to produce international friction. It was to avoid such friction that the Constitution gave treaties the force of domestic law and instructed judges to give them effect. The Constitution’s authors may well have preferred no treaty at all to

<sup>339</sup> 542 U.S. 692 (2004).

<sup>340</sup> *Id.* at 728.

<sup>341</sup> See Bradley & Goldsmith, *supra* note 316, at 405–09; cf. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1929 (2005) (noting that when “the treaty power overlaps with Congress’s enumerated powers,” it is sensible “to say that the greater power to make self-executing treaties includes the lesser power to leave the implementation of a treaty to Congress, if Congress already has the requisite legislative power”). But see John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213, 1233 (1996) (noting that the view that declarations of non-self-execution are constitutional might seem justified based on the rationale that a greater power includes a lesser power, but ultimately rejecting the argument that the Senate has the power to impose such conditions).

<sup>342</sup> See Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 545–46 (2002); Bradley & Goldsmith, *supra* note 316, at 447–48.

<sup>343</sup> Bradley, *supra* note 342, at 547; Bradley & Goldsmith, *supra* note 316, at 448–49.

a treaty that was more likely to be violated because it was not enforceable by the courts.<sup>344</sup>

The analogy to the lawmakers' control over statutes also fails. First, it is not clear that the U.S. lawmakers may always instruct the courts to disregard statutes. For example, if a statute provides that "conduct X shall be permitted," it is not clear that Congress can, without repealing the statute, instruct the courts to disregard the statute when it is invoked by someone being tried criminally for violating a law prohibiting conduct X.<sup>345</sup> Second, even if Congress did have such power with respect to statutes, it would not follow that the U.S. treatymakers have that power with respect to treaties. Statutes are made solely by the U.S. lawmakers (a majority of both houses plus the President or two-thirds of both houses without the President). A statute providing in section 1 that conduct X shall be permitted but providing in section 2 that no court may take cognizance of section 1 might be understood as making a purely precatory statement about the permissibility of conduct X. Treaties, by contrast, are not made solely by the U.S. treatymakers (the President plus two-thirds of the Senators present). They are made by the U.S. treatymakers plus at least one other nation. In light of *Foster*, it is clear that the United States and one or more other nations may make a treaty that will lack the usual effects of domestic law. But a non-self-execution declaration is problematic, according to the court in *Power Authority*, precisely because it does not reflect an agreement among the parties. Critics of declarations of non-self-execution object that to recognize the validity of such declarations would be to recognize the power of the President and Senate to make law without the agreement of another country — a form of law-making not authorized by the Constitution. That the U.S. lawmakers may control the legal effects of the statutes they enact is no answer to this argument.

Nor does it help to note that the Supremacy Clause's adoption was animated by a history of violation of treaties *by the States*. It is true that the problem the Founders had just experienced was limited to treaty violations by the States, not the federal government. It is also true that the Founders could have addressed this problem by empowering the federal government to authorize the courts to enforce treaties. But that is not what they did. They empowered the federal government to make treaties, and they declared "all" treaties, once made, to

<sup>344</sup> Cf. James Madison, *Notes on the Federal Convention* (Aug. 23, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 384–93 (Max Farrand ed., rev. ed. 1937) (noting that Gouverneur Morris was "not solicitous to multiply & facilitate Treaties" as "[t]he more difficulty in making treaties, the more value will be set on them").

<sup>345</sup> Cf. Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 92 (2007).

have the force of domestic law and instructed judges to give them effect. That a broadly phrased law was animated by a narrow problem is not a justification for construing the law to cover just the narrow problem. A law prohibiting vehicles in the park may well have been animated by an excess of unicycles in the park during the period before its enactment, but that does not mean the law applies only to unicycles. The Equal Protection Clause may have been animated by a history of discrimination against African Americans,<sup>346</sup> but that does not mean that the clause protects only African Americans. Under the Articles of Confederation, violation of treaties by the federal government was not a problem because the federal government was extraordinarily weak. Upon creating a stronger federal government, the Founders may well have wanted to limit its ability to violate treaties. No one claims that the federal government is powerless to preclude the courts from enforcing treaties — clearly Congress can do so by passing a law that requires a violation of the treaty. I shall conclude that the treaty-makers can also do so by attaching a declaration of non-self-execution to the treaty. But this conclusion cannot rest on the observation that the immediate problem that led to the adoption of the Supremacy Clause (with respect to treaties) was limited to treaty violations by the States.

3. *Evaluating the Arguments Against Validity.* — Treaty-makers can attempt to make a treaty non-self-executing by attaching either a reservation or a declaration to this effect. The difference between a reservation and a declaration is that a reservation modifies the legal effect of certain provisions of a treaty, whereas a declaration does not. My analysis of the validity of declarations of non-self-execution will begin with an examination of the validity of hypothetical reservations of non-self-execution. My conclusion that the latter would be valid leads me to conclude that the former must also be valid.

(a) *Validity of Reservations of Non-Self-Execution.* — The Vienna Convention on the Law of Treaties defines a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>347</sup> By negative implication, a declaration that does not amount to a reservation is a unilateral statement that does not purport to exclude or modify the

<sup>346</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 640 (15th ed. 2004).

<sup>347</sup> Vienna Convention on the Law of Treaties, *supra* note 45, art. 2(1)(d). Although the United States is not a party to the Vienna Convention, the treaty is widely understood to have achieved the status of customary international law in the years since it was opened for signature in 1969. See Richard W. Edwards, Jr., *Reservations to Treaties*, 10 MICH. J. INT'L L. 362, 365–67 (1989).

legal effect of any treaty provision.<sup>348</sup> Thus, the difference between a reservation of non-self-execution and a declaration of non-self-execution is that the former would be attached to a treaty that otherwise required direct enforcement, whereas the latter would be attached to a treaty that did not.

Before the Second World War, the settled rule was that a state attaching a reservation to its ratification of a multilateral treaty would become a party to the treaty only if every other party accepted the reservation.<sup>349</sup> Thus, if the United States attached a reservation to its ratification of a treaty and even one other party objected, the United States would not be bound by the treaty internationally.<sup>350</sup> The reservation would have the effect of denying the treaty the force of domestic law by vitiating its force under international law. Under this international regime, a reservation of non-self-execution would have the intended domestic effect (as far as courts are concerned) by having an unintended international effect.

The so-called unanimity principle has given way to a more flexible approach to reservations. Today, a nation that formulates a reservation to a multilateral treaty may become a party to the treaty even if one or more of the other parties objects to the reservation. If the reservation is otherwise valid, the reserving party and the parties that accept the reservation become parties to the treaty subject to the reservation.<sup>351</sup> A party that objects to the reservation has two options: it may allow the treaty to enter into force between it and the reserving state, subject to the reservation,<sup>352</sup> or it may stipulate that the treaty will not come into force between it and the reserving state at all.<sup>353</sup> Subject to qualifications discussed below, the upshot is that, if another party objects to a reservation of non-self-execution, the treaty is either not in force between the reserving party and the objecting party, or the treaty is in force but is non-self-executing. Thus, the treaty either does not

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<sup>348</sup> Because under the Vienna Convention a statement may be a reservation even if called a declaration, a statement styled a "declaration" would be a reservation if it purported to modify some aspect of the treaty to which it was attached. A genuine declaration is a unilateral statement that does not purport to exclude or modify the legal effect of any treaty provision. Thus, a declaration of non-self-execution, if intended as a *Percheman* stipulation, would constitute a reservation if, in its absence, the treaty to which it was attached required direct, as opposed to indirect, judicial enforcement. Even if the treaty to which it was attached required direct judicial enforcement, the declaration might not be a true reservation if, rather than "purporting to modify" that requirement, it merely offered an interpretation of the treaty. See *supra* note 319.

<sup>349</sup> See J.M. Ruda, *Reservations to Treaties*, 146 RECUEIL DES COURS 95, 113-15 (1975).

<sup>350</sup> If all other parties accepted the reservation, on the other hand, the United States would become a party to the treaty subject to the reservation. See *id.* at 116.

<sup>351</sup> Vienna Convention on the Law of Treaties, *supra* note 45, art. 21(1).

<sup>352</sup> *Id.* art. 21(3).

<sup>353</sup> *Id.* art. 20(4)(b).

bind the reserving party internationally, or the international obligation it imposes is not directly enforceable because of the reservation.

A reservation is not permitted, however, if it “is incompatible with the object and purpose of the treaty.”<sup>354</sup> Thus, if the United States were to attach a reservation of non-self-execution to a treaty that did require direct judicial enforcement, the reservation could in theory be invalid because it would conflict with the “object and purpose” of the treaty.<sup>355</sup> If the reservation were invalid under international law, it might be a nullity under U.S. law.<sup>356</sup>

But reservations of non-self-execution are almost certainly not contrary to the object and purpose of any treaty to which they might be attached. The likelihood that nations negotiating a multilateral treaty would agree to require direct judicial enforcement and would regard any reservation on that question as inconsistent with the treaty’s object and purpose is so small as to be negligible.<sup>357</sup> First, as mentioned above, under the fundamental law of the United Kingdom, treaties are never self-executing.<sup>358</sup> If a general multilateral treaty purported to require that parties regard it as directly enforceable in their courts, a nation such as the United Kingdom would be in violation of the treaty simply by virtue of its constitutional law. The fact that states having such constitutional rules — including, in addition to the United Kingdom, such other members of the Commonwealth as Australia,<sup>359</sup> Canada,<sup>360</sup> and India<sup>361</sup> — have become parties to general multilateral treaties without attaching reservations of non-self-execution and without provoking controversy supports the conclusion that these treaties do not require direct judicial enforcement. It provides even stronger

<sup>354</sup> *Id.* art. 19(c).

<sup>355</sup> Cf. Riesenfeld & Abbott, *supra* note 325, at 631–32 (noting that a Senate declaration purporting to modify the self-executing nature of the Torture Convention might be characterized as a reservation defeating the treaty’s object and purpose).

<sup>356</sup> A reservation is also invalid if the treaty specifically prohibits reservations. Vienna Convention on the Law of Treaties, *supra* note 45, art. 19(a). If a treaty requiring direct judicial enforcement specifically prohibited reservations, then a reservation of non-self-execution would be invalid. I am not aware of any treaties having both of these features. If a treaty prohibiting reservations did not require direct judicial enforcement, a declaration of non-self-execution would not be an invalid reservation.

<sup>357</sup> It is clear that the treaties to which the United States has attached declarations of non-self-execution do not require direct judicial enforcement. See U.N. Human Rights Comm., *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 13, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) (“Article 2 . . . does not require that the [ICCPR] be directly applicable in the courts . . .”).

<sup>358</sup> See Riesenfeld & Abbott, *supra* note 325, at 575.

<sup>359</sup> See *Simsek v. MacPhee* (1982) 148 C.L.R. 636, 642 (Austl.).

<sup>360</sup> See *Att’y Gen. of Canada v. Att’y Gen. of Ont.*, [1937] 1 D.L.R. 673, 678 (P.C.) (appeal taken from Can.); A. JACOMY-MILLETTE, *TREATY LAW IN CANADA* 131–32 (1975).

<sup>361</sup> See *Nanka v. Gov’t of Rajasthan*, 1951 A.I.R. 38 (Raj.) 153, 154; *Birma v. State*, 1951 A.I.R. 38 (Raj.) 127; Robert B. Loper, *The Treaty Power in India*, 32 BRIT. Y.B. INT’L L. 300, 305 (1955–56).

support for the conclusion that, in the rare event that a general multilateral treaty did purport to require direct judicial enforcement, the parties would not feel so strongly about the issue as to make this requirement a *sine qua non* of accession to the treaty. To regard indirect enforcement as contrary to the object and purpose of such a treaty would be to disqualify a significant number of states from becoming parties unless they amended their constitutions. No one has ever suggested that any general multilateral treaty requires amendment of constitutional non-self-execution rules.<sup>362</sup>

Second, as noted, a reservation of non-self-execution would not deny or modify the United States's obligation to afford individuals the judicial remedies the treaty contemplates. Rather, the reservation would stipulate that the United States will comply with this obligation by enacting legislation entitling individuals to obtain those judicial remedies and that the courts will have the power to enforce only the legislation, not the treaty.<sup>363</sup> It is hard to believe that a purely procedural reservation of this sort could ever be contrary to the object and purpose of a treaty, except perhaps a treaty that was otherwise purely procedural.<sup>364</sup>

It follows from the foregoing analysis that a reservation of non-self-execution will rarely be inconsistent with the object and purpose of a general multilateral treaty. If so, then the United States would be a party to the treaties to which it attaches such reservations vis-à-vis the other parties that do not object. If some parties objected to the reservation and specified that they did not regard the treaty as being in force between them and the United States, the treaty would not be in force between those parties and the United States. In either case, the conclusion for U.S. courts would be the same: the treaty could not be enforced.

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<sup>362</sup> The only U.S. treaty of which I am aware that requires that its provisions be directly enforced as law includes an exception for nations following the British rule. See Inter-American Trademark Convention, *supra* note 249. The existence of this exception establishes that direct enforcement was not regarded as essential to the treaty's object and purpose. Cf. *supra* note 259 (discussing the *Van Gend & Loos* case).

<sup>363</sup> The purpose and effect of a reservation of non-self-execution would thus be to bring about for the United States precisely the state of affairs that exists for some other countries solely by virtue of their constitutional laws.

<sup>364</sup> If a declaration of non-self-execution were regarded as contrary to the object and purpose of a treaty, the next question would be whether the invalidity of the reservation vitiates the reservation or the reserving party's ratification of the treaty. For discussion, see Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 536-38 (2002). Given the remoteness of the possibility that a reservation of non-self-execution would be regarded as invalid, I do not discuss the severability issue here beyond noting that the United States could all but ensure the latter result by making clear, in ratifying the treaty, that its ratification was inseverable from the reservation.

(b) *Validity of Declarations of Non-Self-Execution.* — Declarations of non-self-execution, if intended as *Percheman* stipulations, would constitute what the International Law Commission (ILC) calls “informative” declarations,<sup>365</sup> which include statements “whereby the formulating State informs its partners . . . of the internal authorities that will be responsible for implementing the treaty.”<sup>366</sup> The ILC has cited the Niagara Reservation as an example of this sort of declaration.<sup>367</sup> Declarations of non-self-execution would not alter any international obligations because the treaties to which they are attached do not require direct judicial enforcement. Their function would be only to override a domestic law default rule on a matter as to which the treaty itself imposes no contrary obligation (direct versus indirect judicial enforcement).

Professors Jessup and Lissitzyn may have been right in concluding that an informative declaration of this sort is not technically a part of the treaty under international law.<sup>368</sup> The ILC’s Special Rapporteur on the subject has concluded that such declarations, being “exclusively domestic in scope,”<sup>369</sup> “ha[ve] no connection to the law of treaties.”<sup>370</sup> But it does not follow that such a declaration has no status as domestic law. The analysis of reservations of non-self-execution in the previous section supports Professor Henkin’s conclusion that the treaty makers have a limited power under the Constitution to limit the domestic legal consequences of the treaties they make.<sup>371</sup>

Even when incorporated into the body of the treaty, a *Percheman* stipulation is likely to be “purely domestic” in its effect. As noted, states negotiating treaties generally do not concern themselves with domestic enforcement mechanisms. Thus, when U.S. negotiators seeking to enter into a non-self-executing treaty propose the insertion of a provision clearly stating that the United States’s obligations shall not be directly enforceable in domestic courts, they are seeking to do the same thing as when they insert a genuine declaration of non-self-

<sup>365</sup> Special Rapporteur, Int’l Law Comm’n, *Third Report on Reservations to Treaties* add. 4, ¶ 376, U.N. Doc. A/CN.4/491/Add.4 (July 2, 1998) (prepared by Alain Pellet).

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* ¶ 382.

<sup>368</sup> See JESSUP & LISSITZYN, *supra* note 331, at 96.

<sup>369</sup> Special Rapporteur, Int’l Law Comm’n, *supra* note 365, ¶ 383.

<sup>370</sup> *Id.* ¶ 392.

<sup>371</sup> See Henkin, *supra* note 335, at 1173. The present analysis differs from, but is consistent with, Professor Henkin’s. More recently, Professor Henkin has stated that his analysis of the Niagara Reservation should not be read to suggest that he considers declarations of non-self-execution to be valid. See Louis Henkin, *Two Hundred Years of Constitutional Confrontations in the D.C. Courts*, 90 GEO. L.J. 725, 734 (2002).

execution. They are providing for a particular assignment of domestic enforcement powers in the face of the other parties' indifference.<sup>372</sup>

More fundamentally, denying legal force to a declaration *because* its effect is purely domestic, as *Power Authority* would seem to require, would produce absurd doctrinal results. Recall from the preceding discussion that a statement of non-self-execution constitutes a reservation if the treaty to which it is attached imposes an international obligation of direct enforcement. A statement of non-self-execution would be a genuine informative declaration if the treaty to which it was attached did *not* purport to require direct judicial enforcement. The conclusion of section III.A.3(a) above was that a reservation of non-self-execution would be valid (or at least effective). Thus, a statement of non-self-execution is valid (or at least effective) when the other parties cared enough about direct enforcement to provide for it in the treaty. It is a part of the treaty and thus binding, on the *Power Authority* view, precisely *because* it goes against the agreement of the parties. Conversely, according to the analysis in *Power Authority*, the statement of non-self-execution would not be a part of the treaty, and hence would be a nullity, when it is *entirely consistent* with the agreement the parties reached. In other words, the statement would be effective when it conflicts with the wishes of the treaty parties but would be ineffective when — indeed, *because* — it does not so conflict.

Two simple examples demonstrate the absurdity of this regime. Consider a treaty that includes some provisions requiring direct judicial enforcement and other provisions neither requiring nor prohibiting it. If statements of non-self-execution were valid and effective to the extent the treaty otherwise required direct judicial enforcement, then the statements would be effective for the provisions of the treaty that otherwise required direct judicial enforcement but would be ineffective for those that did not. Thus, the provisions of the treaty that (in the absence of the statement of non-self-execution) would have imposed an international obligation of direct judicial enforcement would, under our domestic law, require legislative implementation. Conversely, the provisions that the parties did *not* require to be directly enforced would not be affected by the statement of non-self-execution and would be directly enforceable in court by virtue of the Supremacy Clause. The result would be absurd.

Consider as well a treaty that is unclear about whether it imposes an international obligation of direct judicial enforcement. A statement

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<sup>372</sup> Of course, it is impossible to know the extent to which the other parties actually care about the issue, so it can never be said with certainty that the treaty provision serves only a domestic end. Nevertheless, because nations negotiating treaties are not generally concerned with this issue, it is very likely that such a provision, though located in the body of the treaty, serves the purely domestic function of overriding the Supremacy Clause's default rule.

of non-self-execution attached to such a treaty would be valid and effective only if it turned out that the treaty required direct judicial enforcement, but would be ineffective if it turned out that the treaty did not. Again, the result of the *Power Authority* analysis is exactly backwards. The *Power Authority* view would recognize the validity of a statement of non-self-execution precisely when it runs contrary to the other parties' preferences. There is no plausible justification for such a counterintuitive result. If the statement of non-self-execution is effective when the parties want direct judicial enforcement, it must also be effective when they are indifferent.<sup>373</sup>

If so, one must conclude that U.S. treaty-makers have the power to "unilaterally" limit the domestic judicial enforceability of the treaties they conclude.<sup>374</sup> If in fact such a limitation is not technically a part of the treaty, for the reasons given by Professors Jessup and Lissitzyn and the court in *Power Authority*, then the present analysis suggests that the treaty power includes a limited power to make domestic law that is related to, but not strictly part of, the treaty. It bears emphasizing, however, that this analysis yields only a very limited non-treaty lawmaking power for the treaty-makers. The effectiveness of declarations of non-self-execution follows from that of reservations of non-self-execution, and the latter are effective, whether or not accepted by the other parties, only because objection and acceptance have the same result: no direct enforcement. The analysis would similarly support the effectiveness of a declaration limiting but not completely barring the direct judicial enforceability of the treaty (for example, a declaration specifying that a treaty shall preempt state law but not federal law). But the analysis would not support the effectiveness of attached statements seeking to accomplish other ends, even if related to the treaty, such as a stipulation that termination of the treaty shall require the advice and consent of the Senate.

Functionally, there appears to be no reason not to treat declarations of non-self-execution as valid *Percheman* stipulations. As noted, even if contained in the body of the treaty, such stipulations are overwhelmingly likely to serve the purely domestic purpose of overriding the Supremacy Clause's default rule. Declarations of non-self-execution also seem to serve the notice-giving function of *Percheman* stipulations just as effectively.<sup>375</sup>

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<sup>373</sup> There would be no absurdity in denying effect to a declaration of non-self-execution attached to a treaty that prohibited reservations, see *supra* note 356, but other arguments support the validity of such declarations, see *supra* p. 681; see also Henkin, *supra* note 335, and certainly the present *reductio ad absurdum* does not require that such declarations be denied effect.

<sup>374</sup> "Unilaterally" here means without the agreement of the other parties.

<sup>375</sup> Cf. *supra* p. 643 (noting that such stipulations give the other parties notice that legislation will be required, thus potentially reducing the friction that would be produced by noncompliance).

The formalist objection remains powerful, but it may be met with a formalist response. Even if declarations of non-self-execution attached to a treaty that does not require direct judicial enforcement are not technically part of the treaty as a matter of international law, they may be considered part of the treaty as a matter of domestic law, because they are formally submitted along with the United States's instruments of ratification and its genuine reservations. This is not to say that the President and Senate may accomplish any goal by attaching a declaration to that effect to the United States's ratifying instruments. Indeed, I argue below that declarations enhancing the domestic effects of treaties are more difficult to justify. The validity of declarations of non-self-execution follows from the validity of reservations of non-self-execution, and this rationale extends only to declarations *limiting* the domestic effect of treaties.

Because I have overcome the formalist objection by drawing distinctions not based on form, my analysis may not persuade an uncompromising formalist. But it seems to me to be proper to allow considerations of coherence in the law to influence conclusions with respect to form. Insofar as they are embodied in a formal document approved by the President and two-thirds of the Senate and communicated to other parties just like reservations (which are indisputably parts of treaties), declarations of non-self-execution may plausibly be regarded as parts of the treaties to which they relate for purposes of Article VI.

Whether they can plausibly be so regarded if set forth in the Senate's resolution of advice and consent but not communicated to the other parties presents a harder question.<sup>376</sup> If such declarations are, indeed, of "purely domestic" concern, it might be argued that communicating them to the other parties is unnecessary. It is clearly not necessary under international law. But if the need for a stipulation is based on its notice-giving function, then communicating it to the other parties may be significant as a matter of domestic law. Indeed, if part of the point of the Supremacy Clause was to induce other nations to deal with us by "show[ing] the world" that we authorize our courts to enforce treaties as we do statutes,<sup>377</sup> then the clause would seem to require that we also tell the world (or at least our treaty partners) if, in a particular case, the courts will not have that power. At the purely formal level, regarding such declarations as parts of the treaties for Article VI purposes when not communicated to the other parties would seem to stretch the constitutional text to the breaking point, if not be-

<sup>376</sup> See *supra* note 318 (noting that the Senate apparently does not contemplate communication of recent declarations of self-execution or non-self-execution to other parties).

<sup>377</sup> 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 68, at 490.

yond.<sup>378</sup> Recognizing declarations as binding in such circumstances may thus require the recognition of a new form of federal lawmaking.<sup>379</sup> In any event, statements made by the President or other members of the executive branch in submitting the treaty to the Senate for its consent, or by members of the Senate in rendering its advice and consent, cannot be considered parts of treaties by any stretch.

*B. The Validity of Declarations of Self-Execution*

The foregoing analysis assumed that the Supremacy Clause establishes a default rule of self-execution that can be overcome only through a stipulation of non-self-execution. If the assumption were reversed, the argument for the validity of declarations (this time of self-execution) would face more powerful objections. If the Constitution were read to establish a default rule of non-self-execution, rebuttable only by a clear statement to the contrary, then it is less clear that a treaty that neither requires nor prohibits direct judicial enforcement can be made directly enforceable by attaching a declaration to that effect.

Presumably, like declarations of non-self-execution, declarations of self-execution do not purport to create a treaty obligation of direct enforcement, but instead purport to establish as a matter of domestic law that the treaty has certain legal effects, such as preempting inconsistent state laws. Such declarations would be superfluous under the interpretation of the Supremacy Clause defended in Parts I and II. If *Medellín* were read to establish the opposite default rule, however, the declarations would (as the Court in *Medellín* put it) purport to “make” federal law.<sup>380</sup> Yet the President and Senate do not have the power to make federal law by themselves. The Constitution gives them the power to make law by concluding a treaty with another country, but these declarations are not treaties because they do not purport to create rights or obligations vis-à-vis the other states-parties. If the treaty

<sup>378</sup> The resolution of advice and consent, as such, reflects only the views of the Senate. In some cases, the President’s agreement will be inferable from his having proposed the declaration in the first place; otherwise, we would have to infer it from contemporaneous statements or simply from his subsequent ratification of the treaty. That we would have to piece together various statements of the President and Senate, or even draw inferences from his silence, illustrates the difficulty of regarding the content of such declarations as part of the treaties to which they relate.

<sup>379</sup> Such departures can be justified under certain circumstances. For a defense of such a departure in another context, see Vázquez, *infra* note 390, at 1635–37. Given the existence of other means of achieving the same result (i.e., declarations deposited with the treaty or, possibly, included in the resolution of advice and consent), departing from the original design does not seem warranted here.

<sup>380</sup> The Court in *Medellín* described the President’s attempt to require the states to comply with the ICJ’s judgment in *Avena* as an act of “law-making,” and struck it down because the President alone lacks the power to make law. *Medellín v. Texas*, 128 S. Ct. 1346, 1369 (2008).

itself does not require direct judicial enforcement, the President and the Senate can no more require such enforcement than can the President alone.

Of course, declarations of non-self-execution posed the same difficulties (when examined on the assumption that the default rule was self-execution). Section A concluded that such declarations were valid and reconciled this conclusion with the formal requirements for federal lawmaking by regarding such declarations as a part of the treaties to which they were attached, even though they did not purport to alter the United States's obligations vis-à-vis other states-parties. Clearly, however, a declaration cannot be used by the President and Senate to give domestic legal effect to anything they desire. The declaration must, at a minimum, relate to the domestic legal consequences of the treaty. The question is whether this power encompasses the enhancement of the treaty's domestic legal effects, or just the limitation of its domestic effects. The obstacles to accepting the former appear to be more significant than those to accepting the latter.

The treaty-makers' power to limit a treaty's domestic legal effect follows from the fact that a hypothetical reservation of non-self-execution would be valid under international law (and hence under domestic law) regardless of how the other states-parties reacted to it. Because the only difference between a reservation of non-self-execution and a declaration of non-self-execution is that in the former case the parties wanted the treaty to be self-executing, it would be absurd to accept the validity of a reservation but not a declaration. The parallel argument with respect to declarations of self-execution does not yield the same conclusion. A statement of self-execution would be a reservation only if attached to a treaty that prohibited direct judicial enforcement of the treaty.<sup>381</sup> If states did enter into such a treaty, a reservation to the effect that the United States shall regard the treaty as directly enforceable would be effective only for states that did not object.<sup>382</sup> If a state objected and specified that it would not allow the treaty to come into force between it and the United States, then the United States would not be a party to the treaty with respect to that state, and hence there would be no international obligation (and hence no domestic law power) of direct enforcement as between the United

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<sup>381</sup> Such a hypothetical treaty is even more difficult to imagine than a treaty requiring direct enforcement, since nations would appear to have no reason to insist that their treaty partners prohibit direct enforcement of a treaty. (The usual rule — that the treaty does not require direct judicial enforcement — would satisfy any conceivable interest nations might have in exempting their own courts from having to enforce the treaty.) Still, such a treaty is theoretically possible.

<sup>382</sup> See *supra* p. 678.

States and that state.<sup>383</sup> Thus, the result would be the opposite of what the declaration sought to accomplish.

To be sure, states are unlikely to object to a reservation of self-execution. But this points to a separate problem with such reservations. States are unlikely to object because such a reservation expands the United States's obligations, rather than limiting them. The prevailing view in international law is that a state's unilateral statement agreeing to expand its obligations under a treaty does not constitute a reservation.<sup>384</sup> If so, then it would not be a part of the treaty under international law, and hence it would not have the force of domestic law in the United States by virtue of being part of the treaty.

This is not to say that such a statement would be without legal effect under international law. It is well established that a state's unilateral actions may give rise to a legal obligation under international law.<sup>385</sup> But such an obligation is not considered a treaty obligation under international law, and thus would have no claim to being the supreme law of the land by virtue of being a treaty. It might be argued that such an obligation should have the same domestic legal effect as do rules of customary international law. But the domestic legal force of customary international law is contested,<sup>386</sup> and in any event there would appear to be a stronger basis for giving domestic effect to norms that have arisen through the consistent practice of nations over a lengthy period of time than to norms assumed through a single statement by the President and Senate.

Even if such reservations were regarded under international law as technically part of the treaties to which they are attached, it is unclear that the President and Senate have the power to "make" such treaty provisions as a matter of U.S. constitutional law. It is one thing to agree to direct enforcement of a treaty as the price for some agreement assumed by the other state-party; it is another to make such a promise

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<sup>383</sup> See *supra* p. 678.

<sup>384</sup> See Special Rapporteur, Int'l Law Comm'n, *Third Report on Reservations to Treaties* add. 6, ¶ 1.1.5, U.N. Doc. A/CN.4/491/Add.6 (July 19, 1998) (*prepared by Alain Pellet*) (statements purporting to expand the reserving state's obligations are not deemed reservations and are not governed by the international law on reservations).

<sup>385</sup> *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457, 472 (Dec. 20) ("It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."); see also Hiram E. Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87, 122-24 (1991) (discussing unilateral declarations of law).

<sup>386</sup> Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838-41 (1997), and Ernest Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002), with Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997), and Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

ex gratia after the treaty has otherwise been negotiated.<sup>387</sup> As noted, the treaty power is the power to assume international obligations on behalf of the United States in exchange for beneficial concessions from other states.<sup>388</sup>

Even if the treaty-makers did have the power to assume an international law obligation of direct enforcement through such a statement, it does not follow that they can create a domestic law requirement of direct enforcement *without* creating an international obligation to that effect. We thus return to the question with which we began: is it more problematic to recognize a lawmaking power in the treaty-makers to enhance the domestic effect of treaties than to limit their domestic effect? If there is a default rule that treaties are self-executing, then allowing the President and Senate to limit treaties' domestic effect does empower them to make law, in a sense (i.e., a law repealing the treaty's domestic force), but this sort of lawmaking reduces the degree to which the treaty produces legal change. Such lawmaking does impinge upon the constitutional value underlying the Supremacy Clause (compliance with treaty obligations), but in a manner not materially different from a statement in the treaty itself or a reservation. On the other hand, if there were a default rule that treaties are non-self-executing, then to allow the President and Senate to make treaties self-executing would allow them to make law in a more basic sense. The declaration of self-execution would have the effect of displacing existing state and federal law, thus directly impinging upon the federalism and separation of powers values underlying the Constitution's speci-

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<sup>387</sup> It is important to note that the effect of a "reservation" of self-execution is not the same as the effect of the withdrawal of a reservation of non-self-execution. (The latter is something the President and Senate may well have the power to do on their own. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 131, § 314 reporters' note 4.) A true reservation not only limits the obligations of the reserving state, but also entitles other states-parties to the benefits of the reservation in their relations with the reserving state. See Vienna Convention on the Law of Treaties, *supra* note 45, art. 21(b). Thus, withdrawal of a reservation of non-self-execution (which by hypothesis would be attached to a treaty requiring direct enforcement) would entitle us to insist that the other states-parties enforce the treaty directly. A "reservation" of self-execution (whether attached to a treaty that prohibits direct judicial enforcement or to a treaty that merely permits but does not require indirect judicial enforcement) would not give us any reciprocal rights.

<sup>388</sup> See *supra* pp. 659–60. Perhaps a reservation of self-execution could be defended as an attempt to attain the same benefits for the nation that the Founders sought from the Supremacy Clause. (As discussed above, the Founders gave treaties the force of domestic law in order to avoid international friction and to reap the benefits of a reputation for treaty compliance. See *supra* p. 617.) If so intended, however, their strategy would be decidedly risky. While direct judicial enforcement would indeed make it more likely that the United States would comply with the underlying substantive obligations, a reservation of self-execution would also create an additional treaty obligation of the United States and would thus increase the possibility of a treaty violation. A purely domestic rule of direct enforcement, such as originally embodied in the Supremacy Clause, would achieve those benefits without risking additional treaty violations.

cation of only three forms of federal lawmaking.<sup>389</sup> The constitutional problems with recognizing a power of the President and Senate to displace state and federal law without meeting the constitutionally specified procedures for doing so seem significantly more severe than the problems with recognizing a power to exempt their acts from having such an effect.

The above rationale for rejecting the validity of declarations of self-execution assumes that the Constitution establishes non-self-execution as the default rule. Because this assumption is contrary to the original design, it may seem odd to insist on strict adherence to the original design regarding the mechanisms for making federal law. A default rule of non-self-execution combined with a power in the treaty makers to declare a treaty self-executing would leave us closer to the original design than a default rule of non-self-execution without such a power. Thus, if the Court were to adopt a default rule of non-self-execution despite its inconsistency with text and original meaning, fidelity to the original design should lead it to accept as well the treaty makers' power to declare a treaty to be self-executing even though it is a form of federal lawmaking not contemplated in the Constitution.<sup>390</sup>

<sup>389</sup> See Clark, *supra* note 183, at 1324. A hypothetical may help illustrate the problem: Suppose we had a treaty that was declared to be non-self-executing upon ratification, but a later President and Senate decided that the treaty should be self-executing and replaced the declaration of non-self-execution with a declaration of self-execution. (Such a change would appear to be permissible under international law if the treaty itself neither required nor prohibited direct enforcement, even if the original declaration was deposited with the instruments of ratification. Cf. Vienna Convention on the Law of Treaties, *supra* note 45, art. 22(1) ("Unless the treaty otherwise provides, a reservation may be withdrawn at any time . . ."). If the original declaration was not deposited with the instruments of ratification, the change would clearly present no issue under international law. Cf. *supra* note 318 (noting that the Senate does not contemplate the inclusion of the new declarations of self-execution with the instruments of ratification).) The later decision of the President and Senate to make a non-self-executing treaty self-executing would have the effect of preempting state and federal law that was not preempted when the treaty took force. Indeed, the new declaration would have the precise effect that the Court in *Medellín* found to be lawmaking and invalid when done by the President alone. See *Medellín v. Texas*, 128 S. Ct. 1346, 1369 (2008). Presumably the majority would have the same objection if the lawmaking were done by the President with the Senate's consent but outside the context of treaty making. The fact that the declaration of self-execution in this example comes after the treaty has come into force and would operate to give the treaty domestic effects that it did not have when it entered into force illustrates more vividly how the declaration operates as lawmaking. But a declaration of self-execution operates in the very same way even when it is made at the same time as the treaty. (If the default rule were self-execution, the power to withdraw a declaration of non-self-execution might possibly be inferred from the power to declare the treaty non-self-executing, as the withdrawal would give the treaty its usual effect under the Supremacy Clause. If the default rule were non-self-execution, however, the power to declare a treaty non-self-executing (which would appear to be unnecessary) would not support a power to declare it self-executing later.)

<sup>390</sup> I have criticized on similar grounds the Court's insistence on bicameralism and presentment in rejecting the legislative veto despite its acceptance of broad delegations to the executive branch. In the light of its departure from bicameralism and presentment in the latter context, its strict adherence to these requirements in the former context places us, overall, further from the original design than if both departures were accepted. See Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1635–37 (2008); see

But the Court in *Medellín* did not purport to be departing from the original design, or even from established precedent. I argued above that the opinion should, for this reason, be interpreted narrowly. If, in the next case, the Court were to adopt a default rule of non-self-execution (or interpret *Medellín* as having already done so), it would most likely do so without recognizing that it was departing from the original design. Under such circumstances, the Court would be highly unlikely to uphold the treatymakers' power to make federal law through declarations of self-execution.<sup>391</sup> Its rejection of the legislative veto despite very similar grounds for upholding it<sup>392</sup> suggests that the Court is unlikely to accept a fourth category of federal lawmaking.

If declarations of self-execution were to be regarded as invalid, the resulting inability of the treatymakers to control the domestic consequences of the treaties they conclude would render a default rule of non-self-execution normatively unattractive. In today's complex world, the treatymakers should be able not only to decide between self-execution and non-self-execution, but also to consider intermediate options.<sup>393</sup> Declarations specifying the domestic legal consequences of a treaty provide the treatymakers with a mechanism for doing so. If declarations of non-self-execution were valid but declarations of self-execution invalid, then the treatymakers would have this flexibility only if the Constitution were understood to establish a default rule of self-execution.

The invalidity of declarations of self-execution would also strengthen the textual/structural case against a default rule of non-self-execution. In light of the difficulty of obtaining a stipulation of self-

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also William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 540-43 (1992); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 179-95 (1994). Similarly, insistence here on strict adherence to the original design with respect to the exclusivity of the three methods of lawmaking specified in the Constitution would place us further from the original design, given the Court's (hypothetical) departure from the original design with respect to self-execution. If the Court were to depart from the original design with respect to non-self-execution, faithfulness to the original constitutional structure would require a corresponding departure with respect to the methods of making federal law.

<sup>391</sup> It is of course possible, perhaps likely, that the Court will continue to overlook the fact that treaties do not have any relevant content on this issue and persist in regarding the question as one of treaty interpretation. If so, it would likely regard declarations of self-execution as pertinent to the interpretive enterprise. Since the treaties themselves are likely to be ambiguous on the point, for the reasons discussed in Part II, the declarations are likely to be the only relevant evidence of any intent on the question, and so are very likely to be de facto conclusive. (Indeed, if the Court continues to overlook the fact that treaties have no relevant content on this question, even the less formal statements of the President or Senate are likely to be conclusive in practice for the same reason.) If so, the Court will have arrived at the second best solution (from the perspective of the original design), albeit on the basis of a misconception.

<sup>392</sup> See *INS v. Chadha*, 462 U.S. 919 (1983); cf. *id.* at 984-89 (White, J., dissenting) (arguing that adherence to original design is untenable in light of acceptance of broad delegations of power to the executive branch).

<sup>393</sup> See *supra* note 322.

execution in the treaty itself, adoption of such a default rule would be tantamount to adopting the British rule with respect to multilateral treaties. Because it would almost certainly be more difficult to get the other parties to agree on such a stipulation than to get the House to pass implementing legislation, the executive branch would be likely to give up on self-execution. The benefits of self-execution would not be worth the trouble of satisfying the requirements for achieving self-execution. That such a default rule would resurrect, for today's most important type of treaty, the rule the Founders specifically rejected, is yet another reason to conclude that this is not the rule our Constitution establishes.

The plausibility of an interpretation of our Constitution as effectively adopting the British rule for multilateral treaties is reduced further by another aspect of our constitutional structure: the availability of an alternative process for making international agreements.<sup>394</sup> Article II provides for the making of treaties by the President with the consent of two-thirds of the Senate. The Founders deliberately excluded the House from the treaty-making process.<sup>395</sup> The Supremacy Clause reflects a parallel decision not to make the consent of the House a precondition for judicial enforcement. The consent of a supermajority of the Senate was deemed an adequate substitute.<sup>396</sup> Adoption of the British rule would make the consent of a supermajority of the Senate an additional requirement rather than a substitute (since implementation would require the concurrence of the House). Requiring the consent of both a supermajority of the Senate and a majority of the House would not be irrational (although it does not appear to have been the Founders' intent); it would reflect a desire to make it much more difficult to enter into international agreements than to make ordinary laws. But today it is well accepted that the Article II procedure for making international agreements is not exclusive. Most international agreements can also be made by the President with the consent of a majority of both Houses.<sup>397</sup> Given the availability of

<sup>394</sup> This is a structural argument rather than one based on original design because the emergence of the congressional-executive agreement process as an alternative mechanism for approving most international agreements is a comparatively recent phenomenon. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 889–97 (1995) (arguing that congressional-executive agreements became part of our Constitution through an informal constitutional amendment that took force in the 1940s).

<sup>395</sup> See Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Law-making in the United States*, 117 YALE L.J. 1236, 1277–78 (2008).

<sup>396</sup> See James Madison, Letter of Helvidius No. 1 (Aug.–Sept. 1793), in 6 THE WRITINGS OF JAMES MADISON 138, 148 (Gaillard Hunt ed., 1906) (“In this particular case, a concurrence of two-thirds at least is made necessary, as a substitute or compensation for the other branch of the legislature, which, on certain occasions, could not be conveniently a party to the transaction.”).

<sup>397</sup> See generally Hathaway, *supra* note 395 (defending the use of congressional-executive agreements for entering into international agreements and arguing that this means should replace the

this alternative procedure, adoption of the British rule would render the Article II procedure superfluous. Why use a procedure requiring a supermajority of the Senate and a majority of the House, when a majority of both Houses will do?

Even without adoption of the British rule, the possibility of making international agreements as congressional-executive agreements has been thought to reduce the significance of the Article II treaty-making procedure.<sup>398</sup> But, if the Article II process remained available as a realistic mechanism for concluding treaties enforceable without legislative implementation, it would at least continue to be relevant as an alternative procedure for treaty-making. Adoption of the British rule, however, does seem to make the Article II process superfluous. That this default rule would make the treaty-making process specified in the Constitution superfluous with respect to the most important category of treaty is additional evidence of its implausibility as an interpretation of the Constitution.<sup>399</sup>

If declarations of self-execution and of non-self-execution were both valid, then from the perspective of constitutional design the choice of default rule would be a complex undertaking. Before *Medellín*, scholars argued that the treaty-makers' tendency to attach declarations of non-self-execution to human rights treaties reflected their preference for non-self-execution,<sup>400</sup> and that this preference, in turn, justified a

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Senate ratification process entirely). The option of a congressional-executive agreement is unavailable for agreements that address matters beyond Congress's legislative power under Article I. See *id.* at 1338–49.

<sup>398</sup> See *id.* at 1307.

<sup>399</sup> Notwithstanding the above analysis, the Article II process for making international agreements is unlikely to die out anytime soon. Over the past two hundred-plus years, numerous traditions and practices have accrued around the Article II treaty-making process that will continue to affect the behavior of the three branches. Presidential attempts to steer the process of making international agreements to the easier congressional-executive route might lead a Senate that is proprietary about its role in treaty-making (or, more likely, Senators with particular responsibilities for treaties) to scuttle treaties it may otherwise favor, or to retaliate in other ways (such as in the appointments process). Such attempts may inspire turf battles not just between the Senate and the House, but also among Senate Committees, since Article II treaties are handled by the Senate Foreign Relations Committee whereas congressional-executive agreements are handled by the committees having responsibility for the subject matter of the agreement. See Hathaway, *supra* note 395, at 1315. Thus, it may be some time before theoretical superfluity becomes actual desuetude. My argument here operates mainly at the more abstract structural level: A process effectively requiring the agreement of the President, a majority of the House, and two-thirds of the Senate makes little sense if an alternative process exists requiring the agreement of the President, a majority of the House, and only a majority of the Senate.

<sup>400</sup> See, e.g., Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI-KENT L. REV. 515, 515 (1991) (noting that declarations of non-self-execution are "manifestations of Senatorial reluctance to affect internal U.S. law by means of treaties, and, more generally, [of] neo-isolationist preferences for shielding U.S. institutions from international trends"). In addition to the declarations of non-self-execution attached to human rights treaties, these commentators cite the statutes that limit the enforceability of such international agreements as the World Trade Organization (WTO) Agree-

default rule of non-self-execution.<sup>401</sup> It is far from clear, however, that the treaty-makers have an overall preference for non-self-execution. Since *Medellín* was decided, the Senate has given its consent to more treaties with declarations of self-execution than with declarations of non-self-execution.<sup>402</sup> The above analysis suggests that the President's choice to pursue the Article II route to approval of an international agreement reflects a desire that the agreement (or at least some of its provisions) be self-executing.<sup>403</sup> The pre-*Medellín* declarations of non-self-execution may just reflect the treaty-makers' pre-*Medellín* understanding that the Constitution established a default rule of self-execution.

If we could be confident about the treaty-makers' likely preferences overall, or with respect to particular types of treaties, we would then have to determine whether the appropriate default rule is the one that aligns with those preferences. While it may seem self-evident that the rule that aligns with those preferences is the better one,<sup>404</sup> in certain circumstances it may be advisable to choose the opposite rule. With respect to *Foster*-type self-execution, the optimal result would be for the treaty-makers to deliberate about the domestic consequences of the treaties they conclude and resolve the issues themselves — not just because such a resolution is more democratic but also because it can yield a more fine-grained result.<sup>405</sup> The default rule most likely to induce the treaty-makers to deliberate and resolve this question may well be the one that would produce the result the treaty-makers would not choose in most cases.<sup>406</sup> “[Clear statement rules] can be thought of as deliberation-forcing or democracy-forcing.”<sup>407</sup> If the conditions for the

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ments and North American Free Trade Agreement (NAFTA). North American Free Trade Agreement Implementation Act, 19 U.S.C. ch. 21 (2006); Uruguay Round Agreements Act, 19 U.S.C. ch. 22 (2006).

<sup>401</sup> Yoo, *Treaties and Public Lawmaking*, *supra* note 64, at 2252–53.

<sup>402</sup> See *supra* p. 669.

<sup>403</sup> If the concurrence of the House will be necessary anyway, as it would be with respect to non-self-executing treaties that require implementation, the President would pursue the process requiring only a majority of the Senate, everything else being equal. For the reasons discussed *supra* note 399, however, an analysis of the President's actual incentives in deciding between the Article II process and the Article I process would be exceedingly complex and would likely change over time.

<sup>404</sup> See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1433 (1989).

<sup>405</sup> See *supra* note 322.

<sup>406</sup> See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (introducing the concept of “penalty defaults”: the setting of default rules at what a party *would not want* in order to encourage parties to contract around the rule and affirmatively choose the provision they *do want*); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2242–43 (2002).

<sup>407</sup> Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 686 (1999).

choice of a deliberation-forcing rule were met here (a question beyond the scope of this Article), and the treaty-makers did have an overall preference for non-self-execution, then a default rule of self-execution would be the preferable one.

Of course, from the perspective of constitutional design, we would probably not be discussing the appropriate default rule for determining the domestic consequences of an Article II treaty. For a constitution-writer, a broader set of options would be on the table, including whether to retain the Article II process for making treaties at all,<sup>408</sup> and whether to adopt something resembling the British rule. We are focusing on the question of the appropriate default rule because we are construing the Constitution we have, not one that we might like to have. I have argued that the Supremacy Clause establishes our default rule by declaring that treaties have the force of domestic law. For the reasons set forth above, the best reading of this clause is as establishing a default rule that treaties are self-executing in the sense contemplated by *Foster*, rebuttable by a clear statement in the treaty itself or in a declaration limiting their domestic effect.

#### CONCLUSION

This Article has argued that the Constitution establishes a straightforward rule regarding the judicial enforcement of treaties. By declaring treaties to have the force of law, the Supremacy Clause makes them enforceable in the courts in the same circumstances as statutory and constitutional provisions of like content. The Founders understood that treaties were contracts between nations that, on the international plane, depended on interest and honor for their efficacy. In order to avoid international friction that might lead to war and to capture the benefits of a reputation for treaty compliance, they made treaties enforceable in our courts as a matter of domestic constitutional law. The single exception to the requirement of equivalent treatment concerns treaties that are non-self-executing in the sense contemplated by *Foster v. Neilson*. The Court's subsequent decision in *United States v. Percheman* is best read to have recognized a presumption that treaties are self-executing in this sense, rebuttable by a clear statement in the treaty that the obligations imposed by the treaty are subject to legislative implementation. The recent decision in *Medellín v. Texas* is best understood as an example of an entirely different kind of non-self-execution.

With respect to bilateral treaties, the *Percheman* clear statement rule leaves matters largely within the control of the U.S. treaty-makers.

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<sup>408</sup> The United States is unusual in having a process for making treaties that differs from the process for making statutes. See Hathaway, *supra* note 395, at 1272.

With respect to multilateral treaties, however, the *Percheman* rule would likely pose significant practical problems for treaty-makers seeking to control the domestic legal consequences of the treaties they negotiate (an important power in today's complex world). A hypothetical presumption of non-self-execution would be even more problematic from this perspective. Recognition of the treaty-makers' power to control the domestic effects of a treaty through a clear statement in a "declaration" attached to the treaty would significantly alleviate the problems. I conclude that declarations of non-self-execution would be valid if the default rule were self-execution, but declarations of self-execution would be less likely to be upheld if the default rule were non-self-execution. If the declaration mechanism were only available in the former context, a default rule of self-execution — the rule that coheres best with the Constitution's text and structure and with the Supreme Court's decisions on the subject — would also be normatively preferable.