

## TREATIES, EXECUTION, AND ORIGINALISM IN *Medellín v. Texas*, 128 S. Ct. 1346 (2008)

The unique structure of the United States government creates tensions for the country when it deals with the international community. Most notably, the sharing of sovereignty between the federal and state governments, and between the different branches of the federal government, can create enormous tension between our international obligations and our obligation to constitutional structure. As the world continues to grow smaller, the frequency of these conflicts will surely increase.

Last Term, in *Medellín v. Texas*,<sup>1</sup> the tensions between federalism, separation of powers, and international obligations took center stage, when the Court held that the United States's constitutional structure of government trumped its international obligations.<sup>2</sup> Specifically, the Court held that the United Nations Charter, a treaty to which the United States is a party, did not make judgments of the International Court of Justice (ICJ) directly binding and enforceable as domestic law in a state court, and that the President lacked independent power to require states to comply with ICJ judgments.<sup>3</sup>

Integral to the holding was the Court's pronouncement that, when ratified, treaties are *not* presumed to have the status of binding domestic federal law immediately, but instead require subsequent federal legislation to become law.<sup>4</sup> In other words, treaties are presumed to be non-self-executing. Arguing that the Framers understood treaties to be self-executing, commentators have attacked the majority's presumption of non-self-execution as an ironic departure from originalism by the professed originalists themselves.<sup>5</sup> For the reasons set forth in this

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1. 128 S. Ct. 1346 (2008).

2. *See id.* at 1353.

3. *See id.*

4. *See id.* at 1356.

5. *See, e.g.*, D.A. Jeremy Telman, *Medellín and Originalism*, 68 MD. L. REV. 377, 377 (2009) (arguing that "the majority's opinion . . . cannot be reconciled with any identifiable version of originalism"). Professor Telman includes in the "originalist" group the "self-proclaimed originalists," Justices Scalia and Thomas, as well as Chief Justice Roberts and Justice Alito, "who in their Senate confirmation hearings 'evinced

Comment, such criticisms are unjustified. Although the debate is far from settled, much evidence exists that the Framers understood that many treaties would require subsequent legislation to become binding domestic law. Even if, on balance, treaties were understood generally to be self-executing, the Framers would strongly have preferred a presumption of non-self-execution for treaties with highly invasive domestic implications, such as the ones at issue in *Medellín*.

Jose Ernesto Medellín, a Mexican national living in Texas, was indicted on September 23, 1993, for the rape and murder of sixteen-year-old Elizabeth Pena.<sup>6</sup> A trial established that on June 24, 1993, Medellín participated in a gang initiation, after which he and fellow gang members repeatedly and viciously raped Pena and her fourteen-year-old friend, Jennifer Ertman.<sup>7</sup> After the rapes, Medellín helped strangle Pena to death with one of his shoestrings.<sup>8</sup> In recounting his role in the attacks, Medellín, “giggling and laughing,” bragged about “deflowering one of the young girls.”<sup>9</sup> He only regretted not having a gun “so that the killing would have been quicker.”<sup>10</sup>

A Texas jury convicted Medellín of capital murder, and he was sentenced to death.<sup>11</sup> After his direct appeal was denied in 1997,<sup>12</sup> Medellín filed for and was denied state habeas relief.<sup>13</sup> Medellín then filed for federal habeas relief in 2001, amending his application in 2002 to include, inter alia, as grounds for re-

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considerable sympathy with [the] originalist interpretation.” *Id.* at 381–82. Professor Telman’s criticism of the originalists’ unfaithfulness to their own principles in *Medellín* is only the latest salvo in an ongoing attack on similar lines. See, e.g., THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN CONSERVATISM* 258 (2004) (arguing that the conservatives on the Rehnquist Court pick and choose when they adopt originalism); Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation and . . . Parking Tickets*, 60 OKLA. L. REV. 1, 25–26 (2007) (asserting that Justice Scalia discards originalism in interpreting the Due Process Clause).

6. *Medellín v. Cockrell*, No. H-01-4078, 2003 WL 25321243, at \*1 (S.D. Tex. June 26, 2003).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The habeas trial court found no need for an evidentiary hearing and recommended that relief be denied. The court of criminal appeals agreed, and denied Medellín’s application. *Id.*

lief Texas's failure to notify the Mexican Consulate of his arrest,<sup>14</sup> an obligation the United States had under the Vienna Convention on Consular Relations.<sup>15</sup> The district court denied habeas relief, holding that Medellín had not shown prejudice arising from the treaty violation and that state default rules precluded his Vienna Convention claim.<sup>16</sup>

While the Fifth Circuit was considering his application for a certificate of appealability, the ICJ issued its decision in *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*<sup>17</sup> (*Avena*) and held that the United States had violated the Vienna Convention by failing to notify fifty-one Mexican nationals, including Medellín, of their rights under the Vienna Convention.<sup>18</sup> The ICJ held that, regardless of any state procedural default rules, the United States was obligated to provide the fifty-one Mexican nationals "review and reconsideration" of their convictions and sentences.<sup>19</sup> The Fifth Circuit nonetheless denied Medellín's certificate of appealability,<sup>20</sup> concluding that the Vienna Convention, a compact among nations, did not confer individually enforceable rights.<sup>21</sup>

The Supreme Court granted certiorari.<sup>22</sup> Before the Court heard arguments, however, President Bush issued a memorandum to the Attorney General, asserting that he was empowered to bring the United States into compliance with its treaty obligations by ordering state courts to provide the review and reconsideration that *Avena* purported to require.<sup>23</sup> Medellín subsequently filed a second state habeas petition and the Supreme Court dismissed his certiorari petition as improvidently granted, hoping that state proceedings might resolve the issue.<sup>24</sup> The Texas Court of Criminal Appeals dismissed the new habeas petition as an abuse of the writ, concluding that neither

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14. *Id.* at 2.

15. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

16. *Medellín*, 2003 WL 25321243, at \*11–12.

17. 2004 I.C.J. 12 (Mar. 31).

18. *Id.* at 71.

19. *Id.* at 60, 72.

20. *Medellín v. Dretke*, 371 F.3d 270, 281 (5th Cir. 2004).

21. *Id.* at 280.

22. *Medellín v. Dretke*, 543 U.S. 1032 (2004).

23. *See Medellín v. Texas*, 128 S. Ct. 1346, 1355 (2008).

24. *Medellín v. Dretke*, 544 U.S. 660, 666–67 (2005).

a judgment from an international court nor a Presidential memorandum was binding federal law that could supersede the state's limitation on filing successive habeas petitions.<sup>25</sup> Medellín again petitioned for certiorari and the Supreme Court again granted his petition.<sup>26</sup>

The Supreme Court affirmed. Writing for the Court, Chief Justice Roberts<sup>27</sup> concluded that "neither *Avena* nor the President's Memorandum constitute[d] directly enforceable federal law that pre-empt[ed] state limitations on the filing of successive habeas petitions."<sup>28</sup> The Court began by summarizing Medellín's argument: First, because the United States was a party to the Vienna Convention, it was obligated to perform the consular notification. Second, the Optional Protocol to the Vienna Convention bound the United States to the jurisdiction of the ICJ. Third, Article 94(1) of the United Nations Charter provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party,"<sup>29</sup> which makes the decisions of the ICJ binding rules of decision.<sup>30</sup> Finally, the Supremacy Clause<sup>31</sup> preempts any state law contrary to the ICJ ruling—in this case, state limitations on successive habeas petitions.<sup>32</sup>

Conceding that the *Avena* decision was undisputedly an international obligation of the United States, the Court explained that not all international obligations are binding domestic law to be enforced by U.S. courts. Whether they are hinges upon whether the specific treaties giving rise to the obligations were self-executing, or, if not, whether they had subsequent implementing legislation. Relying on Supreme Court precedent dating back to the 1829 case *Foster v. Neilson*,<sup>33</sup> the Court explained the important distinction between treaties "equivalent to an act

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25. *Ex parte* Medellín, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).

26. Medellín v. Texas, 127 S. Ct. 2129 (2007).

27. The opinion was joined by Justices Scalia, Kennedy, Thomas, and Alito. See *id.* at 1352.

28. *Id.* at 1353.

29. U.N. Charter art. 94, para. 1.

30. Medellín v. Texas, 128 S. Ct. 1346, 1354 (2008).

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

32. Medellín, 128 S. Ct. at 1356.

33. 27 U.S. (2 Pet.) 253, 315 (1829), *overruled on other grounds*, United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

of the legislature”<sup>34</sup> (self-executing treaties) and those that “can only be enforced pursuant to legislation to carry them into effect” (non-self-executing treaties).<sup>35</sup>

Finding textual, structural, and practical problems with applying a presumption of self-execution to the Optional Protocol and the U.N. Charter,<sup>36</sup> the Court held that both treaties required implementing legislation to have effect as binding domestic law in U.S. courts.<sup>37</sup> The Court then clarified the interpretive approach it used to determine the executory status of treaties generally: In looking at the text of the treaty, courts must 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>38</sup> Here the Court considered the terms in the U.N. Charter that “[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party” as only a general commitment to take future political action, rather than “an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. members.”<sup>39</sup> The Court disclaimed, as a caricature of its holding, the dissent’s characterization of the approach as requiring “talismanic words” to make a treaty self-executing, and proceeded to cite certain commercial treaties and their subsequent domestic executing statutes as evidence that Congress “is up to the task of implementing non-self-executing treaties” and “knows how to accord domestic effect to international obligations when it desires such a result.”<sup>40</sup>

The Court next addressed whether the President’s memorandum could, by itself, serve as the enacting legislation that would make the *Avena* decision binding domestic law. Applying the *Youngstown*<sup>41</sup> framework for reviewing executive action,

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34. *Medellín*, 128 S. Ct. at 1356 (quoting *Foster*, 27 U.S. (2 Pet.) at 314).

35. *Id.* (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

36. Because the real question was whether *Avena* itself was binding on U.S. courts, the Court found it unnecessary to determine specifically whether the Vienna Convention was self-executing, assuming *arguendo* that it was and proceeding directly to the executory status of the Optional Protocol and the U.N. Charter. *Id.* at 1357.

37. *See id.* at 1357.

38. *Id.* at 1366.

39. *Id.* at 1358 (emphasis added).

40. *Id.* at 1366.

41. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring), Justice Jackson established three categories of Presidential power with respect to Congress: First, where the President, “acts pursuant to an

the Court concluded that the President's authority to implement the non-self-executing treaties at issue was minimal.<sup>42</sup> The Court also considered and rejected the President's argument based on *Dames & Moore v. Regan*,<sup>43</sup> that, regardless of the treaty power, the President's independent foreign affairs authority, with the gloss of congressional acquiescence, allowed him to "settle foreign claims pursuant to an executive agreement."<sup>44</sup> The Court found this argument unconvincing, as there was no evidence whatsoever of longstanding congressional acquiescence in this area. In fact, the government had

not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.<sup>45</sup>

Justice Stevens wrote a concurrence that praised the wisdom of Justice Breyer's dissent, but ultimately agreed with the majority's conclusion that the language "undertake to comply" in Article 94 of the U.N. Charter, implied only some future action by the parties to the treaty and did not make ICJ judgments immediately binding domestic law.<sup>46</sup> He did not join the majority opinion, however, because he thought that the case was

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express or implied authorization of Congress, his authority is at its maximum"; second, when the President acts in the face of congressional silence, his power is in a "zone of twilight"; and third, when the President's actions are in conflict with the will of Congress, "his power is at its lowest ebb." *Id.*

42. The President argued that the treaties, which were ratified by the Senate, created an obligation to comply with the *Avena* decision, and implicitly gave the President the power to issue the memorandum as binding domestic law, as an exercise of *Youngstown* category one powers. See *Medellin*, 128 S. Ct. at 1368–69. The Court disagreed, stating that the non-self-executing nature of the treaties meant that the Senate had conditioned treaty execution on further legislation through bicameralism and presentment, and had thus directly spoken against such executive action. Therefore, the President's memorandum was in fact firmly in *Youngstown* category three. See *id.* at 1369.

43. In *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1983), the Court extended *Youngstown* by holding that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power'" which provides a presumption of congressional consent.

44. *Medellin*, 128 S. Ct. at 1371.

45. *Id.* at 1372.

46. *Id.* at 1372–73 (Stevens, J., concurring in the judgment).

much closer than the majority allowed, specifically with respect to the default executory status of treaties, and because he was convinced that the Vienna Convention was self-executing and was itself judicially enforceable in domestic courts.<sup>47</sup> Justice Stevens warned that, though ICJ judgments were not automatically binding on the courts, refusing to respect them could jeopardize the reciprocal treatment the United States desires under the Vienna Convention. He concluded by praising the President's "commendable attempt" to induce Texas to follow *Avena* and entreating Texas to provide review and reconsideration of its own accord.<sup>48</sup>

Justice Breyer wrote in dissent.<sup>49</sup> Relying on the Supremacy Clause and *Foster*, he argued that the treaties at issue were indeed self-executing and that the United States had not only submitted itself to the compulsory jurisdiction of the ICJ, but had also agreed to be bound by its judgments.<sup>50</sup> He maintained that the Vienna Convention had granted Medellín the individual right of consular notification—a right that "'shall be exercised in conformity with the laws and regulations' of the arresting nation, provided that the 'laws and regulations . . . enable full effect to be given to the purposes for which those 'rights . . . are intended.'"<sup>51</sup> The Optional Protocol to the Vienna Convention had subjected the United States to the ICJ's jurisdiction for disputes under the Vienna Convention and the U.N. Charter—more specifically, the ICJ Statute—had made the decisions of the ICJ binding upon the United States, "final and without appeal."<sup>52</sup>

Justice Breyer took issue with the majority's interpretation of the words "undertake to comply" in the U.N. Charter as contemplating future action rather than creating immediate legal efficacy. According to Justice Breyer, these words were given too much weight. Because the words did not explicitly foreclose the possibility of immediate binding effect as domestic law, he turned to other case law involving treaty interpretation

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47. *Id.*

48. *Id.* at 1374.

49. Justice Breyer's dissenting opinion was joined by Justices Souter and Ginsburg. *See id.* at 1375 (Breyer, J., dissenting).

50. *See id.* at 1375–76.

51. *Id.* at 1376 (quoting Vienna Convention on Consular Relations arts. 36(1)(b), 36(2), Apr. 24, 1963, [1970] 21 U.S.T. 100–01, T.I.A.S. No. 6820).

52. *Id.* (quoting U.N. Charter art. 60).

in light of the Supremacy Clause to argue that, since the Founding, treaties have been presumed to be self-executing.<sup>53</sup> After recounting several Founding-era, and then *Foster*-era, cases he concluded that “the Supremacy Clause itself answers the self-execution question.”<sup>54</sup> He was especially critical of the majority’s view that a treaty’s text must somehow indicate its intent to be self-executing, saying that “the absence or presence of language in a treaty about a provision’s self-execution proves nothing at all.”<sup>55</sup> Warning that the Court’s decision cast doubt over the status of over seventy similar treaties, none of which have language indicating intent to be self-executing, and which might now require enacting legislation,<sup>56</sup> Justice Breyer proposed applying a multifactor test for determining which treaties are self-executing.<sup>57</sup> Applying his test to the treaties at issue, Justice Breyer concluded that they were self-executing and, consequently, that *Avena* constituted a binding domestic rule of decision.<sup>58</sup> Then, taking the *Avena* language calling for the United States to provide review of Medellín’s case “by means of its own choosing” as an invitation for the Court to fashion those means, he contended that it should remand Medellín’s case to state court with instructions to apply *Avena* as federal law and provide Medellín post-judgment review.<sup>59</sup>

Justice Breyer faced a dilemma regarding whether the President’s memorandum provided an independent basis for making *Avena* binding domestic law. In order to say yes, he would have to admit that President Bush’s assertion of executive power was a valid exercise. Given his numerous and consistent repudiations of President Bush’s exercise of executive power in

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53. *Id.* at 1377–38.

54. *Id.* at 1380.

55. *Id.* at 1381.

56. *Id.* at 1387–88.

57. Justice Breyer’s test would look at several factors: the drafting history and text of the treaty to determine whether it addresses itself to the political departments for further execution or to the judiciary for direct enforcement; the subject matter of the treaty to decide whether it concerns matters associated with the political branches or the judiciary; whether it grants individual rights; and whether enforcement of the treaty by a court would require creation of a new cause of action. *See id.* at 1382.

58. *See id.* at 1383.

59. *See id.* at 1390.



recent years,<sup>60</sup> such an admission could lead to some embarrassment. Instead, after briefly discussing executive powers in the treaty context, he simply stated that he would be “content to leave the matter in the constitutional shade from which it has emerged.”<sup>61</sup>

From an originalist perspective, *Medellín* should not be at all troubling. The notion that the originalists on the Court rejected originalism to arrive at a politically convenient outcome fails for several reasons. To begin with, a default presumption of non-self-execution in no way undermines the Supremacy Clause of Article VI, which declares treaties to be the supreme law of the land, preempting contrary state laws and constitutions. *Medellín* clearly does not allow states to contravene or “opt out” of treaties. And the judiciary is clearly empowered to interpret and apply treaties, pursuant to the Treaty Clause of Article III, Section 2, and the Judiciary Act of 1789. There is no real dispute that these principles reflect the original understanding of the Framers. What is less clear is whether the distinction that Chief Justice Marshall made in *Foster* between self-executing and non-self-executing treaties was his own invention or whether it reflected a more general view of the Framers—in other words, whether the Framers thought that all treaties became supreme domestic federal law immediately upon ratification, or whether there was a presumption that execution of treaties with significant domestic effect was to be delayed “until Congress as a whole [could] determine how treaty obligations [were] to be implemented.”<sup>62</sup>

A superficial reading of the Supremacy Clause might seem to imply that a treaty becomes the equivalent of federal law immediately upon ratification. And, as detailed below, several quotations from various Founders can be read that way. A more plausible reading of the Supremacy Clause, however, is that treaties, *once executed by appropriate means*, become the

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60. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (noting that in authorizing him to use military force, “Congress has not issued the Executive a ‘blank check’”); *Rasul v. Bush*, 542 U.S. 466 (2004) (rejecting the President’s reading of *Eisentrager* as placing Guantánamo detainees beyond the jurisdiction of U.S. federal courts); *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (concluding with Justice O’Connor that a military interrogation “hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker”).

61. *Medellín*, 128 S. Ct. at 1391 (Breyer, J., dissenting).

62. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1961 (1999).

equivalent of federal law. It is critical to understand that the Supremacy Clause is a federalism clause and not a separation-of-powers clause. In other words, the Supremacy Clause deals with the relationship between federal and state enactments, not with the relationship between different types of federal enactments, and the limitations on each.<sup>63</sup> Reading the Supremacy Clause as always granting immediate domestic legal effect to treaties upon ratification creates a potential conflict with the separation-of-powers elements of the Constitution, while reading the Supremacy Clause to grant treaties the status of federal law once properly executed (however that may be) resolves many of those conflicts while doing nothing to weaken the primacy of federal enactments over state ones.

The default status of treaties as supreme domestic law is a matter of academic debate. Professors Flaherty and Vázquez contend that statements from the Philadelphia Convention and early Supreme Court cases support a presumption of self-execution,<sup>64</sup> whereas Professor Yoo finds those statements far from clear, instead relying on the structure of the Constitution, the ratifying debates, and other early cases to support a presumption of non-self-execution.<sup>65</sup> Rather than recount the entirety of the debate, this Comment will draw from its more compelling portions and refer the reader to the sources for the remainder. Among the most compelling historical evidence that the Framers believed treaties were self-executing by default is a 1787 resolution of the Continental Congress that “on being constitutionally made ratified and published [treaties] become in virtue of the confederation part of the law of the land and are not only independent of the will and power of

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63. Although in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Justice Marshall did use the Supremacy Clause to establish judicial review of federal branch actions, the text of the clause is clearly directed at the federal-state relationship.

64. See, e.g., Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999); Carlos Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999); Carlos Vázquez, *Treaties as the Law of the Land: The Supremacy Clause and Presumption of Self-Execution*, 122 HARV. L. REV. 599 (2008); Carlos Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992).

65. See Yoo, *supra* note 62; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*]; John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002).

[state] legislatures but also binding and obligatory on them.”<sup>66</sup> Yet only three weeks later, Congress passed another resolution recommending that the States repeal all state laws that were in conflict with the recently signed Treaty of Paris, the peace treaty with Great Britain.<sup>67</sup> This raises two questions. First, why would state legislatures need to repeal the acts, if the peace treaty automatically invalidated them? This question was answered in the same session as the resolution, namely that “[b]y repealing . . . all Acts and clauses repugnant to the treaty, the business will be turned over to its proper Department, viz, the Judicial.”<sup>68</sup> But a second question remains, namely why Congress felt it needed to do anything. James Madison explained that “the Act of Congress on that occasion, supposed the impediments to be repealed by the Treaty, and recommended a repeal by the States, merely as declaratory and in order to obviate doubts and discussions.”<sup>69</sup> This certainly seems to imply that the Treaty of Paris was self-executing. Indeed, during the Framing, holding the treaty intact and guaranteeing the rights of British creditors undoubtedly affected the debate substantially.<sup>70</sup> On the other hand, could the Congress, by passing this 1787 resolution, have been indicating its belief that to effectuate a treaty, it at least needed to speak domestically, even if merely by a resolution and not a statute?

In propagandizing against the Constitution’s ratification, one prominent Anti-Federalist read the Supremacy Clause exactly as Justice Breyer proposes it be read:

[W]hen treaties shall be made, they will also abolish all laws and state constitutions incompatible with them. This power in the president and senate is absolute, and the judges will

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66. 32 JOURNALS OF THE CONTINENTAL CONGRESS 124–25 (Mar. 21, 1787), reprinted in 4 THE FOUNDERS’ CONSTITUTION 589 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS’ CONSTITUTION].

67. John Jay, 32 JOURNALS OF THE CONTINENTAL CONGRESS 177–84 (Apr. 13, 1787), reprinted in 4 FOUNDERS’ CONSTITUTION, *supra* note 66, at 589–91.

68. *Id.* at 591.

69. Letter from James Madison to Edmund Pendleton (Jan. 2, 1791), in 13 THE PAPERS OF JAMES MADISON 342–44, reprinted in 4 FOUNDERS’ CONSTITUTION, *supra* note 66, at 606.

70. See Yoo, *supra* note 62, at 2013–24.

be bound to allow full force to whatever rule, article or thing the president and senate shall establish by treaty . . . .<sup>71</sup>

He then warned that “whether it be practicable to set any bounds to those who make treaties, I am not able to say: if not, it proves that this power ought to be more safely lodged.”<sup>72</sup>

Further support for a presumption of self-execution is found in the 1796 case *Ware v. Hylton*,<sup>73</sup> in which the Supreme Court struck down a Virginia law inconsistent with the Treaty of Paris, essentially deciding that the treaty itself trumped the state law. In addition, Joseph Story’s *Commentaries on the Constitution* explained the 1787 resolution:

In regard to treaties, there is equal reason, why they should be held, when made, to be the supreme law of the land. . . . The result was, that a declaratory clause was adopted, instead of a mere enacting clause, so that the binding obligation of treaties was affirmatively settled.<sup>74</sup>

Thus, it is undeniable that the Framers considered it possible that treaties could be self-executing.<sup>75</sup>

But strong evidence also exists suggesting that an unqualified presumption of self-execution is inconsistent with the Framers’ understanding, especially for those treaties that involve matters of domestic regulation or powers explicitly vested in the legislature as a whole.<sup>76</sup> Although formal involvement by the House in treaty making was explicitly rejected during the Philadelphia Convention,<sup>77</sup> the lack of textual limitation on the scope of the treaty power means that some (though not all) treaty powers will overlap with powers vested in the whole legislature. As Professor Yoo puts it,

[o]ne could conclude that the best way to reconcile the Framers’ decision to include the Supremacy Clause in its present form with Article I, and with their concerns about the relationship between the legislative and treaty powers, is

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71. *Federal Farmer No. 4* (Oct. 12, 1787), reprinted in 4 FOUNDERS’ CONSTITUTION, *supra* note 66, at 597–98.

72. *Id.*

73. 3 U.S. (3 Dall.) 199 (1796).

74. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 1831–1835 (1833), reprinted in FOUNDERS’ CONSTITUTION, *supra* note 66, at 630–32.

75. See also *supra* note 64.

76. See Yoo, *Treaties and Public Lawmaking*, *supra* note 65, at 2222–24.

77. Yoo, *supra* note 62, at 2036.

to consider treaties as non-self-executing in areas within Congress's legislative powers, but as possibly self-executing in areas reserved to the states.<sup>78</sup>

This reading seems to provide the most harmonious interaction between the Supremacy Clause, Article I, and the treaty powers.

The question of treaty self-execution became a hot issue during the ratifying debates, most notably at the Virginia Convention. Faced with Anti-Federalist opposition emphasizing that “[t]wo-thirds of those [senators] that shall happen to be present, can, with the President make treaties, that shall be the supreme law of the land: They may make the most ruinous treaties; and yet there is no punishment for them,”<sup>79</sup> James Madison explained that the House of Representatives, while not formally part of the treaty process, had an important role in safeguarding the states and citizenry against such “ruinous treaties” because any significant treaty would require an implementing statute.<sup>80</sup> The House’s “approbation and cooperation may often be necessary in carrying treaties into full effect.”<sup>81</sup> After the ratifying debates, as Professor Yoo points out, Madison responded to claims that the “Pennsylvania, Virginia and North Carolina convention records supported a theory of self-execution” by asking whether “it did not appear from a candid and collected view of the debates in those conventions, and particular in that of Virginia that the treaty-making power was a limited power; and that the powers in our constitution, on this subject, bore an analogy to the powers on the same subject, in the government of G. Britain,”<sup>82</sup> where treaties were not self-executing because the Crown made trea-

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78. Yoo, *Treaties and Public Lawmaking*, *supra* note 65, at 2224.

79. Patrick Henry, Speech to the Virginia Convention (June 5, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 951, 965 (John P. Kaminski et al. eds., 1990) [hereinafter DOCUMENTARY HISTORY].

80. Yoo, *supra* note 62, at 2064; *see also* THE FEDERALIST NO. 53, at 334 (James Madison) (Clinton Rossiter ed., 1961) (“[A]lthough the House of Representatives is not immediately to participate in foreign negotiations, . . . [such action] will sometimes demand particular legislative sanction and co-operation.”).

81. Yoo, *supra* note 62, at 2064 (quoting Letter from James Madison to George Nicholas (May 17, 1788), in DOCUMENTARY HISTORY, *supra* note 79, at 808).

82. Yoo, *Treaties and Public Lawmaking*, *supra* note 65, at 2232 (quoting James Madison, Speech (Apr. 6, 1796), in 16 THE PAPERS OF JAMES MADISON 290, 296 (J.C.A. Stagg et al. eds., 1989)).

ties but domestic law required Parliamentary enactments.<sup>83</sup> To assert that the Framers originally understood treaties to be self-executing, one must address Madison's synthesis of the ratifying debates. One must also meet Chief Justice Marshall's distinction in *Foster* with more than a mere assertion that Chief Justice Marshall invented the distinction or a reference to *United States v. Percheman*,<sup>84</sup> which can be read to support either view of default executory status.<sup>85</sup>

Even if the true intent of the Framers with respect to the default self-executing status of a treaty cannot be divined, additional factors at play in *Medellin* make clear that the originalists on the Court did not abandon their principles in deciding the case. Specifically, had the Framers contemplated a reading of the treaties that would grant the ICJ power to issue binding rules of decision on domestic courts, they would likely have rejected self-execution of the treaties as emphatically as the *Medellin* Court did. Although the Framers most certainly envisioned treaties which themselves granted judicially enforceable private rights to individuals,<sup>86</sup> it is highly unlikely that they envisioned a perfect storm combination of treaties such as the

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83. Yoo, *supra* note 62, at 2047 ("Even though the British Constitution had recognized that all formal power over treaty-making belonged to the Crown, constitutional custom and political reality had given the Commons the final say over treaties in their domestic effects.").

84. 32 U.S. (7 Pet.) 51 (1833).

85. *See id.* at 88–89. The Court held that the intent of the parties must prevail, and that the intent, per the Spanish version of the treaty at issue in *Percheman*, was to preserve "the security of private property." *Id.* at 88. The Court's conclusion that "if this security would have been complete without the article, the United States could have no motive for insisting on the interposition of government," *id.*, is easily read as: "the United States cannot require implementing legislation if the treaty itself sufficiently indicates intent for self-execution"—a reading quite consistent with the *Medellin* Court's interpretation of default executory status.

86. *See* Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, T.S. No. 104 (preserving the rights of British creditors in U.S. courts). Incidentally, in order to proceed to the remaining merits of the case in *Medellin*, the Court assumed, without deciding, that the Vienna Convention granted *Medellin* the individual right of consular notification. Because *Marbury* established that a "right, when withheld, must have a remedy," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803), it is certainly safe to assume the judiciary is a proper protector of such rights. But, it is not at all clear that the Vienna Convention granted any individual rights. And, if a treaty did not grant a private right, or if it is unclear whether it intended to grant a private right or merely articulated an agreement between nations, the Framers believed that enforcement of that treaty was up to the political branches, not the judiciary. *See* Yoo, *supra* note 62, at 2087–88.

U.N. Charter, the Vienna Convention, and the Optional Protocol which, when read together in the way Medellín urged, would cede to a foreign tribunal, not contemplated by the Constitution, authority to grant private individual rights which the courts of the United States would then be obliged to enforce. Had they contemplated such a combination of treaties, they almost certainly would not have favored self-execution, and might have argued that even full legislative execution of such treaties would be unconstitutional.

Although admitting that by joining the society of independent nations the United States became bound to the “law of nations,”<sup>87</sup> the Framers firmly rejected any notion that the law of nations entailed ceding authority to an international body to adjudicate the rights and obligations of states and citizens within the United States.<sup>88</sup> They would almost certainly be wary of voluntarily granting such authority to an unaccountable foreign body. Given this reluctance, it would be strange enough to believe that the Framers thought it acceptable for the full legislature, with the President’s signature, to vest an unaccountable international tribunal with Article III powers.<sup>89</sup> It seems virtually inconceivable that they would approve such an abdication when performed by the President and the Senate alone.

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87. *E.g.*, *Brown v. United States*, 12 U.S. (8 Cranch) 110, 112 (1814) (“[W]hen the government of the United States was organized and finally established, it was not only its true policy, but its duty, ‘to receive the law of nations . . .’”).

88. Justice Joseph Story, in his exposition of the “Law of Nations,” for the *Encyclopaedia Americana*, explained the concept this way:

Nations, therefore, in a just sense, are deemed sovereign, not so much because they possess the absolute right to exercise, in their actual organization, such transcendent and despotic authority, but because whatever they do exercise is independent of and uncontrollable by any foreign nation. The sovereignty of many nations is, in its actual organization, limited by their own constitutions of government; but, in relation to all foreign states, the sovereignty is, nevertheless, complete and perfect.

9 *ENCYCLOPAEDIA AMERICANA* 141–49 (Francis Lieber ed., Phila., Carey & Lea 1832). This explanation followed Justice Story’s point that even nations with despotic governments are inherently checked by the “sanguinary remedy” of revolution. *Id.* at 142. Extranational meddling therefore would be unnecessary and unwarranted.

89. The line of Article III delegation cases, *CFTC v. Schor*, 478 U.S. 833 (1986), *Thomas v. Union Carbide*, 473 U.S. 568 (1985), and *Crowell v. Benson*, 285 U.S. 22 (1932), illustrates the Court’s fear of allowing Congress to leave litigants’ fate to tribunals lacking full Article III protections. The Court’s hesitance to allow the full Congress and President to vest jurisdiction in non-Article-III courts applies *a fortiori* to attempts by the President and Senate alone to vest such power in a wholly unaccountable foreign tribunal.

Because the ICJ is an international tribunal, it is not bound by constitutional provisions and thus can issue rulings that are directly and blatantly unconstitutional. If, in accord with the treaty obligations of the United States, ICJ decisions automatically become binding domestic law that the judiciary is bound to apply, the decisions of the ICJ are in effect unreviewable. The case-or-controversy requirement would dictate that these unconstitutional rulings *become domestic law* until a constitutional challenge is raised in either state or federal court, at which point the rulings would be overturned on a state-by-state, district-by-district, or circuit-by-circuit basis until the Supreme Court finally weighed in.<sup>90</sup> It strains reason to think that the Framers would have wanted the President and the Senate to be able to add such an onerous layer to the judicial process. The text of Article III alone should sufficiently establish that the Framers had no such understanding.

The problems with a presumption of self-execution for treaties like those at issue in *Medellín* are not merely structural and formal, but practical as well. The United States prides itself on its independence in thought and policy. Holding judgments of the ICJ to be immediately binding domestic law would create a huge opportunity and temptation for the international community to impose law upon the United States that never would have made it through our legislative process. Consider, for one example, the recent declaration by the United Nations Sub-Commission on the Promotion and Protection of Human Rights. The Sub-Commission essentially declared that no pri-

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90. This fear is not merely conjectural. Given the state of case law on the treaty power and widely accepted views of commentators elaborating on those cases, the threat of unconstitutional action via the treaty power is all too real. For example, Louis Henkin asserts that the President and the Senate can, through the treaty power, make domestic policy for the entire nation on virtually any topic, without regard to the limitations of Article I, Section 9 or the Tenth Amendment. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 190–98 (2d ed. 1996). *Missouri v. Holland* established that the Tenth Amendment presented no bar whatsoever to the treaty power, and Justice Holmes even implied that the Constitution itself might not be a constraint on the treaty power. 252 U.S. 416, 433–35 (1920) (“Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.”). The Court addressed the *Missouri* dicta in *Reid v. Covert*, rejecting the notion that treaties were immune to the Constitution. 354 U.S. 1, 18 (1957). But where the constitutional violation comes not from the treaty itself, but from subsequent actions of an entity empowered by the treaty—here, the ICJ—unconstitutional action could still occur without strictly violating *Reid*.



vate right to bear arms exists, but instead that it is a basic human right to have all governments immediately enact and enforce extremely stringent gun-control laws.<sup>91</sup> Had the *Medellín* Court held the treaties to be self-executing, it is not far-fetched to imagine the ICJ (which could now issue decisions with binding domestic effect) endorsing the Sub-Commission's resolution, consequently compelling either a series of domestic lawsuits within the United States or a congressional enactment to overturn the unconstitutional rule.<sup>92</sup> Is it realistic to believe that the Framers would have understood the Constitution to allow the Senate to cede legislative and judicial power to a tribunal whose interests are so often expressly and proudly aligned in dramatic opposition to those of the United States?

The "originalists" on the Court did not cast originalism aside simply to reach an outcome that aligned with their political views. The structural, historical, and practical examples discussed support a presumption of non-self-execution in many circumstances. The originalists were in fact more disciplined in determining original understanding than advocates of presumed self-execution because a presumption of non-self-execution preserves constitutionally mandated separation of powers while not undermining the primacy of federal law. An automatic presumption of self-execution, on the other hand, seriously weakens this separation of powers. Such a presumption falsely imputes to the Framers a belief that constitutional constraints on federal legislation apply only under limited circumstances. This view sacrifices much for only a marginal increase in the ability of the Supremacy Clause to preserve the primacy of federal law over state law.

*Ben Geslison*

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91. See U.N. Human Rights Council, Sub-Comm'n on the Promotion and Prot. of Human Rights, 58th Sess., *Report on the Fifty-Eighth Session to the Human Rights Council*, U.N. Doc. A/HRC/Sub.1/58/L.11/Add.1 (Aug. 24, 2006), available at [http://hrp.cla.umn.edu/projresearch/salw/pdf/Resolution\\_Principles.pdf](http://hrp.cla.umn.edu/projresearch/salw/pdf/Resolution_Principles.pdf).

92. It is true that the United States's withdrawal from the Optional Protocol has divested the ICJ of its mandatory jurisdiction over these matters, so the illustrated danger is not an imminent possibility. However, this illustration was not intended to assert the imminence of such an assault, but rather to illustrate the implausibility of a notion that the Framers would understand the Constitution to allow such a cession of power to an entity like the ICJ.