8-2015

Taming Madison's Monster: How to Fix Self-Execution Doctrine

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Recommended Citation
Brigham Young Law Review, forthcoming

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Draft, August 2015

Introduction

In the Federalist Papers, James Madison invited readers to consider the hypothetical case of a federal Constitution that provided for the supremacy of state law over federal law. In that case, he said, "the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."[1] The modern doctrine of non-self-executing treaties (NSE doctrine) illustrates the problems posed by Madison's hypothetical monster.

The Supreme Court's decision in *Medellín v. Texas* is an example.[2] The United States has a treaty obligation under Article 94 of the UN Charter "to comply with the decision of the International Court of Justice (ICJ) in any case to which it is a party."[3] When President Truman ratified the Charter in 1945, after the Senate voted 89-2 in favor of ratification, the United States made a binding commitment to comply with ICJ decisions. Since the Charter was ratified, neither Congress nor any President has repudiated that commitment. At issue in *Medellín* was the ICJ decision in the "*Avena* case," where the ICJ ordered the U.S. to provide judicial hearings for 51 Mexican nationals on death row in the United States.[4] Medellín was one of the named Mexican nationals; he was on death row in Texas. President Bush directed State courts to "give effect to the [*Avena*] decision . . . in cases filed by the 51 Mexican nationals addressed in that decision."[5] However, Texas defied the President's order and the U.S. Supreme Court allowed Texas to do so. The Court based its decision on the distinction between "self-executing" and "non-self-executing" treaties. As a result of *Medellín*, the United States stands in ongoing violation of a legally binding treaty commitment, but no national political authority ever decided to violate the treaty. Thanks to *Medellín*, and to the transformation of NSE doctrine after World War II,[6] Madison's monster has come to life. The head is under the direction of the members.

On the other hand, perhaps the head retains control. Even after *Medellín*, Congress could enact legislation requiring Texas and other states to comply with the *Avena* decision, or with ICJ decisions generally. Several bills to that effect have been proposed, but Congress has not enacted such legislation.[7] Recently, Congress has been so deeply divided that it is difficult to pass any

[1] Federalist 44 (James Madison).
[2] 552 U.S. 491 (2008)
[3] UN Charter, art. 94.
[4] Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31).
[5] *Medellin*, 552 U.S., at 503.
[6] *See infra* notes __ and accompanying text (discussing the transformation of NSE doctrine after World War II).
[7] *See* Steve Charnovitz, *Correcting America's Continuing Failure to Comply with the Avena Judgment*, 106 Am. J. Int'l L. 572, 576-79 (2012) (discussing bills introduced in Congress).

new federal legislation. Therefore, given congressional inertia, the real choice for the Court in *Medellín* was whether to place the weight of congressional inertia on the side of compliance or non-compliance. By holding that Article 94 is not self-executing, the Court chose non-compliance, but NSE doctrine did not require that choice. The Court could have chosen compliance by holding that Article 94 is self-executing and binding on Texas. In that scenario, also, Congress could have passed legislation to override the Court's decision. Therefore, NSE doctrine is consistent with federal political control, at least in theory.

The key words in the previous sentence are the words "in theory." To confront Madison's monster, we must move from theory to practice. In practice, judicial application of NSE doctrine is almost entirely arbitrary. Courts decide whether a treaty is self-executing by invoking the "intent of the treaty makers."[8] In the vast majority of cases, that "intent" is purely fictitious; it is a judicial fabrication. If a court finds that the treaty makers intended the treaty to be self-executing, it places congressional inertia on the side of compliance. But if the court finds that the treaty makers intended the treaty to be non-self-executing, it places congressional inertia on the side of non-compliance. Since the courts do not want to admit that they are making decisions about treaty compliance, they hide behind a fictitious "intent of the treaty makers" to evade responsibility for their decisions. Insofar as state courts engage in this behavior, Madison's monster is real. However, federal court decisions applying the fictitious intent test are more numerous than state court decisions. Therefore, in practice, the main problem involves a transfer of power over treaty compliance decisions from the federal political branches to federal courts. Since federal courts are not politically accountable, decisions about whether to comply with national treaty obligations are being made by government actors who lack political accountability. Treaty violations by state and local government officers are largely a consequence of federal court decisions applying a fictitious intent test to justify a holding that a treaty is not self-executing.

This article analyzes the development and application of the fictitious intent test that is the cornerstone of modern NSE doctrine; I focus on the practical implications of the fictitious intent test for the supremacy of treaties over state law. The analysis is divided into four parts. Part One distinguishes among three distinct concepts of self-execution. Part Two summarizes the historical evolution of self-execution doctrine. Part Three presents a detailed analysis of the Supreme Court's opinion in *Medellín;* it demonstrates that the Court applied a fictitious intent test in *Medellín.* Moreover, the Court's decision effectively authorized state government officers to breach U.S. treaty obligations, even though the federal political branches never approved such violations. Part Four presents recommendations for the political branches and the courts. The recommendations are designed to ensure that, in matters related to treaty implementation, the head retains control of the members—not just in theory, but also in practice.

[8] *See Medellín*, 552 U.S. 491, 505 (2008) (treaties "are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing"); Restatement (Third), § 111(4) (an international agreement is non-self-executing "if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation").

I.
Three Concepts of Self-Execution

Courts and commentators agree that an NSE treaty requires implementing legislation. However, for what purpose is legislation needed? Existing doctrine provides three different answers to that question. Those three answers correspond to the "congressional-executive" concept, the "federal-state" concept, and the "political-judicial" concept of self-execution.

Under the political-judicial concept, self-executing treaty provisions are judicially enforceable, but courts may not directly apply NSE treaty provisions unless Congress enacts implementing legislation.[9] Under this concept, unlike the congressional-executive concept, federal executive officers are empowered to implement both SE and NSE treaty provisions, and need not await legislative authorization to do so. The Supreme Court applied the political-judicial concept in *The Head Money Cases*,[10] without using the term "self-executing." There, the Court said that "the judicial courts have nothing to do [with NSE treaties] and can give no redress." However, SE treaties "are capable of enforcement as between private parties in the courts of the country."[11]

The American Law Institute (ALI) is preparing a Fourth Restatement on U.S. foreign relations law. The recent Discussion Draft defines self-execution in terms of the political-judicial concept. It says: "The essential inquiry for self-execution . . . is whether a treaty provision is directly enforceable by the courts. . . . [A]lthough it is often noted that a non-self-executing treaty provision requires implementing legislation . . . that is not inherent in the nature of non-self-execution."[12] The Reporters' choice to define self-execution in terms of judicial enforcement, instead of the need for implementing legislation, is at odds with the weight of authority on the subject.[13] In essence, the Reporters have adopted the political-judicial concept as THE definition of self-execution. In doing so, they disregard a large body of evidence—summarized in this article—showing that the courts and the political branches also apply the congressional-executive concept and the federal state concept.

Under the "federal-state" concept, an SE treaty automatically supersedes conflicting state laws; no legislation is necessary to give the treaty preemptive effect. Conversely, an NSE treaty does not automatically supersede conflicting state laws because federal legislation is necessary to implement the treaty. The California Supreme Court applied the federal-state concept in *Fujii v. State*, where it held that a treaty "does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing."[14] The Restatement (Second)

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[9] The doctrine does not preclude indirect application by, for example, consulting a treaty as an aid to statutory interpretation.

[10] 112 U.S. 580 (1884).

[11] *Id*., at 598-99.

[12] Restatement (Fourth) of Foreign Relations Law, Treaties (Discussion Draft, April 28, 2015) § 106 cmt. b [hereinafter, Discussion Draft].

[13] *Accord*, Carlos M. Vazquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, [this volume].

[14] 242 P.2d 617, 620 (CA 1952).

of Foreign Relations Law also endorsed the federal-state concept.[15] Part Two shows that the federal-state concept arose after World War II in the context of heated political debates about the "Bricker Amendment" and judicial application of the UN Charter's human rights provisions.

Under the "congressional-executive" concept, congressional legislation is necessary to authorize federal executive action pursuant to an NSE treaty.[16] Conversely, the President has the authority to implement an SE treaty, and need not await implementing legislation to do so. The Supreme Court applied the congressional-executive concept in *Cook v. United States*, where it said: "For in a strict sense the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."[17] Parts One and Two demonstrate that the congressional-executive concept has been the dominant concept of self-execution for most of U.S. history.

A. Three Conceps in Medellín

In *Medellin v. Texas,*[18] Chief Justice Roberts' majority opinion applied all three concepts interchangeably, without acknowledging the differences among them. In part II of the opinion, the Court vacillated between the federal-state concept and the political-judicial concept. For example, Roberts said that Article 94 and *Avena* "does not of its own force constitute binding federal law that pre-empts [contrary] state" law.[19] In this passage, the Court seemingly applied the federal-state concept. Elsewhere, though, the Court seemingly applied the political-judicial concept. For example, Roberts wrote that "[t]he pertinent international agreements . . . do not provide for implementation of ICJ judgments through direct enforcement in domestic courts."[20] This passage emphasized the limitations on the judiciary's power to enforce treaties, in accordance with the political-judicial concept.

In part III of its opinion, the Court rejected the U.S. government's argument that the President's memorandum required Texas courts to grant Medellín a judicial hearing.[21] The Court said: "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."[22] Since an NSE treaty is not domestic law, "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."[23] The conclusion that congressional action is necessary follows from "the fundamental constitutional principle that the power to make the

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[15] *See* Restatement (Second) of the Foreign Relations Law of the United States, § 141 (stating that an NSE treaty does not "supersede inconsistent provisions . . . of the law of the several states").

[16] Under this concept, legislation may also be necessary to impose domestic legal duties on federal executive officers. Power-constraining treaty provisions impose duties on the executive branch if they are self-executing, whereas power-enhancing provisions augment federal executive authority if they are self-executing.

[17] 288 U.S. 102, 119 (1933).

[18] 552 U.S. 491 (2008).

[19] *Id*. at 522-23.

[20] *Id*. at 513.

[21] The President's "directive" to state courts was included in a memorandum from President Bush to the Attorney General, referred to as "the President's memorandum." *See id*., at 503.

[22] *Id*., at 527.

[23] *Id*., at 525-26.

necessary laws is in Congress; the power to execute in the President."[24] In the Court's view, the President's memorandum could not be justified as a valid exercise of the President's power to execute the law because Article 94 of the UN Charter is not domestic law.[25] Therefore, the President's memorandum was an invalid attempt "to enforce a non-self-executing treaty by unilaterally creating domestic law."[26] In sum, Part III of the Court's opinion clearly applies the congressional-executive concept of self-execution.

The political-judicial concept cannot explain part III because, under the political-judicial concept, *an NSE treaty is law for the executive branch*. However, the core rationale in part III hinges on the assumption that an *NSE treaty is not law for the executive branch*—i.e., it does not authorize the President to take action that would be unauthorized, absent the treaty. Without that assumption, the rationale of part III simply evaporates. Granted, the Court said in *Medellín* that "[t]he President may comply with the treaty's obligations by some other means," but not "by unilaterally making the treaty binding on domestic courts."[27] That statement, though, is merely a throw-away line. The ICJ decision required the United States to provide a *judicial hearing* for Medellín.[28] Courts are the only institutions in the United States capable of providing a judicial hearing. Therefore, if the President could not make the ICJ decision binding on domestic courts, he could not "comply with the treaty's obligations by some other means." To put it bluntly, the only way to comply with an obligation to provide a judicial hearing is to provide a judicial hearing. The Court was surely aware of this fact when it pronounced, rather disingenuously, that the President could comply with the *Avena* judgment by some other means.

B. Three Concepts in Senate Treaty Practice

In September 2008, in an unprecedented burst of treaty activity, the Senate consented to 78 treaties in four days.[29] The Senate's unusual flurry of activity was a response to the Court's March 2008 decision in *Medellín.* Senate treaty actions in September 2008 provide the best evidence of the treaty makers' understanding of the terms "self-executing" and "non-self-executing."

For seven of the 78 treaties, the Senate adopted declarations specifying that the treaty is "not self-executing" (NSE declarations).[30] For 69 other treaties, it adopted declarations

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[24] *Id*., at 526.

[25] *See id*., at 532 (stating that the President's constitutional authority under the Take Care Clause "allows the President to execute the laws, not make them").

[26] *Id*., at 527.

[27] *Id*., at 530.

[28] *See* Avena judgment, *supra* note __, ¶¶ 128-41, 153.

[29] *See* 154 Cong. Rec. 20166-20174; 154 Cong. Rec. 21775-21778; 154 Cong Rec. 22464-22465.

[30] *See* 1992 Partial Revision of the Radio Regulations, S. Treaty Doc. 107-17 (resolution of ratification at 154 Cong. Rec. 20170-71); 1995 Revision of the Radio Regulations, S. Treaty Doc. 108-28 (resolution of ratification at 154 Cong. Rec. 20171); Land-Based Sources Protocol to the Cartagena Convention, S. Treaty Doc. 110-1 (resolution of ratification at 154 Cong. Rec. 21776); 1998 Amendments to the Constitution and the Convention of the International Telecommunication Union, S. Treaty Doc. 108-5 (resolution of ratification at 154 Cong. Rec. 21778); 2002 Amendments to the Constitution and the Convention of the International Telecommunication Union, S. Treaty Doc. 109-11 (resolution of ratification at 154 Cong. Rec. 21778); 2006 Amendments to the Constitution and the Convention of the International Telecommunication Union, S. Treaty Doc. 110-16 (resolution of ratification at 154

specifying that the treaty is either wholly or partially self-executing.[31] The Senate did not specifically define the term "self-executing" or "non-self-executing." However, Senate resolutions for eight treaties (the "eight key treaties") shed light on its apparent understanding of those terms. For three of the eight treaties, the Senate adopted declarations substantially equivalent to the following: "*This Protocol is self-executing. This Protocol does not confer private rights enforceable in United States courts*."[32] For the other five treaties, the Senate declarations specified that the treaty was partially SE and partially NSE. Those declarations included language substantially equivalent to the following: "*None of the provisions in the Convention . . . confer private rights enforceable in United States courts*."[33]

The Senate clearly did not conceive of self-execution in terms of the federal-state concept, because all of the eight key treaties address matters governed by federal law, not state law.[34] Moreover, the Senate did not conceive of self-execution in terms of the political-judicial concept. For the eight key treaties, it declared in a single paragraph that the treaty was wholly or partially self-executing AND that it was not "enforceable in United States courts." If the Senate understood self-execution in terms of the political-judicial concept, those two statements would be mutually contradictory because, under the political-judicial concept, "self-executing" means "enforceable in courts." In contrast, there is no contradiction under the congressional-executive concept because "self-executing" means that legislation is not needed to authorize federal executive action pursuant to the treaty. Therefore, the declarations for the eight key treaties make it abundantly clear that the Senate understood self-execution in terms of the congressional-executive concept, not the political-judicial concept.[35]

Cong. Rec. 21778); International Convention on the Control of Harmful Anti-Fouling Systems on Ships, S. Treaty Doc. 110-13 (resolution of ratification at 154 Cong. Rec. 22465).

[31] *See* 154 Cong. Rec. 20166-20174; 154 Cong. Rec. 21775-21778; 154 Cong Rec. 22464-22465. The two treaties for which the Senate did not adopt either an SE declaration or an NSE declaration are: Protocol to the North Atlantic Treaty of 1949 on the Accession of the Republic of Albania, S. Treaty Doc. 110-20 (resolution of ratification at 154 Cong. Rec. 21777); Protocol to the North Atlantic Treaty of 1949 on the Accession of the Republic of Croatia, S. Treaty Doc. 110-20 (resolution of ratification at 154 Cong. Rec. 21777).

[32] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, S. Treaty Doc. 105-1(B) (resolution of ratification at 154 Cong. Rec. 20171) (emphasis added). *See also* Protocol on Blinding Laser Weapons, S. Treaty Doc. 105-1(C) (resolution of ratification at 154 Cong. Rec. 20171); Amendment to Article 1 of Convention on Conventional Weapons, S. Treaty Doc. 109-10(B) (resolution of ratification at 154 Cong. Rec. 20171).

[33] International Convention for the Suppression of Acts of Nuclear Terrorism, S. Treaty Doc. 110-4 (resolution of ratification at 154 Cong. Rec. 21776-77) (emphasis added). *See also* Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, S. Treaty Doc. 106-1(A) (resolution of ratification at 154 Cong. Rec. 21776); Amendment to the Convention on the Physical Protection of Nuclear Material, S. Treaty Doc. 110-6 (resolution of ratification at 154 Cong. Rec. 21776); 2005 Fixed Platforms Protocol, S. Treaty Doc. 110-8 (resolution of ratification at 154 Cong. Rec. 21777); Protocol on Explosive Remnants of War, S. Treaty Doc. 109-10(C) (resolution of ratification at 154 Cong. Rec. 22464-65).

[34] *See* treaties cited in two previous footnotes.

[35] The ALI Discussion Draft claims that one of the eight key declarations—the one attached to the Hague Convention on Cultural Property—shows only that the Senate rejected the "private right of action" version of SE doctrine. *See* Discussion Draft, *supra* note __, § 106, n.4. With due respect for the Reporters, that claim is not plausible. None of the eight declarations uses the term "private right of action." All eight declarations say that the treaties are not "enforceable in United States courts." The statement that the treaties are not enforceable in courts, combined with the statement that the treaties are partially or wholly self-executing, demonstrates clearly that the Senate understood self-execution in terms of the congressional-executive concept, not the political-judicial concept.

The ALI Discussion Draft cites the Secretary of State's report on the Convention on the Rights of Persons with Disabilities as evidence that the political branches understand self-execution in terms of the political-judicial concept.[36] On closer examination, though, the Senate record for the Disabilities Convention demonstrates persuasively that the political branches *do not* understand NSE declarations in terms of the political-judicial concept. The Senate Committee Report for the Disabilities Convention explains the NSE declaration as follows: "This [declaration] reflects the shared understanding of the committee and the executive branch that the provisions of the Treaty are not self-executing, are not directly enforceable in U.S. courts, and do not confer private rights of action enforceable in the United States."[37] If the political branches understood self-execution in terms of the political-judicial concept, the statements that the treaty provisions "are not self-executing" and "not directly enforceable in U.S. courts" would be entirely redundant. In contrast, the redundancy is eliminated if one construes "not self-executing" to mean "not supreme law of the land," as in the federal-state concept.[38] Under the federal-state concept, the statements that the treaty provisions are "not directly enforceable" and "do not confer private rights of action" are not redundant because they both follow as a logical consequence from the statement that the provisions are "not self-executing" (i.e., not supreme law of the land).

It is important, here, to highlight a key difference between the Disabilities Convention and the eight treaties that combine SE declarations with "not enforceable in courts." Whereas those eight treaties address matters governed exclusively by federal law, the Disabilities Convention also addresses matters governed by state law. Hence, the political branches wanted to clarify that the Disabilities Convention will not operate as a rule of conduct for federal executive officers (per the congressional-executive concept) *and* that it will not supersede conflicting state laws (per the federal-state concept). If the NSE declaration attached to the Disabilities Convention is construed in accordance with the federal-state concept, it expresses both ideas simultaneously. Since an NSE treaty is not the "supreme law of the land" under the federal-state concept, it necessarily follows that it does not operate as a rule of conduct for federal executive officers.

In sum, analysis of recent Senate treaty actions demonstrates clearly that the Senate *does not* understand self-execution in terms of the political-judicial concept. Thus, the ALI's attempt to define self-execution in terms of the political-judicial concept is at odds with the Senate's understanding and with part III of the Supreme Court's opinion in *Medellín*.

[36] *See* Discussion Draft, § 106, note 4 (citing and quoting S. Treaty Doc. 112-6, at 6).
[37] Convention on the Rights of Persons with Disabilities, S. Exec. Rep. 112-6 (2012), at 14; *see also* Convention on the Rights of Persons with Disabilities, S. Exec. Rep. 113-12 (2014), at 23 (repeating the identical language).
[38] Here, I assume that the statement that a treaty "does not supersede conflicting state laws" is equivalent to a statement that it is not "the supreme law of the land."

II.
A Brief History of Self-Execution Doctrine

The standard account of self-execution identifies Chief Justice Marshall's 1829 opinion in *Foster v. Neilson*[39] as the source of modern doctrine. That account is mistaken in several respects. First, judges cite *Foster* as authority for the "one-step approach" to SE analysis, but Marshall applied a "two-step approach" in *Foster*.[40] Professor Edwin Dickinson invented the one-step approach in a law review article published in 1926.[41] Second, judges cite *Foster* as authority for the federal-state concept of self-execution, but *Foster* did not implicate state law. The federal-state concept emerged in the 1950s in response to the advent of modern international human rights law. Third, the misguided focus on *Foster* creates the false impression that courts developed self-execution doctrine. In fact, courts said very little about self-execution before World War I; legislative and executive materials were the primary sources of authority until the 1920s. Part Two presents a brief history of SE doctrine. This account distinguishes between the "main channel" of historical development and two "side channels."[42]

A. The Main Channel of Doctrinal Evolution

Phase One: The main body of SE doctrine developed in four phases. In phase one, self-execution was a constitutional doctrine that corresponded with the congressional-executive concept (the *constitutional doctrine*). The SE/NSE dichotomy distinguished between: (a) treaties that the President has constitutional authority to implement, without awaiting congressional authorization (self-executing); and (b) treaties that the President lacks authority to implement until Congress enacts implementing legislation (non-self-executing). Congress discussed self-execution extensively in debates related to: implementation of the Jay Treaty in 1795-96;[43] an 1815 commercial treaty with Great Britain;[44] the 1867 treaty acquiring Alaska from Russia;[45] and an 1884 commercial treaty with Hawaii.[46] Legislators never agreed fully about which treaties are SE and which ones are NSE. However, they did agree that the SE/NSE distinction was a federal separation-of-powers concept rooted in U.S. constitutional law, not a treaty interpretation doctrine rooted in international law. In the nineteenth century, legislative materials on self-execution were far more voluminous than judicial decisions on the topic.

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[39] 27 U.S. 253 (1829).

[40] *See* David Sloss, *Executing Foster v. Neilson: The Two-Step-Approach to Analyzing Self-Executing Treaties*, 53 Harv. Int'l L. J. 135 (2012); *see also infra* notes __ and accompanying text (explaining the "one-step" and "two-step" approaches).

[41] Edwin D. Dickinson, *Are the Liquor Treaties Self-Executing*?, 20 Am. J. Int'l L. 444 (1926).

[42] The account presented here relies heavily on David Sloss, Invisible Constitutional Transformation: The Silent Death of the Constitution's Treaty Supremacy Rule (manuscript on file with author) (providing detailed documentation to support claims made in this section).

[43] *See* 5 Annals of Cong. 426-783; John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 Fordham Int'l L. J. 1209, 1276-94 (2009).

[44] *See* 29 Annals of Cong. 46-54, 419-595, 1019-22; Parry, *supra* note __, at 1303-16.

[45] *See* 39 Cong. Globe 4055 (40th Cong., 2nd Sess, July 14, 1868); 15 Stat. 198 (July 27, 1868); SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 135-47 (1904).

[46] *See* Treaty with the Hawaiian Islands, H.R. Rep. No. 49-4177 (1887); Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 89-93 (2014).

Phase Two: In phase two, the focus shifted from Congress to the executive branch. In nineteenth century congressional debates, the most contentious constitutional issue involved treaties reducing import duties. Members of the House of Representatives routinely insisted that such treaties were constitutionally NSE.[47] To sidestep the constitutional issue, the executive branch began to insert "condition precedent clauses" in treaties. Those clauses specified that the treaty would not enter into force *internationally* until after Congress enacted implementing legislation. The first such treaty was signed in 1854.[48] Article V specified: "The present treaty shall take effect as soon as the laws required to carry it into operation shall have been passed by the Imperial Parliament of Great Britain . . . on the one hand, and by the Congress of the United States on the other."

In the late nineteenth century, the executive branch routinely added condition precedent clauses to treaties affecting import duties.[49] By inserting condition precedent clauses, the executive branch effectively bypassed legislative debates about whether the treaty was constitutionally NSE. Since the treaty did not enter into force internationally until after Congress enacted implementing legislation, the self-execution issue became irrelevant. Condition precedent clauses can be viewed as the nineteenth century predecessor of modern NSE declarations, but they differ from NSE declarations in certain respects. Condition precedent clauses required legislation as a precondition for the treaty to take effect *internationally*. In contrast modern NSE declarations do not affect international entry into force. Instead, modern NSE declarations require legislation as a precondition for the treaty to "take effect" *domestically*. (Leave aside, for now, the question of precisely what it means for a treaty to "take effect" domestically.) By adopting condition precedent clauses, the nineteenth century treaty makers (i.e., the President and Senate, acting together under the Article II Treaty Power) *applied their power over international law* to establish preconditions for the treaty to take effect internationally. In contrast, by adopting NSE declarations, modern treaty makers *apply their power over domestic law* to establish preconditions for the treaty to take effect domestically, even after it has entered into force internationally.[50]

Phase Three: Phase three began in 1926 when Edwin Dickinson published an article entitled *Are the Liquor Treaties Self-Executing*?[51] The "liquor treaties" in the article's title were a set of bilateral treaties with sixteen countries to help enforce Prohibition-era laws banning liquor imports.[52] Before the treaties were concluded, federal statutes imposed a 12-mile limit on

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[47] *See, e.g.*, Treaty with the Hawaiian Islands, H.R. Rep. No. 49-4177 (1887); CRANDALL, *supra* note __, at 135-47.
[48] Fisheries, Commerce, and Navigation in North America, June 5, 1854, U.S.-U.K., 10 Stat. 1089.
[49] *See, e.g.*, Treaty of Washington, May 8, 1871, U.S.-U.K., 17 Stat. 863; Treaty of Reciprocity, Jan. 30, 1875, U.S.-Hawaii, 19 Stat. 625; Convention on Commerce, Jan. 20, 1883, U.S.-Mexico, 24 Stat. 975; Convention on Commercial Relations, Dec. 11, 1902, U.S.-Cuba, 33 Stat. 2136.
[50] It is generally agreed that the effect of NSE declarations is purely domestic. Scholars disagree about whether Article II grants the treaty makers the power to regulate domestic law in a way that is not contingent upon the international obligation in the treaty. *See infra* notes __ and accompanying text. Here, I assume that Article II does grant the treaty makers a limited power of that type.
[51] Dickinson, *supra* note __.
[52] *See* Cook v. United States, 288 U.S. 102, 109 n.2 (1933) (citing treaties).

the Coast Guard's search-and-seize operations at sea.[53] So-called "rum runners" evaded enforcement of federal liquor laws by stationing large vessels with contraband beyond the 12-mile limit, and using small, fast boats to ferry liquor from the large, hovering vessels to the coast. The treaties expanded the geographic reach of the executive's search-and-seize authority beyond the 12-mile limit. However, when federal authorities seized vessels and filed civil forfeiture claims, or criminal charges against the rum runners, several lower courts dismissed the charges on the grounds that the liquor treaties were not self-executing.[54] Dickinson sought to demonstrate that the treaties were self-executing—meaning that the treaties themselves authorized federal executive action that was prohibited under prior statutes.

From Dickinson's standpoint, it was not sufficient to show that the treaties authorized search-and-seize beyond the 12-mile limit (which they clearly did).[55] He also wanted to show that the treaties extended the geographic reach of U.S. criminal laws. If the treaties did not have that effect, he said, they would merely authorize the executive "to search and seize foreign vessels which are guilty of no offense."[56] In this respect, Dickinson was mistaken. As the Supreme Court explained in *United States v. Ford*—decided in 1927, one year after Dickinson published his article—"[t]he issue whether the ship was seized within the prescribed limit did not affect the question of the defendants' guilt or innocence."[57] In other words, the vessels hovering beyond the 12-mile limit were guilty of violating U.S. liquor laws even before the treaties were adopted. The problem, absent the treaties, was that personnel on those vessels had a valid defense to the jurisdiction of U.S. courts if seizure occurred beyond the 12-mile limit. The treaties removed that jurisdictional defense by authorizing seizures beyond the 12-mile statutory limit.[58]

However, Dickinson wrote his article before the Court decided *Ford*, and he proceeded on the mistaken premise that the treaties must expand the geographic reach of federal criminal law to accomplish their intended goals. Here, he confronted a problem. Leading authorities suggested that a treaty creating new criminal penalties was constitutionally NSE (meaning that Congress must enact implementing legislation before the executive is authorized to prosecute offenders).[59] If a treaty creating new criminal penalties was constitutionally NSE, then one might infer that a treaty expanding the geographic reach of federal criminal laws was also constitutionally NSE. At least one lower court had so held.[60] However, Dickinson resisted that

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[53] *See* Tariff Act of 1922, Sec. 581, 42 Stat. 858, 979 (1922). The United States had similar statutes since 1790 that authorized enforcement of federal laws beyond U.S. territorial waters. *See* Edwin D. Dickinson, *Jurisdiction at the Maritime Frontier*, 40 HARV. L. REV. 1, 12-18 (1926).

[54] Dickinson specifically cited *The Over the Top*, 5 F.2d 838 (D. Conn. 1925), *United States v. The Sagatind*, 8 F.2d 788 (S.D.N.Y. 1925), and *The Sagatind*, 11 F.2d 673 (2nd Cir. 1926), as examples of lower court cases holding that the liquor treaties were not self-executing.

[55] *See, e.g.*., Convention for Prevention of Smuggling of Intoxicating Liquors, U.S.-Gr. Brit., art. II, Jan. 23, 1924, 43 Stat. 1761.

[56] Dickinson, *supra* note __, at 452.

[57] Ford v. United States, 273 U.S. 593, 606 (1927).

[58] *See id.*, at 604-06.

[59] *See* QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 355-56 (1922).

[60] The Over the Top, 5 F.2d 838 (D. Conn. 1925).

conclusion.[61] So, he argued, the classification of liquor treaties as SE or NSE should be based on a treaty interpretation analysis, not a separation-of-powers analysis.[62] By shifting the focus of the inquiry from a constitutional separation-of-powers analysis to a treaty interpretation analysis, Dickinson invented the "one-step" approach to SE doctrine.

Here, it is crucial to appreciate the distinction between the "one-step" and "two-step" approaches. Under the two-step approach, courts perform a treaty interpretation analysis to ascertain the content and scope of the international obligation codified in the treaty (step one). Then, in step two, they perform a domestic separation-of-powers analysis to determine whether legislation is needed to authorize federal executive officers to implement that international obligation.[63] Under the two-step approach, step two necessarily follows step one because the separation-of-powers analysis is contingent upon the treaty interpretation analysis. In contrast, when courts apply the one-step approach, they combine both steps into a single step by performing a treaty interpretation analysis to answer a domestic separation-of-powers question. In his influential law review article, Dickinson urged courts to perform a treaty interpretation analysis to answer a domestic separation-of-powers question—specifically, the question whether new federal legislation was needed to authorize prosecution of individuals seized beyond the 12-mile limit.

The preceding paragraph explains the distinction between the one-step and two-step approaches from the judicial perspective. One can also view the distinction from the perspective of the treaty makers. Under the two-step approach, the treaty makers use their Article II power to make decisions about the content of the international obligation. Certain domestic consequences follow from those decisions, but the domestic consequences are contingent upon the international obligation. Thus, the treaty makers shape domestic law *indirectly*: by and through the international obligation. Under the one-step approach, though, the treaty makers use their Article II power to make decisions about domestic law—specifically, about the allocation of treaty-implementing authority between Congress and the President. Moreover, their decisions about domestic separation-of-powers issues are not contingent upon the content of the international obligation. Thus, the one-step approach assumes that the treaty makers can use their Article II power to shape domestic law *directly.*

Dickinson defended the one-step approach by citing Marshall's opinion in *Foster v. Neilson* as authority.[64] He claimed that Marshall performed a treaty interpretation analysis in *Foster* to distinguish between SE and NSE treaties. As I have explained in detail elsewhere, Dickinson's interpretation of *Foster* was mistaken, because Marshall applied a two-step approach in *Foster*.[65] Nevertheless, Dickinson's one-step approach—sometimes called the "intent doctrine," because it focuses on the intent of the treaty makers—soon gained widespread acceptance. A comparison of the treatment of self-execution in *Moore's Digest* and *Hackworth's*

[61] *See* Dickinson, *supra* note __, at 449-50.
[62] *See id*., at 448-49.
[63] *See* Sloss, *Executing Foster, supra* note __.
[64] *See* Dickinson, *supra* note __, at 447-50.
[65] *See* Sloss, *supra* note __, at 143-64; *see also infra* notes __ and accompanying text.

Digest provides evidence of Dickinson's influence. (The two Digests provide the best evidence of official State Department views at the time they were published.) *Moore's Digest*, published in 1906, said very little about self-execution because there were few relevant judicial decisions at that time. In his brief references to self-execution, Moore said nothing about the "intent of the treaty makers," nor did he endorse a one-step approach to SE analysis.[66] In contrast, *Hackworth's Digest*, published between 1940 and 1944, includes a much more detailed treatment of self-execution issues. Moreover, Hackworth enthusiastically endorsed Dickinson's intent doctrine, in which courts apply a treaty interpretation analysis to answer a domestic separation-of-powers question.[67]

Hackworth probably endorsed the one-step approach because it supported the rise of executive discretion in foreign affairs. Professor White has documented the fact that, in the period between the two world wars, several distinct doctrinal developments contributed to a transfer of constitutional foreign affairs powers from Congress to the executive.[68] Dickinson's one-step approach was one such development. His approach assumed that the President has discretion, in his treaty-making capacity, to alter otherwise applicable separation-of-powers principles by drafting treaty language that vests treaty-implementing authority in the executive branch, rather than Congress.[69]

The shift from a two-step to a one-step approach raises two distinct issues. First, from a constitutional standpoint, does Article II grant the treaty makers the power to shape domestic law *directly*, in a way that is not contingent upon the content of the international obligation? For the purpose of this article, I assume that the answer is "yes."[70] Second, and of more immediate interest here, the one-step approach induces courts to decide cases by reference to a fictitious "intent of the treaty makers." Let us assume that Article II does grant the treaty makers the power to make decisions about domestic separation-of-powers issues that are not contingent upon the content of the international obligation. Even so, the fact remains that the treaty makers rarely exercise that power. Thus, if a court asks how a particular treaty allocates treaty-implementing responsibility between Congress and the President, the correct answer in most cases is that the treaty does not address that question. Nevertheless, the accepted doctrine under the one-step approach directs courts to apply a treaty interpretation analysis to decide whether legislation is needed to authorize executive action to implement the treaty.[71] Since the treaty does not answer that question (in most cases), courts fabricate a fictitious "intent of the treaty makers."

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[66] *See* John Bassett Moore, A Digest of International Law, v.5 §§ 750, 758, 765, 776, and 777 (1906).

[67] *See* Green Heywood Hackworth, Digest of International Law, v.5 § 488 (1943). *See also* Sloss, Invisible Constitutional Transformation, *supra* note __ (presenting a detailed comparison of Moore's and Hackworth's Digests).

[68] *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1 (1999).

[69] *See* David Sloss, Invisible Constitutional Transformation, *supra* note __ (explaining in greater detail the relationship between the one-step approach and the rise of executive discretion in foreign affairs).

[70] Professor Vazquez provides an insightful analysis of this question, although he frames the question in slightly different terms. *See* Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599, 667-85 (2008).

[71] *See* Medellín v. Texas, 552 U.S. 491, 505, 514 (2008); Restatement (Third), § 111(4).

In sum, Dickinson's article had tremendous influence over the subsequent development of SE doctrine because he initiated the shift from a two-step to a one-step approach. Under the one-step approach, courts apply a treaty interpretation analysis to answer a domestic separation-of-powers question. Since most treaties do not answer that question, courts create a fictitious "intent of the treaty makers." Over the past few decades, application of the fictitious intent test has become the dominant approach to judicial analysis of self-execution issues.

Phase Four: In phase four, lawyers and judges expanded the concept of self-execution to encompass the previously distinct doctrine of treaty supremacy. From the Founding until World War II, treaty supremacy doctrine and self-execution doctrine were independent, non-overlapping doctrines. Treaty supremacy addressed the relationship between treaties and state law. The treaty supremacy rule consisted of two elements: first, treaties supersede conflicting state laws; second, courts have a constitutional duty to apply treaties that conflict with state laws. Before World War II, self-execution doctrine operated purely on a federal separation-of-powers level. It addressed the division of authority over treaty implementation between Congress and the President. Indeed, Quincy Wright wrote in 1951: "the distinction between self-executing and non-self-executing treaties has been used in American constitutional law only with reference to the agency of the Federal Government competent to execute the treaty and has had no reference to the relations between the Federal Government and the States."[72] Thus, before World War II, treaty supremacy doctrine applied to treaties that intersected with areas of state regulatory authority and self-execution doctrine applied to treaties that intersected with areas of federal regulatory authority. There was no NSE exception to the treaty supremacy rule because the concept of self-execution did not apply to treaty supremacy cases—i.e., cases involving an alleged conflict between a treaty and state law.[73]

This picture changed dramatically after World War II. Adoption of the UN Charter and the Universal Declaration of Human Rights unleashed a flood of litigation in U.S. courts between 1948 and 1954 in which plaintiffs invoked the Charter's human rights provisions in conjunction with the treaty supremacy rule to challenge state and local laws that discriminated on the basis of race or nationality.[74] Consistent with the traditional approach—which placed treaty supremacy and self-execution in separate "baskets"—courts initially decided those cases without reference to self-execution doctrine. In the celebrated *Fujii* case, an intermediate appellate court in California ruled that California's Alien Land Law was invalid because it conflicted with the UN Charter's human rights provisions.[75] In short, the lower court decided *Fujii* as a treaty supremacy case, not a self-execution case.

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[72] Quincy Wright, *National Courts and Human Rights: The Fujii Case*, 45 Am. J. Int'l L. 62, 64 (1951).

[73] In a forthcoming book, I provide extensive documentation to support the main points summarized in this paragraph. *See* Sloss, Invisible Constitutional Transformation, *supra* note __.

[74] *See* Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984).

[75] Fujii v. California, 217 P.2d 481 (Cal.App.2nd 1950).

The *Fujii* decision sparked a huge political firestorm, which in turn generated support for a proposed constitutional amendment, known as the Bricker Amendment.[76] One key goal of the Bricker Amendment was to abolish the treaty supremacy rule.[77] Opponents of the Bricker Amendment argued that a constitutional amendment was unnecessary because Article II granted the treaty makers the power to opt out of the treaty supremacy rule on a case-by-case basis. Attorney General Brownell, Secretary of State Dulles, and Harold Stassen (Director of the Mutual Security Administration) all presented variants of this argument in their official Senate testimony on the Bricker Amendment.[78] The New York City Bar Association made a similar argument.[79] The minority view in the Senate Judiciary Committee report advanced this argument.[80] Senator George presented the argument during floor debate.[81] President Eisenhower, himself, made a similar argument in a private letter to John McCloy.[82] They all articulated a similar message: "A constitutional amendment is unnecessary, because the treaty makers have the power to decide that a treaty shall not supersede conflicting state laws, and they can exercise that power by specifying—either in the treaty itself, or in a unilateral reservation—that the treaty is not self-executing." Thus was born the "NSE exception to the treaty supremacy rule," or the "optional treaty supremacy rule." The claim that the treaty supremacy rule is optional played a key role in defeating the Bricker Amendment.

Here, it is important to understand the conceptual shift that created the optional treaty supremacy rule. First, in the period between about 1926 and 1943, the one-step approach to self-execution became the accepted doctrine.[83] Under the one-step approach, Article II grants the treaty makers the power to decide whether a treaty is SE or NSE, and they can exercise that power in a manner that is not contingent upon the content of the international obligation. Then, between about 1949 and 1954, lawyers expanded the concept of self-execution beyond the congressional-executive concept to encompass the federal-state concept. By combining the one-step approach with the federal-state concept, the NSE exception to the treaty supremacy rule was born. After 1954, a new constitutional understanding established that Article II grants the treaty makers the power to decide, on a case-by-case basis, whether a treaty supersedes conflicting state laws. According to this new constitutional understanding: 1) the treaty makers decide in the

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[76] On the political linkage between *Fujii* and the Bricker Amendment, *see* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 Yale L.J. 1564, 1598-1606 (2006).

[77] *See generally* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP (1988).

[78] *Treaties and Executive Agreements: Hearings Before a Subcommittee of the Committee on the Judiciary*, U.S. Senate, 83rd Cong., 1st Sess. (1953), at 921-22 (testimony of Attorney General Herbert Brownell); *id*. at 835 (memorandum submitted by Secretary of State John Foster Dulles); *id*. at 1059 (testimony of Harold Stassen).

[79] *Id*. at 244-46 (report submitted by New York City Bar Association).

[80] *Constitutional Amendment Relative to Treaties and Executive Agreements*, S. Rep. No. 412, 83rd Cong., 1st Sess., at 41-42 (1953) (minority views).

[81] 100 Cong. Rec. 2200, 2204 (Feb. 24, 1954) (statements by Senator George).

[82] FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, v.1, pp. 1833-34 (letter from the President to John J. McCloy, Jan. 13, 1954).

[83] The year 1943 is significant because that is when the State Department published the treaty volume of *Hackworth's Digest*.

context of treaty negotiation and ratification whether the treaty is SE or NSE (the one-step approach); and 2) an NSE treaty does not supersede conflicting state laws (the federal-state concept). The Restatement (Second) of Foreign Relations Law, published in 1965, endorsed the NSE exception to the treaty supremacy rule.[84] So, too, did Whiteman's *Digest of International Law*, published in 1970,[85] and Professor Henkin's leading treatise on U.S. foreign relations law, published in 1972.[86]

The new constitutional understanding that emerged from the Bricker Amendment controversy awakened the ghost of Madison's monster. Since the one-step approach induces courts to decide cases by reference to a fictitious "intent of the treaty makers," and since the classification of a treaty as "non-self-executing" now means that the treaty does not supersede conflicting state laws, the result is that courts apply a fictitious intent test to determine whether it is permissible for state and local government officers to breach U.S. treaty obligations. Indeed, that is precisely what the Supreme Court did in *Medellín*. Before addressing *Medellín* though, we must address the "side channels" of self-execution doctrine that developed in parallel with the main channel.

B. **Two Side Channels**

The canonical view of SE doctrine traces the origins of the doctrine to Chief Justice Marshall's 1829 opinion in *Foster v. Neilson.*[87] In contrast, the historical account presented here suggests that *Foster* did not become an important source of authority for SE doctrine until Edwin Dickinson published his transformative article almost one hundred years later. The ALI's recent Discussion Draft defines self-execution in terms of the political-judicial concept.[88] In contrast, the preceding historical account largely ignored the political-judicial concept. This section first addresses *Foster* and then turns to the political-judicial concept of self-execution.

Foster v. Neilson:

I have written extensively about *Foster* elsewhere. To avoid repetition, I make a few brief points here and refer readers to other sources for supporting details.[89] First, *Foster* provides no support for an NSE exception to the treaty supremacy rule because there was no state law at issue in *Foster*. *Foster* involved a dispute over title to real property. The plaintiffs' claim was based on a Spanish land grant, which they alleged was protected by Article 8 of the 1819 treaty between the United States and Spain (the "Florida treaty").[90] The published decision in *Foster*

[84] *See* Restatement (Second), *supra* note __, § 141.
[85] *See* Whiteman's Digest of International Law, v.14, § 29 (p. 302). The Department of State published a fifteen-volume *Digest of International Law* between 1963 and 1973, edited by Marjorie M. Whiteman, which includes a volume on treaties published in 1970.
[86] *See* Louis Henkin, Foreign Affairs and the Constitution, at 157 (1972).
[87] 27 U.S. 253 (1829).
[88] *See* Discussion Draft, *supra* note __, § 106 cmt. b.
[89] *See especially* Sloss, Invisible Constitutional Transformation, *supra* note __; Sloss, *Executing Foster*, *supra* note __, at 143-64; David Sloss, *When Do Treaties Create Individually Enforceable Rights?*, 45 Colum. J. Trans'l L. 20, 78-90 (2006).
[90] *See Foster*, 27 U.S. at 253-55, 300-03.

does not specify the legal basis of defendant's claim. However, we know from other sources that defendant's asserted property right was based on federal law, not state law. Daniel Webster represented the plaintiffs in *Foster*. Webster's papers specify that the defendant, David Neilson, was "the occupant under a United States grant."[91] Additionally, in his oral argument, Webster conceded that if the Court rejected the validity of plaintiffs' Spanish land grant, then the land "belonged to the United States or her grantees."[92] David Neilson was one of those grantees. As the recipient of a grant from the federal government, Neilson's property claim was based on federal law, not state law.

Second, Marshall's treaty interpretation analysis in *Foster* focused on the nineteenth century distinction between executory and executed treaties, not the modern distinction between SE and NSE treaties. The SE/NSE distinction involves a "who" question: is treaty implementation the responsibility of Congress, the President, or the courts? The executed/executory distinction involves a "when" question: does the treaty accomplish its goal immediately upon entry into force, or is future action necessary to implement the treaty? Article 8 of the Florida Treaty specified that land grants by Spanish authorities "shall be ratified and confirmed to the persons in possession of the lands."[93] In *Foster*, Marshall distinguished this language from hypothetical language stating that land "grants are hereby confirmed."[94] "Had such been its language," said Marshall, "it would have acted directly on the subject."[95] In other words, it would have been executed, not executory, because no future action would be necessary to implement a provision stating that grants "are hereby confirmed." However, according to Marshall's analysis, since Article 8 specified that the land grants "shall be ratified and confirmed," the treaty merely "pledge[d] the faith of the United States to pass acts which shall ratify and confirm" the grants.[96] In other words, he concluded that Article 8 was executory, because it obligated the United States to take future action to confirm the grants. Richard Smith Coxe, Daniel Webster's co-counsel, said shortly after the *Foster* decision that the Court construed "the treaty of 1819 as an *executory contract* between the two nations, which did not of itself confirm the existing titles, but merely stipulated that they should be confirmed."[97]

The Court decided *United States v. Percheman*[98] four years after *Foster*. Joseph White, the attorney who represented Percheman, compared the English and Spanish versions of Article 8 of the Florida Treaty. He argued that "[t]he English side of the treaty leaves the ratification of the grants *executory*—they shall be ratified; the Spanish, *executed*—they shall continue acknowledged and confirmed."[99] Marshall's analysis of the Spanish and English texts closely

[91] The Papers of Daniel Webster: Legal Papers, Volume 3, Part II, at 961 (Andrew J. King ed. 1989) ["Webster Papers"].
[92] *Foster*, 27 U.S. at 293 (argument of counsel).
[93] Treaty of Amity, Settlement and Limits, U.S.-Spain, Feb. 22, 1819, art. 8, 8 Stat. 252.
[94] *Foster*, 27 U.S. at 314.
[95] *Id*.
[96] *Id*.
[97] Webster Papers, *supra* note __, at 994 (emphasis added).
[98] United States v. Percheman, 32 U.S. 51, 89 (1833).
[99] *Percheman*, 32 U.S. at 69 (emphasis added).

tracked White's argument in *Percheman*.[100] Marshall contrasted the Spanish version—which (as newly retranslated) specified that grants "shall remain ratified and confirmed"—with the original English version, which specified that grants "shall be ratified and confirmed."[101] He concluded that Article 8 was executed, as it applied to Percheman's land, because the United States did not need to take any future action to perfect Percheman's already-perfect title.[102] Although Marshall did not use the words "executed" and "executory," later nineteenth century Supreme Court opinions confirm that Marshall's analysis in *Foster* and *Percheman* focused on the distinction between executory and executed treaty provisions.[103]

Finally, Marshall applied a two-step approach in *Foster*, not a one-step approach. Marshall's conclusion that Article 8 of the Florida treaty was NSE was not based *solely* on a treaty interpretation analysis. His treaty interpretation analysis focused on an international law question: whether Article 8 was executory or executed. His conclusion that Article 8 was NSE involved a second step: a domestic separation-of-powers analysis to determine whether the treaty required legislative implementation.[104] Granted, step two of the two-step analysis in *Foster* was implicit, not explicit. Thus, the two-step interpretation of *Foster* is problematic in that it assumes that Marshall failed to explain a critical step in his analysis. However, the one-step interpretation is even more problematic, because it assumes that Marshall made a fundamental category mistake by applying a treaty interpretation analysis to answer a domestic separation-of-powers question that the treaty did not address. I prefer to think that Marshall's SE analysis in *Foster* was merely incomplete, rather than accusing Marshall of failing to understand the difference between an international law question (the "when" question) and a domestic separation-of-powers question (the "who" question). Moreover, if one construes *Foster* in accordance with the two-step approach, then *Foster* provides a useful template for modern SE doctrine. In contrast, if one construes *Foster* in accordance with the one-step approach, the case is simply a prescription for courts to engage in arbitrary judicial decision-making by applying a fictitious intent test.

The Political-Judicial Concept and NSE Declarations

The preceding account of SE doctrine is incomplete in one important respect: the history before World War II focuses on the branch of SE doctrine involving the congressional-executive concept. Even in the nineteenth century, though, a separate branch of SE doctrine applied the political-judicial concept. That branch of SE doctrine is often called the "justiciability" doctrine.[105] Traditional justiciability doctrine involves a two-step analysis. In step one, courts apply a treaty interpretation analysis to ascertain the content of the international obligation. In step two, courts apply a domestic separation-of-powers analysis to determine whether the

[100] *Compare Percheman*, 32 U.S. at 88–89 (Marshall's opinion) *with id*., at 68–70 (White's argument).
[101] *Id*., at 88–89.
[102] *Id*., at 86–89.
[103] *See, e.g.*, Rhode Island v. Massachusetts, 37 U.S. 657, 746 (1838) (stating that *Foster* "recognised the distinction between an executory treaty . . . and an executed treaty").
[104] For detailed analysis of the second step in *Foster*, see Sloss, *Executing Foster*, *supra* note __, at 159-62.
[105] *See* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 710-15 (1995).

judicial branch is competent to enforce that particular treaty obligation. The justiciability doctrine does not raise the specter of fictitious intent because courts do not apply a treaty interpretation analysis to answer a domestic separation-of-powers question.

During the 1970s or later, lawyers began combining the political-judicial concept with the one-step approach. The precise origins of this particular doctrinal shift are not entirely clear, but the combination of the political-judicial concept with the one-step approach is closely related to the modern practice of attaching NSE declarations to treaties. NSE declarations involve a one-step approach because—when the treaty makers adopt an NSE declaration—they use their Article II power to control domestic implementation *directly*, in a way that is not contingent upon the content of the international obligation.[106]

The practice of ratifying treaties subject to NSE declarations raises two distinct sets of questions. First, what is the proper interpretation of NSE declarations? The United States ratified three human rights treaties with NSE declarations in the period from 1992 to 1994. Those were the first treaties that the United States ratified subject to NSE declarations. Congress and the executive branch explained those declarations in accordance with the "private right of action doctrine," which is a variant of the political-judicial concept.[107] However, more recent political branch practice suggests that NSE declarations are properly construed in accordance with the congressional-executive concept or the federal-state concept, not the political-judicial concept.[108]

Second, the practice of ratifying treaties subject to NSE declarations raises constitutional questions. Several scholars have challenged the constitutional validity of NSE declarations;[109] others have defended the practice.[110] In my view, much of the constitutional debate has been off-target because scholars attempt to answer the constitutional question without addressing the interpretive question. One cannot present a coherent analysis of the constitutional issues without first establishing the correct interpretation of NSE declarations. Space does not permit a detailed analysis of the constitutional issues here. Suffice it to say that, in my view, the NSE declarations are constitutionally valid if they are construed in accordance with the congressional-executive concept, or the federal-state concept, or the private right of action doctrine.[111] Professor Bradley has defended the constitutional validity of NSE declarations on the theory that such declarations should be construed in accordance with the political-judicial concept, and that the declarations

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[106] *See* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1, 35-36 (2002).

[107] *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l L. 129 (1999) (defending interpretation of NSE declarations in accordance with the private right of action doctrine); *see also* Sloss, Colum. J. Trans'l L., *supra* note __, at 106-110 (discussing origins of the private right of action doctrine).

[108] *See supra* notes __ and accompanying text.

[109] *See, e.g.*, Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 Colum. J. Trans'l L. 211, 221 (1997); Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 Geo. Wash. J. Int'l L. & Econ. 49, 64-70 (1997).

[110] *See* Vazquez, *supra* note __, at 667-85; Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Penn. L. Rev. 399 (2000).

[111] *See* Sloss, Invisible Constitutional Transformation, *supra* note __.

bar judicial enforcement of the subject treaties by all litigants in all cases.[112] Bradley's argument relies on the unstated premise that Article II grants the treaty makers an *unlimited power* to order courts to refrain from applying supreme federal law. The ALI's Discussion Draft also appears to endorse this position.[113] As I have explained elsewhere, Professor Bradley's position is at odds with the principle of judicial independence and with entrenched Supreme Court doctrine protecting the due process rights of criminal defendants.[114]

Regardless, debates about the constitutional validity of NSE declarations are largely theoretical. From a practical standpoint, the fictitious intent problem is the main problem associated with modern NSE doctrine. The fictitious intent problem does not arise when the treaty makers adopt an NSE declaration because, in that case, the treaty makers have expressed their intentions in a concrete form. Similarly, the fictitious intent problem does not arise when courts apply a two-step approach (as in the justiciability doctrine), because under the two-step approach courts do not apply a treaty interpretation analysis to answer a domestic separation-of-powers question. However, the fictitious intent problem becomes a serious problem when the treaty makers have not adopted an NSE declaration and courts apply a one-step approach in conjunction with the political-judicial concept. In such cases, courts apply a treaty interpretation analysis to answer a question that treaties do not typically address: whether domestic courts are the appropriate government agents to enforce U.S. treaty obligations. Part Three analyzes the Supreme Court decision in *Medellín* to show how the one-step approach induces courts to engage in arbitrary judicial decision-making by applying a fictitious intent test.

III
Fictitious Intent in Medellin

The Supreme Court held in *Medellín* that Article 94 of the UN Charter is not self-executing. The Court relied primarily on the treaty text and the Senate record associated with treaty ratification to support its conclusion that the treaty makers intended Article 94 to be non-self-executing.[115] Unfortunately, a vast gulf separates the actual evidence of the treaty makers' intentions from the conclusions that the Court reached on the basis of that evidence. Part Three examines *Medellín* to illustrate the problems associated with the fictitious intent doctrine. The first section addresses the Court's opinion in *Medellín*. The next section provides an independent analysis of the Senate record associated with ratification of the UN Charter. The final section discusses, in more general terms, the problems associated with judicial reliance on fictitious intent.

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[112] Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 Sup. Ct. Rev. 131.
[113] *See* Discussion Draft, *supra* note __, § 106, cmts. b, c, and f; § 106, notes 2 & 4.
[114] *See* Sloss, Invisible Constitutional Transformation, *supra* note __. The leading Supreme Court decisions on the due process rights of criminal defendants are *Yakus v. United States*, 321 U.S. 414 (1944) and *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).
[115] *See* Medellín v. Texas, 552 U.S. 491, 506-11 (2008).

A. The Court's Opinion in *Medellín*

Chief Justice Roberts began his textual analysis by quoting Article 94(1), which says 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." He construed the italicized language to mean that States made a commitment "to take *future action through their political branches* to comply with an ICJ decision."[116] Here, the Chief Justice made the classic mistake—which is endemic in self-execution doctrine—of conflating a "when" question with a "who" question. He correctly noted that the phrase "undertakes to comply" is a promise of future action. In nineteenth century terms, Article 94(1) is executory, not executed, because treaty ratification, without more, does not accomplish the goal to be accomplished.[117] The text of Article 94 answers the "when" question: it is a promise of future action.

However, the text of Article 94(1) does not answer the "who" question. The text does not support the Court's conclusion that compliance is to be achieved "through their political branches." As Roberts himself correctly noted in a different case, the "rules of domestic law generally govern the [domestic] implementation of an international treaty."[118] Consistent with this understanding, the drafters of the UN Charter did not attempt to answer the "who" question. They did not purport to decide which branch of government *in the United States* would be responsible for compliance with ICJ decisions, because they recognized that domestic law ordinarily governs the internal allocation of responsibility for treaty implementation. Therefore, the text of Article 94(1) does not support Roberts' conclusion that the treaty makers intended to vest responsibility for compliance with ICJ decisions in the political branches, rather than the courts.

Roberts turned next to Article 94(2), which states: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may . . . decide upon measures to be taken to give effect to the judgment."[119] Based on this language, the Court concluded that referral to the Security Council is "the sole remedy for noncompliance." Additionally, the Court said that the "Charter's provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts."[120] With due respect for the Chief Justice, the text of Article 94(2) provides absolutely no support for the conclusions he purports to derive from that text. First, the statement that "the other party may have recourse to the Security Council" simply identifies one option. It does not exclude other options, as Roberts would have us believe. Second, and more importantly, the text addresses enforcement between States in the international sphere. It says nothing whatsoever about remedies for individuals in the domestic sphere. This should come as no surprise because, to quote the Chief Justice again, "rules of domestic law generally govern the [domestic] implementation of an international

[116] *Id*., at 508.
[117] *See supra* notes __ and accompanying text.
[118] Sanchez-Llamas v. Oregon, 548 U.S. 331, 356 (2006).
[119] *Medellín*, 552 U.S., at 509 (quoting Article 94(2)).
[120] *Id*., at 509.

treaty."[121] The question whether an individual can obtain a remedy in a domestic court is a question about the domestic implementation of the treaty. The drafters of the UN Charter chose not to answer that question because they recognized that it is a question governed by domestic law.

The preceding paragraphs address the entirety of Roberts' textual analysis in *Medellín*. In sum, the drafters of the UN Charter could have said something in the text about whether Article 94 has the status of domestic law *in the United States*. They could have said something in the text about which branch of government *in the United States* is responsible for ensuring compliance with ICJ decisions. They could have said something in the text about whether individuals have access to domestic courts *in the United States* to obtain remedies for violations of Article 94. However, the drafters of the UN Charter chose not to address any of those questions because they assumed that the answers to those questions would be governed by U.S. domestic law! Therefore, insofar as Roberts relied on the treaty text to support his conclusions about the treaty makers' intentions, his reliance was misplaced. The ostensible "intent of the treaty makers" that Roberts claimed to find on the basis of the treaty text is sheer judicial fantasy, without foundation in any actual agreement of the treaty's drafters.

Roberts did not rest his decision solely on the treaty text. He also examined the Senate record associated with treaty ratification to support his conclusion that the treaty makers intended Article 94 to be non-self-executing. Here, Roberts quoted three different statements from the Senate record.[122] First, he quoted an excerpt from Secretary of State Edward Stettinius' report to President Truman.[123] The quoted language repeats, almost verbatim, the language in Article 94(2) about recourse to the Security Council.[124] It says nothing whatsoever about the status of the UN Charter as federal law in the United States, or the allocation of responsibility for treaty implementation among the branches of the U.S. government.

Second, Roberts quoted a statement by Leo Pasvolsky, a Special Assistant to the Secretary of State. Pasvolsky said: "When the [ICJ] has rendered a judgment and one of the parties refuses to accept it, then the dispute becomes political rather than legal. It is as a political dispute that the matter is referred to the Security Council."[125] Viewed in context, it is abundantly clear that Pasvolsky was referring to disputes between States on the international plane.[126] He was not referring to disputes between individuals and state governments in the United States—the type of dispute at issue in *Medellín*. Here, it is helpful to recall a distinction that Chief Justice John Marshall made more than two centuries ago between a case "carried before a court as an individual claim" and "a national demand made upon the nation [where] [t]he parties were the

[121] Sanchez-Llamas v. Oregon, 548 U.S. 331, 356 (2006).
[122] *See* Charter of the United Nations for the Maintenance of International Peace and Security, Hearings Before the Committee on Foreign Relations, U.S. Senate, 79th Cong., 1st Sess. (July 1945) ("SFRC Hearings").
[123] *Medellín*, 552 U.S., at 510 (quoting Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (June 26, 1945) ("Stettinius Report"), *reprinted in* SFRC Hearings, *supra* note __, at 34-206).
[124] *See Medellín*, 552 U.S., at 510.
[125] *Id*., at 510 (quoting SFRC Hearings, at 286 (statement of Leo Pasvolsky)).
[126] *See* SFRC Hearings, at 281-87 (statement of Leo Pasvolsky).

two nations."[127] Marshall said that domestic courts are competent to adjudicate a case "carried before a court as an individual claim." However, a demand made upon the nation "is not a case for judicial cognizance."[128] In Marshall's terms, Medellín's habeas corpus petition was a case "carried before a court as an individual claim." In contrast, Pasvolky's statement in the Senate hearings addressed "a national demand made upon the nation." Pasvolsky neither stated nor implied that domestic courts are not competent to adjudicate individual claims that are based, in part, on Article 94.

Third, Roberts quoted a statement by Mr. Charles Fahy, the State Department Legal Advisor. Roberts cited Fahy's statement to support the Court's conclusion that "Article 94(2) provides the exclusive means of enforcement" for ICJ decisions.[129] Here, Roberts used the term "exclusive" to signify that the treaty makers intended to preclude domestic judicial enforcement. However, Fahy's statement does not support that inference. Fahy said that "there is no provision for the enforcement of such [ICJ] decisions unless the failure to comply constitutes a threat to the peace or breach of the peace." [130] As above, the context makes it perfectly clear that Fahy was talking about enforcement between States on the international plane. He was not talking about enforcement by individuals on the domestic plane. Granted, the UN Charter and the ICJ Statute contain "no provision for the enforcement" of ICJ decisions on the domestic plane. However, the decision by the Charter's drafters to say nothing about domestic judicial enforcement *is not* evidence of an intention to preclude domestic judicial enforcement *in the United States*. To the contrary, it is evidence of a widely shared understanding that the United States would decide for itself, in accordance with its own domestic legal rules, whether and how to provide for domestic judicial enforcement of the treaty obligation to comply with ICJ decisions.

The record of a different treaty negotiation in the 1940s confirms this view. At the 1949 meeting of the UN Commission on Human Rights, the United States proposed an amendment to the draft Covenant on Human Rights. The proposed amendment provided in part: "The provisions of this Covenant shall not themselves become effective as domestic law."[131] The representative from the Philippines objected to the U.S. proposal. He explained that, in the Philippines, "all international treaties and conventions, when ratified were incorporated without further formalities in domestic law." The U.S. proposal, even if adopted, "could not change the constitutional rule of the Philippines."[132] The Lebanese representative added that the appropriate mechanism for incorporating the Covenant into domestic law "was entirely a question of the constitutional law of States; there was no reason why the Covenant should interfere with the application of that law."[133] After further discussion, the Commission voted against the U.S.

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[127] 10 Annals of Cong. at 606 (statement of Congressman John Marshall).
[128] *See id*., at 605-15.
[129] *Medellín*, 552 U.S. at 510.
[130] *See* Compulsory Jurisdiction, International Court of Justice, Hearings on S. Res. 196 Before the Subcommittee of the Senate Committee on Foreign Relations, 79th Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, State Dept. Legal Adviser).
[131] E/CN.4/224 (23 May 1949).
[132] *Id*. at 6-7.
[133] *Id*. at 8.

proposal.[134] The Commission's rejection of the proposed U.S. amendment manifested a shared understanding that the question whether the Covenant would be directly applicable as domestic law would be governed by the domestic law of individual States, not by the terms of the Covenant. The diplomats who negotiated the UN Charter in 1945 had a similar understanding.

In sum, Roberts' treaty interpretation analysis in *Medellín* is akin to analyzing regulations promulgated by the Securities and Exchange Commission (SEC) to answer a question about California tort law. The fact that SEC regulations say nothing about tort remedies in California does not mean that there are no tort remedies in California. Roberts was misled by the one-step approach, which induced him to perform a treaty interpretation analysis to answer a question that the treaty did not answer.

B. Independent Analysis of the Senate Record

The Senate record associated with ratification of the UN Charter consists of the following documents: Secretary of State Stettinius' Report to the President ("Stettinius Report"),[135] the Senate Foreign Relations Committee Report ("SFRC Report"),[136] the Senate Foreign Relations Committee Hearings ("SFRC Hearings"),[137] and records of the Senate floor debate reproduced in the Congressional Record ("floor debate").[138] I searched those documents to determine what the treaty makers said about self-execution.

The term "self-executing" does not appear in the Stettinius Report, the SFRC Report, or the Senate Hearings. It does appear in three places in the Congressional Record. Senator Hill said that the United States Constitution is not self-executing. Specifically, he said, the Constitution "proved to be a tremendous step . . . . But it could be only a step, for no such document, however wisely or prophetically drawn, can be *self-executing*." He added: "And so it is with the Charter of the United Nations Organization. It is a step, a magnificent and hopeful step, for peace can never be achieved if we are afraid even to try.[139] Obviously, this statement says nothing about the allocation of responsibility for implementing the Charter among the branches of the federal government.

Senator White used the term "self-executing" to describe the proposed Article 43 agreement between the United States and the United Nations. (Article 43 of the Charter envisions agreements between the United Nations and member states "to make available to the Security Council . . . armed forces, assistance, and facilities . . . ."[140]) Referring to the anticipated Article 43 agreement, he said that the agreement "will not be of itself *self-executing*. It will call for the appointment of officials; it will call for the expenditure of public funds. Those

[134] *Id*. at 17.
[135] Stettinius Report, *supra* note __.
[136] The Charter of the United Nations, S. Exec. Rept. 79-8 (1945).
[137] SFRC Hearings, *supra* note __.
[138] *See* 91 Cong. Rec. 7941-8190 (July 23-28, 1945).
[139] 91 Cong. Rec. 7972 (July 24, 1945).
[140] UN Charter, art. 43, para. 1.

will be authorized, I take it, by the Congress of the United States acting in its legislative capacity."[141]

Senator Revercomb was the only Senator who used the term "self-executing" to refer specifically to the Charter. He said:

> This Charter is not self-executing. It requires future implementing legislation. It requires future legislation to fix . . . the powers and the limitations of the [U.S.] representatives who will take part in administering the new organization. Even legislation will be required fixing the appointment of our representative [to the United Nations] and the method of his appointment. Likewise, the Congress will act later upon the question of the number of troops and the armaments to be used in effectuating the purposes of the Charter and also the extent to which such troops may be used.[142]

This statement is the most detailed statement by any member of the legislative or executive branch addressing the need for legislation to implement the Charter. Notably, Senator Revercomb did not suggest that legislation would be needed to implement the Article 94 obligation to comply with ICJ decisions.

In addition to searching for the term "self-executing," I reviewed the Senate record to find answers to three questions: 1) did the U.S. treaty makers believe that Article 94 of the UN Charter would automatically supersede conflicting state laws? (the federal-state concept); 2) did they believe that Article 94 would require implementing legislation to authorize federal executive action? (the congressional-executive concept); and 3) did they believe that the Article 94 obligation to comply with ICJ decisions was directly enforceable in domestic courts (the political-judicial concept)? In brief, the treaty makers did not specifically address any of these questions, so the Court in *Medellín* was wrong to conclude that the treaty makers had a shared intent regarding any of these questions.

First, several Senators affirmed the principle that the UN Charter, when ratified, would be the supreme law of the land. Senator Ferguson said: "Mr. President, when we ratify this treaty it will become the supreme law of the land, because the Constitution provides that a treaty ratified and consented to by the Senate shall be the supreme law of the land."[143] Similarly, Senator Thomas said: "[W]hen we enter into this agreement, and when the United Nations Charter becomes a treaty accepted by us . . . [w]e agree to every provision in it when we accept it. Therefore . . . the treaty becomes the supreme law of the land."[144] Senator Lucas quoted the language of the Supremacy Clause and said: "The treaty becomes the highest law of the land. We should keep this clearly in mind as we discharge the duty of our offices . . . . When we enter into this treaty we ought to do so with an understanding of the spirit of the Constitution, which makes treaties the supreme law of the land."[145] There is not a single statement in the Senate record

[141] 91 Cong. Rec. 7993 (July 24, 1945).
[142] 91 Cong. Rec. 8159 (July 28, 1945).
[143] 91 Cong. Rec. 7999 (July 24, 1945).
[144] 91 Cong. Rec. 8025 (July 25, 1945).
[145] 91 Cong. Rec. 8025 (July 25, 1945). *See also* 91 Cong. Rec. 8127 (July 27, 1945) (statement of Senator Wiley) ("This Charter, when it is approved by the nations, will be the supreme law of the land.")

contradicting this view. Moreover, as of 1945, the prevailing understanding of the Supremacy Clause was that "supreme law of the land" meant that a treaty supersedes conflicting state laws.[146] Therefore—although there is no evidence that the treaty makers specifically intended Article 94 to supersede conflicting state laws, and there is no evidence that they anticipated any such conflict—key Senators and executive officials probably shared the belief that the UN Charter, including Article 94, would supersede conflicting state laws if a conflict ever arose. In any case, there is not a scintilla of evidence to support the view that the treaty makers made a conscious choice to opt out of the Constitution's treaty supremacy rule when the U.S. ratified the UN Charter.

The Senate record includes numerous statements addressing the need for legislation to implement particular Charter provisions. However, no legislative or executive officer stated or implied that legislation would be needed to implement U.S. obligations under Article 94. The Stettinius Report said that legislation would be needed to implement Articles 104 and 105 (which involve the "legal capacity" and "privileges and immunities" of the United Nations and associated personnel).[147] The SFRC Report indicated that legislation would be needed to determine the scope of "authority of the United States delegate" to the UN Security Council.[148] Some non-governmental witnesses said that legislation would be needed to authorize "the establishment of an International Monetary Fund and an International Bank."[149]

Anna Lord Strauss, the President of the National League of Women Voters, presented the most detailed analysis of the need for implementing legislation. She identified two categories of legislation. First, legislation would be "needed following ratification to get the Organization into operation."[150] Under this heading, she included: legislation to define "the powers of the United States delegate on the Security Council;" "[a]rrangements concerning United States forces to be placed at the disposal of the Security Council;" and "[a]ppropriations for our share of the United Nations Organization expenses."[151] Her second category involved "longer-range legislation connected with the Organization." She included in this category legislation related to U.S. "membership in the subsidiary organizations of the Economic and Social Council," and "[a]cceptance by the United States of the optional clause giving compulsory jurisdiction to the World Court."[152]

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[146] *See* Sloss, Invisible Constitutional Transformation, *supra* note __.
[147] *See* Stettinius Report, *supra* note __, at 134-37.
[148] SFRC Report, *supra* note __, at 8-9. *See also* SFRC Hearings, *supra* note __, at 445-46 (statement of Dr. Helen Dwight Reid) ("We consider that the authority granted the United States delegate on the Security Council is a domestic question and should be handled separately [by legislation], not by amendment or reservation to the Charter.").
[149] SFRC Hearings, *supra* note __, at 448 (statement by Morris Llewellyn Cooke). *See also id*., at 473 (resolution adopted by the Independent Citizens' Committee of the Arts, Sciences, and Professions).
[150] SFRC Hearings, *supra* note __, at 426.
[151] *Id*.
[152] *Id*. The reference to the "optional clause" is a reference to Article 36(2) of the ICJ Statute, which provides: "The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement … the jurisdiction of the Court" regarding certain types of cases.

The Senate record makes clear that the executive branch, the Senate Foreign Relations Committee and various non-governmental witnesses carefully analyzed the need for legislation to implement various Charter provisions. Collectively, they identified several different Charter provisions that required implementing legislation. However, there is not a single statement in the hundreds of pages of documents comprising the Senate record suggesting that legislation would be needed to implement U.S. obligations under Article 94 of the Charter. The Court's conclusion in *Medellín* that the United States made an affirmative decision, at the time of ratification, to require legislative implementation for Article 94 is sheer judicial fantasy, without a shred of supporting evidence.

The final question concerns the role of domestic courts in implementing the Charter. The SFRC Report does not address domestic judicial enforcement. The Stettinius Report includes one reference to domestic courts. It says: "The International Court of Justice . . . has an important part to play in developing international law just as the courts of England and America have helped to form the common law."[153] Apart from that statement, no government official who testified during the SFRC Hearings discussed the role of domestic courts in implementing the Charter.[154] Several non-governmental witnesses made passing references to domestic courts during the SFRC Hearings,[155] but no witness specifically addressed the question whether U.S. obligations under Article 94 would be enforceable in domestic courts. The Senate devoted six days of floor time to discussing the Charter. During floor debate, not a single Senator expressed a view about whether the Charter would be enforceable in domestic courts. The statement that comes closest to addressing that issue is a statement by Senator George. He said: "Surely no American should scoff at international law, because time after time our own Supreme Court has recognized the law of nations, and has given effect to the law of nations, which is but another term for international law, and has applied the principles of international law in the adjudications made by our own courts."[156] Based on this statement, one could infer that Senator George believed that some of the Charter's provisions would be enforceable in U.S. courts. Still, he said nothing about Article 94, and his statement does not express a consensus Senate view.

In sum, the Court's opinion in *Medellín* might be construed to mean that Article 94 is not enforceable in domestic courts because the treaty makers decided, at the time of ratification, to bar domestic judicial enforcement. However, the Senate record demonstrates conclusively that the President and Senate did not make any such decision. The hundreds of pages of documents comprising the Senate record do not include a single statement by any legislative or executive

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[153] Stettinius Report, *supra* note __, at 121.

[154] During his oral testimony, Secretary Stettinius repeated the statement quoted above. *See* SFRC Hearings, *supra* note __, at 219.

[155] *See, e.g.*, SFRC Hearings, *supra* note __, at 393 (statement by W.E.B. DuBois) (urging the United States to declare that members of all races are entitled to equal "justice before the courts"); *id.*, at 468-69 (statement of Mrs. Thomasina W. Johnson) (comparing certain features of the ICJ Statute to domestic courts); *id.*, at 561 (statement by Elizabeth A. Smart) (praising the decision to refer disputes to an international court, and saying: "We recall that the internal feuding between neighbors of medieval times was finally absolutely abolished when men were persuaded to take their disputes to the courts instead of resorting to arms.").

[156] 91 Cong. Rec. 8110 (July 27, 1945).

official expressing any opinion about whether Article 94 is enforceable in domestic courts. Insofar as the majority opinion in *Medellín* suggests otherwise, there is not a shred of evidence to support the Court's conclusion.

C. The Problem of Fictitious Intent

Unfortunately, Roberts' opinion in *Medellín* is consistent with a long line of lower court decisions that reach conclusions about self-execution on the basis of a fictitious, judicially created "intent of the treaty makers." Judicial reliance on fictitious intent is the product of a flawed methodology that is, in turn, the product of a mistaken interpretation of *Foster v. Neilson*. As explained above, Marshall applied a two-step approach in *Foster*. He performed a treaty interpretation analysis to answer an international law question and he performed a domestic separation-of-powers analysis to answer a domestic separation-of-powers question.[157] However, contemporary lawyers believe that Marshall applied a one-step approach, in which he performed a treaty interpretation analysis to answer a domestic separation-of-powers question. This misinterpretation of *Foster* has become so deeply embedded in contemporary legal culture that commentators routinely refer to the one-step approach as "*Foster*-type non-self-execution."[158]

In *Medellín*, Roberts relied on this mistaken interpretation of *Foster* to justify his view that courts have an "obligation to interpret treaty provisions to determine whether they are self-executing."[159] The asserted "obligation" is problematic because the question whether a treaty is self-executing is a domestic separation-of-powers question. The diplomats who draft treaties do not typically use treaties to answer separation-of-powers questions. Hence, the view that courts are obligated to perform a treaty interpretation analysis to answer a domestic separation-of-powers question leads, almost inevitably, to judicial reliance on fictitious intent. Judges believe they are required, as a matter of legal doctrine, to base their self-execution decisions on treaty interpretation. Treaties rarely address the self-execution question because treaty negotiators view self-execution as a domestic legal question. Since the treaty says nothing about self-execution, and courts believe they must perform a treaty interpretation analysis to decide whether a treaty is SE or NSE, judges are effectively backed into a corner where judicial creation of a fictitious intent provides the only escape hatch.

Judicial reliance on fictitious intent creates three distinct problems. First, judicial decision-making is arbitrary. We expect courts to decide cases by applying established legal principles to new factual situations. Application of law to fact necessarily involves some discretion, but judicial discretion is bounded by the need to conform to established legal principles. With respect to SE doctrine, though, established principles do not impose any meaningful boundaries on judicial discretion. The established principles direct judges to decide cases by determining whether the treaty makers intended the treaty to be self-executing. In the vast majority of cases, the treaty makers had no intention regarding self-execution. (*Medellín* is a

[157] *See supra* notes __ and accompanying text.
[158] *See, e.g.*, Bradley, *supra* note __, at 134; Vázquez, *supra* note __, at 602; David H. Moore, *Law(Makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 Harv. L. Rev. 32, 32 n.4 (2009).
[159] *Medellín*, 552 U.S. at 514 (citing *Foster*).

good example.) Hence, judges are free to reach any decision that supports their policy preferences, without fear of contravening a non-existent "intent."

The second problem relates to treaty compliance. When the President ratifies a treaty, he makes a binding commitment on behalf of the nation that the United States will comply with its treaty obligations. Generally speaking, the Senate does not consent to ratification unless the Senate agrees, by the requisite two-thirds majority, that it is in our national interest to comply with the treaty. Therefore, the act of ratification is itself powerful evidence that the President and Senate intend to comply with the treaty.[160] When courts are presented with a self-execution question, they would probably reach a result consistent with the treaty makers' intentions if they asked whether the treaty makers intended to comply, instead of asking whether they intended the treaty to be self-executing. If the treaty makers did intend to comply (which is usually true), and a finding of self-execution is necessary to achieve treaty compliance (which is sometimes true), a self-execution holding would give effect to the treaty makers' intentions. Instead, though, courts often find that a treaty is NSE in circumstances where that finding results in non-compliance, even though the treaty makers fully intended to comply. (Again, *Medellín* is a good example.) In short, judicial reliance on fictitious intent tends to subvert the treaty makers' actual intention to comply with the treaty.

The third problem relates to accountability. The Constitution grants the federal political branches power to violate a binding treaty obligation. Scholars debate whether this power belongs exclusively to Congress, or whether the President has an independent power to violate treaties. Regardless, no reputable scholar claims that the Constitution grants state governments, or federal courts, the power to violate treaties. Even so, as a practical matter, NSE doctrine grants state government officials and federal courts the power to make decisions that are attributable to the United States under international law, and that constitute a violation of U.S. treaty obligations. Judges and state officers try to evade responsibility for their actions by claiming that the political branches decided that the relevant treaty is NSE, and that the treaty violation is merely a consequence of that decision. However, in many cases, the claim that the treaty makers decided that the treaty is NSE is based on a judicially created, fictitious intent. Consequently, the United States breaches its treaty obligations, even though the President and Senate made a purposeful decision at the time of ratification to comply with the treaty and no politically accountable federal official ever purposefully decided to violate the treaty. In short, we violate our treaty commitments but no government officer is accountable. Like a modern Frankenstein, the fictitious intent doctrine has brought Madison's monster to life.

IV
Recommendations

Part Four provides recommendations for the political branches and the courts. I divide those recommendations into two parts. Recommendations for the political branches are designed to help ensure that they express their intentions clearly. Recommendations for the courts are

[160] *See* Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 ASIL Proc. 412, 413 (2008).

designed to establish an appropriate set of default rules for courts to apply when the political branches fail to express their intentions clearly.

A. Recommendations for the Political Branches: Getting the Terminology Right

For better or worse, modern SE doctrine focuses on the intent of the treaty makers to answer questions about the domestic allocation of authority over treaty implementation. Treaties rarely answer those questions. The discrepancy between judicial doctrine and the practice of treaty negotiators has spawned the fictitious intent problem. Treaty makers can avoid the fictitious intent problem by expressing their intentions clearly in the form of unilateral conditions included in the U.S. instrument of ratification. Happily, the treaty makers have begun to do so by adopting declarations specifying that a particular treaty is SE or NSE.[161] Unfortunately, political branch explanations of those declarations have been inconsistent. Those explanations have vacillated among the congressional-executive concept, the federal-state concept, and the political-judicial concept. The President and Senate should agree on clear definitions of terms and apply those terms consistently in accordance with agreed definitions.

The treaty makers should define the terms "self-executing" and "non-self-executing" in accordance with the congressional-executive concept. Under this definition, an SE treaty provides a rule of conduct for federal executive officials, but an NSE treaty is not law for the executive branch unless it is implemented by Congress. The treaty makers should use different terminology to express the federal-state concept and the political-judicial concept. Using the terms "self-executing" and "non-self-executing" to refer to all three concepts without distinguishing among them does not serve any legitimate purpose. Of course, consistent usage of terms in accordance with the political-judicial concept, as recommended by the ALI Reporters,[162] would also promote greater clarity. Nevertheless, there are several reasons to favor the congressional-executive definition over the political-judicial definition.

First, the proposed definition is consistent with the dominant concept of self-execution that prevailed from the Founding until World War II. The federal-state concept was not invented until after 1945. The most important sources of authority on SE doctrine before 1945 were legislative and executive materials, not judicial materials.[163] Most legislative and executive authorities use the SE/NSE terminology in accordance with the congressional-executive concept, not the political-judicial concept.[164]

Second, the proposed definition is consistent with most Supreme Court authority. Part III of the Court's opinion in *Medellín v. Texas* indisputably applied the congressional-executive concept, not the political-judicial concept.[165] Granted, other portions of the Court's opinion can reasonably be construed in accordance with the federal-state concept or the political-judicial concept, but that merely shows that the Court did not consistently apply a single SE concept

[161] *See supra* notes __ and accompanying text.
[162] *See* Discussion Draft, *supra* note __, § 106(1); *id*., § 106, cmt. b.
[163] *See supra* notes __ and accompanying text.
[164] *See* Sloss, Invisible Constitutional Transformation, *supra* note __.
[165] *See Medellin*, 552 U.S. 491, 525-30 (2008).

throughout the opinion. The key passage from Chief Justice Marshall's opinion in *Foster v. Neilson* is ambiguous, but the best interpretation of that passage is consistent with the congressional-executive concept.[166] Other leading Supreme Court opinions on self-execution—including *Trans World Airlines, Inc. v. Franklin Mint Corp.*,[167] *Cook v. United States*,[168] *Cameron Septic Tank Co. v. City of Knoxville*,[169] and *Whitney v. Robertson*[170]—apply the congressional-executive concept, not the political-judicial concept.

Third, the proposed definition is consistent with the most significant political branch practice in the past decade. In September 2008, about six months after the Supreme Court decided *Medellín*, the Senate provided its advice and consent for 78 treaties in four days.[171] Careful analysis of the Senate record demonstrates that the Senate understood the terms SE and NSE in accordance with the congressional-executive concept, not the political-judicial concept.[172]

If the treaty makers want to say that a treaty is not supreme over state law, they can adopt a declaration that the treaty does not supersede conflicting state laws.[173] Here, one must distinguish between the concepts of "supremacy" and "preemption." If a treaty is "supreme" over state law, the treaty supersedes *conflicting* state laws, but states may enact laws that do not conflict with the treaty. In contrast, if a treaty "preempts" state law, states are barred from enacting regulations in the field "occupied" by the treaty, even if those regulations do not conflict with the treaty.[174] In framing unilateral declarations, the treaty makers should distinguish clearly among the concepts of self-execution, supremacy, and preemption. Declarations that a treaty does not supersede conflicting state laws should be used infrequently because such declarations, in Madison's terms, would put the head "under the direction of the members."[175]

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[166] *See Foster*, 27 U.S. 253, 314 (1829); Sloss, *Executing Foster*, *supra* note __, at 153-62.

[167] 466 U.S. 243, 252 (1984) (defining "self-executing" to mean that "no domestic legislation is required to give the Convention the force of law in the United States").

[168] 288 U.S. 102, 119 (1933) ("For in a strict sense the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions.").

[169] 227 U.S. 39, 49 (1913) (concluding that a treaty did not extend the life of a U.S. patent, because the treaty "required legislation to become effective").

[170] 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing they can only be enforced [by the executive] pursuant to legislation to carry them into effect.").

[171] *See* 154 Cong. Rec. 20166-20174; 154 Cong. Rec. 21775-21778; 154 Cong Rec. 22464-22465.

[172] *See supra* notes __ and accompanying text. As noted above, the Senate explained the NSE declaration for the Disabilities Convention in terms of the federal-state concept. *See supra* notes __ and accompanying text.

[173] One could argue that such a declaration is invalid because it conflicts with the text of the Supremacy Clause. *See* Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution* [this volume]. I agree that, as an original matter, the Framers of the Constitution did not believe that Article II granted the treaty makers the power to opt out of the treaty supremacy rule. However, under the new constitutional understanding that emerged from the Bricker Amendment controversy in the 1950s, the treaty makers do have such a power. *See* Sloss, Invisible Constitutional Transformation, *supra* note __.

[174] *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994). The Court sometimes uses the terms "conflict preemption" and "field preemption" to distinguish between "supremacy" and "preemption." However, I agree with Professor Gardbaum that it is preferable to use the terms "supremacy" and "preemption" to avoid confusion.

[175] Federalist 44 (James Madison).

Cases where the political branches make a conscious choice to subordinate the national interest in treaty compliance to the discretion of the fifty states will arise rarely, if at all.

If the treaty makers want a treaty to be enforceable by federal executive officials, but they want to limit private judicial enforcement, they can adopt a declaration that the treaty is "self-executing," but it does not "create a private cause of action," or it does not "confer private rights enforceable in U.S. courts." Indeed, the treaty makers have adopted several such declarations in recent years.[176] Here again, the terminology is important. If a treaty does not "create a private cause of action," civil plaintiffs may not invoke the treaty offensively, but civil and criminal defendants may invoke the treaty as the basis for a defense.[177] If a treaty does not "confer private rights enforceable in U.S. courts," then private litigants are barred from invoking the treaty either offensively or defensively, but the federal government can sue to enforce the treaty.[178] In practice, the treaty makers have used the phrase "does not confer private rights" primarily for treaties that are not intended to benefit private parties. To clarify this point, the treaty makers should express the idea that a treaty "does not confer private rights" in the form of an "understanding," rather than a "declaration." An "understanding" is an interpretive statement designed to clarify the international meaning of the treaty. In contrast, a "declaration" is a unilateral statement that can be used to control the domestic application of the treaty without modifying the international obligation.[179]

Finally, the treaty makers should avoid using the term "not judicially enforceable." The ALI Discussion Draft uses similar terminology,[180] but that terminology is problematic. If the goal is to limit private judicial enforcement, the terminology discussed in the preceding paragraph is preferable, because it preserves the option of a suit by the federal government to enforce the treaty. If the treaty makers want to say that federal executive officials lack authority to implement the treaty until Congress enacts implementing legislation, a declaration that the treaty is "not self-executing" is appropriate. However, there does not appear to be any valid reason for adopting the position that federal executive officials are authorized to implement the treaty (self-executing), but they may not file suit to enforce the treaty (not judicially enforceable). Indeed, I am not aware of any case where the treaty makers have endorsed this position. Moreover, a declaration that a treaty is "not judicially enforceable" would raise difficult constitutional issues because it implies that the treaty makers can use their Article II power to order state and federal courts to refrain from applying supreme federal law. That position is

[176] *See supra* notes __ and accompanying text. The Due Process Clause limits the power of the political branches to preclude a criminal defendant from raising a treaty-based defense. *See supra* note __ and accompanying text. *See also* David Sloss, *The Constitutional Right to a Treaty Preemption Defense*, 40 Univ. Toledo L. Rev. 971 (2009).
[177] *See* Vazquez, *Four Doctrines*, *supra* note __, at 719-22.
[178] *See*, e.g., 19 U.S.C. § 3312(b)(2) ("No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with [NAFTA], except in an action brought by the United States for the purpose of declaring such law or application invalid.")
[179] For definitions of the terms "understanding" and "declaration," see Genocide Convention, S. Exec. Rept. 99-2, at 15-17 (1985).
[180] *See* Discussion Draft, *supra* note __, § 106(1); *id*., § 106, cmt. b.

difficult to reconcile with the principle of judicial independence, and with entrenched Supreme Court doctrine protecting the due process rights of criminal defendants.[181]

B. Recommendations for the Courts: Getting the Presumptions Right

The ALI Discussion Draft says: "The case law has not established a presumption for or against self-execution, in the sense of a clear statement or default rule . . . ."[182] However, if one discriminates among different concepts of self-execution, it becomes apparent that well-established legal principles support different presumptions in different contexts. First, and most importantly, *courts should adopt a presumption that the treaty makers did not have any intention regarding self-execution, unless they expressed their intention clearly*. Or, to state the point differently, courts should adopt a presumption that self-execution is not a treaty interpretation question, unless the treaty makers adopted explicit language addressing self-execution in the treaty text or in the U.S. instrument of ratification. This presumption would bring judicial decision-making in line with the actual practice of the government officials who negotiate and ratify treaties. The presumption is necessary to remedy the fictitious intent problem, which is the central problem with modern SE doctrine. In accordance with this presumption, courts should resort to default rules unless the treaty makers adopt explicit language addressing self-execution in the treaty text or in the instrument of ratification. The appropriate default rule depends on whether the issue presented involves the congressional-executive concept, the federal-state concept, or the political-judicial concept.

Begin with the federal-state concept. As noted above, it is important to distinguish between "supremacy" and "preemption." Absent an explicit declaration (or treaty text) to the contrary, courts should presume that a treaty supersedes conflicting state law (a presumption in favor of supremacy), but it does not preempt non-conflicting state law (a presumption against preemption). The presumption against preemption is justified by the fact that courts apply a presumption against preemption in the statutory context.[183] In contrast, the presumption in favor of supremacy is justified by the text and original understanding of the Supremacy Clause.[184] Moreover, the policy considerations that persuaded the Founders to adopt the treaty supremacy rule—fears that actions by state and local officers could trigger a breach of U.S. treaty obligations, contrary to the wishes of the federal political branches—also support a presumption in favor of treaty supremacy. In short, the presumption in favor of treaty supremacy is necessary to tame Madison's monster: to ensure that the authority of the nation is not subordinate to the authority of its constituent parts.

Consider, next, the congressional-executive concept. The Discussion Draft's "no presumption" rule makes sense as applied to the *constitutional doctrine*. If a court asks whether a treaty is constitutionally SE or constitutionally NSE, the relevant authorities do not support a presumption either way. However, if courts are applying a one-step approach (as in the *intent*

[181] *See supra* note __ and accompanying text. *See also* Sloss, Invisible Constitutional Transformation, *supra* note __.
[182] Discussion Draft, *supra* note __, § 106, n.3.
[183] *See* David Moore, *Treaties and the Presumption Against Preemption* [this volume]
[184] *See* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 39-46, 162-63, 284-86 (2007).

doctrine), the appropriate presumption depends upon the relationship between the treaty and federal statutes. If the treaty conflicts with a prior federal statute, the presumption against implied repeals—which the Court has applied in numerous cases involving conflicts between treaties and statutes[185]—effectively creates a presumption in favor of non-self-execution. However, if the treaty does not conflict with a prior federal statute, the President's duty to execute treaties, rooted in the Take Care Clause, establishes a presumption in favor of self-execution.[186] Either presumption should be rebuttable if the treaty makers adopt a clear statement in the treaty text or in the instrument of ratification. In accordance with the recommended terminology, the clear statement should use the language of "self-execution."

Next, consider the political-judicial concept. In this context, courts should distinguish the question whether a treaty creates a private right of action from other questions related to judicial enforcement. Here, the presumption against implied rights of action under federal statutes supports a presumption against private rights of action under treaties.[187] That presumption should be rebuttable if the treaty makers adopt a clear statement in the treaty text or in the instrument of ratification. To avoid ambiguity, the treaty makers should use the term "private right of action," not the term "self-executing," to overcome the presumption.

For other questions related to judicial enforcement,[188] courts should apply a two-step approach, not a one-step approach (unless there is explicit language in the treaty text or the instrument of ratification addressing judicial enforcement in domestic courts). As noted previously, the *justiciability doctrine* combines the two-step approach with the political-judicial concept.[189] In accordance with justiciability doctrine, courts should apply a treaty interpretation analysis to ascertain the content and scope of the international obligation (step one). Then, in step two, courts should apply a domestic separation-of-powers analysis to determine whether the judicial branch is competent to enforce the specific treaty obligation at issue. For step two (the judicial competence question), the Discussion Draft's recommended "no presumption" rule is appropriate. Courts must answer that question on a case-by-case basis. If the analysis in step two yields a conclusion that courts are competent to enforce the treaty, the relevant authorities support judicial enforcement. As the Supreme Court said recently, "once a case or controversy properly comes before a court, judges are bound by federal law."[190] A treaty is federal law, unless the treaty is unconstitutional, or it has been superseded by a later-in-time statute, or the treaty makers have exercised their Article II power to opt out of the treaty supremacy rule. The principle that judges "are bound by federal law" means that they are bound by a treaty that has the status of federal law, if the particular treaty provision at issue is within the scope of judicial

[185] *See, e.g.*, Cook v. United States, 288 U.S. 102, 120 (1933); United States v. Gue Lim, 176 U.S. 459, 465 (1900); Chew Heong v. United States, 112 U.S. 536, 549 (1884).
[186] *See* Edward T. Swaine, *Taking Care of Treaties*, 108 Colum. L. Rev. 331 (2008).
[187] *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 781-82 (5th ed. 2005).
[188] In other words, the private litigant is invoking the treaty as a defense, or he is bringing a claim on the basis of a statutory or common law right of action and invoking the treaty as a rule of decision.
[189] *See supra* notes __ and accompanying text.
[190] Armstrong v. Exceptional Child Center, Inc.,135 S. Ct. 1378, 1383-84 (2015).

competence. In such circumstances, courts should not invoke a fictitious "intent of the treaty makers" to evade their duty to decide cases in accordance with federal law.