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REDEFINING THE SUPREMACY CLAUSE IN THE GLOBAL AGE: RECONCILING *MEDELLÍN* WITH ORIGINAL INTENT

Sarah Elizabeth Nokes*

INTRODUCTION

If we are to be one nation in any respect, it clearly ought to be in respect to other nations.

—James Madison¹

One of the most fundamental and intuitive principles of international law is that states must be able to contract meaningfully with one another. The founders of this nation had that principle in mind when they drafted the Supremacy Clause into Article VI of the Constitution, which states that treaties are the “supreme Law of the Land.”² The Supreme Court has read caveats into the Supremacy Clause throughout the nation’s history, but no change to the Clause’s apparent meaning and interpretation was greater than the recent ruling in *Medellín v. Texas*.³ The ruling, which seems on its face to have overturned the plain language of the Clause, does constitute a change in the way we view international treaties and obligations. However, it is not a divergence from the founders’ original intent.⁴ This apparent discrepancy is true because the nature of international agreements has so drastically changed since the time of the founding that nothing short of a new interpretation of the Supremacy Clause could reconcile the Framers’ original intent with the modern landscape of treaties. Foreign relations have changed in the past two hundred years, and the law must keep pace with these changes or risk becoming inconsistent and obsolete.⁵

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¹ THE FEDERALIST NO. 42, at 302 (James Madison) (Benjamin Fletcher Wright ed., 1961).

² U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); THE FEDERALIST NO. 75, *supra* note 1, at 476 (Alexander Hamilton) (“[A treaty’s] objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith.”).

³ 552 U.S. 491 (2008).

⁴ *See id.* at 562 (Breyer, J., dissenting) (arguing that the majority in *Medellín* ignored the Framers’ original intent in crafting their opinion).

⁵ *See* WILLIAM O. DOUGLAS, STARE DECISIS 30 (1949) (“[I]t is—in law and in other fields too—that men continue to chant of the immutability of a rule in order to ‘cover up the

When the Framers of the Constitution wrote the Supremacy Clause into Article VI, they did not intend for Congress to have to legislate on treaty content in order for it to become the “supreme Law of the Land.”⁶ However, the Supreme Court’s recent holding in *Medellin* that such implementing legislation is necessary, and indeed that there is a presumption *against* the self-execution of treaties today,⁷ is consistent with the Framers’ original intent, even if it was beyond their contemporary understanding.⁸ To believe otherwise in modern times,⁹ where international agreements and treaties deal with the essential rights of persons and parties, and not solely with the diplomacy of nations, would be to allow international tribunals to say what American law is, and to endanger the fundamental rights—especially the unenumerated rights of the Ninth Amendment¹⁰—of American citizens without their voice or consent.

This Note will argue that the majority opinion in *Medellin v. Texas* is not inconsistent with the intent of the Framers of the Constitution. This Note will first discuss the Supremacy Clause in context of its creation, including the original intent of the clause and the international agreements of the day to which it referred. It will also discuss the history of the case law and related rules which led the Court to its pre-*Medellin* interpretation of treaty self-execution. Next, this Note will discuss all three (majority, concurring, and dissenting) opinions in the *Medellin* case. This Note will then discuss the nature of international agreements and treaties in the modern day, with a focus on how they are different than international agreements at the time of the founding. In order to illustrate these modern treaty differences, this Note will discuss the United Nations Convention on the Rights of the Child. This treaty will also be used to illustrate the possible consequences of the strict originalist interpretation of

transformation, to deny the reality of change, to conceal the truth of adaptation behind a verbal disguise of fixity and universality.’ But the more blunt, open, and direct course is truer to democratic traditions.” (internal citations omitted).

⁶ *Medellin*, 552 U.S. at 541–44 (quoting *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, at 277 (1796) (Iredell, J.)) (“Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of *moral obligation*, it is also by the vigour [sic] of its own authority to be executed in fact. It would not otherwise be the *Supreme law* in the new sense provided for . . .”).

⁷ John T. Parry, *Rewriting the Roberts Court’s Law of Treaties*, 88 TEX. L. REV. SEE ALSO 65, 69 (2010), <http://www.texasrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSeeAlso65.pdf>; see *Medellin*, 552 U.S. at 544–45.

⁸ For the argument that *Medellin* represents a departure from original intent, see D. A. Jeremy Telman, *Medellin and Originalism*, 68 MD. L. REV. 377, 380–83 (2009).

⁹ By “modern times” the author is referring to the post-World War II period, which has been characterized by the explosion of international cooperation, human rights treaties, and super-sovereign bodies. See Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 BERKELEY J. INT’L L. 223, 242 (2005).

¹⁰ U.S. CONST. amend. IX. The distinction of Ninth Amendment rights is important because there is no worry that a treaty which is in direct contradiction with the *enumerated* rights held by citizens under the Constitution will be upheld to the detriment of those rights because the Constitution is also the “supreme Law of the Land” and that which is not constitutional will not be enforced by the courts. U.S. CONST. art. VI, cl. 2.

treaty implementation. Finally, this Note will cursorily discuss the possible effects that the *Medellin* holding will have on treaty interpretation, foreign policy, and the ways in which foreign nations contract with the United States.

I. THE SUPREMACY CLAUSE IN CONTEXT

A. Traditional International Agreements

There is ample evidence that the treaties contemplated by the founders when they wrote the Supremacy Clause looked vastly different than the agreements negotiated by American diplomats today. The corpus of what the founders understood as treaties would have been shaped by their knowledge of treaties negotiated by western European sovereigns during the eighteenth century, and by their own experiences with treaty negotiations under the Articles of Confederation. In the period governed by the Articles of Confederation (1777–1787), the confederation of states was responsible for negotiating ten treaties with foreign nations.¹¹ In the decade following the ratification of the Constitution, the newly created United States contracted with foreign nations a total of six times.¹² These sixteen treaties dealt with alliances, peace, war, and trade relations and were the treaties with which the Framers of the Constitution would likely have been most familiar.¹³

It follows that when the Framers drafted the Supremacy Clause into Article VI of the Constitution, they considered these kinds of treaties and this type of diplomacy. Treaties of the day dealt with war and peace and commercial relations. The private rights of citizens were largely unaffected.¹⁴ While citizens had to abide by these treaties

¹¹ Treaty of Peace and Friendship, U.S.-Morocco, Jan. 1787, 8 Stat. 100; Treaty of Amity and Commerce, U.S.-Prussia, July 9–Sep. 10, 1785, 8 Stat. 84; Definitive Treaty of Peace, U.S.-Gr. Brit., Sep. 3, 1783, 8 Stat. 80; Treaty of Amity and Commerce, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60; Armistice, U.S.-Gr. Brit., Jan. 20, 1783, 8 Stat. 58; Provisional Articles, U.S.-Gr. Brit., Nov. 30, 1782, 8 Stat. 54; Convention Concerning Vessels Recaptured, U.S.-Neth., Oct. 8, 1782, 8 Stat. 50; Treaty of Amity and Commerce, U.S.-Neth., Oct. 8, 1782, 8 Stat. 32; Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12; Treaty of Alliance, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6. For the purposes of this Note, treaties with Native American nations are not considered.

¹² Treaty of Peace and Friendship, U.S.-Tunis, Aug. 28, 1797, 8 Stat. 157; Treaty of Peace and Friendship, U.S.-Tripoli, Nov. 4, 1796, 8 Stat. 154; Treaty of Friendship, Limits, and Navigation, U.S.-Spain, Oct. 27, 1795, 8 Stat. 138; Treaty of Peace and Amity, U.S.-Alg., Sep. 5, 1795, 8 Stat. 133; Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116; Convention on Consular Relations, U.S.-Fr., Nov. 14, 1788, 8 Stat. 106.

¹³ See THE FEDERALIST NO. 3, *supra* note 1, at 98 (John Jay).

¹⁴ This is true as a general rule, particularly in comparison to what we think of as “human rights” in the modern day. However, some treaties of the time conferred rights upon individuals as a secondary result of the rights negotiated by nations. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 199–200 (1796) (requiring the defendant to pay debt owed to British citizens, regardless of a Virginia state statute to the contrary); SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 33 (2d ed. 1916).

and agreements, their own fundamental, individual rights were not jeopardized (nor enhanced) by international diplomacy.¹⁵ As John Yoo has stated, “International affairs and domestic affairs occupied fairly separate spheres, and international agreements rarely regulated private activity, which was the preserve of domestic lawmaking.”¹⁶ Similarly, treaties of the period did not usually give rise to rights which enabled citizens to bring individual causes of action against a government based solely upon the language of the international agreement.¹⁷ These were the treaties and agreements which the Framers of the Constitution envisioned becoming the supreme law of the land.

B. Original Intent

The Supremacy Clause, in Article VI of the Constitution, may be divided into two parts. The first part establishes that federal law is supreme compared to the laws of the several states.¹⁸ The second part declares that treaties entered into by the United States are also supreme over the laws of the states.¹⁹ This Note will focus on the second of these two parts. The history of the treaty power reveals the original intent of the Supremacy Clause.

The origins of the federal government’s treaty-making power—and indeed, the Supremacy Clause—date back to the pre-Revolutionary period. They were expressed in the Declaration of Independence itself.²⁰ The Articles of Confederation placed the power to create treaties in the hands of the federal government to the exclusion of the several states.²¹ However, though the power to treat with foreign nations was given solely to the Continental Congress, the federal government did not have an enforcement mechanism against the states to ensure that the individual states’ laws complied with

¹⁵ David C. Bolstad, Note, *Combating Torture: Revitalizing the Toscanino Exception to the Ker-Frisbie Doctrine*, 13 LOY. L.A. INT’L & COMP. L.J. 871, 902 (1991).

¹⁶ John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1967 (1999).

¹⁷ See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 253 (1829), *overruled in part by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

¹⁸ U.S. CONST. art. VI, cl. 2.

¹⁹ *Id.*

²⁰ See THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (“That these United Colonies are . . . Free and Independent States; . . . [and] they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do.”).

²¹ ARTICLES OF CONFEDERATION of 1777, art. IX, para. 1 (“The United States . . . shall have the sole and exclusive right and power of determining on peace and war, . . . [and] entering into treaties and alliances . . .”); *id.* para. 1 (“No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State . . .”); *id.* art. VI, para. 3 (“No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State . . .”).

American commitments abroad.²² Thus the states often flaunted treaty provisions and failed to enforce treaties against their citizens.²³ Because of the lack of enforcement provision as against the states,²⁴ Congress could do little more than beg them to comply with the country's contracted international obligations.²⁵ It was clear to many of the Framers that if the United States were to succeed as a nation, it would have to give the federal government leave to create treaties *and* to enforce them.²⁶ As Supreme Court Justice Joseph Story asserted, "The peace of the nation, and its good faith, and moral dignity, indispensable require, that all state laws should be subjected to [the] supremacy [of treaties]."²⁷ Thus, the Supremacy Clause was introduced into the debate over the new Constitution.²⁸

The record fairly clearly shows that the founders wrote this clause with the intention that all international agreements properly entered into by the United States would be binding as the supreme law of the land.²⁹ Alexander Hamilton "asserted it to be a fact that it was the sense and intention of the Constitutional Convention that a treaty should control and bind the legislative powers of Congress."³⁰ In fact, the bulk of the

²² See Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 698 (1995).

²³ ROBERT T. DEVLIN, *THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES*, at iii (1908). Indeed, this fact hindered American treaty negotiations during the time period. See EDWARD S. CORWIN, *NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER* 62 (1913).

²⁴ 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 695–96 (Boston, Hilliard, Gray, & Co. 1833) ("It is notorious, that treaty stipulations . . . were grossly disregarded by the states under the confederation. They were deemed by the states, not as laws, but like requisitions, of mere moral obligation, and dependent upon the good will of the states for their execution. . . . It was probably to obviate this very difficulty, that this clause was inserted in the constitution . . .").

²⁵ DEVLIN, *supra* note 23, at 6, 8.

²⁶ See THE FEDERALIST NO. 3, *supra* note 1, at 98–99 (John Jay) ("The wisdom of the Convention in committing such [treaty] questions to the jurisdiction and judgment of courts appointed by, and responsible only to one National Government, cannot be too much commended."). This view was not universal, as demonstrated by the remarks and concerns of Patrick Henry and George Mason at the Virginia Convention discussing the proposed federal constitution. CRANDALL, *supra* note 14, at 58–59.

²⁷ 3 STORY, *supra* note 24, at 695.

²⁸ Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1084 (1992) ("The inability of the general government under the Articles of Confederation to secure compliance with the nation's treaties, the acts of Congress, or the Articles themselves was among the principal animating causes of the Framers' decision to draft a new Constitution.").

²⁹ See Vázquez, *supra* note 22, at 700; see, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (holding that the 1783 Treaty of Paris was the supreme law of the land and as such, debts owed by Americans to British creditors could not be discharged by way of a Virginia statute because the treaty explicitly stated that all such debts would be honored). *But see* Yoo, *supra* note 16, at 1961.

³⁰ JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 144 (1999). Further, in *Federalist No. 22*, Hamilton wrote that "treaties of the

debate over the treaty part of the clause focused not on whether treaties would be considered the supreme law of the land, but rather upon how exactly they would be ratified.³¹ John Jay, two-time President of the Continental Congress and the first Chief Justice of the United States, “reported to Congress that a treaty ‘made, ratified and published by Congress . . . immediately [became] binding on the whole nation, and super-added to the laws of the land. . . . Hence [it was to be] . . . received and observed by every member of the nation’”³² Congress unanimously adopted Jay’s report, showing that they understood treaties to be immediate additions to federal law.³³ The founders intended international treaties to become federal law at the time they were ratified by the Senate, and they intended their words to be taken literally,³⁴ with no strings or further interpretations attached.³⁵ However, the Supreme Court’s interpretation of the Supremacy Clause over the past 175 years has led to an entirely different modern reality of treaty interpretation and enforcement.³⁶

C. Historical Divergence from Original Intent

Originally, the Court upheld the Framers’ intended purpose of the Supremacy Clause by holding that treaties became part of the corpus of American law upon ratification by the Senate.³⁷ However, this precedent was set aside some fifty years after the ratification of the Constitution with Chief Justice Marshall’s holding in the 1829 case of *Foster v. Neilson*.³⁸ *Foster* considered ownership of land ceded by Spain to the United States by treaty.³⁹ The Court ruled that there were two distinct types of treaties:

United States . . . must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.” THE FEDERALIST NO. 22, *supra* note 1, at 197 (Alexander Hamilton).

³¹ See generally LYNCH, *supra* note 30, at 144 (discussing the debate about whether the House of Representatives should be involved in the ratification of treaties instead of just the Senate and Executive); EDWARD J. LARSON & MICHAEL P. WINSHIP, THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON 144 (2005) (discussing the same and adding that additional debate centered upon whether treaties of peace should have different amendment requirements).

³² Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760 (1988) (quoting John Jay, Report to Congress, Oct. 13, 1786).

³³ *Id.* at 760–61.

³⁴ Vázquez, *supra* note 22, at 699 (“[T]he Founders sought to . . . mak[e] treaties enforceable in the courts . . . without the need for additional legislative action, either state or federal.”).

³⁵ Telman, *supra* note 8, at 414–16.

³⁶ See *id.* at 409.

³⁷ See Paust, *supra* note 32, at 765 (discussing early decisions of the Supreme Court, including *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344 (1809), in which Chief Justice Marshall opined that treaties themselves were federal law so long as they were constitutional in their creation).

³⁸ 27 U.S. (2 Pet.) 253 (1829).

³⁹ *Id.* at 299–300. The case involved a dispute over land in Florida where the plaintiff claimed that the land had been granted to him by the Spanish governor, but the opposing

those which became law upon their ratification, and those which “import a contract, whe[re] 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.”⁴⁰

Under the doctrine created by *Foster*, those treaties which “address [themselves] to the political . . . department[s]” require implementing legislation in order to become the supreme law of the land.⁴¹ However, the distinction (and its associated test) was inconsistently applied by the Court in the Nineteenth Century.⁴² The general trend, as expressed by the Restatement (Third) of Foreign Relations, was to hold treaties to be self-executing—that is, as the supreme law of the land—unless the treaty itself contained language to the contrary.⁴³ Therefore, though the Framers may not have intended that implementing legislation ever be necessary for a treaty to address itself to the courts, the rule at least held on to that intent by implementing a presumption in favor of self-execution.⁴⁴ Thus, treaties would self-execute unless the treaty expressly addressed itself to the “political department” and contained non-binding language.⁴⁵ This interpretation of Marshall’s distinction between self-executing and non-self-executing treaties was largely consistent with the Framers’ understanding of the Supremacy Clause.⁴⁶ Although the founders may not have anticipated a distinction between self-executing and non self-executing treaties, even the most literal interpretation of the Supremacy Clause would allow for treaties to declare *themselves* to be something less than the supreme law of the land, just as Congress—the most common issuer of “supreme laws of the land”—may issue non-binding legislation in the form of sense of Congress declarations.⁴⁷ Thus, some treaties, which could be primarily expressions

argument claimed that the land had been ceded from Spain to France and then from France to the United States via treaty. *Id.*

⁴⁰ John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 *FORDHAM INT’L L.J.* 1209, 1210 (2009) (quoting *Foster*, 27 U.S. (2 Pet.) at 314).

⁴¹ *Foster*, 27 U.S. (2 Pet.) at 314.

⁴² See Paust, *supra* note 32, at 772.

⁴³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111(4) (1987) (defining a “non-self-executing” international agreement); see also *Medellín v. Texas*, 552 U.S. 491, 545 (2008) (Breyer, J., dissenting) (noting that the Supreme Court has frequently held treaty provisions to be self-executing).

⁴⁴ *Foster*, 27 U.S. (2 Pet.) at 314.

⁴⁵ This is a point of contention among some scholars. For a brief discussion about whether *Foster* and the subsequent case law created a presumption in favor of self-execution, see CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 160 (2004). The contention that *Foster* created a presumption in favor of self-execution is favored by Justice Breyer’s dissent in *Medellín*, 552 U.S. at 545 (Breyer, J., dissenting).

⁴⁶ Paust, *supra* note 32, at 768.

⁴⁷ One or both houses of Congress may express its views about a subject in a “sense of” resolution which is not binding as federal law. See CHRISTOPHER M. DAVIS, *CONG. RESEARCH SERV.*, “SENSE OF” RESOLUTIONS AND PROVISIONS (2007); see also *Yang v. Cal. Dep’t of Soc. Servs.*, 183 F.3d 953, 958 n.3 (9th Cir. 1999).

only of the general views and declarations of common understanding of nations would purport themselves to be just that—non-binding statements. Contrarily, in order for a treaty to be considered a contract between nations enforceable by American courts as domestic law, the treaty would have to contain some language which showed that the negotiators did not contemplate the particular agreement as a non-binding political understanding.

Until recently, this is where the history of judicial interpretation of the Supremacy Clause would end—with a doctrine of interpretation different than, but consistent with, the Framers' intent.⁴⁸ However, in 2008, more than 200 years after the Framers originally debated the Supremacy Clause, the Supreme Court saw fit to change the way in which the clause is interpreted in American law by handing down its decision in *Medellín v. Texas*, a holding which drastically reformed the landscape of treaty interpretation and the Supremacy Clause in American law.

II. THE LENS OF *MEDELLÍN V. TEXAS*

A. *Facts and Context of the Case*

The facts of the case were undisputed.⁴⁹ On the night of June 24, 1993, José Ernesto Medellín was participating in a gang initiation ritual in Houston, Texas.⁵⁰ Jennifer Ertman and Elizabeth Pena, fourteen and sixteen years old respectively, were walking home when they came upon the gang members.⁵¹ Medellín and the others beat the girls, raped them, and finally murdered them. Medellín was personally responsible for strangling at least one of them to death with her own shoelace.⁵² Medellín, who confessed to the rape and murder apparently without remorse, was convicted of capital murder and sentenced to death.⁵³ The conviction and sentence held on appeal.⁵⁴

Medellín, a Mexican national,⁵⁵ was issued his *Miranda* rights upon his arrest, but he was not informed of his right to contact the Mexican Consulate upon his detention.⁵⁶ He held this right according to the Vienna Convention on Consular Relations of 1963, to which the United States was a signatory.⁵⁷ The Vienna Convention explicitly states

⁴⁸ For an example of this analysis see Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001). *But see* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 198–201 (2d ed. 1996).

⁴⁹ *Medellín*, 552 U.S. at 501.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 500.

⁵⁶ *Id.* at 499.

⁵⁷ *Id.* at 499–500; *see* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 [hereinafter Vienna Consular Convention]. The United States had signed and ratified the

that individuals detained in a foreign nation have the right to contact the consulate of their home country *and* that officials in the detaining nation must notify the national of his rights under the Convention.⁵⁸ Medellín raised the issue of the authorities' failure to notify him of his right to contact the Mexican consulate in an application for state post-conviction relief and its subsequent appeals in Texas state courts.⁵⁹ Medellín's habeas petition was denied in state court because of a state procedural default rule which required that the issue of his Convention rights be raised during his trial or on its direct appeal.⁶⁰ The federal district court issued a similar ruling.⁶¹ Medellín's appeal was then given apparent new life by the decision of the International Court of Justice (ICJ) in the *Case Concerning Avena and Other Mexican Nationals*.⁶²

In the *Avena* case, Mexico accused the United States before the International Court of Justice (ICJ) of breaching its obligations under the Vienna Convention on Consular Relations in fifty-two separate instances involving Mexican nationals.⁶³ Medellín was one of the individuals actually named in Mexico's complaint.⁶⁴ Mexico argued that the specifically named individuals went uninformed of the rights that they held pursuant to the Convention and thus that the United States had violated its obligations under the treaty.⁶⁵ The ICJ ruled in favor of Mexico, holding that the United States had failed to fulfill its obligations under Article 36(1)(b) of the Convention,⁶⁶ and that the nationals named in Mexico's complaint deserved "review and reconsideration of the[ir] convictions and sentences . . ."⁶⁷ The Supreme Court granted certiorari for the *Medellín* case

Convention at the time the events of this case took place, but has since rescinded its consent to be bound by the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Convention. *Medellín*, 552 U.S. at 499–500 (citation omitted).

⁵⁸ Vienna Consular Convention, *supra* note 57, 21 U.S.T. at 101.

⁵⁹ *See Medellín*, 552 U.S. at 501–02.

⁶⁰ *Id.* at 501.

⁶¹ *Id.* at 502. The Fifth Circuit then denied his certificate of appeal. *Id.* at 503.

⁶² *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31). *But see* *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354–55 (2006) (stating that ICJ interpretations of Vienna Convention disputes, such as *Avena*, are not binding on United States courts in regard to the application of domestic procedural default rules to claimed Vienna Convention violations).

⁶³ *Avena*, 2004 I.C.J. at 24–26.

⁶⁴ *Id.* at 25.

⁶⁵ *Id.* at 20–21.

⁶⁶ *Id.* at 71–72; *see* Vienna Consular Convention, *supra* note 57, 21 U.S.T. at 101 (“[T]he competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph . . .”).

⁶⁷ *Avena*, 2004 I.C.J. at 72. One of these fifty-two Mexican nationals, Ramón Salcido Bojórquez, was not included in this holding. *Id.* at 53–54. This was because Salcido claimed to be a United States citizen at the time of his arrest. *Id.* at 44.

in order to decide the impact of the International Court of Justice's *Avena* holding on Medellín's individual appeal.⁶⁸ More broadly, the Court accepted certiorari to decide the proper impact that decisions of the ICJ should have on state court procedures⁶⁹ and on American courts in general.⁷⁰ The ruling in *Medellin* answered these questions and the much broader question of when, if ever, treaties become the "supreme law of the land" without Congressional implementing legislation.

B. *The Ruling*

Chief Justice Roberts wrote the majority opinion for the Court and was joined by Justices Scalia, Thomas, Kennedy, and Alito.⁷¹ The majority held that the ICJ decision in *Avena* was not automatically enforceable domestic federal law, and would not preempt Texas's state laws of judicial procedure.⁷² Thus Texas was not required to "review and reconsider[]" Medellín's habeas petition on the basis of the Vienna Convention provisions that he had failed to raise in his first appeals.⁷³ The majority further held that treaties at issue in this case⁷⁴—Article 94 of the U.N. Charter and the ICJ statute⁷⁵—were not of the class of treaties that Chief Justice Marshall had so

⁶⁸ The Court had already ruled on the issue of whether a state's failure to abide by the notification requirement of the Vienna Convention required the state to review the accused person's conviction when the issue had been procedurally defaulted. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). The Court held that it could not force a state court to review the petition. *Id.* at 357–58, 360.

⁶⁹ *Medellin* was not the first case in which a state court was asked to determine the impact of the Vienna Convention and related ICJ decisions on state rules of criminal procedure. *See, e.g., Bell v. Commonwealth*, 563 S.E.2d 695, 705–07 (Va. 2002); *State v. Cervantes-Carrillo*, No. 2005AP1408-CR, 2007 WL 968797 (Wis. Ct. App. Apr. 3, 2007).

⁷⁰ The Court also addressed the issue of the impact of a presidential memorandum directed at state courts to coerce them into fulfilling the United States' treaty obligation. *Medellin v. Texas*, 552 U.S. 491, 523–32 (2008). This issue is not directly addressed in this Note.

⁷¹ *Medellin*, 552 U.S. at 496.

⁷² *Id.* at 498. The Court admitted that the *Avena* ruling "constitutes an *international* law obligation on the part of the United States," but stated that "not all international law obligations automatically constitute binding federal law enforceable in United States courts," and held that the obligation created under the *Avena* ruling was not automatically binding federal law. *Id.* at 504, 506.

⁷³ *Id.* at 498. Upon Medellín's loss in the Supreme Court, the State of Texas carried out his death sentence by lethal injection. James C. McKinley, Jr., *Texas Executes Mexican Despite Objections from Bush and International Court*, N.Y. TIMES, Aug. 6, 2008, at A19.

⁷⁴ The Court deemed it unnecessary to decide whether the other treaty at issue in this case, the Vienna Convention on Consular Relations, was self-executing. *Medellin*, 552 U.S. at 506 n.4. The Court did note that it had already ruled that the Vienna Convention did not override state procedural rules in *Sanchez-Llamas v. Oregon*. *Id.* at 512 n.8.

⁷⁵ Under the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, which the Senate had ratified, disputes between nations arising under the Vienna Convention on Consular Relations were to be submitted to the ICJ, which would have

long ago defined as self-executing.⁷⁶ Thus, since the treaty had not been the subject of implementing legislation in Congress, the ruling of the ICJ was *not* the supreme law of the land.⁷⁷

The majority rested their conclusions on the idea that the treaties upon which the ICJ's authority are based⁷⁸ do not purport *themselves* to be self-executing,⁷⁹ and so therefore are not.⁸⁰ The Court reached this conclusion by examining the language of the treaty provisions. It interpreted the language in the U.N. Charter Article 94(1),⁸¹ to mean that each state party could choose how to comply with the decision, and thus that the decisions were not automatically binding upon the nation's courts.⁸² The majority held that the "sensitive" policy considerations⁸³ of whether or not to abide by the decision of the ICJ should be left to the "political branches" of our government, namely, the executive and the legislature.⁸⁴ However, the Court further revealed that, though a political branch under Marshall's initial construction of the term, action undertaken solely by the executive branch was insufficient to bind state courts.⁸⁵ Thus President Bush's attempt to give force to the *Avena* decision by instructing the Texas state courts to comply with the ICJ's ruling were frustrated.⁸⁶ According to the opinion then, a

compulsory jurisdiction over the parties. Vienna Consular Convention, *supra* note 57, 21 U.S.T. at 77, 326. Thus, Mexico's *Avena* suit was rightly brought before the ICJ. The agreement of member nations to be bound by decisions of the ICJ is in the U.N. Charter. U.N. Charter art. 94, para. 1.

⁷⁶ *Medellin*, 552 U.S. at 514 (citing *Foster v. Neilson* 27 U.S. (2 Pet.) at 253–54 (1829), *overruled in part by* *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833)).

⁷⁷ *Medellin*, 552 U.S. at 506.

⁷⁸ See U.N. Charter art. 94, para. 1; Vienna Consular Convention, *supra* note 57, 21 U.S.T. 77.

⁷⁹ There is considerable room for questioning whether this is true, especially with regard to the U.N. Charter. The language that the majority points to in order to substantiate the claim that the Article does not purport itself to be self-executing is: "Each Member of the United Nations *undertakes to comply* with the decision of the [ICJ] . . ." *Medellin*, 552 U.S. at 508 (quoting U.N. Charter art. 94, para. 1). The dissent points to the same language and argues that it does in fact contemplate itself to be self-executing. *Id.* at 553–54 (Breyer, J., dissenting).

⁸⁰ *Medellin*, 552 U.S. at 506 (majority opinion).

⁸¹ U.N. Charter art. 94, para. 1 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").

⁸² *Medellin*, 552 U.S. at 508.

⁸³ *Id.* at 511 (noting that the petitioner's automatic enforceability theory would shift "sensitive foreign policy decisions" to the courts and eliminate the "option of noncompliance contemplated by Article 94(2)").

⁸⁴ *Id.* at 508.

⁸⁵ The Court held that such a mandate was beyond the power of the Executive acting alone, without Congressional assent. *Id.* at 525.

⁸⁶ The Supreme Court issued a holding contrary to the *Avena* decision in *Sanchez-Llamas v. Oregon*. *Id.* at 498. In response to this, President Bush issued a memorandum which stated that the U.S. would fulfill its duties and obligations under *Avena* by having the states abide by the *Avena* decision in their courts. *Id.*

literal mandate from Congress (and nothing less) is necessary to make a treaty execute unless the treaty contains specific self-execution language.⁸⁷

The majority mentions the (naturally following) concern of the dissent “that our decision casts doubt on some 70-odd treaties under which the United States has agreed to submit disputes to the ICJ according to ‘roughly similar’ provisions.”⁸⁸ The majority then dismisses the dissent’s concern for these other treaties by saying that though a treaty may fail to create a domestic law obligation through its language alone, it will create an international law obligation, and can become domestic law if implemented by Congress.⁸⁹ This answer, however, misses the point of the dissent’s concern. It is at least probable that in some of the “70-odd treaties under . . . ‘roughly similar’ provisions,”⁹⁰ the intent of Executive and Senate *was* that the treaty become self-executing and that decisions of the ICJ pursuant to such treaty were to become domestic law.⁹¹ Just, of course, as it is likely that some of the treaties (including the dispute provision at issue here, according to the majority) were not meant to self-execute. However, the majority rejects a case-by-case determination based on intent, in favor of a rule that the language within the four corners of the document is dispositive.⁹² By treating the

⁸⁷ *Id.* at 521 (“Congress is up to the task of implementing non-self-executing treaties The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress.”).

⁸⁸ *Id.* at 520.

⁸⁹ *Medellin*, 552 U.S. at 520. It is not entirely clear what threshold language a treaty must contain in order to purport itself to be self-executing. At the least, according to the decision, it must contain something stronger than the language in Article 94 of the U.N. Charter implementing the ICJ as a dispute resolution mechanism: “undertakes to comply.” U.N. Charter art. 94, para. 1. The Court did give two examples of language sufficient for self-execution. *Medellin*, 552 U.S. at 521. The first was from an 1881 treaty between the United States and Serbia. *Id.* (citing *Kolovrat v. Oregon*, 366 U.S. 187 (1961)). The relevant treaty provision states that “Serbian subjects in the United States . . . shall be at liberty to acquire and dispose of [] property.” *Kolovrat*, 366 U.S. at 191 n.6. The language was binding upon an Oregon court which had denied aliens within its jurisdiction of the rights contemplated in that treaty provision. *Id.* at 191. Similarly, language in a 1923 treaty between the United States and Germany was sufficient to bind a California court where the relevant treaty provision stated that “[w]here, on the death of any person holding real or other immovable property . . . [a] national shall be allowed a term of three years in which to sell the same, . . . and withdraw the proceeds thereof, without restraint or interference” *Clark v. Allen*, 331 U.S. 503, 507 (1947).

⁹⁰ *Id.*

⁹¹ See Curtis A. Bradley, *Intent, Presumptions and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 543–44 (2008) (discussing the role of legislative and executive intent in determining whether a treaty was self or non-self-executing). Exploration of the intent of the negotiating parties to a treaty should be considered, not in the least because a treaty is fundamentally a contract in which the intent of the parties is at least as important as the words that they commit to paper. See *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929) (citing *Jordan v. Tashiro*, 278 U.S. 123 (1928)) (“Treaties are to be liberally construed so as to effect the apparent intention of the parties.”); DRAHOZAL, *supra* note 45, at 160.

⁹² See *Medellin*, 552 U.S. at 517.

“70-odd treaties”⁹³ the same—and holding, crucially, that they are not self-executing—the Court created a clear presumption *against* the self-execution of treaties.⁹⁴

C. *The Concurrence*

Justice Stevens joined in the decision, but wrote a separate concurrence.⁹⁵ Stevens seemed stuck on the fence regarding the question of whether the Texas state court should be forced to comply with the ICJ decision. He fretted about the possible consequences of ignoring the *Avena* decision but, in the end, did not find them compelling enough to call the treaties self-executing.⁹⁶ As the dissent pointed out, he ended up furthest from the Framers’ intent.⁹⁷ By asking the individual states to comply with the *Avena* judgment,⁹⁸ he essentially asked for a return to the days of the Articles of Confederation when the only hope for American compliance with its international obligations was based upon the good faith and effort of the individual states themselves.⁹⁹ As founder James Madison wrote in the *Federalist No. 42*, “If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”¹⁰⁰ Stevens recognized this need to present a united front,¹⁰¹ but his method of doing so—asking states to comply with the contracted international obligations of the United States by their own choice—is not the most practical way of achieving this result.¹⁰² It was a solution which has already been tried in this nation’s history, and which failed unequivocally.¹⁰³

⁹³ *Id.* at 520.

⁹⁴ *See* Parry, *supra* note 7, at 69 (noting that the Court “strongly hints at” a presumption against self-execution).

⁹⁵ *Medellin*, 552 U.S. at 533 (Stevens, J., concurring).

⁹⁶ *Id.* at 533–35, 537 (“On the other hand, the costs of refusing to respect the ICJ’s judgment are significant. The entire Court and the President agree that breach will jeopardize the United States’ plainly compelling interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.” (internal quotation marks and citation omitted)).

⁹⁷ *See id.* at 554 (Breyer, J., dissenting) (“The consequence of such a reading is to place the fate of an international promise made by the United States in the hands of a single State. And that is precisely the situation that the Framers sought to prevent by enacting the Supremacy Clause.” (internal citation omitted)).

⁹⁸ *See id.* at 536 (Stevens, J., concurring).

⁹⁹ *Id.* (“The consequences of such a reading is to place the fate of an international promise made by the United States in the hands of a single State.”). For a discussion of treaties during the Articles of Confederation, see *supra* text accompanying notes 21–27.

¹⁰⁰ THE FEDERALIST NO. 42, *supra* note 1, at 302 (James Madison).

¹⁰¹ *Medellin*, 552 U.S. at 536 (Stevens, J., concurring).

¹⁰² *Id.* at 554 (Breyer, J., dissenting) (“[The] purpose of [the] Supremacy Clause ‘was probably to obviate’ the ‘difficulty’ of a system where treaties were ‘dependant upon the good will of the states for their execution.’” (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 696 (Boston, Hilliard, Gray & Co. 1833))).

¹⁰³ *See* Yoo, *supra* note 16, at 1980 (recounting the failure of the states to obey provisions of the Treaty of Paris of 1783, which ended the Revolutionary War).

D. The Dissent

Justice Breyer, was joined by Justices Souter and Ginsburg, in comprising the dissent.¹⁰⁴ The dissent used a historical approach to the Supremacy Clause and its subsequent case law to argue that there is a strong presumption in the law in favor of self-execution.¹⁰⁵ The dissent cites language from the founders at the time of the framing of the Constitution to argue that the Framers meant for the Supremacy Clause to confer upon treaties direct enforceability in the courts of the nation.¹⁰⁶ The dissent cites several cases, and their precedent, from the history of treaty execution jurisprudence that have upheld treaty provisions as binding American law.¹⁰⁷ Most relevant to the *Medellín* case were two cases (involving two different treaties) in which the Court had held that where the United States had submitted to the jurisdiction of an international tribunal, it was bound by the international court's ruling.¹⁰⁸

The dissent argued that “[t]he majority . . . looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)” to decide the question of self-execution in the case at bar.¹⁰⁹ According to Breyer, there are several substantive, contextual factors (derived from case law which dealt with the issue of the self-execution of treaties) which should be considered when deciding whether a treaty is self-executing.¹¹⁰ These factors include: (1) whether the language of the treaty points to self-execution;¹¹¹ (2) whether the subject of the language deals precisely with matters that the courts are used to handling;¹¹² (3) whether the treaty promise is itself self-executing;¹¹³ (4) whether the majority's holding has severe consequences for several other treaties;¹¹⁴ (5) whether the judiciary (not Congress) is best able to implement this particular question of law;¹¹⁵ (6) whether the judgment does not conflict with the Constitution or require the Court to create new law;¹¹⁶ and (7) whether the President is in favor of (and Congress has not expressed disagreement with) the enforcement of treaty provisions by and through the judiciary.¹¹⁷

¹⁰⁴ *Medellín*, 552 U.S. at 538 (Breyer, J., dissenting).

¹⁰⁵ *Id.* at 544–45.

¹⁰⁶ *Id.* at 542–44.

¹⁰⁷ *Id.* at 545.

¹⁰⁸ *Id.* at 545–46 (citing *Meade v. United States*, 76 U.S. (9 Wall.) 691 (1870); *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828)).

¹⁰⁹ *Id.* at 562.

¹¹⁰ *Id.* at 551.

¹¹¹ *Id.*

¹¹² *Id.* at 555.

¹¹³ *Id.* at 556. The promise made explicitly in article 36(b)(1) to inform alien prisoners of their right to contact their consulate. Vienna Consular Convention, *supra* note 67.

¹¹⁴ *Medellín*, 552 U.S. at 559 (Breyer, J., dissenting).

¹¹⁵ *Id.* at 560.

¹¹⁶ *Id.* at 561.

¹¹⁷ *Id.* The majority rejected the idea that the president had the authority to order the state courts to comply with the *Avena* decision. *Id.* at 532 (majority opinion). However, the dissent

Though the dissent claims that its analysis for whether a treaty should be considered self-executing is based simply on the language of the Supremacy Clause and precedent,¹¹⁸ these seven issues roughly add up to a test based upon the fundamental substantive nature of the treaty and the rights which it has the potential to affect.¹¹⁹

Finally, the dissent attacks the textual interpretation espoused by the majority, arguing that the words “undertakes to comply”¹²⁰ in the U.N. Charter do not amount to anything less than an obligation to understand the relevant ICJ decision as binding domestic law.¹²¹ Breyer also takes issue with the textual analysis approach in general, opining that because nations have varying models of domestic implementation for their treaty commitments, it would be improper for an international agreement to explicitly require certain steps for domestic implementation.¹²² The dissent applies its own method, using the abovementioned seven factors to determine that the relevant treaty provisions at issue in this case should be understood as self-executing, and thus domestic law enforceable by American courts without implementing legislation from Congress.¹²³

The dissent’s argument for the presumption of self-execution is a good one, rooted, as discussed, in the clear expression of the Framers’ intent.¹²⁴ It is also a contention that is more directly supported by the historical case law on the subject,¹²⁵ of which the majority cannot have been unaware.¹²⁶ But, what the dissent failed to recognize is that

seems much more willing to place such issues of treaty implementation and foreign policy within the “zone of twilight” of permissible presidential power. *Id.* at 560–62 (Breyer, J., dissenting); *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or a denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”).

¹¹⁸ *See Medellin*, 552 U.S. at 562 (Breyer, J., dissenting) (“Were the Court . . . [to] look[] instead to the Supremacy Clause and to the extensive case law . . . I believe it would reach a better supported, more felicitous conclusion. That approach, well embedded in Court case law, leads to the conclusion that the ICJ judgment before us is judicially enforceable without further legislative action.”).

¹¹⁹ *See id.* at 549 (“In making this determination, this Court has found the provision’s subject matter of particular importance.”).

¹²⁰ U.N. Charter art. 94, para. 1.

¹²¹ *Medellin*, 552 U.S. at 553–54 (Breyer, J., dissenting).

¹²² *Id.* at 552 (“[N]either the Protocol nor the Charter explicitly states that the obligation to comply with an ICJ judgment automatically binds a party *as a matter of domestic law* without further domestic legislation. *But how could the language of those documents do otherwise?* The treaties are multilateral.”).

¹²³ *Id.* at 562.

¹²⁴ *See id.* at 544–45 (Breyer, J., dissenting).

¹²⁵ *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254 (1829), *overruled in part by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833); Vázquez, *supra* note 22, at 708–09.

¹²⁶ For a scathing review of the majority’s interpretation of the history of the Supremacy Clause and relevant case law, see Telman, *supra* note 8, at 412.

treaties themselves have changed since the time of the founding¹²⁷ and Chief Justice Marshall's first basic distinction between self-executing and non-self-executing treaties. While the dissent's analysis follows a closer interpretation of the language and history of the creation of the Supremacy Clause, its espousal of a continued presumption in favor of the self-execution of treaties fails to account for the fact that modern treaties have the increasing tendency to address issues, questions and rights which come close to without actually contradicting our Constitution and federal law. The grey areas of Constitutional rights interpretation are those in danger of preemption by international bodies,¹²⁸ and it is these areas of law that the majority protects by establishing a presumption against self-execution.¹²⁹ While the dissent's contextual approach allows the presumption in favor of self-execution to be disregarded when several other contextual factors indicate that the self-execution of a treaty might be inappropriate, the majority's holding, that implementing legislation is necessary in nearly all cases, will provide more protection for the grey areas of American rights which could potentially be affected by treaty provisions.

The Supreme Court did not address in *Medellin* whether the Vienna Convention granted rights which could be enforced against the state by individuals,¹³⁰ however the Court held that the judgment of the ICJ in *Avena* was not one which could be enforced by individuals.¹³¹ The Court relied on the international court's charter statute which asserts that the ICJ resolves disputes among nations—not individuals—to hold that *Medellin* did not have an individual right to claim the *Avena* judgment as binding (even though he was one of the named individuals in Mexico's complaint).¹³² This argument against such individually enforceable rights was also advanced by twenty-eight states, the District of Columbia and Puerto Rico as amici curiae.¹³³ The Court in *Medellin* declined to decide whether the Vienna Convention gave an individually enforceable right,¹³⁴ though this was by no means the only way the issue could have been resolved.

¹²⁷ See LOUIS HENKIN, *THE AGE OF RIGHTS* 18–19, 21, 28, 39 (1990) (discussing how different factors, such as broader interpretation of lack of remedies, may alter international effect).

¹²⁸ No international obligation alone could ever overrule our Constitution, but there are issues, questions and rights addressed by treaties which might come uncomfortably close to deciding a question of law that *feels* like a constitutional question.

¹²⁹ The majority could also be understood as protecting their turf as the ultimate arbiter of American law as against inconsistent decisions by the ICJ. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006). See generally Michael S. Paulson, *The Constitutional Power To Interpret International Law*, 118 *YALE L.J.* 1762, 1765 (2009) (describing how U.S. constitutional law should be supreme to international law, and its interpretation should be conducted by the United States).

¹³⁰ *Medellin v. Texas*, 552 U.S. 491, 506 n.4 (2008).

¹³¹ See *id.* at 506 (determining that legislation is needed for the treaty to be binding on domestic courts).

¹³² *Id.* at 511.

¹³³ Brief for the Commonwealth of Virginia et al. as Amici Curiae Supporting Respondent, *Medellin*, 552 U.S. 491 (No. 06-984).

¹³⁴ *Medellin*, 552 U.S. at 506 n.4.

The states of the European Union, as amici curiae urged the Court to find that the Vienna Convention confers individual rights which would be supreme over state procedural rules.¹³⁵

Many treaties do not create individually enforceable rights because, by their nature, treaties are contracts between nations which contemplate the rights and obligations of states.¹³⁶ But when it is clear that a treaty provision can be construed to create an individually enforceable right, such right under a pre-*Medellin* standard would likely be self-executing.¹³⁷ Upon the Court's new presumption that treaties are not self-executing, if a right is to be given or taken away from the American people, the Court has ensured that in the absence of explicit treaty language to the contrary (which is not often found), by requiring implementing legislation, that the contemplated right will come from (or be denied by) Congress or the state legislatures, not an international agreement.

III. THE CHANGING NATURE OF INTERNATIONAL AGREEMENTS

A. *Nature of International Agreements*

At the time of the framing of the Constitution, treaties dealt with war and peace, land grants, alliances, and commercial relations.¹³⁸ Some even granted limited rights to individuals.¹³⁹ Treaties did *not* deal with the fundamental rights of states, however, or the citizens of those states.¹⁴⁰ It was understood that treaties rightfully contracted and signed would be binding upon the governments and people of the nations which made the agreement. After all, if they were not binding, nations would have had no incentive to make agreements with one another.¹⁴¹ Nothing within the sphere of the

¹³⁵ Brief for the European Union et al. as Amici Curiae Supporting Petitioner, *Medellin*, 552 U.S. 491 (No. 06-984).

¹³⁶ See *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 598 (1884) (“A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.”).

¹³⁷ See Yoo, *supra* note 16, at 1969 (“*Foster* declared that federal courts could enforce certain treaty provisions particularly those that created individual rights” (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), *overruled in part by* *United States v. Percheman*, U.S. (7 Pet.) 32 (1833))).

¹³⁸ See Lynch, *supra* note 30, at 150 (“[Treaties were] compact[s] with a foreign country whereby each party could agree to arrangements for mutual security and mutual benefits, including the exchange of commerce; to the adjudication of disputes, including the settlement of boundaries; and, most important of all, during wartime, to the conclusion of peace.”).

¹³⁹ See *supra* note 14.

¹⁴⁰ See Bolstad, *supra* note 15, at 902.

¹⁴¹ See Vázquez, *supra* note 22, at 698 (noting the widespread problems with American enforcement of treaties under the Articles of Confederation).

Framers' experience looked like many of the treaties, conventions, and agreements of the modern day.¹⁴² As John Yoo wrote in a 1999 article on the subject, "International agreements are becoming more like the permanent statutes and regulations that characterize the domestic legal system, and less like mutually convenient, and temporary, compacts to undertake state action."¹⁴³

Treaties today confer broad commercial rights to states and private parties, and their scope reaches far beyond the trade, boundary and peace negotiations of the late eighteenth century.¹⁴⁴ While treaties have always considered trade provisions between individual nations, bodies like the World Trade Organization and the North American Free Trade Agreement go beyond initiating a reciprocal grant of Most Favored Nation status¹⁴⁵ and create duties for private individuals and obligations of states to international tribunals.¹⁴⁶ International agreements also contemplate the rights of states in relation to the environment which all states share and impose burdens upon state actions, which have the potential to impact the environment.¹⁴⁷ This phenomena is new, perhaps made possible only by the contemporary scientific understanding of the complexities of the environment and the steps which must be taken to preserve it for our posterity. Nevertheless these treaties clearly constitute a class of state promises and obligations which do not have analogies in treaties from the time of America's founding.¹⁴⁸

Perhaps the clearest example of treaties not contemplated at the time of the founding are those that deal in human rights. Author, and former president of the American Society of International Law, Louis Henkin argues that "[t]he internationalization of human rights, the transformation of the idea of constitutional rights in a few countries to a universal conception and a staple of international politics and law, is a phenomenon of the middle of [the twentieth] century."¹⁴⁹ This phenomenon of internationalization of human rights has given rise to multilateral treaties which deal in issues once left exclusively to the purview of sovereign nations.¹⁵⁰ Agreements such as the International

¹⁴² There has been a boom in human rights treaties and the administration of international criminal law against individuals in the post-World War II era. This reflects the trend toward recognition of individual rights in international legal fora. See LOUIS HENKIN, *THE AGE OF RIGHTS* 16 (1990).

¹⁴³ Yoo, *supra* note 16, at 1958.

¹⁴⁴ See *id.* at 1968.

¹⁴⁵ States entered into agreements for Most Favored Nation (MFN) status in the eighteenth century, the time period of the drafting of the Constitution. The Treaty of Amity, Commerce, and Navigation (Jay Treaty) with Great Britain, for example, established MFN status between Great Britain and the United States. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116; John J. Janssen, *Dualist Constitutional Theory and the Republican Revolution of 1800*, 12 CONST. COMMENT. 381, 388 (1995).

¹⁴⁶ Yoo, *supra* note 18, at 1968.

¹⁴⁷ *Id.* at 1968-69.

¹⁴⁸ *Id.* at 1967-68.

¹⁴⁹ Henkin, *supra* note 142, at 13-14.

¹⁵⁰ See, e.g., *Multilateral Treaties Deposited with the Secretary-General*, U. N. TREATY COLLECTION, <http://treaties.un.org/Pages/ParticipationStatus.aspx> (last visited Feb. 24, 2011).

Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women are examples of treaties that affect the fundamental rights of people in the signer nations.¹⁵¹

In the United States, most of the human rights issues covered in treaties like these are either guaranteed to citizens through the Bill of Rights and its subsequent interpretation by U.S. courts, or they are left to the people or to the individual States to legislate upon appropriately through the Ninth and Tenth Amendments.¹⁵² The United States has a well-established means for the provision and protection of the rights and civil liberties found within these commercial, environmental and human rights treaties. It is understandable then, that a shift in the decision-making process regarding issues so intricately tied to our understanding of, for example, the Bill of Rights, from the domestic federal and state governments to diplomats negotiating treaties and the international bodies charged with interpreting those treaties should give the Court pause. The Court's ruling in *Medellín*, that there is a presumption against the self-execution of treaties, reflects that pause as well as the desire to have *only* domestic law decide the fate of the fundamental rights of Americans. The ruling attempts to alleviate the "ambiguity and contradictions in the status of treaties in the American legal system"¹⁵³ by implying that where there is doubt about the proper effect of a particular treaty upon American law and upon American courts, the court will find that the language of the treaty supports a theory of non-self-execution.

B. United Nations Convention on the Rights of the Child

While many treaties potentially threaten the many and varied rights granted and protected under the Constitution,¹⁵⁴ an examination of the United Nations' Convention on the Rights of the Child¹⁵⁵ and its potential effect on American law provides a prime

¹⁵¹ See Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. The ICCPR has been declared non-self-executing. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (holding that the United States ratified the Covenant on the express understanding that it was not self-executing and therefore did not itself create obligations enforceable in federal courts); see also Timothy K. Kuhner, Note, *Human Rights Treaties In U.S. Law: The Status Quo, its Underlying Bases, and Pathways for Change*, 13 DUKE J. COMP. & INT'L L. 419, 425–26 (2003).

¹⁵² See U.S. CONST. amend. IX; U.S. CONST. amend. X.

¹⁵³ Yoo, *supra* note 16, at 1958 (discussing the unsettled nature of the treaty power under the Constitution).

¹⁵⁴ See *supra* note 117; see also *Multilateral Treaties Deposited with the Secretary-General*, *supra* note 150.

¹⁵⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. Although the Convention is a treaty in its own right and not decision of the ICJ like *Avena*, it is still a useful example of the possible implications of self-execution. The Court has not yet discussed possible

example of the friction between modern international treaty obligations and constitutionally guaranteed individual rights.

The Convention is a binding legal instrument¹⁵⁶ wherein party nations agree to ensure that minors (children under the age of 18) in their countries are provided certain basic human rights.¹⁵⁷ This treaty is based upon the four principles of “non-discrimination; best interests of the child; the child’s right to life, survival and development; and respect for the views of the child.”¹⁵⁸ The Convention was presented on November 20, 1989, and has since been signed by representatives of every nation in the world, though the United States and Somalia have failed to ratify it.¹⁵⁹

There are several aspects of the Convention that have the potential to clash with the rights—both positive and negative—guaranteed by the Bill of Rights and the judicial interpretation it has undergone in its over two-hundred years of existence.¹⁶⁰ One of the most-discussed provisions of the treaty could immediately change the reproductive rights of American minors if the treaty were ratified *and* considered to be self-executing. Article 16 of the Convention reads: “(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. (2) The child has the right to the protection of the law against such interference or attacks.”¹⁶¹ This can be interpreted to mean that minors have the right to make reproductive decisions, including decisions regarding abortion, without informing or receiving consent from their parents.¹⁶²

While *Roe v. Wade* and subsequent decisions provided women in America with the right to abort a pregnancy under certain circumstances,¹⁶³ the Supreme Court has

self-execution or implementing legislation regarding the treaty because it has not been ratified by the United States.

¹⁵⁶ See Barbara J. Nauck, Note, *Implications of the United States Ratification of the United Nations Convention on the Rights of the Child: Civil Rights, the Constitution and the Family*, 42 CLEV. ST. L. REV. 675, 684 (1994) (“The wording is clear. The child is to be accorded these rights without any action required on the part of the State Party.”).

¹⁵⁷ Convention on the Rights of the Child, *supra* note 155, at art 1–2.

¹⁵⁸ *United Nations Special Session on Children*, UNICEF, <http://www.unicef.org/specialsession/rights/index.html> (last visited Feb. 24, 2011).

¹⁵⁹ Somalia has evinced an intention to ratify the treaty. If it does, the United States will be the only nation which has not ratified the Convention. *Somalia to Join Child Rights Pact: UN*, REUTERS AFRICA, (Nov. 20, 2009, 1:19 PM), <http://af.reuters.com/article/topNews/idAFJOE5AJ0IT20091120>.

¹⁶⁰ See Katie Hatzivramidis, *Parental Involvement Laws for Abortion in the United States and the United Nations Conventions on the Rights of the Child: Can International Law Secure the Right to Choose for Minors?*, 16 TEX. J. WOMEN & L. 185, 197 (2007) (“The freedom from interference with privacy, which has been articulated by the U.S. Supreme Court as a constitutional principle, would, under the convention, extend to minors seeking an abortion.”).

¹⁶¹ Convention on the Rights of the Child, *supra* note 155, at art. 16.

¹⁶² Nauck, *supra* note 156, at 701–02 (noting that state parental notification laws may violate the convention).

¹⁶³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46 (1992); *Bellotti v. Baird*, 428 U.S. 132, 134 (1976), *rev’d in part, aff’d in part*, 433 U.S. 622 (1979); *Planned*

generally held state legislation¹⁶⁴ that requires parents to be involved in the abortion process of their minor children to be constitutional.¹⁶⁵ Though the Court held in *Guaranty Trust Co. v. United States* that treaty language should be interpreted so as not to invalidate state laws wherever possible,¹⁶⁶ state laws giving parents the right to be informed of their minor children's reproductive decisions would not survive even the most deferential reading of the Convention if its provisions were enforceable in American courts. The rights guaranteed to children in Article 16 of the Convention are of the highest class of rights incorporated by the treaty and, if enforceable in domestic courts, are rights with the potential to upset established understandings of parental rights.¹⁶⁷

The argument that the Convention would be self-executing is not supported by all scholars, and indeed it runs against the general presumption that human rights treaties are not, and were not under the pre-*Medellin* standard, self-executing.¹⁶⁸ This presumption against the self-execution of human rights treaties, however, does not stem from the language of the treaties or their provisions. Rather, the presumption stems from the Senate's established practice of ratifying human rights treaties pursuant to

Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 62–63 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); see also *Roe*, 410 U.S. 113 at 154. See generally *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

¹⁶⁴ According to the Guttmacher Institute:

- 34 states require some parental involvement in a minor's decision to have an abortion.
- 20 states require parental consent only; 2 of which require both parents to consent.
- 10 states require parental notification only; 1 of which requires that both parents be notified.
- 4 states require both parental consent and notification.
- All of the 34 states that require parental involvement have an alternative process for minors seeking an abortion.
- 34 states include a judicial bypass procedure, which allows a minor to obtain approval from a court.
- 6 states also permit a minor to obtain an abortion if a grandparent or other adult relative is involved in the decision.
- Most states that require parental involvement make exceptions under certain circumstances.
- 31 states permit a minor . . . an abortion in a medical emergency.
- 14 states permit a minor to obtain an abortion in cases of abuse, assault, incest or neglect.

Parental Involvement in Minors' Abortions, GUTTMACHER INST. (Oct. 1, 2010), http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

¹⁶⁵ See, e.g., *Planned Parenthood of Kan. City v. Ashcroft*, 462 U.S. 476, 490–91 (1983) (“A State's interest in protecting immature minors will sustain a requirement of a consent statute, either parental or judicial.”).

¹⁶⁶ *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938).

¹⁶⁷ See Hatzivramidis, *supra* note 160, at 194.

¹⁶⁸ Kuhner, *supra* note 151, at 422.

reservations, understandings and declarations which explicitly state the treaty will not become self-executing and thus will not bind American courts.¹⁶⁹ Setting aside these reservations (as the Convention on the Rights of the Child has not yet been ratified, reservations have not been contemplated by the Senate) and looking at the plain language of the Convention, it appears at least *some* provisions are of the type the Court has considered to be self-executing. The Court has held, for example, that “all persons who have real claims under a treaty should have their cause decided by national tribunals.”¹⁷⁰ Article 16 of the Convention specifically grants to children the *protection of law* against interference in their privacy concerns.¹⁷¹ Such a clear grant of a liberty and right to protection under the law could be construed, under the pre-*Medellin* analysis, to afford children the “real claim under the treaty” that can be enforceable in court.¹⁷² This runs directly counter to the judicial precedent on the matter which allows for parental involvement in a minor’s choice to have an abortion. It is also directly contrary to the idea that American lawmakers and judges should decide the issues which affect the rights of Americans.

According to the U.N. Children’s Fund (UNICEF), the Convention is a legally binding instrument.¹⁷³ Countries which sign and ratify it are bound, under international law, to abide by all of its provisions. The intent—that the treaty create enforceable legal obligations—was clear at the time of the signing.¹⁷⁴ But after the ruling in *Medellin*, were the Court to look at the Convention to decide whether it self-executes, it would look first and foremost at the language in the document. The Convention states that nations will “respect and ensure the rights” and “take all appropriate measures” to see that the liberties in the Convention are granted to children in the state.¹⁷⁵ But how is this language substantively different than the language of the ICJ statute which the court found lacking in *Medellin*? There, where the language stated that nations would “undertake to comply,” the Court held that implementing legislation was necessary to bind American courts.¹⁷⁶ It would also likely find implementing legislation necessary for the Convention on the Rights of the Child.¹⁷⁷

¹⁶⁹ See *id.* at 426 (“[The Senate] has declared all judicially relevant provisions of these [human rights treaties to be] non-self-executing”).

¹⁷⁰ *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cran.) 344, 348 (1809).

¹⁷¹ Convention on the Rights of the Child, *supra* note 155, at art. 16.

¹⁷² See, e.g., Gerald Abraham, *The Cry of the Children*, 41 VILL. L. REV. 1345, 1365–66 n.126 (1996) (noting the Convention may be invoked in the domestic courts of at least sixteen ratifying nations, including France and Australia).

¹⁷³ *Convention on the Rights of the Child*, UNICEF, <http://www.unicef.org/crc/> (last visited Feb. 24, 2011).

¹⁷⁴ *Id.* But see Abraham, *supra* note 172, at 1365–66 n.126 (noting that some states have found the provisions of the treaty to have direct effect in their domestic courts).

¹⁷⁵ Convention on the Rights of the Child, *supra* note 155, at art. 2.

¹⁷⁶ *Medellin v. Texas*, 552 U.S. 491, 508 (2008).

¹⁷⁷ At this time, it does not matter whether the language of the treaty is clear enough to support self-execution because the Senate has not ratified the treaty.

IV. ORIGINAL INTENT IN MODERN TIMES

Many scholars consider American reluctance to ratify (or assent to the ratification only pursuant to reservations which effectively strip the treaty of domestic legal effect) human rights-based treaties as a sign of American exceptionalism; the willingness to create rules for others but not be bound by them ourselves.¹⁷⁸ However, perhaps the problem is not so much that the United States is not committed to human rights, but more that we believe that our Constitution, which is revered in American law and history, should be interpreted and applied solely by Americans. At least under a pre-*Medellin* standard, upon ratification of a treaty like the Convention on the Rights of the Child (without reservation), the United States would likely have been bound under international law obligations to grant some of the rights as they appear in the treaty. This would come at the cost of invalidating various state laws already held to be constitutionally consistent with the Bill of Rights.¹⁷⁹ However, in a post-*Medellin* world, the Senate may no longer need to tread so carefully upon the question of ratification of a treaty. Instead, it could signal to the international community that the United States is committed to the principles of human rights treaties through ratification. The Senate could then consider and weigh the various domestic implications before providing carefully crafted implementing legislation which would give a treaty, such as the Convention, the force of law. This may be the most desirable outcome, because though it may seem that by making treaty ratification non-threatening, the Court has just put the issue¹⁸⁰ off until it is time for Congress to make implementing legislation, perhaps this is a better, more proper way of proceeding under the principles of our Constitution. One of the Anti-Federalists' greatest concerns about the treaty power as it was stated in the Constitution during the debates on ratification was that the House of Representatives did not have a say in the treaty ratification process.¹⁸¹ However, if a duly ratified treaty must be addressed with the passage of implementing legislation, then the House *will* have the opportunity to weigh in on these fundamentally rights-related issues which are the fodder for modern day treaties, because though only the Senate has the power to ratify a treaty, the Senate alone can not enact implementing legislation. Thus the "democracy gap"¹⁸² is cured by a ruling which presumes that treaties require implementing legislation created by both houses of Congress before final law is created. The *Medellin*-created presumption against self-execution allows for democratic issuance of law on the fundamental rights questions which are often raised by modern day

¹⁷⁸ See, e.g., Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 391 (2009) ("[T]his [is the] apparent paradox of U.S. human rights policy—outwardly prodigious, inwardly niggardly . . .").

¹⁷⁹ Nauck, *supra* note 156, at 701–02.

¹⁸⁰ The issue of whether or how treaties signed by the United States will actually be implemented as domestic law.

¹⁸¹ DRAHOZAL, *supra* note 45, at 158.

¹⁸² Yoo, *supra* note 16, at 1962.

treaties, but which the Framers did not contemplate when they wrote that treaties would be the “supreme law of the land.”¹⁸³

The self-execution debate must also be considered in light of the Ninth and Tenth Amendments. Ninth Amendment concerns are triggered by the idea that rights can be taken away from American citizens (such as the parental right to knowledge of a minor child’s intent to obtain an abortion) without their voice or consent.¹⁸⁴ And though such a parental right is certainly not enumerated in the Constitution, the Ninth Amendment and constitutional interpretation by the Supreme Court has led scholars to believe that such a right is reserved to the people. The Court’s presumption in favor of non-self-execution is consistent with protection of the unenumerated rights left to Americans under the Ninth Amendment. There are also Tenth Amendment concerns with ratification because, as discussed, many modern treaties deal with issues once left solely to domestic governments.¹⁸⁵ In the United States, many of these rights are those granted by individual state governments by and through their powers under the Tenth Amendment.¹⁸⁶ A greater discussion of the federalism concerns raised by this question is beyond the scope of this Note.

Chief Justice Marshall preserved the original intent of the Framers, though it was his decision in the *Foster* case that initially created a distinction among treaties as self-executing and non-self-executing.¹⁸⁷ And though his distinction has been transformed into a presumption against the self-execution of treaties in *Medellin*, (which neither the Founders nor Marshall would have predicted),¹⁸⁸ the changed nature of international agreements today allows *Medellin* to coexist with original intent instead of clashing with it.¹⁸⁹ The Founders spent considerable time and energy deciding exactly how

¹⁸³ See Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT’L L. 589, 590 (1995) (observing that Congress retains its supremacy over domestic laws with the presumption against self-execution); see also Yoo, *supra* note 16, at 1974–75.

¹⁸⁴ See U.S. CONST. amend. IX.

¹⁸⁵ See U.S. CONST. amend. X.

¹⁸⁶ Treaties may validly create or restrict rights ordinarily under the purview of the states even if Congress would be precluded from passing the same legislation because of the Tenth Amendment. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

¹⁸⁷ See *Foster v. Neilson*, 27 U.S. (2 Pet.) 254, 314 (1829), *overruled in part by* *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

¹⁸⁸ Marshall reversed his decision from *Foster* in *United States v. Percheman*, 32 U.S. (7 Pet.) 51, a case regarding the exact same treaty which had been ruled upon in *Foster*. Presumably, this was because a more textually-accurate version of the treaty (in its original Spanish language form) was made available to the Court which found the language of self-execution it had not found in the translation used in the *Foster* case.

¹⁸⁹ *Medellin v. Texas*, 552 U.S. 491, 523 (2008) (“Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by ‘many of our most fundamental constitutional protections.’” (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006))).

federal law was to be created in the United States according to their brilliant and delicate system of checks and balances. They did not envision a scenario in which domestic law could be created by international bodies¹⁹⁰ (particularly because no super-sovereign bodies or courts existed at the time) pursuant to a treaty made the supreme law of the land by the Supremacy Clause. Accordingly, where treaties now have the potential to impact the fundamental rights of Americans, *Medellin*'s presumption against self-execution acts as a Congressional check on the potentially untoward obligations imposed by modern international agreements.

V. EFFECTS

There is an uneasy push and pull between the idea that we do not want international law or norms deciding how we interpret our Constitution¹⁹¹ and the historical precedent of incorporating them anyway.¹⁹² Scholars and judges alike disagree on the subject. One scholar has suggested that we should actually look toward international law, particularly international humanitarian law, to interpret the rights granted to Americans in our own Constitution, especially where the rights have not yet been enumerated by Congress or the Constitution itself.¹⁹³ Another argues that no international legal norms or international bodies can ever aid in the interpretation of the Constitution.¹⁹⁴ The lack of consensus regarding the effect that international law should have on domestic law is all the more reason why treaties today are—and rightfully should be—examined substantively before they become the “supreme law of the land” and are implemented through legislation from Congress.

Justice Scalia, a member of the majority in *Medellin*, disparages the use of international legal norms in furthering our understanding of our own Constitution.¹⁹⁵ It is

¹⁹⁰ *Id.* at 515. (“Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it.” (citing U.S. CONST. art I, §7; *id.* art II, §2)).

¹⁹¹ See Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 307 (2004) (“It is my view that modern foreign legal materials can never be relevant to an interpretation of—to the meaning of—the U.S. Constitution.”).

¹⁹² Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 7–8 (2006). *But see* Paulson, *supra* note 129, at 1765–66 (“The power to interpret and apply international law for the United States is a power vested in . . . the U.S. government, *not* in any foreign or international body. . . . As a matter of U.S. constitutional law, the International Court of Justice . . . cannot authoritatively determine the content of international law for the United States.”).

¹⁹³ Cindy G. Buys, *Burying our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation*, 21 BYU J. PUB. L. 1, 2, 30 (2007).

¹⁹⁴ Paulson, *supra* note 129, at 1765–66.

¹⁹⁵ Scalia, *supra* note 191, at 307.

not a stretch to view the Court's recent decision in *Medellin* as a sort of protectionist way of reclaiming the unqualified right to say what the law *is*.¹⁹⁶ This hesitancy may indeed have been what the Framers would have intended could they have known about the nature of modern treaties and the way that they have the potential to impact individual rights.¹⁹⁷ However, there may be serious consequences to this way of thinking for American foreign policy which the majority in *Medellin* seemed to not even consider.

The United States' refusal to ratify treaties can create problems on the international stage.¹⁹⁸ The world looks to the United States as a leader in democracy and the provision of rights. Even when the United States does ratify treaties such as the Vienna Convention, issues arise with our neighbors and international partners when the United States does not follow the letter of the treaty (or what the international community perceives to be the letter of the treaty), or when the United States makes reservations preserving the status quo in American law.¹⁹⁹ Unfortunately, these problems are not likely to be solved with the ruling in *Medellin* that treaties require implementing legislation to be executed. If anything, this requirement makes the legitimacy of the United States' multilateral rights treaties an even thornier issue, if for no other reason than that Congress will likely be slow to implement legislation to give effect to treaties which should be binding on American courts.²⁰⁰ Similarly, the United States' apparent lackluster commitment to human rights treaties, even those it *does* ratify, could give rise to problems for American nationals abroad.²⁰¹ If other nations cannot trust that their nationals will be afforded the protections given to them by law under the Vienna Convention and other treaties which deal with the rights of foreign nationals, they may choose to reciprocally deprive American nationals of their rights.²⁰² Though serious,

¹⁹⁶ This proposition is further backed by the fact that the Supreme Court in *Sanchez-Llamas*, two years prior to *Medellin* ruled on the same question that faced the ICJ in *Avena*, and came out on the other side of the issue. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354–55 (2006).

¹⁹⁷ One author suggests that the use of foreign or international law norms is a trend in which “beginning in the late nineteen-nineties, the Court’s more liberal members began citing foreign sources to help interpret the Constitution on basic questions of individual liberties.” Jeffrey Toobin, *Swing Shift*, NEW YORKER, Sept. 12, 2005, at 42.

¹⁹⁸ *Medellin v. Texas*, 552 U.S. 491, 537 (2008) (Stevens, J. concurring) (“On the other hand, the costs of refusing to respect the ICJ’s judgment are significant.”); *id.* at 566 (Breyer, J., dissenting) (“[This ruling threatens to] diminish[] our Nation’s reputation abroad as a result of our failure to follow the ‘rule of law’ principles that we preach.”).

¹⁹⁹ See Brief for the European Union et al. as Amici Curiae Supporting Petitioner, *supra* note 135 at 2–3; Brief for the United Mexican States as Amicus Curiae Supporting Petitioner at 4–5, *Medellin*, 552 U.S. 491 (No. 06-984). Both parties argued for the Court to stringently apply the liberal interpretation of Article 36 of the Vienna Convention as well as affirm the ICJ’s opinion in *Avena*.

²⁰⁰ *Medellin*, 552 U.S. at 560 (Breyer, J., dissenting).

²⁰¹ *Id.* at 566.

²⁰² *Id.*

these consequences should not be considered to tip the balance in favor of a presumption of self-execution.

CONCLUSION

The Framers intended nothing if not that the Constitution be a living document, capable of absorbing the realities of ever-changing times. We are in an era where treaties are substantively different than they were at the time of the founding, and it is necessary that we interpret Constitutional provisions (made with one type of treaty in mind) in a way that will reflect the ideals and principles upon which our Constitution and our nation are based. The majority in *Medellin* cast off the originalist and historical interpretations of the Supremacy Clause in their opinion by discarding the well-established precedent for the presumption of self-execution in U.S. treaties and international agreements. However, their decision is ultimately consistent with the Framers' actual intent and understanding of the Constitution because the substantive nature of treaties has so changed in the past 200 years that to follow history and precedent would in itself be diverging from original intent.