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The New ALI Restatement and the Doctrine of Non-Self-Executing Treaties

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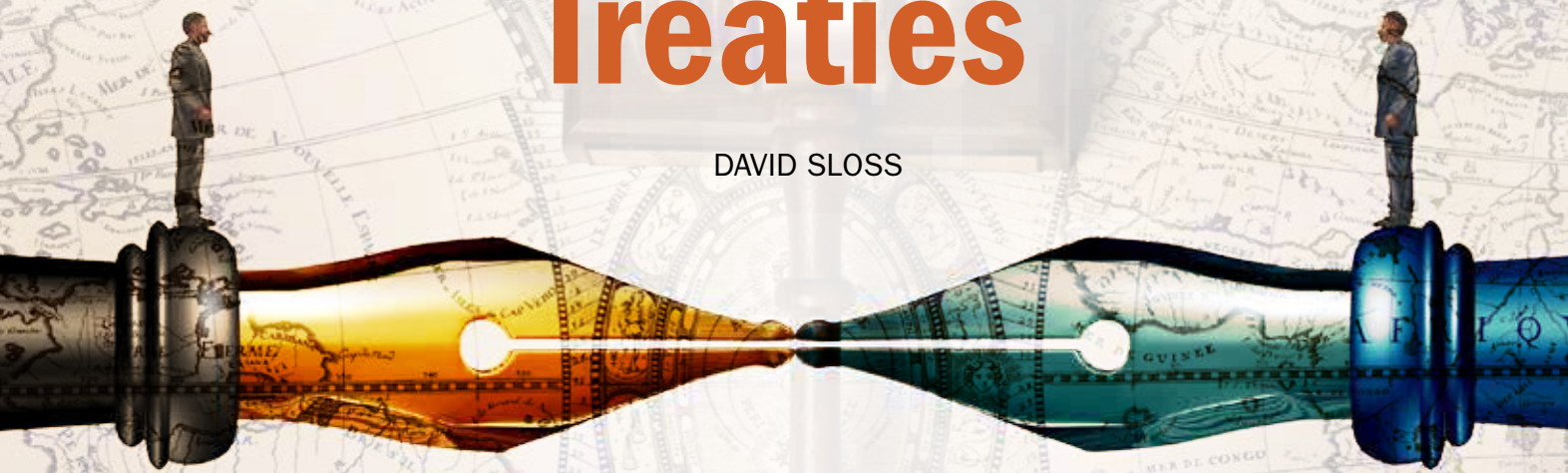


At its annual meeting in May 2017, the American Law Institute (ALI) approved a new Restatement on Treaties as part of a broader project on Foreign Relations Law.[1] The Reporters deserve much praise for their excellent work on treaties. However, this essay criticizes their approach to the doctrine of non-self-executing (NSE) treaties and the related topic of treaty supremacy.

The doctrine of NSE treaties is not a single doctrine, but a group of loosely related doctrines to which courts and commentators have applied a single label. I encouraged the ALI to disaggregate the distinct doctrines and treat them separately. Instead, the Reporters lumped the various doctrines together under the rubric of self-execution. By doing so, they created a new doctrine that differs in important ways from prior versions of NSE doctrine. That new doctrine lacks support in precedent and raises some constitutional difficulties.

This essay consists of three parts. Part One presents a brief history of NSE doctrine and the treaty supremacy rule. The history draws heavily on my recent book.[2] Part Two addresses the Supreme Court decision in *Medellín v. Texas*, 552 U.S. 491 (2008). The ALI reporters rely heavily on *Medellín* to support the "new ALI doctrine." I contend that *Medellín* should be understood as an application of the "*Fujii* doctrine." Part Three presents recommendations for judges about how to approach self-execution issues.

A Brief History of NSE Doctrine

Part One identifies six distinct NSE doctrines that developed in different historical periods. In brief, the six doctrines are: the constitutional doctrine (from the 1790s), the justiciability doctrine (from the nineteenth century), the intent doctrine (1920s), the *Fujii* doctrine (1950s), the private right of action doctrine (1970s), and the new ALI doctrine (from the twenty-first century). Before the rise of the *Fujii* doctrine in the 1950s, the treaty supremacy rule and NSE doctrine were distinct, non-overlapping doctrines. However, since the 1950s, the treaty supremacy rule has functioned as an appendage of NSE doctrine.

The Constitutional Doctrine

The constitutional doctrine has its origins in congressional debates about implementation of the Jay Treaty in 1795-96.[3] The debate pitted Senators, who favored a broad view of self-execution, against House members, who favored a narrow view. All agreed that the Constitution requires bicameral legislation to appropriate money. Therefore, treaty provisions requiring an appropriation of funds are "constitutionally non-self-executing." The Jay Treaty promised a reduction of duties on certain British imports; partisans debated whether bicameral legislation was necessary to repeal federal statutes involving import duties. Most Senators believed the treaty was "self-executing" in this respect, meaning that the treaty itself superseded prior federal statutes that imposed higher duties. Most House members believed the treaty was "non-self-executing" in this respect, meaning that bicameral legislation was constitutionally required to reduce a statutorily mandated import fee. Ratification of the Jay Treaty left the constitutional issue unresolved.

Three points about the Jay Treaty merit comment. First, although the debate involved a turf battle between the House and Senate, the underlying issue involves the scope of Presidential power over treaty implementation. The Senate view of self-execution effectively empowered the President to instruct federal officers to disregard prior federal statutes and apply the treaty as the governing rule. Second, the Jay Treaty debates manifest a "congressional-executive" concept of self-execution. Under the congressional-executive concept, the distinction between SE and NSE treaties implicates the division of power over treaty implementation between Congress and the President. The House and Senate were not arguing about judicial enforcement of the treaty. They disagreed about whether legislation was necessary to authorize customs collectors to charge the lower treaty rate instead of the higher statutory rate. Third, the Jay Treaty debates presupposed a "two-step" approach to self-execution analysis. The two-step approach distinguishes sharply between the domestic and international aspects of self-execution. Step one involves a treaty interpretation question: did the Jay Treaty create an international obligation to reduce import duties? Step two involves a domestic constitutional question: does the President have a unilateral power to implement that treaty obligation, or does the Constitution require bicameral legislation to reduce import duties?

The constitutional doctrine was the dominant version of NSE doctrine from the late eighteenth century until the early twentieth century. Modern mythology holds that Chief Justice Marshall created NSE doctrine in *Foster v. Neilson*, 27 U.S. 253 (1829). Most modern commentators construe *Foster* in accordance with either the intent doctrine or the justiciability doctrine. However, *Foster* should be understood as an application of the constitutional doctrine that originated in the Jay Treaty debates.[4]

The Justiciability Doctrine

The Restatement suggests that classification of a treaty provision as SE or NSE hinges, in part, on "whether the treaty provision is sufficiently precise or obligatory to be suitable for direct application by the judiciary."[5] This statement expresses the justiciability doctrine. If a treaty provision is sufficiently precise or obligatory to be suitable for direct application, it is self-executing. Otherwise, it is non-self-executing. The Supreme Court has never applied justiciability doctrine

as the *ratio decidendi* in any case (although some commentators put *Foster v. Neilson* in this category). However, Justice Samuel Miller clearly articulated the core idea of the justiciability doctrine in *The Head Money Cases*, 112 U.S. 580 (1884).[6]

The justiciability doctrine differs from the constitutional doctrine in that it applies the "political-judicial" concept of self-execution, not the "congressional-executive" concept. Both doctrines treat self-execution as a separation of powers issue. However, the political-judicial concept emphasizes limits on judicial power to enforce treaties, whereas the congressional-executive concept emphasizes limits on executive power to implement treaties. Like the constitutional doctrine, justiciability doctrine presupposes a two-step approach to self-execution analysis. Step one involves treaty interpretation to ascertain the content and scope of the international obligation. Step two involves a domestic separation of powers analysis to determine whether—given limits on judicial power in our constitutional system—the treaty provision is suitable for direct application by the judiciary. Courts sometimes blur the distinction between the two steps, but they are analytically distinct.

The Intent Doctrine

Professor Edwin Dickinson created the intent doctrine in an influential law review article published in 1926.[7] During Prohibition, the United States concluded bilateral "liquor treaties" with several countries. The treaties purported to authorize U.S. executive officials to seize foreign vessels on the high seas beyond the 12-mile limit set by federal statute. Lower courts divided as to whether the treaties were self-executing. In other words, was legislation constitutionally required to authorize executive officers to conduct search and seizure operations beyond the 12-mile statutory limit? Framed in that way, resolution of the issue required application of the constitutional doctrine.

Dickinson proposed dodging the constitutional question and focusing on the "intent of the treaty makers."[8] If the treaty makers intended to require legislation as a precondition for extending the territorial reach of executive enforcement authority, then the treaty was NSE. Conversely, if the treaty makers intended to authorize a wider scope for executive action directly, by means of the treaty itself, then the treaty was self-executing. Dickinson recognized that the "intent of the treaty makers" could not overcome constitutional limits on self-execution. However, in cases where the constitutional issue was indeterminate—and it was indeterminate in a wide range of cases—courts should examine the treaty makers' intentions to decide whether the treaty was self-executing. Dickinson argued on this basis that the liquor treaties were self-executing. The issue was important because courts would nullify any seizure beyond the 12-mile statutory limit if the treaties were NSE.

Like constitutional doctrine, the intent doctrine applies the congressional-executive concept of self-execution. However, in contrast to both the constitutional and justiciability doctrines, the intent doctrine involves a "one-step approach" to self-execution analysis, not a two-step approach. To reiterate, the two-step approach draws a sharp analytical distinction between the international and domestic aspects of self-execution. Step one applies treaty interpretation analysis to answer an international law question. Step two applies separation-of-powers analysis to answer a domestic legal question. Dickinson collapsed the two steps by suggesting that courts should perform a treaty interpretation analysis to ascertain the "intent of the treaty makers" concerning the division of authority over treaty implementation between Congress and the President. In practice, the one-step approach encourages courts to create a fictitious intent because evidence of the treaty makers' actual intentions is often lacking.

The State Department endorsed Dickinson's one-step approach because it gave treaty negotiators tremendous flexibility.[9] Insofar as a treaty imposed restrictions on federal government action, the negotiators could make the treaty NSE by stipulating that implementing legislation was required. In that case, the treaty restrictions would not be operative without legislation. However, insofar as a treaty authorized federal government action that would otherwise be prohibited, the negotiators could remove the prohibition by stipulating that the treaty was self-executing. Thus, Dickinson's one-step approach allowed the executive branch to use treaties to expand federal executive authority without constraining that authority. After the executive branch endorsed the intent doctrine, lower courts began to apply the doctrine.

The Fujii Doctrine

The *Fujii* doctrine arose in the 1950s in the context of debates about judicial enforcement of the UN Charter's human rights provisions. The Charter obligates the United States to promote "human rights and fundamental freedoms for all *without distinction as to race*."[10] In *Fujii v. California*, 217 P.2d 481 (Cal. App. 2d 1950), the Court of Appeal invalidated California's Alien Land Law. The court concluded that California law discriminated on the basis of race in violation of the UN Charter, and the Charter trumped state law under the Supremacy Clause.[11]

The Court of Appeal's decision involved a fairly straightforward application of the treaty supremacy rule, as that rule had been understood since the Founding. Before 1950, treaty supremacy doctrine and NSE doctrine were independent, non-overlapping doctrines. The treaty supremacy rule, codified in the Supremacy Clause, governed the relationship between treaties and state law. NSE doctrine addressed the division of power over treaty implementation between Congress and the President (the congressional-executive concept) or between the political branches and the courts (the political-judicial concept). Before 1950, no state or federal court had ever applied NSE doctrine to justify enforcement of state law in the face of a conflicting treaty![12]

Regardless, *Fujii*'s implications were shocking. If *Fujii* was right, the United States had abrogated Jim Crow laws throughout the South by ratifying the UN Charter. Americans were not ready to accept that conclusion. Thus, *Fujii* sparked a movement for a constitutional amendment: the Bricker Amendment.[13] The Amendment's sponsors wanted to remove treaties from the Supremacy Clause to prevent courts from applying human rights treaties to invalidate state laws. In response, Bricker's opponents created a new constitutional understanding, which I call the *Fujii* doctrine. The *Fujii* doctrine holds that a self-executing treaty supersedes conflicting state laws, but an NSE treaty does not supersede conflicting state laws.

Bricker's opponents presented the *Fujii* doctrine as settled law. That strategy was politically important because it helped defeat the Bricker Amendment. However, the *Fujii* doctrine was not settled law; it constituted a dramatic departure from the traditional treaty supremacy rule. The doctrine applies the "federal-state" concept of self-execution. Under that concept, an SE treaty is supreme over state law, but an NSE treaty is not. The federal-state concept was novel. Before 1950, NSE doctrine and the treaty supremacy rule

were entirely separate doctrines. The *Fujii* doctrine converted the treaty supremacy rule from an independent constitutional rule into an appendage of NSE doctrine. The *Fujii* doctrine combines the federal-state concept with Dickinson's one-step approach to self-execution. Thus, under the *Fujii* doctrine, a treaty is supreme over state law if the treaty makers intended that result. However, the treaty makers have discretion to opt out of the treaty supremacy rule by stipulating that a particular treaty provision is NSE.

On appeal from the lower court decision, the California Supreme Court applied the *Fujii* doctrine in *Fujii v. State*, 242 P.2d 617 (Cal. 1952). The California Supreme Court held that the UN Charter's human rights provisions did not supersede California law because the relevant Charter articles were NSE. Those treaty articles were NSE, said the court, because that is what the treaty drafters intended.[14] The state supreme court decision in *Fujii* was the first recorded decision by any state or federal court to hold that an NSE treaty does not supersede conflicting state law!

The ALI published the Restatement (Second) of Foreign Relations Law in 1965. Section 141 endorsed the federal-state concept: it says that an NSE treaty does not "supersede inconsistent provisions . . . of the law of the several states." Section 154 endorsed the one-step approach to self-execution: it says that a treaty is self-executing only if it "manifests an intention that its provisions shall be effective under the domestic law of the" United States. Read together, the two sections endorsed the *Fujii* doctrine, which combines the one-step approach with the federal-state concept. The Restatement cited the California Supreme Court decision in *Fujii* as authority for the *Fujii* doctrine.

The Private Right of Action Doctrine

During the 1970s, the Supreme Court created a presumption against implied private rights of action to enforce federal statutes. Shortly thereafter, lower federal courts transplanted the private right of action doctrine from statutes to treaties, thereby creating the "private right of action" doctrine. In *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), Judge Joseph Weis said: "Thus, unless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action." Similarly, in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), Judge Robert Bork wrote: "Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action."

The private right of action doctrine combines the political-judicial concept of self-execution with a one-step approach to self-execution analysis.[15] The one-step approach focuses on the intent of the treaty makers to determine whether a treaty is SE or NSE. In *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), the Supreme Court clarified that courts should focus on the intent of legislators to determine whether a statute creates a private right of action. The private right of action doctrine combines these ideas, creating a one-step test for self-execution that focuses on whether the treaty makers intended to create a private right of action.

Like justiciability doctrine, the private right of action doctrine applies the political-judicial concept of self-execution. However, private right of action doctrine differs from justiciability doctrine in two respects. First, justiciability doctrine involves a two-step approach, whereas the private right of action doctrine involves a one-step approach. Accordingly, under justiciability doctrine, the critical first step is to determine the content and scope of the international obligation. Under the private right of action doctrine, though, the content and scope of the international obligation is irrelevant: the critical question is whether the treaty makers intended to create a private right of action. Second, under justiciability doctrine, an NSE treaty cannot be directly enforced by a court in any type of judicial proceeding. However, under private right of action doctrine, an NSE treaty is judicially enforceable in some contexts. For example, a criminal defendant does not need to show that a treaty (or statute) creates a private right of action to invoke that treaty (or statute) in his defense. Similarly, in *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004), the Supreme Court held that plaintiffs could sue under the Administrative Procedure Act to enforce a federal statute that did not itself create a private right of action.

The political branches seemingly approved the private right of action doctrine when the United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992. The instrument of ratification included an express declaration stating that the treaty's substantive provisions "are not self-executing." The ICCPR was the first treaty in U.S. history to include an NSE declaration of this type. The executive branch explained that the NSE declaration was intended "to clarify that the Covenant will not create a private cause of action in U.S. courts." The Senate Foreign Relations Committee adopted this language in its official report.[16]

The New ALI Doctrine

The Restatement asserts: "the self-execution inquiry focuses on whether the [treaty] provision is directly enforceable in court."[17] Thus, the Reporters endorse the political-judicial concept of self-execution. The Restatement says: "Treaties are supreme over State and local law."[18] Since this statement applies to both SE and NSE treaties, the Reporters implicitly reject the federal-state concept of self-execution and the associated *Fujii* doctrine. The Restatement also says: "even absent implementing legislation or other statutory authorization, the President may rely on appropriate constitutional authority to implement a non-self-executing treaty obligation."[19] This statement appears to reject the congressional-executive concept of self-execution (and the associated "intent doctrine") by asserting that the President has authority to implement an NSE treaty. However, the Reporters acknowledge the existence of the constitutional doctrine, which is based on the congressional-executive concept.[20]

Although the Restatement explicitly endorses the political-judicial concept, and tacitly rejects the other two concepts, the Reporters did not articulate a clear preference for either the one-step or two-step approach. Instead, they endorsed both. The Restatement says that a treaty provision that is "sufficiently precise or obligatory" is self-executing, but "provisions that are vague or aspirational may be regarded as non-self-executing."[21] These statements are consistent with the justiciability doctrine and the two-step approach to self-execution analysis. The justiciability doctrine necessarily entails a two-step approach because classification of a treaty provision as "precise," "obligatory," "vague," or "aspirational" depends on the content and scope of the international obligation.

The Reporters also endorse a one-step approach. They note that the U.S. has ratified human rights treaties subject to NSE declarations, and that many human rights treaty provisions would be self-executing under the two-step, justiciability doctrine.[22] However,

they conclude that NSE declarations effectively convert those treaty provisions from SE to NSE, because the NSE declarations provide authoritative evidence of the treaty makers' intentions, and those intentions are dispositive under a one-step approach to self-execution.[23] Thus, the Restatement endorses a combination of the political-judicial concept with a one-step approach. That combination is consistent with the private right of action doctrine. However, the Restatement rejects the private right of action doctrine. The Reporters note approvingly that the Supreme Court has "indicated that self-execution and private rights of action are distinct concepts."[24] They correctly cite *Medellín v. Texas*, 552 U.S. 491 (2008), to support this proposition.

Before publication of the new Restatement, relevant authorities supported two distinct versions of NSE doctrine that apply the political-judicial concept: the two-step justiciability doctrine and the one-step private right of action doctrine. The Restatement endorses the justiciability doctrine, rejects the private right of action doctrine, and endorses a new doctrine that combines a one-step approach with the political-judicial concept. Call this the "new ALI doctrine." The new ALI doctrine differs from the private right of action doctrine because, under the new ALI doctrine, a finding of "non-self-execution would preclude all judicial enforcement of the treaty."[25] In contrast, under the private right of action doctrine, classification of a treaty as NSE does not preclude all judicial enforcement. The new ALI doctrine differs from justiciability doctrine because it involves a one-step approach, not a two-step approach. That distinction has two significant implications. First, under justiciability doctrine, classification of a treaty as SE or NSE hinges on the content and scope of the international obligation. Under the new ALI doctrine, though, the content and scope of the international obligation is irrelevant. Second, under justiciability doctrine, restraints on judicial enforcement are derived from constitutional limits on judicial power. In contrast, under the new ALI doctrine, restraints on judicial enforcement are derived from an affirmative decision by the political branches to prevent courts from applying treaty provisions that have the status of supreme federal law and that—absent a decision by the political branches—would be appropriate for judicial enforcement.

The Reporters would surely claim that the "new ALI doctrine" is not new because it is supported by a wide variety of legal authorities. It is beyond the scope of this essay to review all the relevant materials. The key authority is the Supreme Court decision in *Medellín*. The Reporters believe that the Court applied the "new ALI doctrine" in *Medellín.* If they are right, then *Medellín* itself is sufficient authority for the doctrine. However, I believe the Court applied the *Fujii* doctrine in *Medellín.* Part Two analyzes *Medellín* and compares the new ALI doctrine with the *Fujii* doctrine.

Medellín, Fujii, and the New ALI Doctrine

Before analyzing the Court's decision in *Medellín*, let us review the basic differences between the *Fujii* doctrine and the new ALI doctrine. The Supremacy Clause says that treaties are "the supreme Law of the Land," and that "Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." Before 1950, the consensus view held that the Supremacy Clause creates a constitutional rule, the treaty supremacy rule, consisting of two elements. First, treaties are supreme over state laws. Second, judges have *a constitutional duty* to enforce treaties in cases presenting a conflict between a treaty and state law.[26] In theory, the justiciability doctrine limited the scope of the constitutional duty to enforce treaties. Before 1950, though, no court ever applied the justiciability doctrine to avoid enforcing a treaty that conflicted with state law.

Under the *Fujii* doctrine, the treaty supremacy rule is optional: Article II grants the treaty makers discretion to opt out of the first part of the treaty supremacy rule by deciding that a particular treaty provision shall not be supreme over state laws. The new ALI doctrine also assumes that the treaty supremacy rule is optional, but in a different way. The new ALI doctrine assumes that Article II grants the treaty makers discretion to opt out of the second part of the treaty supremacy rule by deciding that judges shall not be bound by a particular treaty provision, even though that provision is supreme over state laws. Thus, under the *Fujii* doctrine, some treaties are not supreme over state laws. However, if a particular treaty provision is supreme, then the "judges in every state shall be bound thereby." In contrast, under the new ALI doctrine, judges are not bound by an NSE treaty, even though that treaty is nominally supreme over state laws.

The Supreme Court Decision in Medellín

Medellín v. Texas, 552 U.S. 491 (2008), is the only case in U.S. history where the Supreme Court held that a state court could disregard a treaty because that treaty was NSE. (The Court relied heavily on *Foster v. Neilson*, but *Foster* did not involve a state court or state law.) *Medellín* involved Article 94 of the UN Charter, which obligates the United States "to comply with the decision of the International Court of Justice [(ICJ)] in any case to which it is a party." The ICJ had issued a decision (the *Avena* decision) requiring the U.S. to provide judicial hearings for several Mexican nationals on death row in the United States. José Ernesto Medellín, a death row prisoner in Texas, was one of the Mexican nationals covered by the *Avena* decision. Although the ICJ decision was binding on the United States as a matter of international law, the Supreme Court held that the treaty obligation to provide a judicial hearing for Medellín was not binding on Texas courts under domestic law because Article 94 is not self-executing.

The reasoning supporting the conclusion that Article 94 is NSE is perplexing. One could extract selected quotations to make an argument that the Court applied a two-step approach in *Medellín*. However, the main thrust of the opinion is consistent with a one-step approach. The Court said: "No one disputes that the *Avena* decision . . . constitutes an *international* law obligation on the part of the United States. But . . . [t]he question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect." (emphasis in original). 552 U.S. at 504. The Court's focus on the treaty's domestic effect, rather than the nature of the international obligation, suggests a one-step approach. Moreover, the Court placed great weight on the views of the executive branch to support its conclusion that the United States did not intend for Article 94 to be self-executing. *See id*., at 508, 510, 513. The Court's focus on the unilateral understanding of the United States also suggests a one-step approach. The key difference between the one-step and two-step approaches is that, under a two-step approach, limits on domestic judicial enforcement are derived from the nature of the international obligation. In *Medellín*, the precise obligation at issue was a treaty obligation to provide a judicial hearing for Mr. Medellín. Not even the State of Texas had the temerity to argue that the obligation to provide a judicial hearing is the type of treaty obligation that is not appropriate

for judicial enforcement. In sum, the Court's conclusion that Article 94 is NSE was not based on the nature of the international obligation; it was based on the unilateral U.S. understanding regarding domestic enforcement of that obligation. That is a one-step approach.[27]

Given that the Court applied a one-step approach, the next question is whether the Court conceived of self-execution in terms of the federal-state concept (the *Fujii* doctrine) or the political-judicial concept (the new ALI doctrine). The opinion contains language to support both interpretations. The Court said that treaties "are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing." *Id.*, at 505. Similarly, the Court distinguished "between treaties that automatically have effect as domestic law, and those that . . . do not by themselves function as binding federal law." *Id.*, at 504. These and other statements are consistent with the *Fujii* doctrine and the federal-state concept because they suggest that an NSE treaty is not supreme federal law. Elsewhere, though, the Court said that Article 94 "is not a directive to domestic courts," and "that ICJ judgments were not meant to be enforceable in domestic courts." *Id.*, at 508-09. One could infer from these and other statements that the Court conceived of self-execution in terms of the political-judicial concept, and therefore the Court was applying the new ALI doctrine.

Although the Court's language is ambiguous, three factors specifically related to *Medellín* support a construction that accords with the *Fujii* doctrine. First, all of the Court's statements that appear to express the political-judicial concept are consistent with the *Fujii* doctrine. Under the *Fujii* doctrine, an NSE treaty is not enforceable in domestic courts *because* it is not supreme federal law. Thus, the statement that Article 94 is not "enforceable in domestic courts," *id.* at 509, and other similar statements, are consistent with both the *Fujii* doctrine and the new ALI doctrine. However, the statement that NSE treaties "are not domestic law," *id.* at 505, and other similar statements, are inconsistent with the new ALI doctrine because that doctrine holds that NSE treaties are supreme federal law. Thus, the *Fujii* doctrine is consistent with language in *Medellín* that resonates with the political-judicial concept, but the new ALI doctrine is not consistent with language that resonates with the federal-state concept.

Second, Part III of the Court's opinion tends to support the *Fujii* doctrine and negate the new ALI doctrine. President Bush had issued a memorandum directing state courts to provide judicial hearings for the Mexican nationals covered in the *Avena* decision. In Part III, the Court held that the Presidential memorandum was not binding on Texas courts. In that context, 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." *Id.*, at 527. Since an NSE treaty lacks domestic effect, "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Id.*, at 525-26. The conclusion that congressional action is necessary follows from "the fundamental constitutional principle that the power to make the necessary laws is in Congress; the power to execute in the President." *Id.*, at 526. The President's memorandum was not a valid exercise of executive power because Article 94 is not domestic law. Therefore, Congress had to create domestic law before the President could execute that law. In the Court's words, the President's memorandum was an invalid attempt "to enforce a non-self-executing treaty by unilaterally creating domestic law." *Id.*, at 527. In sum, the rationale for holding that the Presidential memorandum was not binding on Texas courts rested on the premise that an NSE treaty is not federal law. That premise is consistent with the *Fujii* doctrine, but inconsistent with the new ALI doctrine.

Third, the aftermath of the Court's decision also tends to support the *Fujii* doctrine and negate the new ALI doctrine. The *Avena* decision can fairly be described as an order to the United States as follows: "do not execute the Mexican nationals subject to this order without first providing them a judicial hearing of the type required by this decision." Construed in this manner, the ICJ order is directed to executive officials, because the executive branch is responsible for conducting executions. After the Supreme Court decision, Texas executed Mr. Medellín. That execution was a clear violation of the U.S. treaty obligation to comply with the ICJ decision because Texas courts did not provide Medellín the requisite judicial hearing before Texas officers executed him. Texas executive officials reasonably understood the Supreme Court decision in *Medellín* as a "green light" authorizing them to proceed with the execution. Indeed, it is hard to see how they could have construed the Supreme Court decision differently. If the new ALI doctrine is right, Texas officials violated supreme federal law when they executed Medellín because Article 94 is supreme federal law. Therefore, if the new ALI doctrine is right, the Supreme Court in *Medellín* effectively authorized Texas executive officers to violate supreme federal law. One should be hesitant to draw that conclusion. Conversely, construing *Medellín* in accordance with the *Fujii* doctrine avoids that problem because, under the *Fujii* doctrine, Article 94 is not supreme federal law.

Text, Structure, and Precedent

Medellín aside, let us compare the *Fujii* doctrine to the new ALI doctrine in terms of text, structure, and precedent. The *Fujii* doctrine is difficult to reconcile with the Constitution's text because the Supremacy Clause says that "all Treaties" are "supreme Law of the Land," but the *Fujii* doctrine holds that NSE treaties are not supreme over state law. The new ALI doctrine is also in tension with the text because the Constitution says that "judges in every state shall be bound" by "all Treaties," but the new ALI doctrine holds that judges are not bound by NSE treaties. Thus, neither doctrine has strong textual support. However, one cannot reject both doctrines without also rejecting *Medellín*, not to mention a large body of political branch practice.

One could argue that the new ALI doctrine is preferable on textual grounds because there are necessary limits on judicial enforcement of treaties, so the phrase "judges in every state shall be bound thereby" cannot apply literally to "all treaties." In contrast, the phrase "supreme Law of the Land" can and should be applied literally to "all treaties." In my view, this argument is not persuasive. From a textual standpoint, it is reasonable to construe the Supremacy Clause to mean that the judicial duty to enforce treaties is subject to constitutional limitations on judicial power. That is the basis of justiciability doctrine. However, it is a very different matter to construe the Supremacy Clause to mean that the judicial duty to enforce treaties is subject to limitations imposed by the political branches in the exercise of their discretionary powers. That is the basis of the new ALI doctrine. If the political branches do have an affirmative power to prohibit judicial enforcement of some treaties—as the new ALI doctrine holds—that power cannot be derived from the Supremacy Clause because that clause is not a power-conferring provision.

The ostensible power to prohibit judicial enforcement of treaties must be rooted in the Article II power "to make treaties." In that case, the *Fujii* doctrine and the new ALI doctrine have precisely the same textual basis. Both doctrines assume that the Article II power "to make treaties" includes a power to opt out of the Article VI treaty supremacy rule—either by deciding that a particular treaty provision is not supreme over state law (the *Fujii* doctrine), or by deciding that judges shall not be bound by a particular provision (the new ALI doctrine). (By way of analogy, the Article II power to opt out of the treaty supremacy rule is similar to Congress' Fourteenth Amendment power to override the Eleventh Amendment.) In sum, from a textual standpoint, the contest between the *Fujii* doctrine and the new ALI doctrine is a toss-up.

Next, consider precedent. As of 1972, there was no significant support for the new ALI doctrine in any legislative, executive, judicial, or scholarly authority. However, as of 1972, the *Fujii* doctrine was black letter law. The California Supreme Court endorsed the *Fujii* doctrine in *Fujii v. State*, 242 P.2d 617 (Cal. 1952), as did a federal district court in *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961). Both Attorney General Brownell and Secretary of State Dulles endorsed the *Fujii* doctrine in their Senate testimony on the proposed Bricker Amendment, as did Senator Walter George during floor debate over the Amendment.[28] Even President Eisenhower endorsed the *Fujii* doctrine in a private letter related to the Bricker Amendment controversy.[29] The ALI codified the *Fujii* doctrine as black letter law in the Restatement (Second) of Foreign Relations Law, published in 1965.[30] The Department of State endorsed the *Fujii* doctrine in Whiteman's *Digest of International Law*, published in 1970.[31] Finally, Professor Louis Henkin endorsed the *Fujii* doctrine in his leading treatise on U.S. foreign relations law, published in 1972.[32]

Aside from *Medellín*, the ALI Reporters rely primarily on lower court decisions and political branch practice related to NSE declarations to support the new ALI doctrine. I agree that some lower court decisions after 1990 include language that tends to support the new ALI doctrine. However, political branch practice provides very little support for that doctrine. The United States ratified three human rights treaties in 1992-94. Those were the first treaties for which the U.S. adopted NSE declarations. The President and Senate explained those declarations in terms of the private right of action doctrine, not the new ALI doctrine.[33] The most intensive recent period of relevant political activity was in fall 2008, three months after the Supreme Court decided *Medellín.* In September 2008, the Senate consented to seventy-eight treaties in just four days. For seven of those treaties, the Senate adopted declarations specifying that the treaty is not self-executing. For sixty-nine other treaties, it adopted declarations specifying that the treaty is wholly or partially self-executing. The Senate did not define the terms SE or NSE. However, careful analysis of key documents demonstrates that the Senate, at that time, conceived of self-execution in accordance with the congressional-executive concept.[34] Therefore, Senate documents from September 2008 do not support either the *Fujii* doctrine or the new ALI doctrine. In contrast, Senate deliberations on the Convention on the Rights of Persons with Disabilities in 2012-14 suggest that the Senate, at that time, understood self-execution in accordance with the *Fujii* doctrine.[35] In sum, the *Fujii* doctrine was settled law as of 1972, and there is very little evidence in either judicial precedent or political branch practice to substantiate the claim that the new ALI doctrine has displaced the *Fujii* doctrine in the ensuing decades.

Finally, consider structural arguments. To put it bluntly, the new ALI doctrine is problematic because it implicitly assumes that the Article II power to "make treaties" grants the President and Senate an unfettered power to prevent courts from applying supreme federal law, even in cases where the court has jurisdiction and the federal law at issue (the treaty) creates specific, binding obligations. Thus, the new ALI doctrine poses a threat to judicial independence. The doctrine is also at odds with the principle of federal supremacy because it treats "the supreme Law of the Land" in the Supremacy Clause as a hollow phrase, devoid of any substantive content.

The new ALI doctrine also threatens the due process rights of criminal defendants, as illustrated by the following hypothetical case. Assume that the United States ratifies the Convention on the Rights of the Child, an important human rights treaty. Article 37 states: "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." Assume, further, that the United States adopts an NSE declaration. What is the effect of that declaration? Consider a Florida defendant who is charged with murder. Defendant was seventeen-years-old when he committed the crime. The state seeks a life without parole (LWOP) sentence. The LWOP sentence is authorized by state law and permissible under the Eighth Amendment. Defendant invokes the treaty as a defense. The treaty clearly bars the sentence. Should the court apply the treaty to bar the sentence? Or does the NSE declaration preclude the court from applying the treaty? If the NSE declaration is construed in accordance with the *Fujii* doctrine, the answer is clear: the court should apply Florida law because the treaty is not supreme federal law.

However, if the NSE declaration is construed in accordance with the new ALI doctrine, the case presents a serious problem. Supreme Court decisions in *Yakus v. United States*, 321 U.S. 414 (1944), and *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), establish that the Due Process Clause limits the government's power to enact a law that bars criminal defendants from challenging the validity of a legal rule invoked by the government as a source of authority to impose a penalty.[36] The constitutional principle arguably extends to any government-initiated civil or criminal proceeding where the state threatens to deprive a person of life, liberty or property. In the hypothetical Florida case, the Florida government invokes state law as authority for imposing an LWOP punishment. Defendant argues that the Florida law is invalid because it conflicts with the treaty, which is supreme federal law under the new ALI doctrine. Even so, the new ALI doctrine directs the Florida court to ignore the treaty and impose the LWOP sentence in violation of supreme federal law because the NSE declaration bars judicial enforcement of the treaty. In these circumstances, application of the NSE declaration in accordance with the new ALI doctrine would violate the due process rights of criminal defendants, per the Supreme Court decisions in *Yakus* and *Mendoza-Lopez*.

Recommendations

The Restatement says: "The case law has not established a general presumption for or against self-execution, in the sense of a clear statement or default rule."[37] If one distinguishes among six NSE doctrines and three concepts of self-execution, though, it becomes apparent that different presumptions or default rules are appropriate in different contexts.[38] First, courts should adopt a presumption that

the treaty makers did not have any intention regarding self-execution, unless they expressed that intention clearly. This presumption would help align judicial decision-making with the practice of government officials who negotiate and ratify treaties. In most cases, those officials do not have any specific intention as to whether the treaty should be SE or NSE. However, when courts apply a one-step approach to self-execution analysis, they search for the "intent of the treaty makers" because that intent is the critical factor under a one-step approach. Lacking evidence of the treaty makers' actual intentions, courts tend to create a fictitious intent to address the issue.[39] The presumption that the treaty makers lacked any intention regarding self-execution is a necessary corrective to the fictitious intent problem.

If the treaty makers have not expressed their intentions clearly, the appropriate default rule depends on whether the issue presented involves the federal-state concept, the congressional-executive concept, or the political-judicial concept. First, consider the federal-state concept of self-execution. Here, it is important to distinguish between "supremacy" and "preemption." Supremacy means that federal law (including treaties) supersedes *conflicting* state law. In contrast, under preemption doctrine, state law is often displaced even though it *does not conflict* with federal law.[40] The factors that support a presumption against preemption in the statutory context also support a presumption against application of treaties to preempt non-conflicting state law.

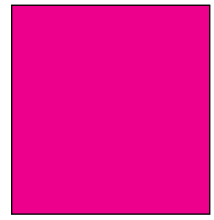
In contrast, the text and original understanding of the Supremacy Clause support a strong presumption in favor of the supremacy of treaties over conflicting state law.[41] To overcome that presumption, courts should insist upon clear evidence that the treaty makers decided that a particular treaty provision should not supersede conflicting state law. A declaration that a treaty is "not self-executing," without more, should not be considered sufficiently clear evidence to overcome the presumption in favor of treaty supremacy because NSE declarations are ambiguous in this respect. I note that this particular recommendation is at odds with the Supreme Court's methodology in *Medellín*. In *Medellín,* the Court concluded that the government officials who negotiated and ratified the UN Charter did not intend for Article 94 to supersede conflicting state laws. However, the Court did not adduce a shred of evidence that actually supported that conclusion.[42] Insofar as *Medellín* relied on a fictitious, judicially fabricated "intent of the treaty makers" to guide its self-execution analysis, lower courts are not bound to follow the Court's methodology.

Consider, next, the congressional-executive concept of self-execution. The Restatement's "no presumption" rule makes sense with respect 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 doctrine, the appropriate default rule 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[43]—effectively creates a presumption in favor of non-self-execution. In contrast, if the treaty does not conflict with a federal statute, the President's duty to execute treaties, which is rooted in the Take Care Clause, establishes a presumption in favor of self-execution. Either presumption should be rebuttable if the treaty makers adopt a clear statement in the treaty text or in the instrument of ratification.

Finally, consider the political-judicial concept. Here, courts should distinguish between the private right of action question and other issues related to judicial enforcement. The factors that support a presumption against implied rights of action for federal statutes also support a presumption against implied rights of action for treaties. That presumption should be rebuttable if the treaty makers adopt a clear statement in the treaty text or in the instrument of ratification.

For other questions related to judicial enforcement, courts should apply a two-step approach. In accordance with justiciability doctrine, courts should perform 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 specific treaty obligation at issue is appropriate for judicial enforcement. The Restatement's "no presumption" rule is appropriate for step two: courts must answer the separation-of-powers question on a case-by-case basis.

A difficult question arises if the step two analysis leads to a conclusion that judicial enforcement is appropriate, but the treaty makers adopted an NSE declaration. The Restatement seems to suggest that courts could solve this problem by avoiding the two-step analysis altogether and simply applying the NSE declaration as a bar to judicial enforcement.[44] Two factors counsel against this approach. First, the NSE declarations are ambiguous. Although political branch explanations of NSE declarations have changed over time, it is doubtful that the declarations were intended to bar judicial enforcement in all circumstances.[45] Second, as explained previously, application of an NSE declaration to bar judicial enforcement could, in some cases, deprive a defendant of his constitutional rights under the Due Process Clause. Happily, this type of problem is unlikely to arise very often. When it does, courts should attempt to give effect to the NSE declarations, while recognizing that those declarations are subject to different interpretations, and protecting the due process rights of civil and criminal defendants. ⊙



Author Bio

Endnotes

[1]As of this writing, the Restatement (Fourth) on Foreign Relations Law has addressed three topics: Immunity, Jurisdiction, and Treaties. The approved version of the treaty portion is currently divided between two documents: Tentative Draft No. 1 (approved May 2016) [hereinafter TD No. 1] and Tentative Draft No. 2 (approved May 2017) [hereinafter TD No. 2].

[2]David L. Sloss, *The Death of Treaty Supremacy: An Invisible Constitutional Change* (2016) [hereinafter, *Treaty Supremacy*].

[3]*See id.*, at 51-56.

[4]*See id.*, at 76-84.

[5]TD No. 2, § 110, note 5.

[6]*See* Sloss, *Treaty Supremacy,* at 132-34 (analyzing *Head Money*).
[7]Edwin D. Dickinson, *Are the Liquor Treaties Self-Executing*?, 20 Am. J. Int'l L. 444 (1926).
[8]*See* Sloss, *Treaty Supremacy,* at 154-62.
[9]*See id*., at 162-66.
[10]UN Charter, art. 55 (emphasis added).
[11]*See* Sloss, *Treaty Supremacy,* at 208-13.
[12]*See id*., at 85-105.
[13]*See id*., at 219-25, 248-56.
[14]*See id*., at 231-40.
[15]*See id*., at 296-98.
[16]S. Exec. Rep. 102-23 (1992), at 19.
[17]TD No. 2, § 110, cmt. b.
[18]TD No. 1, § 108 (black letter).
[19]TD No. 2, § 110, note 13.
[20]*See id*., § 110(3); § 110, note 11.
[21]*Id*., § 110, note 5.
[22]*See id*., § 110, note 9.
[23]*See id*., § 110(2); § 110, cmt. e; § 110, note 9.
[24]*Id*., § 110, note 9.
[25]*Id*. § 110, note 9.
[26]*See* Sloss, *Treaty Supremacy,* at 32-40, 47-54, 85-105.
[27]*See* Sloss, *Treaty Supremacy,* at 310-13 (elaborating this point in more detail).
[28]*See* Sloss, *Treaty Supremacy,* at 253-56, 299-303.
[29]*See id.*, at 301.
[30]*See id*., at 273-84.
[31]*See id*., at 284-85.
[32]*See id*., at 286-87.
[33]*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) [hereinafter "*Domestication*"].
[34]*See* Sloss, *Treaty Supremacy,* at 308-09.
[35]*See id*., at 309-10.
[36]*See id*., at 303-06.
[37]TD No. 2, § 110, note 3.
[38]This section borrows liberally from David L. Sloss, *Taming Madison's Monster: How to Fix Self-Execution Doctrine*, 2015 B.Y.U. L. Rev. 1691 [hereinafter, "*Madison's Monster*"].
[39]*See id*., at 1721-36.
[40]*See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767 (1994).
[41]*See* Sloss, *Treaty Supremacy,* pp. 17-57.
[42]*See* Sloss, *Madison's Monster*, at 1721-33.
[43]*See, e.g*., Cook v. United States, 288 U.S. 102, 120 (1933); Chew Heong v. United States, 112 U.S. 536, 549 (1884).
[44]*See* TD No. 2, § 110, note 9.
[45]*See* Sloss, *Treaty Supremacy,* at 306-10; Sloss, *Domestication*, at 152-71.