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Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties

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David L. Sloss*

The Supreme Court's 2008 decision in Medellin v. Texas *unleashed a flood of new scholarship on the doctrine of self-executing treaties. Unfortunately, the entire debate has been founded on two erroneous assumptions. First, courts and commentators have assumed that self-execution is a treaty interpretation question. Second, they have assumed that the modern doctrine of self-execution is essentially the same as the doctrine articulated by Chief Justice Marshall in his seminal opinion in* Foster v. Neilson. *The consensus view is wrong on both counts.*

*Properly framed, the self-execution inquiry comprises two distinct questions. First, what does the treaty obligate the United States to do? This is a question of international law governed by treaty interpretation principles. Second, which government actors within the United States are responsible for domestic treaty implementation? This is a question of domestic law, not international law: treaties almost never answer this question. Even so, courts and commentators routinely analyze domestic implementation issues by examining treaty text and ancillary documents to ascertain the ostensible intent of the treaty makers. In the vast majority of cases, there is nothing in the treaty text, negotiating history, or ratification record that specifies which domestic legal actors have the power or duty to implement the treaty. Undaunted by the lack of relevant information, courts invent a fictitious intent of the treaty makers. Thus, the "intent-based" doctrine of self-execution, commonly called the "*Foster *doctrine," promotes the arbitrary exercise of judicial power by encouraging courts to decide cases on the basis of a fictitious intent that the courts themselves create.*

To provide a cogent answer to domestic implementation questions, courts must analyze domestic constitutional and statutory provisions to determine which government officials have the domestic legal authority and/or duty to implement the treaty. The inquiry necessarily begins with treaty interpretation: courts cannot properly resolve domestic implementation issues without first ascertaining the nature and scope of the international obligation. Having determined the content of the international obligation, though, the treaty interpretation inquiry is complete. The second step of the analysis necessarily moves beyond treaty interpretation to consider domestic laws delineating the powers and duties of various government officials and institutions. This two-step approach provides the best explanation of Marshall's opinion in Foster.

The intent-based doctrine is founded on the mistaken view that self-execution is a single question to be answered by treaty interpretation analysis. In contrast, the two-step approach recognizes that the question whether a treaty is self-executing is actually two very different questions masquerading as a single question. The two-step approach directs courts to address domestic treaty implementation issues by abandoning their quest for a fictitious intent of the treaty makers, and considering a variety of domestic constitutional and statutory provisions that actually address the allocation of domestic authority over treaty implementation.

Introduction

The Supreme Court's 2008 decision in *Medellin v. Texas*[1] unleashed a flood of new scholarship by the nation's leading foreign affairs scholars on the

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1. 552 U.S. 491 (2008).

doctrine of self-executing treaties. The self-execution debate implicates fundamental constitutional questions about federalism, separation of powers, and individual rights. Partisans in that debate tend to divide into two camps: nationalists and transnationalists. Nationalists generally favor non-self-execution; they advocate a limited judicial role in the domestic application of treaties, especially insofar as private parties invoke treaties as a constraint on federal, state, or local government actors.[2] Transnationalists generally favor self-execution; they advocate a broader role for courts in the domestic application of treaties.[3] In *Medellin*, the Supreme Court threw its substantial weight behind the nationalist camp.

Unfortunately, the entire debate about self-execution—in the Supreme Court and in academia—has been founded on two erroneous assumptions. First, courts and commentators, be they nationalist or transnationalist, have assumed that self-execution is a treaty interpretation question. Second, they have assumed that the modern doctrine of self-execution is essentially the same as the doctrine articulated by Chief Justice Marshall in his seminal 1829 opinion in *Foster v. Neilson*.[4] The consensus view is wrong on both counts.

Properly framed, the self-execution inquiry comprises two distinct questions. First, what does the treaty obligate the United States to do? This is a question of international law governed by treaty interpretation principles. Second, which government actors within the United States are responsible for domestic treaty implementation? This is a question of domestic law, not international law, and treaties almost never answer this question. Even so, courts and commentators routinely analyze domestic implementation issues by examining treaty text and ancillary documents to ascertain the ostensible intent of the treaty makers.[5] In the vast majority of cases, there is nothing in the treaty text, negotiating history, or ratification record that specifies which domestic legal actors have the power or duty to implement the treaty.[6] Undaunted by the lack of any relevant information, courts boldly

2. *See* Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131; Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. 11 (2009); Ernest A. Young, *Treaties as "Part of Our Law"*, 88 TEX. L. REV. 91 (2009); *see also* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

3. *See* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); *see also* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002).

4. 27 U.S. (2 Pet.) 253 (1829).

5. *See, e.g.*, Medellin v. Texas, 552 U.S. at 504–14; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987).

6. Given the variety of national legal systems, it would be virtually impossible for the drafters of a multilateral treaty to agree on treaty language specifying which domestic government institutions have the power and/or duty to implement the treaty. *See generally* NATIONAL TREATY LAW AND PRACTICE (Duncan B. Hollis, Merritt R. Blakeslee & Benjamin Ederington eds., 2005) (surveying treaty law and practice in nineteen countries); THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COM-

invent a fictitious intent of the treaty makers. Judicial opinions applying the doctrine are reminiscent of the fable about the emperor's new clothes. Like the citizens who pretend to see the emperor's non-existent clothes, courts and commentators pretend to find a fictitious intent, even though the treaty makers did not have any intent regarding the allocation of domestic responsibility for treaty implementation.[7] Thus, the "intent-based" doctrine of self-execution, commonly called the "*Foster* doctrine,"[8] promotes the arbitrary exercise of judicial power by encouraging courts to decide cases on the basis of a fictitious intent that the courts themselves create.

To provide a cogent answer to domestic implementation questions, courts must analyze domestic constitutional and statutory provisions to determine which government officials have the domestic legal authority and/or duty to implement the treaty. The inquiry necessarily begins with treaty interpretation: courts cannot properly resolve domestic implementation issues without first ascertaining the nature and scope of the international obligation. Having determined the content of the international obligation, though, the treaty interpretation inquiry is complete. The second step of the analysis necessarily moves beyond treaty interpretation to consider domestic laws delineating the powers and duties of various government officials and institutions.[9] Although *Foster v. Neilson* is somewhat cryptic, this two-step approach provides the best explanation of Marshall's opinion in *Foster*.

The intent-based doctrine is founded on the mistaken view that self-execution is a single question to be answered by engaging in a treaty interpretation analysis. In contrast, the two-step approach recognizes that the question of whether a treaty is self-executing is actually two very different questions masquerading as a single question. The first question—which concerns the nature and scope of the international obligation—is a treaty interpretation question. The second question—which concerns the allocation of responsibility for treaty implementation among various domestic government actors—is not a treaty interpretation question. The two-step approach directs

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PARATIVE STUDY (David Sloss ed., 2009) (surveying the role of domestic courts in treaty implementation in eleven countries).

7. Justice Breyer made a similar point in *Medellin*. *See* Medellin v. Texas, 552 U.S. 491, 549 (2008) (Breyer, J., dissenting) ("At best the Court is hunting the snark."); *see also* Vázquez, *supra* note 3, at 607 (noting that a judicial conclusion that the parties intended "to require legislative implementation is almost certainly attributing to the parties a nonexistent intent").

8. Professor Vázquez was the first scholar to identify the "*Foster* doctrine" as a distinct doctrine of self-execution. *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 700–05 (1995). Since then, several other scholars have borrowed his terminology. *See, e.g.*, Young, *supra* note 2, at 109–12; David H. Moore, *Law(Makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. F. 32 (2009). This Article refers to the modern doctrine or intent-based doctrine of self-execution to distinguish it from the doctrine courts applied in the nineteenth and early twentieth centuries. I have shown elsewhere that the intent-based doctrine had virtually no support until after publication of the Restatement (Second) of Foreign Relations Law in 1965. *See* Sloss, *supra* note 3, at 70–80.

9. In the rare case where the treaty itself, or the Senate resolution of ratification, actually addresses the question of which domestic government actors are responsible for treaty implementation, the treaty would be one of several sources courts could consult to answer domestic implementation questions.

courts to address domestic treaty implementation issues by abandoning their quest for a fictitious intent of the treaty makers, and considering a variety of domestic constitutional and statutory provisions that actually address the allocation of domestic authority over treaty implementation.

If one views self-execution doctrine through the lens of the two-step approach, then a broad range of constitutional treaty issues comes into sharper focus. The self-execution debate implicates at least four distinct sets of constitutional questions: the relationship between treaties and state law; treaty-based delegations of authority to international tribunals; the separation of lawmaking power between Congress's Article I powers and the Article II treaty power; and the division of treaty implementation responsibility between the executive and judicial branches. The two-step approach promises new insights in analyzing all of these issues, but it is not possible to address all of them in a single article. This Article focuses on two such issues: the judicial enforcement of treaties against state government officers (in Part II), and the delegation of decisionmaking authority to international tribunals (in Part III).

Judicial Enforcement of Treaties Against the States

The two-step approach helps disentangle domestic from international legal issues, but this is merely the first layer of confusion in self-execution doctrine. The next layer stems from the persistent failure to distinguish between primary and remedial law concepts of non-self-execution. Under a primary law concept, non-self-executing treaties do not create domestic legal duties for government officials, even if they create international duties for the United States. Under a remedial law concept, private parties may not demand judicial enforcement of non-self-executing treaties, even though government officials have a domestic legal duty to implement the treaty.[10] Generally, the question of *whether* a government officer has a legal duty is analytically prior to the question of *how* that duty is enforced.[11] However, commentators analyzing non-self-execution doctrine typically bypass the primary question—whether a treaty creates domestic legal duties for government officers—and jump straight to the remedial question of judicial enforcement.[12] This is like trying to build the second story of a house before building the ground floor. It is impossible to present a cogent analysis of judicial enforcement issues without first determining whether the treaty creates domestic legal duties for government officers.[13]

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10. *See* Sloss, *supra* note 3, at 10–12 (discussing primary and remedial law concepts of self-execution).

11. *Cf.* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 136 (1994) [hereinafter Hart & Sacks].

12. *See, e.g.*, Bradley, *supra* note 2 (analyzing judicial enforcement of treaties without analyzing the analytically prior question of whether, and in what circumstances, treaties create primary duties under domestic law); Young, *supra* note 2 (same).

13. This Article focuses primarily on treaties that create legal duties for government officers. The article says little about private law treaties that regulate transnational relationships between private

If one frames the question properly in terms of primary duties and asks whether treaties create primary duties for state government officers, it is clear that the Supremacy Clause addresses the issue. The Clause stipulates that treaties are "the supreme Law of the Land."[14] When the United States ratifies a treaty imposing non-discretionary duties on the nation under international law,[15] the Supremacy Clause means that the treaty creates non-discretionary duties for state government officers under domestic law, insofar as they have the capacity to promote or hinder performance of the nation's treaty obligations.[16] This was the consensus understanding of the Constitution from the Founding until at least World War II.[17] Whatever else the Supremacy Clause might mean, it must accomplish at least this much: if a treaty imposing non-discretionary duties on the nation did not create domestic legal duties for state officers who have the capacity to promote or hinder treaty performance, the statement that treaties are the "supreme Law of the Land" would be utterly meaningless.[18]

Assuming that a particular treaty creates non-discretionary duties for state government officers, the question of judicial enforcement arises. Here again, modern self-execution doctrine generates unnecessary confusion by ignoring standard principles of legal analysis. Applying standard principles, courts would distinguish between civil and criminal proceedings, offensive and defensive applications of treaty rules, different types of judicial remedies, and numerous other issues. In short, apart from self-execution, courts and commentators analyze judicial enforcement issues at the retail level, addressing various discrete issues as discrete issues. In contrast, modern self-execution doctrine addresses judicial enforcement at the wholesale level, asking whether a treaty is "judicially enforceable" without regard to the type of

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parties. As a formal matter, non-self-execution doctrine applies equally to both public law and private law treaties. In practice, however, courts apply non-self-execution doctrine almost exclusively in cases where private parties invoke treaties as a constraint on government action. *See* David Sloss, *United States*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT, *supra* note 6, at 504, 534–39.

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

15. Under the two-step approach, the question whether a treaty imposes non-discretionary duties on the United States is a question of international law. Unlike the intent-based doctrine, the two-step approach clearly distinguishes this question from the issue of which domestic government institution has the power and/or duty to perform U.S. treaty obligations.

16. This statement is subject to some additional caveats and qualifications. *See infra* Part II.A.

17. *See, e.g.*, Quincy Wright, *The Legal Nature of Treaties*, 10 AM. J. INT'L L. 706, 719 (1916) ("The Government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the Government to carry it into complete effect, according to its terms . . .") (quoting an 1831 letter from Secretary of State Livingston to Mr. Serurier); *see also* Michael P. Van Alstine, *Treaties in the Supreme Court, 1901-1945*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 191 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) [hereinafter CONTINUITY AND CHANGE]; Duncan B. Hollis, *Treaties in the Supreme Court, 1861-1900*, *in* CONTINUITY AND CHANGE 55; David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, *in* CONTINUITY AND CHANGE 7.

18. A distinct question is whether the treaty makers have the power to alter the ordinary operation of the Supremacy Clause by stipulating that a treaty shall not be binding on state officers until Congress enacts implementing legislation. *See infra* notes 188–203 and accompanying text.

judicial proceeding, the identity of the litigants, or the nature of relief sought. If a treaty *does not* impose non-discretionary duties on government officers, the wholesale conclusion that the treaty is not judicially enforceable against those officers is ordinarily justified. However, apart from its decision in *Medellin*, the Supreme Court has never recognized the existence of a "law" that imposes non-discretionary duties on state government officers that is not enforceable by *any* litigant in *any* type of judicial proceeding.[19] Thus, if non-self-execution is construed to bar *all* avenues for judicial enforcement of a treaty that imposes non-discretionary duties on government officers, that doctrine is a constitutional anomaly.

Indeed, modern self-execution doctrine is worse than an anomaly: courts commit constitutional error when they apply non-self-execution doctrine to bar judicial enforcement of treaties in cases where the Constitution mandates judicial enforcement. If a treaty creates domestic legal duties for state officers, an individual alleges that a state government is threatening to subject him to criminal sanctions in violation of that treaty, and the defendant raises that argument at the first available opportunity in accordance with state procedural rules, the Due Process Clause requires the state court to decide the merits of that defense before the state implements criminal sanctions. This is not a novel interpretation of the Due Process Clause: it is based on a traditional understanding of procedural due process whose roots can be traced to the Magna Carta.[20] Insofar as the intent-based doctrine tacitly assumes that the treaty makers have unbounded discretion to bar judicial enforcement of treaties—even in cases where the Due Process Clause mandates judicial enforcement—that doctrine is unconstitutional.

Delegation of Authority to International Tribunals

The preceding section addressed treaties that, by their terms, create non-discretionary duties for state government officers. Suppose, though, that a treaty delegates authority to an international tribunal and that tribunal issues an order requiring state government action. *Medellin* involved treaties that delegated authority to the International Court of Justice ("ICJ") to issue decisions binding on the United States under international law.[21] The petitioner in *Medellin* argued that a state government official had a non-discretionary duty based on the ICJ's decision in *Avena*.[22] Thus, *Medellin*

19. The Supreme Court decision in *Medellin* might be construed to mean that a non-self-executing treaty is not a "law" for purposes of domestic law. *See* Sloss, *supra* note 13, at 509–14. Under this interpretation, *Medellin* is inconsistent with the text of the Supremacy Clause. Hence, scholars who defend *Medellin* uniformly assume that a non-self-executing treaty is the "Law of the Land" under the Supremacy Clause. *See, e.g.*, Bradley, *supra* note 2; Stephan, *supra* note 2; Young, *supra* note 2. Accordingly, this Article assumes that a non-self-executing treaty is a "law."

20. *See infra* Part II.B; *see also* David Sloss, *The Constitutional Right to a Treaty Preemption Defense*, 40 U. TOL. L. REV. 971, 986–92 (2009).

21. *See* Medellin v. Texas, 552 U.S. 491 (2008).

22. Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31).

raises the question whether, and under what circumstances, the decision of an international tribunal creates domestic legal duties for state government officers. This Article contends that an international tribunal's decision creates domestic legal duties for state officers when: a valid treaty ratified by the United States delegates decisionmaking authority to an international tribunal; that tribunal acts within the scope of delegated authority; the treaty creates a non-discretionary duty under international law for the nation to comply with the tribunal's decision; and state government officers have the capacity to promote or hinder performance of the nation's treaty obligations.[23] If the decision of an international tribunal creates domestic legal duties for state officers, those duties are judicially enforceable in the same way as domestic legal duties based on treaties that do not delegate authority to international tribunals.

This Article contends that the Supreme Court's rationale in *Medellin* is seriously flawed under any plausible interpretation of the Court's opinion. Even so, the Court's decision manifests legitimate concerns about policy issues related to treaty-based international delegations.[24] The Court might have presented a more coherent rationale for its decision had it confronted the international delegation issues directly, instead of avoiding the main issues by relying on an incoherent non-self-execution rationale. This Article confronts the international delegation issues that the Court dodged in *Medellin*; it recommends a set of reservations and declarations that treaty makers can use to limit the international and domestic effects of treaty-based delegations in future treaties.

The Article proceeds in four parts. Part One explains and defends the two-step approach to self-execution. It demonstrates that the two-step approach provides the best explanation of Marshall's opinion in *Foster v. Neilson*, and that the two-step approach is analytically and normatively superior to the intent-based doctrine. Parts Two and Three utilize the two-step approach to analyze two recurring issues of constitutional treaty law. Part Two addresses judicial enforcement of treaties against state government officers. Part Three addresses treaty-based delegations of authority to international tribunals. Part Four presents a critical assessment of the Supreme Court's decision in *Medellin*.

23. To be precise, the proposed rule is subject to anti-commandeering limitations and subject to the caveat that the treaty makers have the power to alter the ordinary operation of the Supremacy Clause by adopting appropriate conditions. *See infra* notes 223–34 and accompanying text.

24. *See* John O. McGinnis, Medellin *and the Future of International Delegation*, 118 YALE L.J. 1712 (2009) (analyzing policy issues associated with treaty-based international delegations).

I. The Two-Step Approach to Self-Execution

Contemporary legal scholarship is virtually unanimous in the belief that Marshall's opinion in *Foster v. Neilson*[25] applied the intent-based doctrine of self-execution.[26] Courts applying the intent-based doctrine view self-execution as a treaty-interpretation question; they examine the treaty text and ancillary materials to ascertain whether the treaty makers intended the treaty to be self-executing.[27] Part I demonstrates that Marshall did not apply the intent-based approach in *Foster*. The analysis draws on eighteenth and nineteenth century sources—some of which have been completely overlooked by other scholars—to show that Marshall applied the two-step approach in *Foster*. Under the two-step approach, courts first engage in treaty interpretation to ascertain the nature and scope of the international obligation. Then, at step two, they analyze domestic law to determine which government actors have the power and duty to implement the treaty domestically. Thus, step one focuses on international obligations; step two focuses on domestic implementation.

The first section analyzes eighteenth and nineteenth century sources that provide crucial historical context to uncover the hidden rationale underlying Marshall's enigmatic opinion in *Foster*. The second section presents a detailed analysis of Marshall's opinions in *Foster* and *United States v. Percheman.*[28] The final section explains why the two-step approach is analytically and normatively superior to the intent-based approach.

A. Historical Context

Section II.A considers three sets of sources from the eighteenth and nineteenth centuries that help shed light on Marshall's opinion in *Foster*: the Supreme Court decision in *Ware v. Hylton*;[29] congressional debates on the Jay Treaty and the Jonathan Robbins case; and Supreme Court decisions between 1830 and 1855 relating to land claims in Louisiana and Florida. The analysis demonstrates that—from the late eighteenth century until the Civil War—members of Congress and Supreme Court Justices agreed that the question of whether a treaty requires legislative implementation was properly understood as a question of domestic constitutional law, *not* as a question of treaty interpretation. The modern assumption that Marshall

25. 27 U.S. (2 Pet.) 253 (1829).

26. *See, e.g.*, Bradley, *supra* note 2; Vázquez, *supra* note 3; Young, *supra* note 2.

27. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 504–14 (2008); Al-Bihani v. Obama, 619 F.3d 1, 16 (D.C. Cir. 2010) (Kavanaugh, J., concurring); Gross v. German Found. Indus. Initiative, 549 F.3d 605, 615–16 (3d Cir. 2008); Renkel v. United States, 456 F.3d 640, 643–44 (6th Cir. 2006); Cantor v. Cohen, 442 F.3d 196, 207 (4th Cir. 2006) (Traxler, J., dissenting); Jogi v. Voges, 425 F.3d 367, 377–78 (7th Cir. 2005); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. h (1987).

28. 32 U.S. (7 Pet.) 51 (1833).

29. 3 U.S. 199 (1796).

conceived of this question as a treaty interpretation question reflects a failure to understand the intellectual universe of the early nineteenth century.

1. *Ware v. Hylton*

Ware v. Hylton was one of the first Supreme Court decisions addressing the domestic implementation of treaties. Before becoming Chief Justice, Marshall served as lead counsel for the defendants in *Ware.*[30] The Court ruled against Marshall's client; Justice Iredell was the only Justice who would have ruled in Marshall's favor. Thus, Iredell's opinion provides an important benchmark for understanding Marshall's early thinking about treaty implementation. Moreover, Iredell's opinion provides a lucid explanation of the doctrine of executory and executed treaties that Marshall applied three decades later in *Foster*.

In *Ware*, a British creditor sued American debtors to collect a debt incurred before the Revolutionary War. The defendants answered that they discharged part of the debt by paying money into a state loan office in accordance with Virginia law.[31] In reply, the plaintiff invoked Article 4 of the 1783 peace treaty with Britain, which provided that "[c]reditors on either Side shall meet with no lawful Impediment to the Recovery . . . of all bona fide Debts heretofore contracted."[32] The Court ruled in favor of the British plaintiff, holding that the treaty removed any bar to recovery created by Virginia law. Justice Cushing wrote that under the Supremacy Clause, a treaty "overrules all State laws upon the subject."[33] The other Justices agreed on this point,[34] including Justice Iredell, who dissented on other grounds.[35] Although Marshall argued eloquently on behalf of the losing defendants,[36] he never challenged the consensus view that under the Supremacy Clause, the treaty displaced any state law inconsistent with U.S. treaty obligations.

Relying on Blackstone's parallel distinction for contracts,[37] Justice Iredell distinguished between executory and executed treaty provisions.[38] Executed treaty provisions "require no further act to be done."[39] Iredell cited Britain's

30. *See* 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 215–17 (Maeva Marcus ed., 2003) [hereinafter 7 DHSC].

31. *See Ware*, 3 U.S. at 220–21.

32. Definitive Treaty of Peace, U.S.-Gr. Brit., art. 4, Sept. 3, 1783, 8 Stat. 80.

33. *Ware*, 3 U.S. at 282 (Cushing, J.).

34. *See id.* at 236–37 (Chase, J.) (implying that, by virtue of the Supremacy Clause, "a law of a State, contrary to a treaty" is void).

35. *See id.* at 277 (Iredell, J.) ("[W]hen this constitution was ratified, the case as to the treaty in question stood upon the same footing, as if every [state law] constituting an impediment to a creditor's recovery had been expressly repealed, and any further act passed, which the public obligation had before required, if a repeal alone would not have been sufficient.").

36. *See id.* at 210–15 (Marshall's argument).

37. 2 WILLIAM BLACKSTONE, COMMENTARIES *443.

38. *Ware*, 3 U.S. at 271–73 (Iredell, J.).

39. *Id*. at 272.

acknowledgment of U.S. independence as an example of an executed provision. In contrast, executory provisions require the nation to undertake affirmative steps to fulfill its treaty commitments. Iredell divided executory treaty provisions into three classes: legislative, executive, and judicial.[40] In his view, "when a nation promises to do a thing, it is to be understood, that this promise is to be carried into execution, in the manner which the Constitution of that nation prescribes."[41] Thus, Iredell's analytic framework involves a two-step analysis. In step one, the court analyzes the treaty to determine whether the provision is executory or executed. If it is executory, the second step entails a domestic separation of powers analysis to determine whether treaty implementation requires judicial, executive, or legislative action.

To fully understand Iredell's two-step approach, it is essential to grasp the conceptual distinction between an executory treaty provision and a non-self-executing provision. The statement that a treaty is "non-self-executing" means that congressional legislation is necessary to implement the treaty; if the treaty is "self-executing," no such legislation is needed.[42] The statement that a treaty is "executory" means that some affirmative action is necessary to implement the treaty; if a treaty is "executed," no affirmative action is required. Thus, all non-self-executing treaty provisions are executory, but not all executory provisions are non-self-executing, because some executory treaty provisions can be implemented by executive or judicial action.

It bears emphasis that, under Iredell's two-step approach, Article 4 of the 1783 peace treaty was an executory treaty provision that required judicial implementation. Article 4 was executory because it required the United States to take affirmative steps to ensure that British creditors recovered their debts. Although Article 4 was executory, it did not require legislative implementation. The Court held that judicial action was the appropriate means to implement the treaty because the combination of the treaty and the Supremacy Clause obligated state courts to "execute" the U.S. treaty obligation by ordering American debtors to pay their debts to British creditors.

2. *Congressional Debates on Treaty Implementation*

At about the same time that the Supreme Court decided *Ware*, members of Congress were debating proposed legislation to implement the Jay

40. *Id.*

41. *Id.*

42. Although the terms "self-executing" and "non-self-executing" are ambiguous, there is general agreement that the distinction hinges on whether the treaty requires legislative implementation. The ambiguity involves what it means to say that legislation is "necessary." Is legislation necessary to incorporate the treaty into domestic law? Or are non-self-executing treaties part of domestic law, but legislation is necessary to authorize judicial enforcement?

Treaty,[43] one of the most controversial treaties in the nation's early history.[44] During congressional debates, Federalists and Republicans staked out opposing positions on the need for legislation to implement treaties.[45] Republicans claimed that all treaties "that fell within the enumerated legislative powers of Congress" required legislative implementation to become effective as domestic law.[46] In contrast, Federalists argued that "treaties automatically become law by virtue of the Supremacy Clause [and] they also 'repealed' or 'annulled' prior inconsistent federal statutes."[47] Most Federalists acknowledged that a treaty could not appropriate funds, but they claimed that Congress had a constitutional duty to appropriate funds whenever that was necessary to implement a treaty.[48] Despite deep divisions between Federalists and Republicans, all agreed that the question whether treaties required legislative implementation was a constitutional law question, not a treaty interpretation question. Ultimately, Congress enacted an appropriations bill to fund implementation of the Jay Treaty, but "the episode ended in a standoff on the constitutional questions."[49]

Just four years later, Congress resumed the debate about the Constitution and treaty implementation when Republicans introduced a formal resolution criticizing President Adams' handling of the so-called "Jonathan Robbins affair."[50] The Robbins affair is noteworthy because Chief Justice Marshall, then serving as a Congressman from Virginia, delivered an important speech in the House of Representatives presenting a constitutional defense of President Adams' actions.[51] Marshall's speech set forth his views about the allocation of constitutional responsibility for treaty implementation among the three branches of the federal government.[52] In brief, Marshall believed that all government officers have a duty to execute treaties, insofar as they can do so by acting within the scope of authority granted under domestic law.

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43. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty]. The Court decided *Ware* in March 1796. *See* Dates of Early Supreme Court Decisions and Arguments, *available at* http://www.supremecourt.gov/opinions/opinions.aspx. Congress debated the Jay Treaty in March and April 1796. *See* 5 Annals of Cong. 424–1295 (1796).

44. Jerald A. Combs, The Jay Treaty: Political Battleground of the Founding Fathers (1970) (analyzing the history and debates surrounding the Jay Treaty controversy); Samuel Flagg Bemis, Jay's Treaty: A Study in Commerce and Diplomacy (2d ed. 1962) (discussing the history, creation and ratification of the Jay Treaty).

45. *See* 5 Annals of Cong. 424–1295 (1796). For an excellent summary of the debate, see John T. Parry, *Congress, the Supremacy Clause and the Implementation of Treaties*, 32 Fordham Int'l L.J. 1209, 1276–94 (2009).

46. *See* Parry, *supra* note 45, at 1281–83 (citing statements by Representatives Gallatin and Giles).

47. *Id*. at 1284.

48. *See id*. at 1281–84.

49. David P. Currie, The Constitution in Congress: The Federalist Period 1789-1801, at 215 (1997).

50. *See* 10 Annals of Cong. 532–33 (resolution by Representative Livingston on Feb. 20, 1800).

51. *See* Michael P. Van Alstine, *Taking Care of John Marshall's Political Ghost*, 53 St. Louis U. L.J. 93 (2008) (discussing Marshall's role in the Robbins affair).

52. *See* 10 Annals of Cong. 596, 605–15 (1800).

The Robbins case arose when British authorities sought the extradition of Jonathan Robbins on the charge that he committed murder on a British warship.[53] Under Article 27 of the Jay Treaty,[54] the United States agreed to extradite fugitives to Britain if certain conditions were satisfied.[55] British authorities asked Thomas Bee, the federal district judge in South Carolina, to order Robbins' extradition. When Judge Bee refused, the British approached Secretary of State Timothy Pickering. After consulting with President Adams, Pickering sent Judge Bee a letter conveying the President's "advice and request that [Robbins] may be delivered up to the consul or other agent of Great Britain."[56] After receiving Pickering's letter, Judge Bee ordered Robbins to be delivered to British authorities,[57] and the government proceeded to extradite him.

Consistent with Republican positions in the Jay Treaty debates, Republicans argued that President Adams acted improperly because he lacked the constitutional authority to extradite Robbins until Congress enacted legislation implementing Article 27.[58] Marshall agreed that Congress "may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses."[59] Marshall explained this position as follows: "[The President] is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he . . . possesses the means of executing it."[60] Since Article 27 had the force of law under the Supremacy Clause, and the President had a duty under Article II to execute the law, the President had a duty to execute Article 27, at least in cases where Congress had not specified some other mechanism for treaty implementation.

Republicans also argued that Article 27 required judicial, not executive implementation.[61] In response, Marshall emphasized the distinction between a case "carried before a court as an individual claim" and a case "brought before the Executive as a national demand."[62] The Robbins case was "in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court

53. *See* Van Alstine, *supra* note 51.

54. Jay Treaty, *supra* note 43, art. 27.

55. *See id.*

56. Letter from Timothy Pickering to Thomas Bee (June 3, 1799), *in* 4 State Papers and Publick Documents of the United States 304 (2d ed., Boston, T.B. Wait & Sons 1817).

57. *See* United States v. Robbins, 27 F. Cas. 825, 833 (D.S.C. 1799).

58. 10 Annals of Cong. 614 (1800).

59. *Id.*

60. *Id.* at 615.

61. *Id.* at 606. It is noteworthy that Marshall's Republican opponents thought the judiciary could execute the treaty without waiting for legislative authorization, but the executive had to await legislative authorization before implementing the treaty. This is precisely the opposite of the view espoused by many modern scholars, who think that the President can execute treaties on his own authority, but the courts must await legislative implementation. *See, e.g.*, Stephan, *supra* note 2.

62. 10 Annals of Cong. 609.

decide on them. Of consequence, the demand is not a case for judicial cognizance."[63] A treaty-related claim falls within the scope of judicial competence where parties "come into court, who can be reached by its process, and bound by its power . . . to which they are bound to submit."[64] Since the real parties in interest in the Robbins case were two sovereign powers, and they were not bound to submit to judicial authority, the case fell outside the scope of judicial competence.

In Marshall's view, cases in which individuals raise claims under treaties fall within the scope of judicial competence. "A case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court."[65] In particular, Marshall noted, in cases where the government arrests a person pursuant to an extradition request and that person alleges that he has been wrongfully detained, the individual can raise a claim under the extradition treaty by filing a habeas corpus petition.[66] Robbins himself sought habeas relief in precisely these circumstances and no one challenged the judiciary's authority to adjudicate the merits of his petition.[67] Thus, in Marshall's view, judges have a duty to execute treaties whenever treaty-related questions fall within the scope of judicial competence, just as executive officers have a duty to execute treaties whenever treaty issues are within the scope of their competence. Moreover, the scope of judicial and executive authority is governed by domestic law, not international law.

All congressional participants in the Robbins debate agreed that Article 27 was executory—i.e., the United States had to take affirmative steps to implement Article 27. But this did not mean that legislation was required. To the contrary, the congressional debate focused almost exclusively on the question whether the judiciary or the executive was the appropriate branch to execute the treaty. Thus, consistent with Justice Iredell's opinion in *Ware*, the consensus view was that some executory treaty provisions require judicial implementation, and some executory provisions require executive implementation.

Finally, all participants in the Robbins debate agreed that constitutional law, not international law, determines which branch of government is responsible for treaty implementation. In Marshall's words, the distribution of power among the branches is governed by "the principles of the American

63. *Id.* at 613.

64. *Id.* at 606.

65. *Id. See also* Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348 (1809) (Marshall, C.J.) ("Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.").

66. 10 Annals of Cong. 615 ("And if the President should cause to be arrested under the treaty an individual who was so circumstanced as not to be properly the object of such an arrest, he may perhaps bring the question of the legality of his arrest before a judge, by a writ of habeas corpus.").

67. *See* United States v. Robbins, 27 F. Cas. at 833.

Government."[68] Marshall acknowledged that explicit treaty language providing for a specific mode of treaty implementation would have controlling effect.[69] However, in the absence of such explicit treaty language, constitutional separation-of-powers principles determine which branch of government has the power and/or duty to implement a particular treaty provision.

3. *Land Claims in Louisiana and Florida*

By 1820, the United States had concluded two major treaties involving acquisition of land from foreign powers: the 1803 treaty acquiring Louisiana from France[70] and the 1819 treaty acquiring Florida from Spain.[71] Article 3 of the Louisiana Treaty and Article 8 of the Florida Treaty protected the property rights of individuals who owned land in the subject territories before the transfer of sovereignty.[72] The Court interpreted both provisions to provide identical protection for individual property rights. *Foster* involved Article 8 of the Florida Treaty.

The Court decided *Foster* in 1829; over the next three decades, the Court decided at least seventy-five other cases entailing application of Article 8 of the Florida Treaty and/or Article 3 of the Louisiana Treaty.[73] Other scholars

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68. 10 Annals of Cong. 615.

69. *See id*. at 608 (comparing the Consular Convention with France, which specified a particular mode of treaty implementation, with Article 27 of the treaty with Britain, which contained no such provision).

70. Treaty for the Cession of Louisiana, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200 [hereinafter Louisiana Treaty].

71. Treaty of Amity, Settlement and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252 [hereinafter Florida Treaty].

72. *See id*., art. 8; Louisiana Treaty, *supra* note 70, art. 3.

73. One source indicates that the Supreme Court decided "some fifty cases" involving the Louisiana Treaty and "about fifty Florida cases." Homer Cummings & Carl McFarland, Federal Justice: Chapters in the History of Justice and the Federal Executive 124–25 (1937). Their figures may include some cases decided after 1860. The author identified seventy-five cases decided between 1829 and 1859. *See* Doe v. Braden, 57 U.S. 635 (1853); Guitard v. Stoddard, 57 U.S. 494 (1853); Chouteau v. Molony, 57 U.S. 203 (1853); United States v. Roselius, 56 U.S. 31 (1853); United States v. Davenport's Heirs, 56 U.S. 1 (1853); Glenn v. United States, 54 U.S. 250 (1851); United States v. Pillerin, 54 U.S. 9 (1851); United States v. Castant, 53 U.S. 437 (1851); United States v. Moore, 53 U.S. 209 (1851); Montault v. United States, 53 U.S. 47 (1851); United States v. Cities of Philadelphia & New Orleans, 52 U.S. 609 (1850); United States v. Power's Heirs, 52 U.S. 570 (1850); United States v. Boisdoré, 52 U.S. 63 (1850); Robinson v. Minor, 51 U.S. 627 (1850); United States v. D'Auterive, 51 U.S. 609 (1850); Villalobus v. United States, 51 U.S. 541 (1850); Goodtitle *ex dem* Pollard v. Kibbe, 50 U.S. 471 (1850); Davis v. Police Jury of the Parish of Concordia, 50 U.S. 280 (1850); La Roche v. Lessee of Jones, 50 U.S. 155 (1850); United States v. Reynes, 50 U.S. 127 (1850); Almonester v. Kenton, 50 U.S. 1 (1850); Bissell v. Penrose, 49 U.S. 317 (1850); Menard's Heirs v. Massey, 49 U.S. 293 (1850); United States v. Heirs of Boisdoré, 49 U.S. 113 (1850); United States v. King, 48 U.S. 833 (1849); Kennedy's Executors v. Hunt's Lessee, 48 U.S. 586 (1849); United States v. Lawton, 46 U.S. 10 (1847); Les Bois v. Bramell, 45 U.S. 449 (1846); Mackay v. Dillon, 45 U.S. 421 (1846); Lessee of Hickey v. Stewart, 44 U.S. 750 (1845); McDonogh v. Millaudon, 44 U.S. 693 (1845); Pollard v. Hagan, 44 U.S. 212 (1845); Barry v. Gamble, 44 U.S. 32 (1845); Lessee of Pollard v. Files, 43 U.S. 591 (1844); Chouteau v. Eckhart, 43 U.S. 344 (1844); Stoddard v. Chambers, 43 U.S. 284 (1844); City of Mobile v. Emanuel, 42 U.S. 95 (1843); United States v. Acosta, 42 U.S. 24 (1843); City of Mobile v. Hallett, 41 U.S. 261 (1842); City of Mobile v. Eslava, 41 U.S. 234 (1842); United States v. Clarke, 41 U.S. 228 (1842); United States v. Hanson, 41 U.S. 196 (1842); United States v. Miranda, 41 U.S. 153 (1842); United States v. Breward, 41 U.S. 143 (1842); United States v. Delespine, 40 U.S. 319 (1841); O'Hara v.

who have written about the historical origins of the self-execution doctrine have generally overlooked the Louisiana and Florida property cases,[74] but one cannot properly interpret Marshall's opinions in *Foster* and *Percheman* without understanding those cases. The property claims presented in those cases can be divided into three groups: claims involving perfected titles; claims involving inchoate titles based on legally valid grants; and claims involving grants from a government representative who lacked authority to convey a valid legal title.[75] The characterization of the relevant treaty provisions as "executory" or "executed" depended, in large part, on the nature of the property interests at stake in a particular case.[76]

If a person held a perfected title to real property before the effective date of the treaty, he retained his title when sovereignty passed to the United States. The United States had no obligation to take affirmative steps to perfect such already-perfect titles.[77] As Justice Catron explained, "[t]hat the perfect titles, made by Spain, before the 24th January, 1818, within the ceded territory, are intrinsically valid . . . is the established doctrine of this Court; and that they need no sanction from the legislative or judicial departments of this country."[78] Article 8 of the Florida Treaty and Article 3 of the Louisiana Treaty—as applied to perfect titles—were "executed," not "exec-

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United States, 40 U.S. 275 (1841); United States v. Heirs of Forber, 40 U.S. 173 (1841); Mitchel v. United States, 40 U.S. 52 (1841); United States v. Waterman, 39 U.S. 478 (1840); Lessee of Pollard's Heirs v. Kibbe, 39 U.S. 353 (1840); United States v. Wiggins, 39 U.S. 334 (1840); Keene v. Whitaker, 39 U.S. 170 (1840); United States v. Levy, 38 U.S. 81 (1839); Garcia v. Lee, 37 U.S. 511 (1838); United States v. Kingsley, 37 U.S. 476 (1838); Strother v. Lucas, 37 U.S. 410 (1838); United States v. Mills' Heirs, 37 U.S. 215 (1838); Mayor of New Orleans v. United States, 35 U.S. 662 (1836); Mackey v. United States, 35 U.S. 340 (1836); Smith v. United States, 35 U.S. 326 (1836); United States v. Sibbald, 35 U.S. 313 (1836); United States v. Seton, 35 U.S. 309 (1836); United States v. Fernandez, 35 U.S. 303 (1836); Keene v. Clark's Heirs, 35 U.S. 291 (1836); Soulard's Heirs v. United States, 35 U.S. 100 (1836); Mitchel v. United States, 34 U.S. 711 (1835); City of New Orleans v. De Armas, 34 U.S. 224 (1835); United States v. Clarke, 34 U.S. 168 (1835); Delassus v. United States, 34 U.S. 117 (1835); United States v. Huertas, 33 U.S. 488 (1834); United States v. Clarke, 33 U.S. 436 (1834); United States v. Percheman, 32 U.S. 51 (1833); United States v. Arredondo, 31 U.S. 691 (1832); Soulard v. United States, 29 U.S. 511 (1830); Foster v. Neilson, 27 U.S. 253 (1829).

74. *See, e.g.*, Bradley, *supra* note 2; Flaherty, *supra* note 3; Parry, *supra* note 45; Vazquez, *supra* note 3; Yoo, *supra* note 2. *But see* Sloss, Ramsey & Dodge, *International Law in the Supreme Court to 1860*, *supra* note 17, at 18–23.

75. The Court used the terms "perfect," "complete," and "legal" title interchangeably, distinguishing sharply between this class of property rights and "inchoate," "incomplete," or "equitable" titles, terms it also used interchangeably.

76. It is noteworthy that the Court never used the term "self-executing" or "non-self-executing" to modify the term "treaty" in any of the Louisiana/Florida property cases. *Bartram v. Robertson*, 122 U.S. 116, 120 (1887) was the first case in which the Court used the term "self-executing" to refer to treaties.

77. *See, e.g.*, United States v. Roselius, 56 U.S. at 34 ("If the grant of the French government to Duport was a complete title, then no act on the part of the American government was required to give it additional validity, as the treaty of 1803, by which Louisiana was acquired, sanctioned perfect titles[.]"); McDonogh, 44 U.S. at 706 ("The perfect title of McDonogh being clothed with the highest sanction, and in full property, on the change of governments . . . in addition to the general law of nations and the treaty of 1803 . . . secured in full property such titles.").

78. United States v. Wiggins, 39 U.S. 334, 350 (1840).

utory," because the United States did not have to take any affirmative steps to implement its treaty obligation to respect perfected property rights.[79]

The second class of cases under the Florida and Louisiana treaties involved inchoate titles based on legally valid grants. As the Court noted, "there were at the date of the treaty very many claims, whose validity depended upon the performance of conditions in consideration of which the concessions had been made, and which must have been performed before Spain was bound to perfect the titles."[80] If a person held an inchoate title before the effective date of the treaty, "the fee [i.e., the legal title] was transferred to the United States by the treaty, with the equity attached in the claimant."[81] The relevant treaty provisions obligated the United States to convert such imperfect titles (i.e., equitable claims) into perfect titles (i.e., legal titles), but only insofar as the prior sovereign was obligated to perfect the title of that particular claimant.[82] With respect to these claimants, Article 8 of the Florida Treaty and Article 3 of the Louisiana Treaty were executory, not executed, because the United States had to take affirmative steps to perfect these inchoate titles.

The Supreme Court stated in several cases that federal legislation was required to perfect the titles of claimants who held inchoate titles at the time sovereignty passed to the United States, because Congress was the only branch of government with the constitutional authority to convert inchoate titles into perfect titles.[83] It bears emphasis that such statements presuppose a two-step approach. First, the Court determined as a matter of treaty interpretation that a particular treaty required conversion of inchoate titles to

79. It is helpful here to distinguish between two types of "affirmative steps." In some cases, affirmative judicial action is necessary to resolve a treaty-related dispute between two private parties. Such disputes might arise with respect to either executed or executory treaty provisions. For example, if a private party trespassed on land for which another person held a perfect title, the judiciary might need to take affirmative steps to protect the owner's title, even though the title is protected by an executed treaty provision. In contrast, some treaties obligate the United States to take affirmative steps even in the absence of any dispute between private parties. Such treaties are "executory" in the sense in which Iredell (and Blackstone) used that term.

80. *Wiggins*, 39 U.S. at 350.

81. *McDonogh*, 44 U.S. at 706. *See also* Strother v. Lucas, 37 U.S. 410, 436 (1838) (explaining that an "inchoate" or "equitable" title was a property right, "which before the treaty with France in 1803, or with Spain in 1819, had so attached to any piece or tract of land, great or small, as to affect the conscience of the former sovereign, 'with a trust,' and make him a trustee for an individual").

82. *See Wiggins*, 39 U.S. at 350 (stating that "the United States were bound, after the cession of the country, to the same extent that Spain had been bound before the ratification of the treaty, to perfect" these inchoate titles); *see also* Chouteau v. Eckhart, 43 U.S. 344, 374 (1844); Florida Treaty, *supra* note 71, art. 8, Feb. 22, 1819, 11 Bevans 528, 531 ("All the grants of land made before the 24th of January 1818 . . . shall be ratified and confirmed to the persons in possession of the lands, *to the same extent, that the same grants would be valid if the territories had remained under the Dominion of His Catholic Majesty*.") (emphasis added).

83. *See, e.g.*, United States v. Reynes, 50 U.S. 127, 153 (1850) ("And it has been invariably held, and indeed must follow as of necessity, that imperfect titles derived from a foreign government can only be perfected by the legislation of the United States."); Menard's Heirs v. Massey, 49 U.S. 293, 307 (1850) ("It was therefore manifest, that . . . [inchoate titles] must depend for their sanction and completion upon the sovereign power . . . No standing, therefore, in an ordinary judicial tribunal has ever been allowed to these claims, until Congress has confirmed them and vested the legal title in the claimant.").

perfect titles. Second, the Court decided as a matter of U.S. constitutional law that federal legislation was needed to implement that obligation. The Court did not clearly articulate this view until 1844,[84] fifteen years after its decision in *Foster*. Nevertheless, as explained below, the doctrine that federal legislation was constitutionally required to convert inchoate titles into perfect titles helps clarify the rationale underlying Marshall's opinion in *Foster*.[85]

The third class of cases involved grants made by government representatives who lacked authority to convey legal title because the grant was made after the date on which the grantor's government signed a treaty ceding the territory to a different sovereign.[86] In some of these cases, the Court held that the grant was void because the government that issued the grant lacked authority to do so.[87] In other cases, though, the Court held that claimants had an equitable claim (i.e., an inchoate title) because they inhabited land on the basis of a good faith belief that the government granting the land had the authority to do so.[88] In several cases, Congress enacted legislation to validate the property claims of individuals in this group. The Court ruled in favor of claimants who could point to such legislation to support their claims,[89] but it never ruled in favor of any claimant who merely asserted an equitable claim unsupported by such legislation.

In sum, with respect to claimants who held perfect legal titles, Article 8 of the Florida Treaty and Article 3 of the Louisiana Treaty were executed, not executory. However, with respect to claimants who held inchoate titles, the same treaty provisions were executory, and Congress was the only institution with the domestic constitutional authority to execute U.S. treaty ob-

84. *See* Chouteau v. Eckhart, 43 U.S. 344, 374–75 (1844).

85. The Court's view that legislation was necessary to perfect inchoate titles was entirely consistent with Marshall's theory in *Robbins*. Marshall's theory was that every government officer has a duty to execute treaties, insofar as treaty implementation measures fall within the scope of his competence. In the Louisiana and Florida cases, the Court held that Congress is the only government institution with the constitutional authority to convert inchoate titles into perfect titles. Therefore, federal judicial and executive officials could not execute the relevant treaty provisions, because judicial and executive officers lacked the constitutional authority to convert inchoate titles into perfect titles.

86. Portions of the territory conveyed to the United States by the 1803 Louisiana Treaty and the 1819 Florida Treaty had previously been traded among France, Spain, and Britain in a series of treaties concluded between 1763 and 1800. *See* Foster v. Neilson, 27 U.S. 253, 300–03 (1829). Several of the Louisiana-Florida property cases that reached the Supreme Court involved land granted by a representative of one of these governments after the grantor's government had already ceded sovereignty to another country.

87. *See, e.g.*, Keene v. Whitaker, 39 U.S. 170 (1840); Garcia v. Lee, 37 U.S. 511 (1838).

88. *See, e.g.*, Lessee of Pollard v. Files, 43 U.S. 591, 603 (1844) ("Very many permits to settle on the public domain and cultivate, were also granted about the same time; which were in form incipient concessions of the land, and intended by the governor to give title, and to receive confirmation afterwards from the king's deputy, so as to perfect them into a complete title. . . . Although the United States disavowed that any right to the soil, passed by such concessions; still they were not disregarded as giving no equity to the claimant: on the contrary. . . ." [explaining how Congress passed legislation to recognize equitable claims]).

89. *See* Lessee of Pollard v. Files, 43 U.S. 591 (1844); Lessee of Pollard's Heirs v. Kibbe, 39 U.S. 353 (1840).

ligations. Finally, with respect to grants made by government representatives who lacked authority to convey legal title, the Court sometimes held that such grants were void and sometimes held that such grants gave rise to equitable claims, which required congressional sanction before they could be enforced in court. In every case where the issue arose, the Court's analysis proceeded on the basis of the same assumption that shaped congressional debates: whether a treaty requires legislative implementation is a domestic constitutional question, not a treaty interpretation question.

B. Application of the Two-Step Approach in Foster *and* Percheman

In *Foster v. Neilson*,[90] Marshall penned the following words, which have come to be associated with the doctrine of non-self-executing treaties:

> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[91]

Marshall clearly believed that legislation was necessary to implement Article 8 of the Florida Treaty, but it is unclear why. The dominant contemporary interpretation asserts that, under the *Foster* doctrine of non-self-execution, "the need for implementing legislation has its source in the treaty itself."[92] Under this view, Marshall's conclusion that Article 8 required legislative implementation rested entirely on a treaty interpretation analysis, not a separation of powers analysis.[93] Moreover, under the conventional view, Marshall reversed himself in *United States v. Percheman*[94] and held—again as a matter of treaty interpretation—that Article 8 did not require legislative implementation.[95]

This section contends that this conventional interpretation is mistaken. From Marshall's perspective, the key factor that distinguished *Percheman* from *Foster* was the nature of the property interest at stake. The plaintiffs in *Foster* traced their title to a grant that was void *ab initio* because the grantor lacked authority to convey title. Hence, the plaintiffs at best had an equitable claim to the land. They needed congressional action to validate their title because Congress was the only branch of government with the constitu-

90. 27 U.S. (2 Pet.) 253 (1829).
91. *Id.* at 314.
92. Vázquez, *supra* note 3, at 631.
93. *See id.* at 629–37.
94. 32 U.S. (7 Pet.) 51 (1833).
95. *See* Vázquez, *supra* note 3, at 644–45. *See also* RESTATEMENT, *supra* note 5, § 111 n.5.

tional authority to convert inchoate titles into perfect titles. In contrast, Percheman held title "in absolute property" based on a valid grant from the Spanish governor of Florida.[96] Thus, in Marshall's view, legislation was not necessary to validate Percheman's title because he already had a perfect title before Spain conveyed Florida to the United States.

1. *The Property Interests at Stake in* Foster *and* Percheman

Marshall explained in *Foster* how France, Spain, Britain and the United States concluded a series of treaties over several decades in which they traded various portions of Florida and Louisiana among themselves.[97] It is not necessary to recount the full history here, but knowledge of certain facts is essential to understand the Court's decisions in *Foster* and *Percheman.* The land at issue in *Percheman* was in East Florida,[98] in an area subject to undisputed Spanish sovereignty from 1783 until 1819. In contrast, the land at issue in *Foster* was east of the Mississippi River and west of the Perdido River (in what is now southeastern Louisiana), an area that was the subject of competing sovereignty claims between 1800 and 1819. The United States maintained that Spain ceded land west of the Perdido to France by means of an 1800 treaty, and that France had ceded it to the United States as part of the 1803 Louisiana Purchase.[99] Spain, however, contended that land between the Mississippi and Perdido Rivers was part of Spanish Florida until 1819, when the United States acquired Florida from Spain.[100]

Percheman traced his title to an 1815 grant from the Spanish governor of Florida, a grant made when Spain exercised undisputed sovereignty over East Florida.[101] The Spanish governor conveyed title to Percheman "in absolute property."[102] Thus, in terms of the tri-partite division of cases noted above, *Percheman* fits in the class of cases involving perfected titles. The plaintiffs in *Foster,* in contrast, traced their title to an 1804 grant from the Spanish governor of Florida,[103] a grant made when the United States already claimed sovereignty over land west of the Perdido by virtue of the 1803 Louisiana Purchase. The *Foster* Court held that, in 1804, the Spanish governor lacked authority to convey legal title to the property because the land at issue was already part of the United States.[104] Thus, *Foster* falls squarely within the class of cases involving grants made by government representatives who lacked authority to convey legal title.

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96. *See Percheman*, 32 U.S. at 54–56.
97. *See* Foster v. Neilson, 27 U.S. 253, 300–03 (1829).
98. *See Percheman*, 32 U.S. at 54–56.
99. *See* David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in* Hamdan *and* Sanchez-Llamas, 45 COLUM. J. TRANS'L L. 20, 79–83 (2006).
100. *See id.*
101. United States v. Percheman, 32 U.S. (7 Pet.) 51, 54–56 (1833).
102. *Id.*
103. *Foster*, 27 U.S. at 253–55.
104. *Id.* at 300–09.

As noted above, cases where the grantor lacked authority to convey title can be further sub-divided into two groups: those where the grant was simply void, and those where the grant gave rise to an equitable claim.[105] The *Foster* Court divided precisely along these lines. "The majority of the Court," said Marshall, believed that Spanish grants of land west of the Perdido after 1803 were simply "void."[106] In contrast, Marshall wrote, "[o]ne other judge and myself are inclined to adopt" the opinion that imperfect grants for land west of the Perdido "were as obligatory on the United States, as on his catholic majesty."[107] In other words, Marshall thought the plaintiffs had an equitable claim to the property. In a subsequent case involving a Spanish grant of land west of the Perdido, the Court expressed the idea as follows: "Although the United States disavowed that any right to the soil, passed by such concessions; still they were not disregarded as giving no equity to the claimant."[108] The Court explained that an "inchoate" or "equitable" title was a property right that "had so attached to any piece or tract of land . . . as to affect the conscience of the former sovereign, 'with a trust,' and make him a trustee for an individual."[109] Thus, in Marshall's view, under Article 8 of the Florida treaty, the United States inherited Spain's position as a "trustee" for individuals, like the plaintiffs in *Foster,* who had equitable claims to property based on Spanish grants. Those grants did not convey legal title, but they nevertheless affected "the conscience of the former sovereign with a trust."

2. *The Law of Nations and Individual Property Rights*

Before undertaking a treaty interpretation analysis in *Percheman*, Marshall explained the background principles of the law of nations (i.e., international law) that apply when territory is passed from one sovereign to another. In his view, the law of nations ensured that individuals who held perfected titles to land retained those titles when a sovereign conveyed the surrounding territory to a different sovereign.

> [I]t is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their . . . rights of property, remain undisturbed . . . . Had Florida changed

105. *See supra* notes 80–89 and accompanying text.
106. *Foster*, 27 U.S. at 313–14.
107. *Id.* at 313.
108. Lessee of Pollard v. Files, 43 U.S. 591, 603 (1844).
109. Strother v. Lucas, 37 U.S. 410, 436 (1838).

> its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change; it would have remained the same as under the ancient sovereign. . . . A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him; lands he had previously granted, were not his to cede. Neither party could so understand the cession; neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory, by its name, from one sovereign to another . . . would be necessarily understood to pass the sovereignty only, and not to interfere with private property.[110]

In Marshall's view, private property rights "remain undisturbed" when one sovereign conveys land to another. Marshall stated explicitly that these principles "ought to be kept in view, when we construe the eighth article of the treaty."[111] He then proceeded to analyze the treaty text.[112] Thus, in *Percheman*, Marshall construed Article 8 of the Florida Treaty in conformity with the principles of the law of nations.

Those principles applied to perfect titles differently than to inchoate titles. To appreciate this point, it is helpful to recall Justice Iredell's distinction between executory and executed treaty provisions.[113] Executory treaty provisions require the nation to undertake affirmative steps to fulfill its treaty commitments, whereas executed treaty provisions "require no further act to be done."[114] The Court held in *Percheman* that Article 8 was executed, as applied to Percheman's land, because Percheman held title "in absolute property." No further act was necessary to grant him legal title because he already held legal title before Spain ceded Florida to the United States. In Marshall's words, "that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged"[115] if the treaty deprived him of pre-existing property rights by requiring legislative action to grant him property that he already owned.

Conversely, if an individual held an inchoate title to property before the date of the treaty, the treaty did not magically convert that inchoate title into a perfect legal title. Under the law of nations, the property rights of individuals who held inchoate titles "remain[ed] undisturbed,"[116] just as the

110. United States v. Percheman, 32 U.S. (7 Pet.) 51, 86–87 (1833).
111. *Id.* at 88.
112. *Id.* at 88–89.
113. *See supra* notes 37–42 and accompanying text.
114. Ware v. Hylton, 3 Dall. 199, 272 (1796) (Iredell, J.).
115. *Percheman*, 32 U.S. at 87.
116. *Id.*

property rights of individuals who held perfect titles remained undisturbed. An individual with an inchoate title had an equitable claim against the sovereign, entitling the individual to insist that the sovereign take affirmative steps to convert that inchoate title into a perfect title.[117] When sovereignty transferred from Spain to the United States, "the fee [i.e., the legal title] was transferred to the United States by the treaty, with the equity attached in the claimant."[118] Accordingly, the equitable claim against Spain became an equitable claim against the United States. Since affirmative steps were still needed to convert the inchoate title into a perfect title, Article 8 was executory as it applied to inchoate titles.

Thus, contrary to conventional wisdom, *Percheman* did not overrule *Foster*. In both cases, Marshall construed Article 8 in accordance with the law of nations principle that private property rights "remain undisturbed" when one sovereign conveys territory to another. Article 8 was executed as it applied to Percheman because he already held a perfect title. However, in Marshall's view, Article 8 was executory as it applied to the *Foster* plaintiffs because they had an equitable claim against the sovereign that was "as obligatory on the United States, as on his catholic majesty."[119]

3. *Textual Analysis in Foster and Percheman*

According to the conventional view, Marshall's textual analysis of the Florida Treaty led him to conclude in *Foster* that Article 8 was non-self-executing. In *Percheman*, though, Marshall's analysis of the Spanish text led him to conclude that Article 8 was self-executing.[120] The conventional wisdom is wrong: Marshall's textual analysis in both *Foster* and *Percheman* focused on the nineteenth century distinction between executory and executed treaty provisions, not the twentieth century distinction between self-executing and non-self-executing provisions.[121]

Article 8 of the Florida Treaty specified that land grants made by Spanish authorities prior to the date of the treaty "shall be ratified and confirmed to the persons in possession of the lands."[122] In *Foster*, Marshall distinguished this language from hypothetical language stating that land "grants are hereby confirmed."[123] "Had such been its language," said Marshall, "it would have acted directly on the subject."[124] In other words, it would have been executed, not executory, because no further act would be necessary to implement a provision stating that grants "are hereby confirmed." How-

117. *See* Strother v. Lucas, 37 U.S. 410, 436 (1838).

118. McDonogh v. Millaudon, 44 U.S. 693, 706 (1845).

119. Foster v. Neilson, 27 U.S. 253, 313 (1829).

120. *See, e.g.*, RESTATEMENT, *supra* note 5, § 111 n.5; Vázquez, *supra* note 3, at 632–45.

121. *See supra* note 42 and accompanying text (explaining the distinction between the nineteenth century concept of an executory treaty and the twentieth century concept of a non-self-executing treaty).

122. Florida Treaty, *supra* note 71, art. 8.

123. *Foster*, 27 U.S. at 314.

124. *Id.*

ever, according to Marshall's analysis in *Foster*, 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.[125] In other words, he concluded that Article 8 was executory, not executed, because it obligated the United States to take affirmative steps to confirm the grants. Thus, Marshall's textual analysis in *Foster* focused on the distinction between executory and executed treaty provisions, not the modern distinction between self-executing and non-self-executing treaty provisions.

Careful analysis of *Percheman* confirms this view. In *Percheman*, Marshall adopted the argument presented by Joseph White, the attorney who represented Percheman. Comparing the English and Spanish versions of Article 8, White 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."[126] Marshall's analysis of the Spanish and English versions of Article 8 was virtually identical to White's.[127] 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."[128] He concluded that Article 8 was executed, not executory, as it applied to Percheman's land, because the United States did not need to take any affirmative steps to perfect Percheman's already perfect title.[129] 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* relied on the distinction between executory and executed treaty provisions.[130]

Of course, Marshall said in *Foster* not only that the United States was obligated to take affirmative steps to implement Article 8 (i.e., it was executory), but also that legislative action was necessary (i.e., it was non-self-executing). The conventional wisdom holds that, under Marshall's analysis in *Foster*, "the need for implementing legislation has its source in the treaty itself."[131] However, this view is mistaken for three reasons.

First, the claim that Article 8 requires legislative implementation, as a matter of treaty interpretation, has no basis in the treaty text. The treaty specifies that the grants "shall be ratified and confirmed."[132] But as Mar-

125. *Id.*

126. United States v. Percheman, 32 U.S. (7 Pet.) 51, 69 (1833).

127. *Compare Percheman*, 32 U.S. at 88–89 (Marshall's opinion) *with id.* at 68–70 (White's argument).

128. *Id.* at 88–89.

129. *Id.* at 86–89.

130. *See, e.g.*, Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 746 (1838) (stating that *Foster* "recognised the distinction between an executory treaty . . . and an executed treaty"); *see also* Sloss, *supra* note 3, at 19–23.

131. Vázquez, *supra* note 3, at 631.

132. Florida Treaty, *supra* note 71, art. 8.

shall himself conceded, the text does not address the question "[b]y whom shall they be ratified and confirmed?"[133]

Second, it was well established in the early nineteenth century, as it is today, that international law does not govern the internal processes by which a nation implements its treaty obligations.[134] The question of who shall ratify and confirm the grants—Congress, the President, or the judiciary—is a question about the internal process through which the United States implements its treaty obligations. As his speech in the Jonathan Robbins case makes clear,[135] Marshall understood that this is *not* a question of treaty interpretation; it is a question governed by domestic law.

Third, if the conventional interpretation were correct—and *Percheman* had held as a matter of treaty interpretation that Article 8 was self-executing—then Article 8 would be self-executing for all property interests, including inchoate titles as well as perfect titles. However, after *Percheman*, the Supreme Court decided dozens of cases involving Article 8 of the Florida Treaty and Article 3 of the Louisiana Treaty,[136] and it repeatedly affirmed that congressional legislation was necessary to perfect inchoate titles. Yet, no legislation was necessary to implement U.S. treaty obligations regarding already-perfect titles.[137] Therefore, treaty interpretation, without more, cannot answer the question whether a particular treaty provision requires legislative implementation, because the Court's decisions in the Louisiana-Florida property cases established that the same treaty provision required legislative implementation in some cases but not others. Hence, it is necessary to look beyond the text of the treaty to understand why some treaties require legislative implementation. As the next section contends, Marshall's conclusion in *Foster* that Article 8 required legislative implementation probably rested on certain unstated assumptions about the constitutional distribution of governmental power to regulate property.

4. *The Need for Legislative Implementation*

In *Foster*, Marshall stated clearly that legislation was necessary to implement Article 8 of the Florida Treaty.[138] Unfortunately, he did not explain why he thought legislation was necessary. The best explanation is that Marshall believed legislation was necessary because: 1) the plaintiffs held an

133. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 315 (1829).

134. *See* 1 Sir Robert Jennings & Sir Arthur Watts, Oppenheim's International Law § 21 (9th ed. 1992); 2 Charles Cheney Hyde, International Law Chiefly as Interpreted and Applied by the United States § 523 (1922) (stating that the process by which states effect performance of treaty obligations "is primarily a matter of domestic concern"); *id.* § 524 n.4 (citing 18th and 19th century authorities).

135. *See supra* notes 50–69 and accompanying text.

136. *See supra* note 73.

137. *See, e.g.*, United States v. Wiggins, 39 U.S. (14 Pet.) 334, 349–50 (1840); *see also supra* notes 73–89 and accompanying text.

138. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

inchoate title; 2) the treaty obligated the United States to perfect that inchoate title, but only insofar as Spain had a pre-existing duty to perfect the title; and 3) for domestic separation of powers reasons, federal legislation was necessary to perfect inchoate titles.

Before addressing these points directly, it is helpful to recall two points established above. First, in *Ware v. Hylton*, Justice Iredell stated that executory treaty obligations can be divided into three classes—legislative, executive, and judicial—depending on which branch of government has the domestic constitutional authority to implement the treaty obligation.[139] Second, in his speech in the Jonathan Robbins case, Marshall applied Iredell's two-step approach to support his claim that the President had the domestic constitutional authority to execute Article 27 of the Jay Treaty.[140] Thus, it should come as no surprise that Marshall applied the same two-step approach to analyze the issues in *Foster*. Under Iredell's framework, the question whether a treaty is executed or executory involves treaty interpretation (step one), but the question whether an executory treaty requires legislative, executive, or judicial implementation involves a constitutional separation of powers analysis (step two).

Under Marshall's analysis in *Foster*, Article 8 merely granted the plaintiffs an equitable title.[141] Marshall wrote that this equitable title was "as obligatory on the United States, as on his catholic majesty."[142] In other words, the United States had a treaty obligation to perfect the plaintiffs' inchoate title "to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty." Marshall's opinion makes clear that he thought this was an executory treaty obligation.[143] Thus, step one of the two-step analysis is fairly clear. Unfortunately, though, step two of the analysis—the constitutional separation of powers analysis—is underdeveloped in *Foster*. In essence, Marshall stated his conclusion that legislative implementation was necessary (rather than judicial or executive implementation), but he did not provide the separation of powers analysis needed to support that conclusion.

Even so, other materials discussed above help illuminate Marshall's unstated separation of powers rationale. Marshall's speech in the Jonathan Robbins case demonstrates that he believed all government actors have a constitutional duty to implement U.S. treaty obligations, insofar as they can do so by acting within the scope of their domestic legal authority. Therefore, Marshall's conclusion in *Foster* that Article 8 required legislative implementation necessarily implies that he thought the President and the judiciary lacked the domestic legal authority to convert the plaintiff's inchoate title

139. *See Ware*, 3 U.S. 199, 271–73 (1796); *see supra* notes 37–42 and accompanying text.
140. *See supra* notes 50–69 and accompanying text.
141. *See supra* notes 105–09 and accompanying text.
142. *Foster*, 27 U.S. at 313.
143. *See supra* notes 120–30 and accompanying text.

into a perfect legal title. This conclusion is consistent with later cases in which the Supreme Court held explicitly that Congress was the only institution with the domestic constitutional authority to convert inchoate titles into perfect titles.[144]

The Court never explained why Congress had exclusive constitutional authority to convert inchoate titles into perfect titles. However, Article IV of the Constitution provides textual support for this view. It states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States."[145] Consider the situation of individuals who held equitable claims to land in Louisiana or Florida before the United States acquired sovereignty over those territories. When the relevant treaty conveyed sovereignty over the land, "the fee [i.e., the legal title] was transferred to the United States by the treaty, with the equity attached in the claimant."[146] Hence, upon entry into force of the treaty, the land became subject to Congress' Article IV power to regulate "[p]roperty belonging to the United States."[147]

The majority of cases arising under Article 3 of the Louisiana Treaty and Article 8 of the Florida Treaty pitted private claimants against the United States.[148] If the executive or judicial branches awarded legal titles to private claimants on the basis of the treaties themselves, without awaiting congressional guidance, the United States would have lost its legal title to the property. However, Article IV specified that "nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States,"[149] implying that the executive and judicial branches must exercise their powers under Articles II and III so as not to interfere with Congress's Article IV Property Power. Therefore, if the executive or judicial branch attempted to convert equitable titles into legal titles without awaiting congressional action, they would have prejudiced claims of the United States in contravention of Article IV. This may explain why the Court consistently held that federal legislation was constitutionally required to implement Article 8 of the Florida Treaty and Article 3 of the Louisiana Treaty, as those articles applied to inchoate titles.

In sum, although Marshall's opinion in *Foster* is hardly a model of clarity, Marshall apparently believed that legislation was necessary to implement Article 8 because: the plaintiffs held an inchoate title; the treaty obligated

144. *See supra* notes 80–85 and accompanying text.

145. U.S. CONST. art. IV, § 3, cl. 2.

146. McDonogh v. Millaudon, 44 U.S. (3 How.) 693, 706 (1845).

147. U.S. CONST. art. IV, § 3, cl. 2. In contrast, if a person held a perfected title before the treaty entered into force, the land never became subject to Congress's Article IV power because the treaty did not disturb perfect titles.

148. *See supra* note 73 (listing 75 property cases, 45 of which involved the United States as a party).

149. U.S. CONST. art. IV, § 3, cl. 2.

the United States to perfect that inchoate title to the same extent that Spain was obligated to do so; and federal legislation was necessary to perfect the plaintiffs' inchoate title because Article IV granted Congress the exclusive power to dispose of territory belonging to the United States. Thus, in terms of the four categories of non-self-executing treaties identified by Professor Vázquez, Article 8, in Marshall's view, belonged to the class "of treaties that purport to accomplish something for which the Constitution requires a statute."[150] In other words, Marshall's analysis in *Foster* is not an example of what Professor Vázquez, and others have called "*Foster* non-self-execution."[151]

C. The Advantages of the Two-Step Approach

Modern judicial decisions routinely cite *Foster* as authority for the proposition that judicial application of the intent-based approach to self-execution is doctrinally required.[152] The preceding analysis demonstrates that *Foster* provides no support for the intent-based doctrine. During the 180-year period between its 1829 decision in *Foster* and its 2008 decision in *Medellin*, the Court applied treaties in hundreds of cases without stopping to ask whether the particular treaty provision at issue was self-executing.[153] During the same period, the Court did not decide a single case in which it denied relief solely on the ground that a treaty was non-self-executing.[154] Thus, insofar as courts look to history as a guide, the history (before *Medellin*) favors the two-step approach over the intent-based doctrine.

Even so, one must still ask whether courts should adopt the two-step approach today. Iredell's distinction between executory and executed treaty provisions is not especially helpful for analyzing modern treaties because the vast majority of modern treaty provisions are executory, not executed. Accordingly, this Article advocates an updated version of the two-step approach. In step one, courts should apply a treaty interpretation analysis to ascertain the nature and scope of the international obligation (the "international obligation" issue). In step two, courts should apply domestic law—informed by the treaty interpretation analysis in step one—to determine which government actors within the United States have the power and/or duty to implement the treaty domestically (the "domestic implementation" issue).[155]

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150. Vázquez, *supra* note 3, at 630.

151. *Id.* at 629–31.

152. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 504–05 (2008).

153. *See* Hollis, *supra* note 17; Van Alstine, *supra* note 17; Paul B. Stephan, *Treaties in the Supreme Court, 1946-2000*, *in* CONTINUITY AND CHANGE, *supra* note 17.

154. *See* Vázquez, *supra* note 3, at 601.

155. If a treaty does not obligate the United States to undertake domestic implementation measures, step two becomes unnecessary. Treaties that do not require domestic implementation measures include: "executed" treaty provisions (where treaty performance is accomplished by ratification); and "precatory" treaty provisions (i.e., those that do not impose any binding obligation on the United States).

The primary advantage of the two-step approach is analytic clarity. The intent-based approach is analytically incoherent.[156] Courts applying the intent-based doctrine consistently conflate the international obligation inquiry with the domestic implementation inquiry by combining them into a single inquiry, asking whether the treaty makers intended the treaty to be self-executing.[157] The question itself is nonsensical because, in the vast majority of cases, the treaty makers did not have any specific intention concerning which government actors within the United States have the power and/or duty to implement the treaty domestically. Unable to find any actual evidence of the treaty makers' intentions, the courts invent a fictitious intent to resolve domestic implementation issues.[158] In contrast, the two-step approach promotes analytic clarity by drawing a sharp distinction between the international obligation issue and the domestic implementation issue. If courts applied the two-step approach, they would consider a variety of domestic constitutional and statutory provisions to resolve domestic implementation issues. Since those domestic constitutional and statutory provisions actually address domestic implementation issues, courts applying the two-step approach could answer domestic legal questions by applying real laws, rather than invoking a fictitious "intent of the treaty makers."

Analytic clarity also yields certain additional benefits—most importantly, transparency and accountability. Judicial decisions applying the intent-based approach are notoriously lacking in transparency. *Medellin* illustrates this point. The *Medellin* Court clearly held that Article 94 of the United Nations Charter is not self-executing,[159] but commentators disagree about why or how the Court reached this conclusion.[160] Indeed, commentators do not even agree about what the Court meant when it said that Article 94 was not self-executing.[161] Adoption of the two-step approach would force courts to distinguish clearly between international obligation issues and domestic implementation issues, yielding greater transparency in judicial decisionmaking.

156. Some commentators suggest that the treaty makers can provide clarity under the intent-based approach by adopting declarations specifying that a particular treaty is self-executing or non-self-executing. *See infra* note 190. However, such declarations do not actually provide much clarity regarding domestic implementation issues because the terms "self-executing" and "non-self-executing" are deeply ambiguous. *See supra* note 42; *see also infra* notes 190–92 and accompanying text.

157. *See, e.g., Medellin*, 552 U.S. at 504–14.

158. *See, e.g.*, *id.*

159. *Id.*

160. *Compare* Vázquez, *supra* note 3, at 660–65 (construing *Medellin* as a decision about the nature of the international obligation embodied in the U.N. Charter) *with* Bradley, *supra* note 2, at 168–76 (construing *Medellin* as a decision about domestic implementation of the U.N. Charter).

161. *See, e.g.*, ABA/ASIL Joint Task Force on Treaties in U.S. Law, Report (March 2009), *available at* http://www.asil.org/files/TreatiesTaskForceReport.pdf (analyzing various possible interpretations of the Supreme Court decision in *Medellin*); John T. Parry, *Rewriting the Roberts Court's Law of Treaties*, 88 TEX L. REV. 65, 67–68 (2010) ("with Medellin, defenders of the opinion are doing as much rewriting and contextualizing as its opponents").

Application of the two-step approach would also enhance accountability for decisions that trigger violations of the nation's treaty obligations. Under the two-step approach, state government officials may not take steps that trigger a breach of U.S. treaty obligations without explicit authorization from the federal political branches.[162] Thus, the federal political branches are accountable for decisions to violate treaties. In contrast, under the intent-based approach, state governments can trigger a breach of U.S. treaty obligations without any authorization from the federal political branches. Again, *Medellin* illustrates the point. The Supreme Court decision in *Medellin* effectively authorized Texas to implement the death penalty, and Texas proceeded to execute Medellín.[163] The matter is not free from doubt, but most commentators agree that his execution constituted a breach of U.S. treaty obligations.[164] Congress never authorized that breach, and the President expressly opposed state action that would trigger a violation of U.S. treaty obligations. Under the Supreme Court's intent-based analysis, though, the question whether the nation breached its treaty obligations was simply irrelevant. Texas was free to execute Medellín, regardless of the international consequences, unless Congress enacted legislation to block action inconsistent with U.S. treaty obligations.[165] Thus, the Supreme Court and the Texas Governor made decisions that probably triggered a violation of the nation's treaty commitments, but no government official at the state or federal level ever assumed responsibility for the decision to violate the U.N. Charter.

II. The Constitution and Treaty Implementation

Part I demonstrated that the two-step approach to self-execution is superior to the intent-based approach. Parts II and III address application of the two-step approach in cases, like *Medellin*, where a treaty constrains the authority of state governments. *Medellin* is complicated because the key obligation was not based directly on a treaty: it was based on the decision of an international tribunal whose authority derived from a treaty. These types of

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162. *See infra* notes 171–93 and accompanying text.

163. *See* John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 102 Am. J. Int'l L. 860, 862 (2008).

164. The State of Texas argued that it implemented the U.S. treaty obligation by providing the judicial hearing mandated by the International Court of Justice (ICJ). *See* Br. in Opp'n, Medellin v. Texas, No. 08-5573, at 4, *available at* http://www.debevoise.com/publications/pdf/10x08_04_08%20BIO.pdf. However, the Supreme Court did not rely on this argument, and commentators who defend the Court's opinion in *Medellin* have placed little or no weight on this argument. If, as seems likely, the judicial hearing that Texas courts provided for Medellín did not satisfy the requirements established by the ICJ, then his execution placed the United States in violation of its international obligations.

165. Senator Leahy has introduced draft legislation designed to avoid further violations of U.S. treaty obligations under the U.N. Charter. *See* S.1194, 112th Cong., (2011). Meanwhile, despite efforts by President Obama and former President Bush to halt a pending execution, Texas has triggered an additional treaty violation by executing another Mexican national. *See* Chris McGreal, "Humberto Leal Garcia Executed in Texas Despite White House Appeal," The Guardian, July 8, 2011, at 28.

international delegations raise distinct issues.[166] Accordingly, Part II focuses on domestic application of treaties in cases that do not involve international delegations. Part III considers how the element of international delegation alters the analysis.

Part II is divided into two sections. Section II.A asks: when does a treaty create non-discretionary duties for state government officers under domestic law?[167] Section II.B addresses judicial enforcement of treaties against state officers. The order of the two sections is important. If a treaty *does not* impose a non-discretionary duty on a government officer, questions about judicial enforcement are largely irrelevant. If a treaty *does* impose a non-discretionary duty on a government officer, certain remedial consequences follow. As Henry Hart observed, "[t]he remedial parts of law . . . are subsidiary. To the primary parts they have the relation of means to ends. They come second not first."[168] Whether a treaty imposes non-discretionary duties on state officers is a question of primary law; issues involving judicial enforcement implicate remedial law. Many courts and commentators, when addressing self-execution, put "the cart before the horse"[169] by jumping straight to questions about judicial enforcement, skipping the analytically prior question of whether the treaty creates non-discretionary duties for domestic government officials.[170] To dispel the confusion surrounding self-execution doctrine, it is essential to disentangle primary law from remedial law, and to address questions about primary duties *before* analyzing judicial enforcement.

A. The Supremacy Clause and Non-Discretionary Duties

This section contends that a treaty is presumptively binding on state government officers[171] if: (1) the treaty imposes non-discretionary duties on the United States under international law; (2) state officers have the capacity to promote or hinder treaty performance; and (3) application of treaty duties to state officers would not violate the anti-commandeering rule.[172] This claim is based primarily on the text of the Supremacy Clause. Section III.A.1 ex-

166. *See* McGinnis, *supra* note 24; *see also* Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, LAW & CONTEMP. PROBS. 22 (Winter 2008).

167. Throughout this Article, the term "state government officer" refers collectively to state and local government officers.

168. Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 935 (1951).

169. In a famous speech in 1897, Oliver Wendell Holmes declared that it puts "the cart before the horse . . . to consider the right or the duty as something existing apart from and independent of the consequences of its breach." Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897). In an equally famous critique of Holmes, Henry Hart stated: "Holmes' 'cart' is the horse and his 'horse' is the cart." Hart, *supra* note 168, at 935.

170. *See, e.g.*, Bradley, *supra* note 2, at 140–48 (analyzing judicial enforcement of treaties without addressing which treaties create primary duties); Young, *supra* note 2, at 107–28 (same).

171. Throughout this Article, the statement that a treaty is binding on government officers means that it creates non-discretionary duties for government officers as a matter of domestic law.

172. The "anti-commandeering" rule precludes Congress from enacting legislation that "commandeers" state legislatures or state executive officers. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

plains and defends this claim. Section III.A.2 considers whether and how the treaty makers can overcome the presumption that a treaty binds state officers.

1. *The Ordinary Operation of the Supremacy Clause*

Whether a treaty imposes non-discretionary duties on the United States is a treaty interpretation question. A treaty that does not impose binding obligations on the nation cannot impose binding obligations on government officers under domestic law. Suppose, though, that a treaty creates non-discretionary duties for the United States under international law. Does the Supremacy Clause mean that the treaty is automatically binding on state government officers under domestic law? The Clause specifies that "all Treaties" are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[173] Read literally, the text seems to say that *all* treaties are directly binding on state governments. This interpretation is broadly consistent with the original understanding of the Supremacy Clause. Although commentators disagree about the original understanding, they generally agree that the Framers included treaties in the Supremacy Clause to make treaties binding on state government officers under domestic law.[174]

There are two problems, though, with a literal interpretation of the Supremacy Clause. First, the Constitution prohibits federal lawmakers from "commandeering" state legislatures or state executive officers.[175] It is unclear whether the anti-commandeering rule applies to treaty lawmaking, as opposed to other methods of federal lawmaking,[176] but this Article assumes that the anti-commandeering rule applies to treaties. The main question under consideration is: when does a treaty imposing non-discretionary duties on the nation create non-discretionary duties for state government officers under domestic law? State legislatures are not "government officers," so we can set aside issues involving commandeering of state legislatures. Moreover, the anti-commandeering rule does not apply to state courts.[177] That leaves

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

174. *See, e.g.*, MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS (2007); Flaherty, *supra* note 3; Yoo, *supra* note 2, at 1978–80; *see also* Ware v. Hylton, 3 U.S. 199 (1796). Professor Bradley contends that the Supremacy Clause does not constrain the federal political branches, but he agrees that the Clause makes treaties binding on the states. *See* Bradley, *supra* note 2, at 140–48.

175. *See* Reno v. Condon, 528 U.S. 141, 149–51 (2000); Printz v. United States, 521 U.S. at 905–33; *New York*, 505 U.S. at 161–69 (1992).

176. *Compare* Martin S. Flaherty, *Are We to be a Nation?: Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1279 (1999) (contending that the anti-commandeering rule does not apply to the treaty power) *with* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?,* 103 COLUM. L. REV. 403, 480 (2003) (contending that treaty power is subject to anti-commandeering limitations) *and* Carlos Manuel Vázquez, Breard*,* Printz*, and the Treaty Power*, 70 U. COLO. L. REV. 1317 (1999) (same).

177. *See Printz*, 521 U.S. at 907 (the Constitution "permit[s] imposition of an obligation on state *judges* to enforce federal prescriptions") (emphasis in original); *see also* U.S. CONST. art. VI, cl. 2 (specifying that "the Judges in every State shall be bound" by treaties).

state executive officers. Broadly speaking, one can divide treaty-based duties into prohibitions and affirmative mandates. The anti-commandeering rule applies only to affirmative mandates, not prohibitions.[178] Thus, construing the Supremacy Clause in light of the anti-commandeering rule, the anti-commandeering rule narrows the literal interpretation of the Clause by precluding application of affirmative mandates to state executive officers in some cases.[179] However, the rule does not affect application of affirmative mandates to state judicial officers, nor does it affect application of treaty-based prohibitions.

The other problem with a literal interpretation of the Supremacy Clause is that state officers lack the capacity to perform some treaty obligations. For example, federal legislation is necessary to implement a treaty obligating the United States to appropriate funds for an international organization:[180] state officers lack the domestic legal authority to appropriate federal funds. Nor do state officers have the domestic legal authority to implement a treaty obligating the United States to negotiate with other countries because international negotiation is a federal executive function.[181] It makes no sense to construe the Supremacy Clause to obligate state officers to perform functions that the Constitution assigns exclusively to Congress or the President.

However, other treaties involve matters within the scope of state government authority. Examples include the treaty prohibition on torture[182] and the treaty mandate to notify detained foreign nationals that they have a right to consult consular officers.[183] In cases where a treaty imposes non-discretionary duties on the nation, and state officers have the capacity to promote or hinder treaty performance,[184] the Supremacy Clause transforms the international duty into a domestic legal duty, making it directly binding on state government officers, at least presumptively.[185] The fact that a

178. *See Printz*, 521 U.S. at 913 (noting "the duty owed to the National Government, on the part of *all* state officials . . . not to obstruct the operation of federal law") (emphasis in original).

179. The precise scope of the prohibition on commandeering state executive officers remains unclear. For present purposes, though, it is sufficient to note that some treaties do create affirmative mandates for state executive officers, and at least some such treaties do not appear to raise commandeering problems.

180. *See* RESTATEMENT, *supra* note 5, § 111 cmt. i.

181. *See id.*, § 311 cmt. b; United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (stating that the President "makes treaties with the advice and consent of the Senate; but he alone negotiates").

182. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, *modified,* 24 I.L.M. 535 (1985).

183. Vienna Convention on Consular Relations and Optional Protocol on Disputes, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

184. Here again, the two-step approach brings added clarity to the analysis. Treaty interpretation determines the nature and content of the international obligation. Domestic law determines whether a state officer has the authority to perform that obligation.

185. This Article does not express a view about how the Clause applies to treaties that do not impose binding obligations on the nation, or how (or whether) the Clause applies to federal officers. Most commentators agree that the Take Care Clause creates a legal duty for the President to implement treaties, insofar as he has the domestic legal authority to do so, unless Congress or the treaty makers have assigned responsibility for treaty implementation to some person or institution outside the Executive Branch. *See, e.g.*, Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331 (2008).

strictly literal interpretation of the Supremacy Clause is potentially problematic does not permit courts and commentators to ignore the text altogether. An interpretation that makes the Clause superfluous is impermissible.[186] Therefore, under the bare minimalist interpretation of the Supremacy Clause—consistent with the principle that the Clause must have some effect—a treaty imposing non-discretionary duties on the nation presumptively creates non-discretionary domestic legal duties for state government officers who have the capacity to promote or hinder treaty performance, subject to the anti-commandeering rule.

2. *Overcoming the Presumption*

The preceding interpretation of the Supremacy Clause is not controversial. The main controversy involves two issues. First, what must the treaty makers do to overcome the presumption that treaties are binding on state officers in the circumstances described above? Second, in what circumstances are treaty-based duties judicially enforceable against state officers? The remainder of this section addresses the first question. Part II.B addresses the second question. Before proceeding, though, it is important to emphasize that this Article does not advocate a presumption in favor of judicial enforcement of treaties. Much ink has been spilled debating the merits of such a presumption.[187] In my view, the debate focuses on the wrong question. The Supremacy Clause establishes a presumption that treaties create domestic legal duties for state officers in the circumstances described above. Judicial enforcement is a distinct issue that requires separate analysis.

One could plausibly interpret the Supremacy Clause as a hard rule, rather than a presumption. Under this view, Article II does not grant the treaty makers the power to alter the ordinary operation of the Clause for particular treaties.[188] This Article assumes that the Supremacy Clause merely creates a presumption, not a hard rule.[189] The issue is: What must treaty makers do

186. *See* NORMAN J. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 46: 6 230–31 (7th ed. 2007) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." (internal quotation marks omitted)). This fundamental principle of statutory construction applies with equal force to constitutional text.

187. *See, e.g.*, Vázquez, *supra* note 3; Bradley, *supra* note 2; Young, *supra* note 2.

188. This Article uses the term "treaty makers" to refer to the President and Senate, acting jointly under Article II.

189. The assumption that the Supremacy Clause merely creates a presumption, rather than a hard rule, is justified for at least two reasons. First, from a functional standpoint, construing the Supremacy Clause as a hard rule would deprive the treaty makers of flexibility necessary to handle international delegations. *See infra* notes 249–56 and accompanying text. Second, consider the analogy to the Take Care Clause. Commentators generally agree that the President has a duty under the Take Care Clause to implement treaties, but that treaty makers can assign responsibility for implementation of particular treaty functions to officials outside the Executive Branch. *See* Swaine, *supra* note 185. If the treaty makers can assign treaty implementation functions to actors outside the Executive Branch, there is no apparent reason why they cannot also assign treaty implementation functions to actors other than state government officers.

or say to overcome that presumption? There are two aspects to this question: one concerning the *content* of statements intended to alter the ordinary operation of the Supremacy Clause, the other involving the *form* of those statements.

First, with respect to *content*, several commentators assume that a declaration specifying that a treaty is "not self-executing" is sufficiently clear to alter the ordinary operation of the Supremacy Clause.[190] This claim is problematic because commentators advancing the claim generally fail to distinguish between primary and remedial law concepts of self-execution. Insofar as they equate "not self-executing" with "not judicially enforceable,"[191] their argument does not address the primary legal issue: whether a treaty creates domestic legal duties for state government officers. Since the statement that a treaty is "not self-executing" is ambiguous on this point, such a statement is not sufficiently clear to alter the ordinary operation of the Supremacy Clause. Similarly, a statement that a treaty "is not judicially enforceable in the absence of implementing legislation" lacks sufficient clarity because it does not specify whether the treaty is binding on state officers. If treaty makers want to authorize state government officers to engage in conduct inconsistent with the nation's treaty obligations, they should make a statement along the following lines: "this treaty shall not create domestic legal duties for state government officers unless Congress enacts legislation specifying that the treaty is binding on state officers."[192]

Proponents of non-self-execution may object that this approach creates an unreasonably high barrier for the treaty makers to render a treaty non-self-executing. This objection is unpersuasive. Insofar as proponents of non-self-execution favor limits on judicial enforcement of treaties, their objection is misplaced because the proposed clear statement requirement does not address judicial enforcement. Moreover, the proposed clear statement requirement is consistent with the stated intent of treaty makers. When the treaty makers have adopted non-self-executing declarations, they have clearly expressed their view that such declarations do not affect the duty of state officers under the Supremacy Clause to conform their conduct to the nation's treaty obligations.[193]

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190. *See, e.g.*, Bradley, *supra* note 2, at 149–57; Vázquez, *supra* note 3, at 672–85; Young, *supra* note 2, at 121–25.

191. *See, e.g.*, Bradley, *supra* note 2, at 134–40; Young, *supra* note 2, at 107–13.

192. The suggested language is effectively an anti-preemption provision. *See* Sloss, *supra* note 20, at 983–86 (discussing treaties and anti-preemption clauses).

193. The United States ratified the Covenant on Civil and Political Rights, the Convention on Racial Discrimination, and the Torture Convention subject to declarations that all three treaties are not self-executing. Even so, in testimony to the Senate, Executive Branch officials made clear that these treaties are binding on state government officers under the Supremacy Clause. *See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination: Hearing Before the Comm. On Foreign Relations, U.S. Senate*, 103rd Cong. 20 (1994) (stating "that a duly ratified treaty will supercede [sic] prior inconsistent federal law"); *International Covenant on Civil and Political Rights: Hearing Before the Comm. On Foreign Relations, U.S. Senate*, 102nd Cong. 80 (1992) ("Under the Supremacy Clause, ratified treaties are the law of the land, equivalent to federal statutes. . . . Consequently, properly ratified treaties can and do supersede

Assuming the treaty makers adopt a statement along the lines suggested above, what *form* should such a statement take? Several points are clear. First, if the statement is included in the text of the treaty, it would have the desired effect.[194] Second, if the United States adopts a valid reservation limiting the scope of the international obligation, that reservation also limits the scope of any derivative domestic legal duty.[195] Third, if Congress enacts legislation authorizing state governments to act in a manner contrary to treaty-based duties, the legislation eliminates any domestic legal duty for state officers to comply with the treaty.[196] Fourth, if a state legislature enacts legislation that purports to authorize treaty violations by state officers, that legislation would be invalid under the express terms of the Supremacy Clause.

Suppose, though, that the treaty makers adopt a statement, in the context of ratification, stipulating that a particular treaty provision shall not be binding on state government officers unless Congress enacts legislation to make it binding. Does the form of that statement matter? The short answer is that the statement must, at a minimum, be included in the Senate resolution of ratification—the official document by means of which the Senate consents to ratification of the treaty.[197] The Supremacy Clause is law. Therefore, to alter the ordinary operation of the Clause, the treaty makers must express their will in the form of a law.[198] Neither a statement transmitted from the President to Congress, nor a statement in a Senate committee report, nor a statement by an individual Senator on the Senate floor is a "law." These types of statements may help shed light on treaty interpretation is-

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inconsistent domestic law."); *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Hearing Before the Comm. On Foreign Relations, U.S. Senate*, 101st Cong. 42 (1990) (stating that, after ratification, the Torture Convention "would be part of domestic law. If you adopt this treaty, it is not just international law. The standard becomes part of our law."); *see also* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 152–97 (1999) (providing a detailed review of a Senate record associated with ratification of human rights treaties); Young, *supra* note 2, at 134–36 (contending that non-self-executing treaties are binding on state governments).

194. This conclusion follows from the assumption that treaty makers have the power to alter the ordinary operation of the Supremacy Clause. The least controversial way for the treaty makers to exercise domestic lawmaking authority is to include language in the treaty that the United States ratifies. If the treaty makers have the power to alter the ordinary operation of the Supremacy Clause, they must be able to do so by inserting appropriate language in the treaty.

195. *See* RESTATEMENT, *supra* note 5, § 314 cmt. b.

196. This point is implicit in the later-in-time rule. *See id.*, § 115 cmt. a.

197. The argument here focuses on Article II treaties. If the international agreement takes the form of a congressional-executive agreement, the relevant statement would have to be included in the statute approving that agreement. If the agreement takes the form of a sole executive agreement, the statement would have to be included in the text of the international agreement itself, since there is no document expressing legislative consent for a sole executive agreement.

198. Professor Vázquez makes a similar argument. *See* Vázquez, *supra* note 3, at 681–85.

sues, but the question whether a particular treaty provision is binding on state officers is a domestic law issue, not a treaty interpretation issue.[199]

Some may object that a statement included in the Senate resolution of ratification is not "law" either, unless that statement is formally transmitted to the other treaty parties. Conditions transmitted to other parties are "law" because they become part of the treaty.[200] In contrast, statements in the Senate resolution of ratification that are not transmitted to other parties are not part of the treaty. Assuming this is true, the fact remains that the President may not ratify a treaty without first obtaining Senate consent.[201] Therefore, the President may not use the Article II treaty power to create domestic law without Senate consent. If the Senate consents subject to certain conditions—e.g., the treaty is not binding on state officers without implementing legislation—and those conditions are included in the formal instrument in which the Senate grants consent, those conditions must be controlling for purposes of domestic law.[202] Otherwise, the President could circumvent the constitutional safeguards that restrict his power to use Article II treaties to create domestic law.[203]

B. Judicial Enforcement and the Due Process Clause

Many commentators equate the concept of self-execution with judicial enforcement and therefore agree that a self-executing treaty is judicially enforceable while a non-self-executing one is not.[204] This approach is problematic because the conclusion that a particular law is not enforceable by a particular litigant in a particular type of judicial proceeding does not tell us whether that same law is enforceable by a different litigant in a different type of proceeding.[205] Granted, laws that do not create non-discretionary duties for natural or legal persons may not be enforceable by any litigant in

199. *See supra* notes 171–86 and accompanying text. Of course, if the treaty text explicitly addresses the question of whether the treaty is binding on state officers, it would be a treaty interpretation issue. In that case, though, any statement in the Senate record would be redundant.

200. Some scholars contend that a condition transmitted to treaty parties is not part of the treaty unless it modifies the United States' international legal obligations under the treaty. *See, e.g.*, Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI-KENT L. REV. 293, 296–97 (1991). In their view, a purely domestic condition attached to a treaty is not "law" because it is not part of the treaty. *Id.* For a response to this argument, see Vázquez, *supra* note 3, at 681–85.

201. *See* U.S. CONST. art. II, § 2, cl. 2 (granting the President power to make treaties "by and with the advice and consent of the Senate").

202. *See* RESTATEMENT, *supra* note 5, § 303 cmt. d; § 314 cmts. b and d.

203. One could argue that as a practical matter, restrictions on the President's domestic lawmaking power are illusory because the President has virtually unlimited discretion to bypass the Senate by using sole executive agreements to create international law that has the status of supreme federal law. However, this view arguably overstates the President's ability to bypass the Senate because the President's power to enter into sole executive agreements is subject to constitutional constraints that are enforced politically, if not judicially. *See generally* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1965–75 (2003).

204. *See, e.g.*, Bradley, *supra* note 2; Stephan, *supra* note 2; Young, *supra* note 2.

205. This Article assumes that a non-self-executing treaty is a "law." *See supra* note 19.

any type of judicial proceeding. However, apart from non-self-executing treaties, there is no such thing as a "law" that imposes non-discretionary duties on government officers that is not enforceable by *any* litigant in *any* type of judicial proceeding.[206] Thus, if the doctrine of non-self-executing treaties is construed to bar *all* avenues for private judicial enforcement of a treaty that imposes non-discretionary duties on state government officers, that doctrine is truly a constitutional anomaly.[207] Indeed, when construed in this fashion, the doctrine conflicts with the Due Process Clause.

It is well established that "a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."[208] Writing for the Court in 1876, Justice Field expressed the principle as follows:

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.[209]

Writing for a unanimous Court in 1897, Justice White traced the evolution of this principle from Roman law and the Magna Carta through Blackstone and Coke.[210] He also cited Story's treatise on the Constitution, several nineteenth century Supreme Court decisions, and numerous English court decisions.[211]

Although the opportunity to be heard is a constitutionally protected right, that right applies differently to plaintiffs than to defendants. The distinction between plaintiffs and defendants is fundamental because plaintiffs have the option of resolving their disputes through "private structuring of individual relationships," but defendants are "forced to settle their claims of

206. International free trade agreements are usually codified in the form of federal statutes. Those statutes typically include provisions that purport to bar all avenues for private judicial enforcement of the underlying international agreement. *See* Sloss, *supra* note 20, at 972. I have argued elsewhere that such statutory provisions are constitutionally problematic. *See id.* at 977–94. Regardless, it is no accident that the leading example of a statute that purports to bar any form of private judicial enforcement involves a statute enacted to implement a treaty.

207. Professor Young contends that the Supreme Court decision in *Medellin* represents the "normalization" of treaty law: i.e., a decision to view treaties as being the same as, or similar to, other types of federal law. He argues that normalization is a good thing. *See* Young, *supra* note 2, at 136–40. I generally agree with Professor Young's policy arguments supporting normalization. However, as a descriptive matter, it would be more accurate to say that non-self-execution doctrine represents the "abnormalization" of treaty law.

208. Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

209. Windsor v. McVeigh, 93 U.S. 274, 277 (1876).

210. *See* Hovey v. Elliott, 167 U.S. 409, 415–16 (1897).

211. *Id.* at 414–44.

right and duty through the judicial process."[212] Congress undoubtedly has the power to preclude private plaintiffs from initiating civil suits to enforce federal laws—even laws that create non-discretionary duties for government officers—by creating an administrative mechanism that provides an adequate substitute for judicial enforcement.[213] By analogy, it is reasonable to assume that the treaty makers have the power to preclude private plaintiffs from initiating civil suits to enforce federal treaties, and they can exercise this power by adopting a non-self-executing declaration.[214]

Criminal defendants are different from civil plaintiffs. Unlike civil plaintiffs, criminal defendants do not seek to initiate judicial proceedings; they want to defend themselves against criminal charges brought by the government. The Due Process Clause does not permit the government to use the judicial process to pursue criminal sanctions and, at the same time, prevent the defendant from using that judicial process to present a defense. "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable."[215] Thus, in certain cases, courts have a *constitutional duty* to rule on the merits of a criminal defense. As the Supreme Court stated more than one hundred years ago, "[t]here is no distinction in principle between determining a cause . . . in the actual absence of the party, and rendering a decree by refusing to . . . consider the merits of a sufficient defense."[216] Both procedures deny the defendant the opportunity to be heard, and hence violate the Due Process Clause. Moreover, in *Hovey v. Elliott* the Supreme Court held that the trial court violated the defendant's due process rights by refusing to decide the merits of a common law fraud defense.[217] Given that defendants have a constitutional right, rooted in the Due Process Clause, to demand a judicial ruling on the merits of a common law fraud defense, it necessarily follows that defendants have a comparable constitutional right to demand a judicial ruling on the merits of a treaty-based defense.[218]

In the context of criminal proceedings, there is an important distinction between a defendant who seeks a remedy for a past violation and one who seeks to prevent the future imposition of allegedly unlawful criminal sanctions. Defendants who raise Fourth Amendment defenses typically seek a remedy for a past violation: they argue, for example, that the police obtained

212. *Boddie*, 401 U.S. at 375, 377.

213. *See, e.g.*, Schweiker v. Chilicky, 487 U.S. 412 (1988); Bush v. Lucas, 462 U.S. 367 (1983).

214. *See* Sloss, *supra* note 3, at 39–41. It is an interesting question whether, if the treaty makers adopt this approach, the Due Process Clause requires them to provide an alternative enforcement mechanism that provides an adequate substitute for judicial enforcement. This Article expresses no view on that question.

215. Windsor v. McVeigh, 93 U.S. 274, 277 (1876).

216. Hovey v. Elliott, 167 U.S. 409, 446 (1897).

217. *Id*. at 444.

218. *See* Sloss, *supra* note 20, at 988–92; *see also* Carlos M. Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 Am. J. Int'l L. 73, 84–87 (2007).

evidence by conducting an illegal search.[219] An appellate court might duck the merits of such an argument by holding that, even if the search was illegal, reversal is not warranted because the trial court's decision to admit the evidence constituted harmless error.[220] In contrast, an individual raising a defense based on the Eighth Amendment's Cruel and Unusual Punishments Clause seeks to prevent the future imposition of an unlawful criminal sanction. Unlike the Fourth Amendment, there is no harmless error exception to the Eighth Amendment's ban on cruel and unusual punishments. Courts invariably decide such claims on the merits because it would be unconscionable to permit the State to impose criminal sanctions in violation of that Clause. Doctrines of waiver or procedural default may bar Eighth Amendment defenses that prisoners fail to raise at the first available opportunity, but those doctrines are consistent with the Due Process Clause precisely because they apply only in cases where an individual has had an opportunity to be heard.[221]

In sum, when the state threatens to impose criminal sanctions on someone, and that person alleges that the threatened sanction is unlawful, the Due Process Clause requires a judicial hearing on the merits of the argument, provided the argument is raised at the first available opportunity in accordance with established procedural rules. This principle applies with equal force to criminal defendants in state court and habeas petitioners in state court. Whenever the state threatens an individual with criminal sanctions, the state must provide that person an opportunity to be heard (i.e., an opportunity to present a defense). Virtually every state has rules permitting convicted prisoners to bring claims—via habeas corpus or some analogous proceeding—that they could not have raised at trial or on direct appeal. If a convicted prisoner uses such a procedure to present an argument that the state is threatening to impose an unlawful sanction, and he raises that argument at the first available opportunity in accordance with state procedural rules, the Due Process Clause requires the court to address the merits of that argument.[222] The contrary view—that the Due Process Clause permits the state to subject an individual to criminal sanctions without giving him any opportunity to contest the legality of those sanctions—is antithetical to the core meaning of "due process."

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219. *See* U.S. CONST. amend. IV (prohibiting "unreasonable searches").

220. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL AND NANCY J. KING, CRIMINAL PROCEDURE § 27.6 (4th ed. 2004).

221. Similarly, federal law restricts federal habeas review of state criminal convictions if the individual had an opportunity to litigate his claim in state court. *See* LARRY W. YACKLE, FEDERAL COURTS 430–37 (1st ed. 1999). Indeed, the primary rationale for a restrictive approach to federal habeas review is based on the assumption that the federal habeas petitioner had a fair opportunity to be heard in state court. *See id*.

222. *See* Sloss, *supra* note 20, at 988–92.

III. Treaty Delegations and International Judgments

Part II addressed the domestic application of treaties that directly constrain the authority of state governments. Part III addresses cases, like *Medellin*, where a treaty delegates authority to an international tribunal and the tribunal issues a judgment that appears to constrain the authority of state governments. The analysis is divided into three sections. The first section considers whether a binding ICJ judgment has the same domestic effect under the Supremacy Clause as a treaty of equivalent content. The second section addresses limits on the ICJ's remedial authority. The final section addresses policy issues related to treaty-based international delegations.

A. International Judgments and the Supremacy Clause

It is generally agreed that valid ICJ judgments are binding on the United States under international law.[223] The question arises: assuming that an ICJ judgment is valid and binding under international law, does that judgment have the same domestic effect under the Supremacy Clause as a treaty of equivalent content? In other words, does an ICJ judgment ordering the United States to do X have the same domestic effect as a treaty obligating the United States to do X?

To address this question, it is helpful to begin with some simplifying assumptions. First, this discussion focuses exclusively on treaties that create a non-discretionary duty under international law for the United States to comply with the judgment of an international tribunal. Second, the discussion focuses exclusively on cases where a tribunal's judgment creates an international obligation of a type such that state officers have the capacity to promote or hinder performance of the treaty obligation to comply with the judgment. Third, assuming that a federal rule compelling state officers to comply with the tribunal's judgment would violate the anti-commandeering principle in some cases, but not others,[224] this discussion focuses exclusively on cases that do not raise an anti-commandeering problem. If these three conditions are satisfied, and the tribunal's judgment is valid and binding under international law, I contend that the Supremacy Clause makes that judgment binding on state government officers under domestic law.

Professor McGinnis defends a much more restrictive view of the domestic effects of decisions by international tribunals.[225] To defend that view, he makes some persuasive policy arguments about the dangers of international

223. *See* Statute of the International Court of Justice [hereinafter ICJ Statute], art. 59, June 26, 1945, 59 Stat. 1055 (stating that the Court's decision has "binding force . . . between the parties"); Medellin v. Texas, 552 U.S. 491, 504 (2008) ("No one disputes that the *Avena* decision . . . constitutes an international law obligation on the part of the United States.").

224. *See supra* notes 175–79 and accompanying text.

225. *See* McGinnis, *supra* note 24, at 1717–24.

delegations.[226] The question, though, is how best to address those policy concerns within our existing constitutional framework. One possibility would be to amend the Constitution to distinguish between treaties that delegate authority to international tribunals and those that do not. Some other countries have adopted this strategy,[227] but Professor McGinnis does not recommend this approach. Instead, he advances two proposals. First, he argues that international agreements delegating authority to international tribunals must be handled domestically as Article II treaties, not congressional-executive agreements.[228] I have no quarrel with this recommendation.

His second proposal, however, is more problematic. Professor McGinnis argues that judgments of international tribunals should not be binding on domestic government officials unless the treaty delegating authority to the international tribunal includes a clear statement specifying that the tribunal's judgments will bind government officers under domestic law.[229] There are two problems with this proposal. First, like the intent-based approach to self-execution generally, it conflates treaty interpretation issues with domestic legal issues. As the two-step approach makes clear, the question whether an international tribunal's judgment creates domestic legal duties for domestic government officers is a question of domestic law, not treaty interpretation. Nevertheless, Professor McGinnis wants courts to approach the issue as if it were a treaty interpretation issue. In effect, his proposed clear statement rule would have courts examine treaty text to answer a question of domestic constitutional law.

This raises the second problem with Professor McGinnis's proposal: his analysis tacitly assumes that the Supremacy Clause says nothing about the domestic effects of treaties that delegate authority to international tribunals. That assumption is plainly incorrect. The Supremacy Clause creates domestic legal duties for state government officers to conform their conduct to the nation's treaty obligations in the circumstances described in Part II.A above.[230] The Clause does not distinguish between treaties that delegate authority to international tribunals and those that do not: it states explicitly that "*all treaties* . . . [are] the supreme Law of the Land."[231] It is not permissible to interpret the phrase "all treaties" to mean "only those treaties that do not delegate authority to international tribunals." Therefore, if a treaty

226. I do not mean to endorse Professor McGinnis's policy arguments *in toto* because I think he may overstate the dangers of international delegations. Nevertheless, I agree that international delegations pose real risks and he does an excellent job of explaining those risks.

227. For example, the Polish Constitution requires a two-thirds majority vote, instead of a simple majority, for treaties that "delegate to an international organization or international institution the competence of organs of State authority in certain matters." *See* Lech Garlicki, Malgorzata Masternak-Kubiak and Krzysztof Wojtowicz, *Poland*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT, *supra* note 6, at 377–84.

228. *See* McGinnis, *supra* note 24, at 1742–57.

229. *Id.* at 1714–17.

230. *See supra* Part II.A.

231. U.S. CONST. art VI, cl. 2 (emphasis added).

creates a non-discretionary duty for the United States to comply with an international tribunal's judgment, the conditions specified in Part II.A are satisfied, and the tribunal issues a valid judgment such that state officers have the capacity to promote or hinder performance of the nation's treaty obligation, the tribunal's judgment binds those officers as a matter of domestic law because the Supremacy Clause says so,[232] unless the treaty makers adopt a clear statement to alter the ordinary operation of the Supremacy Clause.[233]

One might object that judgments of international tribunals are not the "Law of the Land" because the Supremacy Clause does not identify such judgments as an enumerated category of supreme federal law. This objection is formally correct: the judgment of an international tribunal is not supreme federal law. However, a treaty provision creating a non-discretionary duty to comply with the judgment of an international tribunal is the "Law of the Land" under the express terms of the Constitution. Therefore, such a treaty provision is binding on state government officers in precisely the same circumstances as other treaty provisions that create non-discretionary duties for the nation—i.e., when state officers have the capacity to promote or hinder treaty performance and application of treaty duties to state officers would not violate the anti-commandeering rule.[234] There is no substantive difference between a treaty obligating the United States to do X and a treaty obligating the United States to comply with an international judgment ordering the nation to do X. Therefore, if the United States ratifies a treaty creating a non-discretionary duty for the nation to comply with the judgments of an international tribunal, and that tribunal issues a valid, binding judgment ordering the United States to do X, that judgment is binding on state government officers under the Supremacy Clause in precisely the same way as a treaty obligating the United States to do X.

B. Limits on the ICJ's Remedial Authority

The Supreme Court granted certiorari in *Medellin v. Texas* to decide whether "the ICJ's judgment in *Avena* [is] directly enforceable as domestic law in a state court in the United States."[235] Clearly, the *Avena* judgment would not be binding on state government officers under domestic law if it was not a valid judgment under international law. What are the criteria for determining the validity of an ICJ judgment? Under well-established legal principles, if Congress enacts a statute delegating adjudicatory power to a federal administrative tribunal, the tribunal's decision is not valid if the

232. As discussed above, the conclusion that an international tribunal's judgment binds domestic government officers, without more, tells us very little about the modalities for enforcing that obligation in a judicial proceeding. *See supra* notes 167–70 and accompanying text.

233. *See supra* notes 190–203 and accompanying text.

234. *See supra* notes 173–86 and accompanying text.

235. Medellin v. Texas, 552 U.S. 491, 498 (2008).

initial delegation of authority was invalid or the decision was *ultra vires*—i.e., the tribunal acted beyond the scope of delegated authority.[236] By analogy, an ICJ decision would be invalid if the initial delegation of authority to the ICJ was invalid or the ICJ's decision was *ultra vires*.

Whether and to what extent U.S. treaty makers can legitimately delegate decisionmaking authority to an international tribunal is primarily a question of domestic constitutional law. Other scholars have debated that constitutional issue;[237] this Article expresses no view on the constitutionality of treaty-based international delegations. Instead, this Article focuses on the second issue: assuming that the initial delegation of authority to the ICJ was valid, under what circumstances would an ICJ decision be *ultra vires?* As the two-step approach makes clear, this is a treaty interpretation question, not a constitutional law question.

The ICJ's decisionmaking authority in *Avena* was based primarily on two treaties: the Statute of the International Court of Justice ("ICJ Statute")[238] and the Optional Protocol to the Vienna Convention on Consular Relations.[239] The Optional Protocol clearly authorized Mexico to initiate proceedings against the United States before the International Court of Justice.[240] However, the Optional Protocol says nothing about the ICJ's remedial powers. In *Avena*, the United States effectively conceded that it had breached an international obligation.[241] The main issue in dispute was the appropriate remedy for that breach.

Article 36(2) of the ICJ Statute grants the ICJ broad remedial powers: it authorizes the ICJ to decide "the nature or extent of the reparation to be made for the breach of an international obligation."[242] But the ICJ did not decide *Avena* under Article 36(2); it decided *Avena* under Article 36(1). Article 36(1) grants the ICJ jurisdiction to decide "matters specially provided for in . . . treaties."[243] Article 36(2) applies only to claims against states who have submitted a declaration "recogniz[ing] as compulsory ipso facto and

236. *See* RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE 975–76 (5th ed. 2002).

237. *See, e.g.*, McGinnis, *supra* note 24; Bradley & Kelley, *supra* note 166; Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 CAL. L. REV. 1693 (2008); Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004).

238. ICJ Statute, *supra* note 223; *see* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

239. Optional Protocol Concerning the Compulsory Settlement of Disputes, art. X, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

240. *See id.*, art. 1 ("Disputes arising out of the interpretation or application of the Convention . . . may . . . be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.").

241. *See* Avena and Other Mexican Nationals (Mex v. U.S.), 2004 I.C.J. 4; Counter-Memorial of the United States of America 178 (Nov. 2, 2003), available at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=18&case=128&code=mus&p3=1.

242. ICJ Statute, *supra* note 223, art. 36.

243. *Id.*

without special agreement . . . the jurisdiction of the Court."[244] The United States filed an Article 36(2) declaration with the ICJ in 1946, but it terminated that declaration in 1985.[245] Thus, when Mexico filed its claim against the United States in 2003, Article 36(2) was inapplicable, and Article 36(1) provided the only available basis for ICJ jurisdiction.

Article 36(1) says nothing about the ICJ's remedial powers. Article 36(2) grants the ICJ much more open-ended authority than Article 36(1). Whereas 36(1) applies only to "matters specially provided for in" treaties, 36(2) potentially applies to "any question of international law."[246] Given that Article 36(2) grants the ICJ expansive jurisdiction and Article 36(1) grants much narrower jurisdiction, it is questionable whether the ICJ's broad remedial powers under Article 36(2) apply to cases arising under 36(1), especially because the only textual reference to remedial powers is in 36(2).

Domestic courts in the United States exercise "inherent" remedial powers.[247] There are plausible functional arguments supporting the view that the ICJ Statute grants the ICJ broad remedial powers comparable to those exercised by domestic courts. On the other hand, there are also plausible functional arguments supporting a much narrower view of the ICJ's remedial authority.[248] It is not my purpose to resolve that debate here. My point is simply that the text of the ICJ Statute provides at best weak support for the widely shared, unstated assumption that Article 36(1) of the ICJ Statute grants the ICJ broad remedial powers. Nor do functional rationales favoring a broad view of the ICJ's remedial powers provide a "slam dunk" argument supporting ICJ authority. An ICJ remedial order would be *ultra vires* if the Court purported to exercise remedial powers beyond the scope of authority that the states who created the ICJ delegated to that tribunal.

If the remedial powers granted to the ICJ under Article 36(2) do not apply to cases arising under Article 36(1), then there is at least a colorable legal argument that the ICJ judgment in *Avena* was *ultra vires*. If that judgment was *ultra vires*, then it was not binding on the United States under international law. If the judgment was not binding on the nation, then it was not binding on domestic government actors under U.S. domestic law. Although I am not persuaded that the ICJ's decision was *ultra vires,* the *ultra*

244. *Id.*

245. *See* Shabtai Rosenne, Documents on the International Court of Justice 782–84 (3rd ed. 1991).

246. ICJ Statute, *supra* note 223, art. 36.

247. *See, e.g.,* Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

248. Professor McGinnis offers some persuasive functional reasons why the United States should be cautious about delegating authority to international tribunals. *See* McGinnis, *supra* note 24, at 1717–28. He invokes those arguments to support a narrow view of the domestic effects of international delegations. As explained above, I believe his focus on domestic effects is misguided. Nevertheless, one might reasonably adduce similar policy arguments to support a narrow view of the ICJ's delegated remedial powers, especially under Article 36(1).

vires argument provides a more convincing rationale for the outcome in *Medellin* than any of the arguments offered by the Court's leading academic defenders.

C. Future Delegations

The core policy issue underlying the Supreme Court's decision in *Medellin*, which has fuelled much of the related scholarly commentary, arises from the confluence of two factors. First, the treaties at issue in *Medellin* granted the ICJ authority to issue a judgment that was binding on the United States under international law. Second, the ICJ exercised that authority by issuing a remedial order targeted directly at state government officials.[249] The confluence of these two factors raises, in the starkest form, the policy concerns that Professor McGinnis correctly identifies in his article.[250] I suggest that U.S. treaty makers could address those concerns by adopting reservations specifically designed to limit the authority of international tribunals to issue judgments that bind state and local government officers.

When the United States ratifies a treaty granting authority to an international tribunal to issue judgments that bind the nation under international law, the treaty makers could include two conditions in the instrument of ratification. First, they could adopt a reservation stipulating that the United States will be bound to comply with the tribunal's judgments only insofar as *federal* executive and judicial officers have the requisite statutory and/or constitutional authority to implement those judgments. If the tribunal orders the United States to take steps beyond the scope of authority of *federal* officers under domestic law, the United States will make its best efforts, but it will not be legally bound to implement the tribunal's order.[251] Second, the treaty makers could adopt a declaration stipulating that the tribunal's judgments shall not be binding on state government officers under domestic law unless Congress enacts legislation directing those officers to implement the tribunal's judgments. The proposed reservation would limit the scope of U.S. international legal obligations, thereby avoiding unwanted breaches of the nation's treaty obligations. The proposed declaration would limit the domestic effects of the tribunal's judgments, thereby ensuring that Congress

249. The ICJ issued an order requiring a judicial hearing in domestic court for prisoners detained by state governments (not the federal government). *See* Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J 12 (Mar. 31). ICJ judges were presumably aware that statutory constraints on federal habeas proceedings created substantial uncertainty as to whether federal courts had the necessary statutory jurisdiction to provide the judicial hearing required by *Avena*. *See* Medellin v. Dretke, 544 U.S. 660 (2005) (addressing statutory restrictions on federal habeas jurisdiction). Thus, the ICJ had to assume that state courts were the only courts with jurisdiction to provide the mandated judicial hearings.

250. *See* McGinnis, *supra* note 24, at 1720–25.

251. Canada has sometimes adopted reservations to treaties to signal the inability of the federal government to mandate compliance by provincial governments. *See* Maurice Copithorne, *National Treaty Law and Practice: Canada*, *in* NATIONAL TREATY LAW AND PRACTICE 91, 95–98, *supra* note 6.

makes a conscious policy choice before any such judgment creates binding domestic legal obligations for state government officers.

The recommended approach fully addresses the policy concerns associated with future treaty-based international delegations. Moreover, it has three distinct advantages over Professor McGinnis's proposal. First, and most importantly, this approach is consistent with the text of the Supremacy Clause. In contrast, Professor McGinnis's proposal tacitly assumes that the Supremacy Clause is meaningless.[252] Second, the recommended approach promotes compliance with the nation's treaty obligations by utilizing reservations to limit the scope of those obligations. In contrast, Professor McGinnis's proposal effectively establishes a default rule of noncompliance, because the treaty makers' failure to adopt the clear statement he advocates would lead to noncompliance with a tribunal judgment requiring domestic implementation until Congress enacted legislation to implement that judgment.[253]

Third, the recommended approach would provide notice to other states about the United States' plans for treaty implementation by including relevant reservations and declarations in the instrument of ratification. In contrast, under Professor McGinnis's proposal, the United States would convey information to other states, in the form of a clear statement, only in cases where it intends to implement tribunal decisions domestically.[254] In cases where implementation of a tribunal's decision is dependent on congressional action—i.e., in those cases where the risk of noncompliance is greatest—the United States would not convey any advance information to other states, because there would be no clear statement. Thus, Professor McGinnis's proposal creates a perverse signaling regime wherein the United States would provide advance signals to other states in cases where the risk of noncompliance is low, but not advance warning in cases where that risk is higher. The failure to provide any advance warning of noncompliance would exacerbate the costs of noncompliance.

One potential objection is that the recommended approach does not address the problem of existing treaties that delegate authority to international tribunals. Professor Damrosch notes that the United States "remains a 'repeat player' at the ICJ and is liable to be sued there again under any of approximately seventy treaties that are still in force for the United

252. *See supra* notes 230–33 and accompanying text.

253. More precisely, under Professor McGinnis's proposal, noncompliance would result whenever a tribunal ordered the United States to take steps that required domestic implementation, and Congress failed to enact the legislation necessary to authorize or compel some government officer to take the necessary steps.

254. As noted above, Professor McGinnis argues that judgments of international tribunals should not be binding on domestic government officials unless the treaty delegating authority to the international tribunal includes a clear statement specifying that the tribunal's judgments will bind government officers under domestic law. McGinnis, *supra* note 24, at 1714–17. Under this approach, other states receive advance notice that the United States will implement its treaty obligations, but they do not receive advance notice if the United States decides not to implement its treaty obligations.

States."[255] It is difficult to assess the risk that one of those treaties will result in a suit in which the ICJ issues a remedial order targeted at state government officers. Even so, it would be wise for the United States government to conduct a detailed study to address that question. For any treaty where the risk of such a scenario is significant, the United States could mitigate the risk by withdrawing from the treaty and then rejoining the treaty subject to reservations and declarations along the lines suggested above.[256]

IV. Three Readings of *Medellin*

José Ernesto Medellín was a Mexican national convicted of murder and sentenced to death in Texas state court.[257] Texas officials violated U.S. treaty obligations under the Vienna Convention on Consular Relations ("VCCR") by failing to advise him of his right to consult with a consular officer. After an unsuccessful appeal, Medellín filed his first state habeas corpus petition, raising a claim under the VCCR. The state trial court denied that petition and the Texas Court of Criminal Appeals affirmed.[258] Mexico then brought a claim against the United States in the International Court of Justice on behalf of Medellín and other Mexican nationals (the *Avena* case).[259] The ICJ issued its *Avena* judgment in March 2004; it ordered the United States to provide judicial hearings for 51 Mexican nationals, including Medellín.[260]

After the ICJ decision, Medellín filed a second habeas petition in Texas state court, arguing that it would be illegal for Texas to subject him to capital punishment without first providing the judicial hearing mandated by *Avena,* because Article 94 of the U.N. Charter created a non-discretionary duty for the United States to comply with the ICJ judgment in *Avena*, and that duty was directly binding on Texas government officials under the express terms of the Supremacy Clause.[261] The Texas Court of Criminal Appeals denied Medellín's second habeas petition in November 2006 without reaching a decision on the merits of his argument.[262] The U.S. Supreme Court affirmed the Texas court's decision in March 2008, holding that Article 94 of the U.N. Charter is not self-executing.[263] Texas subsequently exe-

255. Lori F. Damrosch, Medellin *and* Sanchez-Llamas*: Treaties from John Jay to John Roberts*, *in* Continuity and Change, *supra* note 17, at 451, 463.

256. Most treaties that delegate authority to international tribunals include withdrawal clauses. If there are any such treaties that do not include withdrawal clauses, this strategy would not be viable.

257. *See Ex parte* Medellin, 223 S.W.3d 315, 321 (Tex. Crim. App. 2006).

258. *Id.* at 321–22.

259. Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 12 (Mar. 31).

260. *See id.* at ¶¶ 128–41, 153.

261. *Ex parte* Medellin, 223 S.W.3d at 323.

262. *Id.* at 352.

263. Medellin v. Texas, 552 U.S. 491 (2008).

cuted Medellín in August 2008. It is unclear whether Texas ever provided the judicial hearing mandated by *Avena*.[264]

The Supreme Court's decision in *Medellin* is open to several interpretations.[265] This Part considers three possible interpretations of the Court's non-self-execution holding in *Medellin*. The Court's holding means either: (1) that Article 94 of the United Nations Charter does not create non-discretionary duties for the United States under international law; or (2) that Article 94 creates non-discretionary duties for the nation, but it does not impose any binding obligations on state officers under the Supremacy Clause; or (3) that Article 94 imposes binding obligations on state officers, but those obligations are not judicially enforceable. The intent-based approach to self-execution blurs the vital distinctions among these three possible interpretations. The two-step approach helps clarify that these really are three very different interpretations of the Court's opinion. Under the first interpretation, *Medellin* is wrong as a matter of international law. Under the second, *Medellin* is flatly inconsistent with the Supremacy Clause. If the third interpretation is correct, the Court probably violated the Due Process Clause.

A. The First Interpretation

Under the first possible interpretation, the Supreme Court held that Article 94 of the United Nations Charter does not create non-discretionary duties for the United States under international law. There is some language in the Court's opinion to support this interpretation.[266] Commentators disagree whether this is the best construction of the Court's decision in *Medellin*.[267] However, there is no dispute that if this is what the Court held, its holding is incorrect as a matter of treaty interpretation. The United States government has consistently maintained that Article 94 creates a non-discretionary duty for the United States to comply with valid ICJ judgments.[268] No com-

264. In his brief to the Supreme Court, the Texas Solicitor General argued that Texas courts had already provided the judicial hearing mandated by *Avena*. *See* Brief for Respondent at 49–50, Medellin v. Texas, 552 U.S. 491 (2008) (No. 06-984). However, Texas devoted only one page of a 50-page brief to supporting this argument. *See id*. Moreover, the Supreme Court did not rely on this argument to support its decision in *Medellin*, *see* 552 U.S. 491, and Medellín himself vigorously denied that he had received the required judicial hearing. *See* Brief for Petitioner, at 12–15, Medellin v. Texas, 552 U.S. 491 (2008) (No. 06-984).

265. *See, e.g.*, ABA/ASIL Joint Task Force on Treaties in U.S. Law, Report (March 2009), *available at* http://www.asil.org/files/TreatiesTaskForceReport.pdf (analyzing various possible interpretations of the Supreme Court decision in *Medellin*).

266. *See, e.g., Medellin*, 552 U.S. at 508 (stating that Article 94 "does not provide that the United States 'shall' or 'must' comply with an ICJ decision"); *id*. at 510 ("Noncompliance with an ICJ judgment . . . [was] always regarded as an option by the Executive and ratifying Senate during and after consideration of the U.N. Charter.").

267. *Compare* Vázquez, *supra* note 3, at 660–65 (defending this interpretation of *Medellin*) *with* Bradley, *supra* note 2, at 168–76 (criticizing this interpretation).

268. *See, e.g.*, International Court of Justice, Written Observations of the United States of America on the Application for Interpretation of the Judgment of 31 March 2004 in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (Aug. 29, 2008), at 1–2, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=11&case=139&code=musa&p3=1.

mentator has seriously contested this proposition.[269] Although, under the first interpretation, *Medellin* is incorrect on treaty interpretation grounds, this interpretation of *Medellin* is not constitutionally problematic. A treaty that does not create non-discretionary duties for the nation under international law does not create non-discretionary duties for government officers under domestic law.[270]

B. The Second Interpretation

Under the second interpretation of *Medellin*, the Supreme Court held that Article 94 imposes non-discretionary duties on the United States under international law, but does not create non-discretionary duties for state government officers under domestic law. This interpretation is generally consistent with Chief Justice Roberts' majority opinion in *Medellin*.[271] However, it is impossible to reconcile with the text of the Supremacy Clause. Under a bare minimalist interpretation of the Supremacy Clause, the Clause means that a treaty imposing non-discretionary duties on the nation creates non-discretionary duties for state government officers if: (a) those officers have the capacity to promote or hinder treaty performance; (b) application of treaty duties to state officers would not violate the anti-commandeering rule; and (c) the treaty makers did not adopt conditions to alter the ordinary operation of the Supremacy Clause.[272]

In *Avena*, the ICJ ordered the United States to provide judicial hearings for 51 Mexican nationals, including Medellín.[273] The second interpretation assumes that Article 94 of the U.N. Charter creates a non-discretionary duty for the United States to provide the judicial hearings mandated by *Avena*. There is no question that Texas courts had the legal authority under Texas law to provide the required judicial hearing for those prisoners named in the *Avena* decision who were detained under authority of Texas state law (including Medellín).[274] A federal rule obligating Texas courts to provide that judicial hearing does not raise an anti-commandeering problem because the anti-commandeering rule does not apply to state courts.[275] Finally, when the Senate consented to ratification of the U.N. Charter, it did not include any statement in the resolution of ratification to alter the ordinary operation of the Supremacy Clause.[276] Thus, Article 94 is directly binding on Texas

269. Although Professor Vázquez defends this interpretation of the Court's opinion in *Medellin*, he agrees that, under this interpretation, the Court's opinion is incorrect as a matter of treaty interpretation. *See* Vázquez, *supra* note 3, at 666–67.

270. *See* Sloss, *supra* note 3, at 25 n.103.

271. *See* Medellin v. Texas, 552 U.S. 491, 504–14.

272. *See supra* Part II.A.

273. *See* Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J 12, 128–41, 153 (Mar. 31).

274. Section 5(a)(1) of the Texas Code of Criminal Procedure expressly authorized Texas state courts to adjudicate Medellín's claim. *See infra* notes 283–85 and accompanying text.

275. *See* Printz v. United States, 521 U.S. 898, 907 (1997).

276. *See* 91 Cong. Rec. 8134, 8189-90 (July 28, 1945). In *Medellin*, the Court justified its non-self-execution holding, in part, by invoking statements from the Senate record associated with ratification of

courts under the express terms of the Supremacy Clause. Therefore, under the second interpretation of *Medellin*, the Court's non-self-execution holding is inconsistent with the plain meaning of the Supremacy Clause.

C. The Third Interpretation

Under the third interpretation of *Medellin*, Article 94 of the U.N. Charter is supreme federal law and binding on Texas officials under the Supremacy Clause, but is "not judicially enforceable." Under this interpretation, Texas officials violated supreme federal law when they executed Medellín, unless Texas courts provided the judicial hearing required by *Avena* before they executed him.[277] Let us assume, as the Supreme Court apparently assumed, that Texas never did provide the *Avena* hearing.[278] Given this assumption, the Supreme Court's non-self-execution holding ostensibly justifies the Texas court's refusal to decide the merits of Medellín's Article 94 argument. However, under this view, the Court's non-self-execution holding violated the Due Process Clause.

When a state threatens to impose criminal sanctions on someone, and that person alleges that the threatened sanction is unlawful, the Due Process Clause requires a judicial hearing on the merits of the argument, provided the argument is raised at the first available opportunity in accordance with established procedural rules.[279] Medellín filed his second state habeas petition in 2005. At that time, Texas was threatening to impose capital punishment. Medellín argued that it would be illegal for Texas to subject him to capital punishment without first providing the judicial hearing mandated by *Avena,* because Article 94 created a non-discretionary duty for the United States to comply with the ICJ judgment in *Avena*, and that duty was directly binding on Texas government officials under the Supremacy Clause. Medellín could not have raised that claim when he filed his first habeas petition in 1998 because the ICJ did not decide *Avena* until 2004. The Texas court conceded that Medellín's Article 94 claim was unavailable in 1998.[280] Thus, he raised his claim at the first available opportunity.[281]

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the U.N. Charter. *See* Medellin v. Texas, 552 U.S. 510–11. None of those statements was part of the Senate resolution of ratification. Unlike the text of the Supremacy Clause, none of those statements addresses the question whether the U.N. Charter creates non-discretionary duties for state officers under domestic law. It is unclear whether Chief Justice Roberts, the author of the majority opinion, thought those statements altered the ordinary operation of the Supremacy Clause. However, if that is what he believed, he was clearly mistaken. It is untenable to claim that domestic law accords more weight to statements by individual Senators or Executive Branch officials than it does to the constitutional text.

277. *See supra* note 264.

278. The Supreme Court decision in *Medellin* did not address the Texas Solicitor General's argument that Texas had already provided the required *Avena* hearing. If the Court had accepted that argument, though, it could simply have ruled that the case was moot, since the only relief Medellín requested was the judicial hearing mandated by *Avena*.

279. *See supra* Part II.B.

280. *See Ex parte* Medellin, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).

281. The fact that Medellín failed to raise his VCCR claim at the first available opportunity is immaterial. His second habeas petition raised an entirely different claim, based on Article 94 and *Avena*.

Medellín also raised his Article 94 claim in accordance with state procedural rules. Section 5(a)(1) of the Texas Code of Criminal Procedure permits convicted prisoners to file a second habeas petition in cases where "the current claims and issues . . . could not have been presented previously in a timely initial application . . . because the factual or *legal basis for the claim was unavailable on the date the applicant filed the previous application.*"[282] Article 94 of the U.N. Charter and *Avena* constituted the "legal basis for the claim" presented in Medellín's second habeas petition.[283] That legal basis was "unavailable" in 1998, when he filed his first habeas petition, because Article 94 did not become applicable to Medellín's case until the ICJ decided *Avena* in March 2004. Thus, Texas procedural law explicitly authorized Medellín's petition, and he presented that petition in accordance with state procedural rules.[284]

Since Medellín argued that Texas was threatening to impose an unlawful criminal sanction, and since he raised that claim at the first available opportunity in accordance with state procedural rules, he had a constitutional right under the Due Process Clause to demand a judicial hearing on the merits of his claim. Under the third interpretation, the Supreme Court's non-self-execution holding violated the Due Process Clause by denying Medellín his constitutional right to a judicial hearing.

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In sum, the Court's inscrutable opinion in *Medellin* is subject to three different interpretations. Under the first interpretation, *Medellin* is wrong as a matter of international law. Under the second, *Medellin* is flatly inconsistent with the Supremacy Clause. If the third interpretation is correct, the Court probably violated the Due Process Clause.

Medellin illustrates the problems with the intent-based approach to self-execution. The Court's opinion in *Medellin* is analytically incoherent because it is unclear whether the Court's non-self-execution holding is based on international law or domestic law. Moreover, assuming that the Court's holding is based on domestic law, it is unclear whether the Court employed a

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282. Tex. Code Crim. Pro, art. 11.071, § 5(a)(1) (emphasis added).

283. The Texas Court of Criminal Appeals held that the *Avena* judgment did not provide either a "factual" or "legal" basis for the claim advanced in Medellín's second habeas petition. *See Medellin*, 223 S.W.3d at 348–52. Its conclusion that *Avena* did not provide a new "factual" basis for Medellín's claim was clearly correct. However, its conclusion that Article 94 and *Avena* did not provide a new "legal" basis for that claim was clearly incorrect. In essence, the Texas court ruled that there was no "legal" basis for Medellín's claim because the *Avena* judgment itself was not federal law. *See id*. at 352. In so holding, the court simply disregarded Medellin's textually irrefutable argument that Article 94 of the United Nations Charter is federal law, which provided a new legal basis for his claim.

284. It is important to distinguish between Medellín's claim and the claim advanced by Mario Bustillo, one of the petitioners in the *Sanchez-Llamas* case. Bustillo's claim was clearly barred by state procedural default rules because he failed to raise his claim at the first available opportunity. S*ee* Sanchez-Llamas v. Oregon, 548 U.S. 331, 341–42 (2006). In contrast, Texas law explicitly authorized Medellín's claim because the "legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Pro, art. 11.071, § 5(a)(1).

primary law or remedial law concept of non-self-execution. The Court's opinion relies heavily on a fictitious "intent of the treaty makers" that has no basis in the treaty text or in any authoritative document adopted by the Senate at the time of ratification.[285] Finally, the Court's misguided reliance on the intent-based approach to self-execution yielded an opinion that, depending on one's preferred interpretation, is either wrong as a matter of treaty interpretation, inconsistent with the Supremacy Clause, or violated Medellín's rights under the Due Process Clause. The Court could have avoided all of these problems by applying the two-step approach to self-execution.

V. Conclusion

The doctrine of self-executing treaties is analytically incoherent because it directs courts to utilize treaty interpretation tools to answer questions of domestic constitutional law. The question whether a treaty is self-executing is actually two very different questions, masquerading as a single question. The first question is: "what does the treaty obligate the United States to do?" This is a treaty interpretation issue. The second question is: "which government actors within the United States have the power and duty to implement the treaty domestically?" This is a domestic legal issue, not a treaty interpretation issue. Examining the treaty text to answer the second question is like studying the text of a private contract to determine the correct interpretation of federal securities laws. No matter how carefully one examines the contract, the answer is simply not there. The doctrine of self-execution will remain hopelessly incoherent until courts and commentators learn to distinguish correctly between treaty interpretation issues and domestic implementation issues.

The core policy issue in *Medellin* arose from the confluence of two factors. First, the treaties at issue granted authority to an international tribunal to issue decisions binding on the United States under international law. Second, the ICJ issued a remedial order that, while directed formally to the United States, as a practical matter required implementation by state government officers. Never before had an individual litigant asked the Supreme Court to order state government officers to implement a judgment of an international tribunal. The petitioner's claim that the ICJ order was directly binding on state government officers, as a matter of domestic law, raised novel questions about the international legal order and the autonomy of States within the United States.

The treaty makers could have addressed the underlying policy issue by adopting reservations to limit the scope of the ICJ's decisionmaking authority, and by adopting declarations to limit the domestic effects of ICJ judg-

285. *See* Medellin v. Texas, 552 U.S. 491, 504–14 (2008).

ments. However, the treaty makers never adopted any such reservations or declarations, in part because they did not anticipate that the ICJ would exercise its decisionmaking power in a manner that called for implementation of ICJ judgments by sub-national government authorities. Now that the United States has received clear notice about the risks of ratifying treaties that delegate binding decisionmaking authority to international tribunals, it is the responsibility of the federal political branches to adopt measures to mitigate those risks. As explained in Part III above, the treaty makers have the power to adopt a combination of reservations and declarations that would resolve the basic policy problem presented by *Medellin*.

Absent action by the federal political branches, though, the Supreme Court has a duty to apply the Supremacy Clause as written. Under the Supremacy Clause, a treaty is binding on state government officers if the treaty imposes non-discretionary duties on the United States under international law, state officers have the capacity to promote or hinder treaty performance, and application of treaty duties to state officers would not violate the anti-commandeering rule. The Clause applies both to treaties that delegate decisionmaking authority to international tribunals and those that do not.

Whether, and in what circumstances, a treaty is judicially enforceable against state officers is a separate issue. This Article does not analyze the myriad issues associated with judicial enforcement of treaties that are binding on state government officers under domestic law. However, the Article does identify a narrow set of cases in which the Due Process Clause mandates judicial enforcement of treaties. When the state threatens to impose criminal sanctions on someone, and that person claims the sanction would violate a treaty-based, non-discretionary duty, the Due Process Clause requires a judicial hearing on the merits, provided the individual raises the argument at the first available opportunity in accordance with established procedural rules. State and federal judicial decisions in *Medellin* probably violated the petitioner's constitutional rights under the Due Process Clause.