

Treaties as “Part of Our Law”

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Justice Gray famously wrote in *The Paquete Habana*¹ that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”² The succeeding century has seen a great deal of sparring among courts and commentators as to what, exactly, that memorable phrase means for the status of international law within the domestic legal system. *The Paquete Habana* itself concerned customary international law, and scholars continue to debate whether that law amounts to supreme federal law.³ More recently, controversy has shifted to the domestic status of

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1. 175 U.S. 677 (1900).

2. *Id.* at 700.

3. See, e.g., Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 572 (2007) (“[J]udicial treaty enforcement is widely seen as unpredictable, erratic, and confusing. As a result, the question of treaty enforcement has become a leading question in both American jurisprudence and the study of international law.”). Compare, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary*

treaties.⁴ The Supremacy Clause plainly makes treaties “part of our law”;⁵ the question is what that status entails for the interpretation and enforcement of treaty provisions.

The interpretation and force of treaties in domestic courts lie at the heart of a line of recent cases concerning the Vienna Convention on Consular Relations (VCCR).⁶ The VCCR requires law enforcement officials to notify foreign nationals whom they arrest of the foreign nationals’ right to consult with their consulates.⁷ Dual opinions by the International Court of Justice (ICJ), culminating in its 2004 *Avena*⁸ decision, found the United States in violation of the VCCR and required American courts to give the treaty effect, notwithstanding domestic doctrines limiting the enforceability of its provisions in certain circumstances.⁹ The U.S. Supreme Court rejected *Avena*’s

International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815, 861 (1997) (arguing that customary norms should not be treated as supreme federal law unless the political branches take action to incorporate them into U.S. law), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1861 (1998) (arguing that customary international norms automatically have the domestic status of federal law). For my own assessment of those issues, see Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365, 462–63 (2002) [hereinafter Young, *Customary International Law*]. I argue that customary international law should be treated as “general” rather than federal law for supremacy and jurisdictional purposes but that domestic courts can apply such law when ordinary choice of law principles permit. *Id.*

4. Compare, e.g., Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095, 2123–24 (1999), Carlos Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2176–98 (1999), and Carlos Vázquez, *Treaties as the Law of the Land: The Supremacy Clause and Presumption of Self-Execution*, 122 HARV. L. REV. 599, 619–22 (2008) [hereinafter Vázquez, *Treaties as the Law of the Land*] (all relying on statements from the Philadelphia Convention and early Supreme Court cases to argue that—in the domestic law context—treaties are self-executing), with John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-self-execution*, 99 COLUM. L. REV. 2218, 2223–39 (1999), and John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1312–25 (2002) (both relying on the structure of the Constitution, the ratifying debates, and other early cases to conclude that—in the domestic law context—treaties are non-self-executing).

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

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

7. *Id.* art. 36(1)(a), (c).

8. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8190.pdf>.

9. *Id.*; *LaGrand* Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27). Additionally, based on alleged violations of the VCCR, the ICJ issued in 1998 a provisional stay-of-execution order for a Paraguayan national on death row; however, Paraguay withdrew its petition shortly after the convict’s execution, thus the ICJ never issued a final opinion on the merits of that case. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Provisional Measures Order of Apr. 9); Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426 (Discontinuance Order of Nov. 10).

construction of the treaty in *Sanchez-Llamas v. Oregon*,¹⁰ refusing to give much deference to the ICJ’s interpretation.¹¹

The VCCR saga took a more curious turn when, in a rare fit of multilateralism, President George W. Bush sought to enforce the ICJ’s judgment by directing an unusual executive order to the state courts.¹² The Supreme Court rejected the President’s effort in *Medellín v. Texas*,¹³ and it further held that ICJ judgments lack “self-executing” effect within the domestic legal system.¹⁴ *Medellín*’s latter holding was the first Supreme Court intervention in recent memory into a longstanding debate among the courts of appeals (and scholars of foreign relations law) concerning when a treaty should be considered to have domestic legal force without further action by the national political branches.

This extraordinary sequence of rulings and events concerning the VCCR may well be *sui generis* in any number of ways, but the issues of interpretive deference and self-execution that it raises are likely to recur across any number of other treaty regimes, from trade to terrorism. In debates about the domestic status of international law generally, internationalists typically invoke *The Paquete Habana* for the proposition that domestic courts and officials should be more receptive to international law,¹⁵ nationalists, on the other hand, generally seek to maintain a firewall between international and domestic law, and to leave decisions about which norms pass through that firewall to national political officials.¹⁶ I argue here that, contrary to conventional assumptions, *The Paquete Habana* principle does not necessarily support various internationalist doctrinal prescriptions and that, properly considered, it frequently buttresses more nationalist positions.

The point is a general one. In an earlier piece on customary international law (CIL), I argued that the “modern position”—which treats CIL norms as supreme federal law with binding effect in every case within the scope of those norms—is not actually consistent with the way federal common law works.¹⁷ Rather, federal courts articulate federal common law rules only when the otherwise-applicable state law would conflict with some particular federal interest (and not some generic federal interest in

10. 548 U.S. 331, 353 (2006) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

11. *See id.* at 353–55 (downplaying the argument that the ICJ’s decisions or interpretations are conclusive upon U.S. courts).

12. *See infra* text accompanying notes 276–78.

13. 128 S. Ct. 1346 (2008).

14. *Id.* at 1360.

15. *See, e.g.*, Beth Stephens, *The Law of Our Land: Customary International Law as Federal Common Law After Erie*, 66 *FORDHAM L. REV.* 393, 393 (“For decades, federal courts have cited [*The Paquete Habana*] for the proposition that customary international law is a part of federal common law . . .”).

16. *See, e.g.*, Bradley & Goldsmith, *supra* note 3, at 866–68 (arguing that federal courts should enforce customary international law only when domestic political actors have acted to incorporate it into domestic law).

17. Young, *Customary International Law*, *supra* note 3, at 435–38.

“uniformity” for its own sake).¹⁸ Treating CIL as part of our law would thus subject it to the same highly contextual conflicts analysis that federal courts apply in domestic cases not governed by federal statutes, treaties, or constitutional provisions.¹⁹

This Article makes a similar point about treaties. As internationalist scholars often point out, the Supremacy Clause explicitly recognizes treaties as supreme federal law.²⁰ These scholars often argue that proper respect for treaties requires that domestic courts defer to interpretations of treaty provisions by supranational bodies²¹ and that treaties be treated as (at least presumptively) self-executing in all instances.²² But these internationalist conclusions do not necessarily follow from the premise that treaties are the supreme law of the land. Taking treaties seriously as part of our law—that is, treating them the same way we treat federal statutes and constitutional provisions—actually supports a number of conclusions generally advanced by nationalists. First, if treaties are part of *our* law, then there is no reason to defer to foreign or supranational courts in interpreting them. Rather, as the Supreme Court recently recognized in *Sanchez-Llamas v. Oregon*,²³ interpreting treaties falls within the Court’s familiar duty to “say what the

18. *See, e.g.*, *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (“[W]hen courts decide to fashion rules of federal common law, ‘the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.’” (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966))); *United States v. Kimbell Foods*, 440 U.S. 715, 727–28 (1979) (affirming that when “federal interests are sufficiently implicated to warrant the protection of federal law . . . federal courts [should] fill the interstices of federal legislation ‘according to their own standards’” but “when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision” (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943))). *See generally* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1665 (2008) (“There is no power to routinely ‘federalize’ state law rules, unless the conflict with federal interests is itself a persistent one, most likely created by an ongoing federal need for a uniform rule.”).

19. Young, *Customary International Law*, *supra* note 3, at 445–50.

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

21. *See, e.g.*, Jennifer Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 495 (2003) (“An antiparochial, prodialogic default rule that balances concerns about national sovereignty, the relative expertise of international courts, and the benefits of greater coherence and consistency in interpretation would specify that national courts interpreting international law should consider relevant decisions of international courts, as well as the context in which they were rendered, and should not depart from them without clearly articulating reasons for doing so.”).

22. *See, e.g.*, LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 201 (2d ed. 1996) (“What seems clear, from the language of the Constitution and of John Marshall, is that in the United States the strong presumption should be that a treaty or a treaty provision is self-executing, and that a non-self-executing promise is highly exceptional.”); Flaherty, *supra* note 4, at 2099 (asserting that history supports the self-execution orthodoxy); Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 602 (“[T]he Supremacy clause is best read to create a presumption that treaties are self-executing, . . . a presumption that can be overcome only through a clear statement that the obligations in a particular treaty are subject to legislative implementation.”).

23. 548 U.S. 331 (2006).

law is.”²⁴ Second, it does not follow from a treaty’s status as supreme federal law that it is necessarily self-executing in a number of the senses in which that term is generally employed. Domestic federal law is frequently non-self-executing: many statutes provide no private rights of action and some impose no enforceable legal norms at all. Treating treaties as “part of our law” thus does not absolve interpreters of the difficult task of determining precisely what the treaty makers wished to accomplish.

My argument is that the VCCR cases represent a “normalization” of treaty law—that is, that the Court’s decisions demonstrate a determination to approach treaties in much the same way that the Court approaches statutes and other more familiar forms of federal law. Just as federal statutes are not necessarily self-executing, so too with treaties. This uniform approach makes sense in a world where treaties and statutes increasingly address the same sorts of problems and have similar effects on settled domestic practices. If *Medellín* and *Sanchez-Llamas* do, in fact, represent an effort to consolidate the treatment of these disparate forms of supreme federal law, then the VCCR cases will have far-reaching (although not surprising) implications.

Part I of this Article discusses the question of interpretive authority. Part II addresses the self-execution problem. Part III considers the more general matter of normalizing treaty law.

I. Interpretive Authority

Treaties have a dual existence: they are part of international law and, by virtue of the Supremacy Clause,²⁵ simultaneously part of “the supreme Law of the Land.”²⁶ They are thus necessarily *shared* law among multiple jurisdictions and multiple interpreters, including not only the courts of other signatory nations but also, for some treaties, supranational judicial bodies like the ICJ. This situation necessarily raises questions of interpretive primacy and deference: When a domestic court must construe a treaty provision, to what extent should it defer to prior interpretations of the same provision by foreign or supranational courts?

24. *Id.* at 353–54 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), for the proposition that “[i]t is emphatically the province and duty of the judicial department to say what the law is”).

25. U.S. CONST. art. VI, cl. 2. The Supremacy Clause states, 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.

Id.

26. See Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 182 [hereinafter Bradley, *Self-Execution*] (“[T]reaties have a dual nature in that they are situated in the domain of international politics as well as in the domain of law . . .”).

In *Sanchez-Llamas v. Oregon*, Chief Justice Roberts's majority opinion insisted on the Supreme Court's own primary authority—and obligation—to “say what the law is,” even in cases involving treaties.²⁷ I argue here that this was exactly the right thing to do and that arguments for more binding forms of deference, founded either in notions of “comity” or in analogies to the treatment of judgments in private law cases, are unpersuasive.²⁸ This Article discusses comity as well as three other models of interpretive deference grounded in domestic law. None of these models, I contend, adequately captures the function of the Supreme Court in interpreting treaty obligations.

A. *Sanchez-Llamas, Avena, and the Problem of Interpretive Deference*

The *Sanchez-Llamas* litigation involved two consolidated cases arising under the VCCR. Article 36 of the Convention guarantees that consular officials of signatory nations will have access to their nationals when officials of another signatory nation detain those nationals.²⁹ When they detain a foreign national, government authorities must notify that national's consulate if he requests it, and they must inform the detained foreign national of this right “without delay.”³⁰ Moises Sanchez-Llamas, a Mexican national, was convicted in Oregon state court of attempted aggravated murder after a shoot-out with police and sentenced to twenty and one-half years in prison.³¹ Mario Bustillo, a Honduran national, was convicted in Virginia state court of first-degree murder after a fight outside a restaurant and sentenced to thirty years in prison.³² Neither Mr. Sanchez-Llamas nor Mr. Bustillo was notified by police of his rights under the VCCR.³³

On appeal to the U.S. Supreme Court, Mr. Sanchez-Llamas and Mr. Bustillo presented quite different issues. Sanchez-Llamas had invoked his VCCR rights before the state courts and sought to suppress incriminating statements that he made to police prior to notification of the Mexican

27. 548 U.S. 331, 354 (2006).

28. For a characteristically forceful argument, grounded in constitutional text, that American courts should not defer to supranational bodies when interpreting a treaty, see Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L. J. 1762, 1804–07 & n.113 (2009).

29. VCCR, *supra* note 6, art. 36(1)(a), (c).

30. *Id.* art. 36(1)(b). That provision provides,

[I]f he so requests, the 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. . . . The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

Id.

31. *Sanchez-Llamas*, 548 U.S. at 339–40.

32. *Id.* at 340–41.

33. *Id.* at 339–41.

consulate.³⁴ His appeal therefore asked whether the *Miranda*-style exclusion of evidence is a proper remedy for violation of a foreign national’s rights under the VCCR.³⁵ Bustillo, on the other hand, failed to raise the VCCR issue before the state trial court or on direct review; he presented the issue for the first time in a state petition for habeas corpus.³⁶ His case thus concerned whether the doctrine of procedural default—which holds that a habeas petitioner’s failure to comply with state procedural rules for presenting federal claims bars collateral review on habeas³⁷—applies to VCCR claims.³⁸

Although I will have a few things to say about the exclusionary-rule issue, my primary concern here is with the Court’s resolution of Mr. Bustillo’s claim. What makes that claim interesting is that the central issue—the relationship between the procedural default doctrine and the VCCR—had already been addressed by both the Supreme Court and the ICJ. In *Breard v. Greene*,³⁹ a Paraguayan national convicted of capital murder argued that he was entitled to raise a VCCR claim for the first time on collateral review because “the Convention is the ‘supreme law of the land’ and thus trumps the procedural default doctrine.”⁴⁰ The Supreme Court rejected that argument, observing that “it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.”⁴¹ The ICJ reached the opposite conclusion eight years later, however, in the *Avena* case. *Avena*, which concerned the VCCR claims of fifty-four Mexican nationals on death row in various American states, found violations of the Convention in the overwhelming majority of the cases, and ordered the United States to provide “review and reconsideration” of each prisoner’s conviction and sentence.⁴² Citing its earlier decision in the *LaGrand* case,⁴³ the ICJ further held that the American doctrine of procedural default violated

34. *Id.* at 340.

35. *Id.* at 339–40.

36. *Id.* at 341.

37. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 722–23 (1991) (holding that, because of federalism and comity concerns, a federal habeas court may not review a state court’s decision resting on a violation of state procedural rules); *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977) (holding that, where petitioner failed to make timely objection under the state’s contemporaneous objection rule, that failure barred federal habeas review of his *Miranda* claim).

38. *Sanchez-Llamas*, 548 U.S. at 342.

39. 523 U.S. 371 (1998) (per curiam).

40. *Id.* at 375.

41. *Id.* As the *Breard* court noted, the VCCR itself provides that the rights it confers “shall be exercised in conformity with the laws and regulations of the receiving State,” provided that “said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under [the VCCR] are intended.” VCCR, *supra* note 6, art. 36(2).

42. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 53–55, 63, 65–66 (Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8190.pdf>.

43. The ICJ reached a similar conclusion about procedural default in the *LaGrand* case, which involved two German nationals. (F.R.G. v. U.S.), 2001 I.C.J. 466, 514–17 (June 27).

the VCCR by preventing domestic courts from giving “full effect” to the treaty’s provisions.⁴⁴

Naturally, Mr. Bustillo invoked *Avena* in support of his argument that procedural default should not bar his VCCR claim.⁴⁵ An amicus brief of “International Court of Justice Experts” went so far as to urge that “the United States is obligated to comply with the Convention, *as interpreted by the ICJ*.”⁴⁶ Chief Justice Roberts’s majority opinion rejected this suggestion, however. “If treaties are to be given effect as federal law under our legal system,” he wrote, “determining their meaning as a matter of federal law ‘is emphatically the province and duty of the Judicial department,’ headed by the ‘one supreme Court’ established by the Constitution.”⁴⁷ As a result, “*LaGrand* and *Avena* are . . . entitled only to the ‘respectful consideration’ due an interpretation of an international agreement by an international court.”⁴⁸ Applying this standard, the Court rejected *Avena*’s interpretation of the VCCR and adhered to its own prior construction in *Breard*, which applied the same procedural default doctrine to VCCR claims as that which potentially blocks *any* claim to habeas corpus relief.⁴⁹

Chief Justice Roberts’s refusal to defer to the ICJ’s interpretation of the VCCR has been controversial.⁵⁰ Justice Breyer’s dissent was willing to “assume that the ICJ’s interpretation does not bind this Court in this case,”⁵¹ but most observers agree that his version of “respectful consideration” was considerably more deferential than that of the majority.⁵² Justice Stevens went so far as to suggest, in an earlier VCCR case, that the ICJ’s *LaGrand*

44. *Avena*, 2004 I.C.J. at 55–57, 63 (citing VCCR, *supra* note 6, art. 36(2)).

45. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 352 (2006).

46. Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners at 11, *Sanchez-Llamas*, 548 U.S. 331 (No. 04-10566) [hereinafter Brief of International Court of Justice Experts] (emphasis added); *see also* Julian G. Ku, *Sanchez-Llamas v. Oregon: Stepping Back from the New World Court Order*, 11 LEWIS & CLARK L. REV. 17, 20–22 (2007) (discussing this brief).

47. 548 U.S. at 353–54 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

48. *Id.* at 355 (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam)).

49. *Id.* at 356–60.

50. *See, e.g.*, Carsten Hoppe, *Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights*, 18 EUR. J. INT’L L. 317, 330 (2007) (concluding that Chief Justice Roberts’s majority opinion “sorely disappoints” because the majority’s “duty to afford ‘respectful consideration’ thus seems reduced to a duty to take note of the respective decision” but “[t]he Court is free to review the decision and to disagree with it”); John F. Murphy, *Medellín v. Texas: Implications of the Supreme Court’s Decision for the United States and the Rule of Law in International Affairs*, 31 SUFFOLK TRANSNAT’L L. REV. 247, 265 (2008) (“[I]n *Sanchez-Llamas v. Oregon*, . . . the U.S. Supreme Court handed down a decision with the potential to greatly weaken the possibility of enforcing judgments of the ICJ.”).

51. 548 U.S. at 382 (Breyer, J., dissenting).

52. *See, e.g.*, Hoppe, *supra* note 50, at 330 (interpreting Justice Breyer’s dissent as “propos[ing] a more substantive and less confrontational view of ‘respectful consideration’ of ICJ judgments”); Mark L. Movsesian, *Judging International Judgments*, 48 VA. J. INT’L L. 65, 101, 108 (2007) (reading the dissent as embracing a more deferential “comity model” of interpretive authority).

decision was an “authoritative interpretation of Article 36.”⁵³ And prominent academics have claimed that the ICJ’s interpretation binds the U.S. Supreme Court outright.⁵⁴

Although we are unlikely to see much further ICJ litigation under the VCCR itself,⁵⁵ this debate has significant implications for how domestic courts treat decisions of a burgeoning class of supranational judicial institutions. In the remainder of this Part, I argue that none of the traditional reasons for interpretive deference apply to treaties that are “part of our law” under the Supremacy Clause. Indeed, such deference threatens the presumptive authority of federal courts, under Article III of the Constitution, to issue an “independent decision of . . . every . . . question affecting the normative scope of supreme law.”⁵⁶

B. Comity

One possible basis for deference to interpretations of treaties by supranational or foreign courts is the foreign-relations-law doctrine of comity. Although the *Sanchez-Llamas* petitioners (and Justice Breyer’s dissent) avoided explicit references to comity, important amici urged the Court to defer to the ICJ’s interpretation of the VCCR “as a matter of comity and uniform treaty interpretation.”⁵⁷ “International comity” is a notoriously

53. *Torres v. Mullin*, 540 U.S. 1035, 1036 (2003) (Stevens, J., respecting denial of certiorari).

54. *See, e.g.*, Brief of International Court of Justice Experts, *supra* note 46, at 24–25 (“*LaGrand* and *Avena* have stated an authoritative interpretation of the underlying treaty which establishes the rule for deciding comparable questions under the same treaty henceforth.”); Lori Fisler Damrosch, *Interpreting U.S. Treaties in Light of Human Rights Values*, 46 N.Y.L. SCH. L. REV. 43, 56 (2003) (arguing that the ICJ’s decision in *LaGrand* clarified that its interpretation of the VCCR is binding on the Supreme Court).

55. In the wake of *Avena*, the United States exercised its right to withdraw from the Optional Protocol conferring jurisdiction on the ICJ in VCCR cases. *See* Letter from Condoleezza Rice, U.S. Sec’y of State, to Kofi Annan, U.N. Sec’y-Gen. (Mar. 7, 2005) (on file at http://untreaty.un.org/English/CNs/2005/101_200/186E.doc) (constituting notification by the United States of its withdrawal from the Optional Protocol); *see also* Depositary Notification, Secretary-General, United States of America: Notification of Withdrawal, U.N. Doc. CN.186.2005.TREATIES-1 (Mar. 11, 2005), *available at* <http://treaties.un.org/doc/Treaties/1967/06/19670608%2002-19%20AM/Actions/Related%20Documents/CN.186.2005-Eng.pdf> (acknowledging that the “United States will no longer recognize the Jurisdiction of the International Court of Justice reflected in [the Optional Protocol]).

56. James S. Liebman & William F. Ryan, “*Some Effectual Power*”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 884 (1998). One need not accept the argument of Professors Liebman and Ryan that departures from this principle are unconstitutional to agree that the federal courts have a strong *presumptive* right to decide federal questions for themselves.

57. Brief of Former United States Diplomats as Amici Curiae in Support of Petitioners Mario A. Bustillo and Moises Sanchez-Llamas at 1, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (No. 04-10566) [hereinafter Brief of Former United States Diplomats]; *see also* Brief for Amici Curiae Republic of Honduras and Other Foreign Sovereigns in Support of Petitioners at 3, *Sanchez-Llamas*, 548 U.S. 331 (No. 04-10566) (“Whether or not the ICJ’s *Avena* decision on the interpretation of the Convention binds this Court, principles of reciprocity, comity, and uniformity of treaty interpretation all favor following that decision.”).

ambiguous phrase in foreign relations law; as Michael Ramsey has observed, the term “is frequently invoked by courts but rarely defined with precision.”⁵⁸ The Supreme Court’s canonical statement of the doctrine illustrates Professor Ramsey’s point:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.⁵⁹

In the context of *Sanchez-Llamas*, comity amounted to a strong form of interpretive deference; the amici invoked, for example, Justice Ginsburg’s statement from *Medellín v. Dretke*⁶⁰ largely equating comity with binding judgments: “[W]hen a judgment binds or is respected as a matter of comity, a ‘let’s see if we agree’ approach is out of order.”⁶¹ This sort of approach thus would foreclose an independent effort by the domestic court to “say what the law is.”

I hope to show here that “comity” is inappropriate when, as in *Sanchez-Llamas*, a domestic court must determine whether to defer to a foreign or supranational court’s interpretation of a treaty to which the United States is a party. This situation is quite distinct from the one addressed by Justice Ginsburg, which involved the deference owed to *judgments*, not interpretations. It will help to begin by distinguishing among the several distinct principles that courts and commentators often lump indiscriminately together under the label of “comity.” When the object of comity is a foreign judicial proceeding, those principles include: (1) various forms of abstention in favor of ongoing or potential proceedings in the foreign forum, (2) enforcement of judgments already concluded by the foreign forum, and (3) acceptance of a foreign court’s interpretation as evidence—possibly *conclusive* evidence—of the content of foreign law. *Sanchez-Llamas* implicated none of these principles.

Take abstention first. This form of comity involves deference to a foreign *proceeding* (actual or potential), rather than a foreign court’s interpretation of a treaty.⁶² In *Sanchez-Llamas*, for example, there was no

58. Michael D. Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893, 893 (1998).

59. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

60. 544 U.S. 660 (2005).

61. Brief of Former United States Diplomats, *supra* note 57, at 7 (quoting *Dretke*, 544 U.S. at 670 (Ginsburg, J., concurring)). For a discussion of the *Medellín* litigation, see *infra* Part II.

62. See, e.g., *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 897 (7th Cir. 1999) (affirming the district court’s stay of American proceedings pending completion of parallel proceedings in the High Court of St. Lucia); *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1514 (11th Cir. 1994) (staying American proceedings in light of ongoing legal proceedings in Germany).

question of deferring Bustillo’s and Sanchez-Llamas’s domestic criminal prosecutions in favor of proceedings before the ICJ—neither defendant in *Sanchez-Llamas* was entitled to appear before the ICJ.⁶³ Nor were Bustillo or Sanchez-Llamas parties to the ICJ’s *Avena* judgment. Mr. Bustillo was a Honduran national, and therefore unconnected to Mexico’s suit in *Avena*, nor did that suit cover Mexican nationals like Mr. Sanchez-Llamas who had not been convicted of a capital offense.⁶⁴ Petitioners were therefore not entitled to invoke the second form of comity, which requires enforcement of foreign judgments at the behest of a party to that judgment.⁶⁵

The most plausible form of comity in these cases was the third kind, requiring domestic courts to accept a foreign court’s interpretation of foreign law as important evidence of the content of that law.⁶⁶ Courts ordinarily invoke this form of comity when, for example, deferring to a French court’s interpretation of French law. The idea is that the foreign court is applying its *own* law and that it has a special relationship to that law not shared by the domestic court.⁶⁷ But applying that notion of comity to a foreign or supranational court’s interpretation of a U.S. treaty is fundamentally inconsistent with the notion that treaties are part of *our* law.⁶⁸ Moreover, as I discuss further below,⁶⁹ treaties that confer jurisdiction on supranational tribunals generally do not give those tribunals any interpretive preeminence over domestic courts that might also have to resolve disputes about the treaties’ meaning. In the absence of such a delegation, foreign or supranational courts have no greater claim to interpretive authority over treaties than do the do-

63. See Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1055, 1059, T.S. No. 993 (declaring that only states may be parties to the ICJ).

64. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 20–21 (Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8190.pdf>.

65. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 205–06 (1895) (“[When a] foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment . . . should be held conclusive upon the merits tried in the foreign court.”); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (“[C]omity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts.”); *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 444 (3d Cir. 1971) (affirming the district court’s enforcement of a default judgment entered against an American corporation by an English court). On the distinction between the force of supranational judgments and supranational court interpretations or reasoning, see Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 DUKE J. COMP. & INT’L L. 477, 491–515 (2008) [hereinafter Young, *Judgments and Precedents*].

66. See, e.g., *Ramsay v. Boeing Co.*, 432 F.2d 592, 600–01 (5th Cir. 1970) (relying on prior decisions of Belgian courts when deciding the issue of whether, under Belgian law, the statute of limitations for the instant action would be waivable).

67. *Id.* at 599; see also Ramsey, *supra* note 58, at 902 (observing that this form of deference derives from the fact that the foreign court is “recognized by the foreign state as authoritative to determine its law”).

68. See Paulsen, *supra* note 28, at 1774 (“[I]t is important to keep in mind that when international treaties become domestic law, they are U.S. law.”).

69. See *infra* notes 93–95 and accompanying text.

mestic courts. The treaty is, after all, just as much a creature of U.S. law as it is of foreign law. Hence, none of the traditional forms of international comity apply in cases like *Sanchez-Llamas*.

The case for deference might seem stronger under the related notion of uniform treaty interpretation. The principle holds that when multiple nations are party to a treaty, they ought to pay attention to one another's interpretations of that treaty to ensure that the treaty is interpreted uniformly.⁷⁰ Although uniformity arguments are often used rather uncritically in the domestic context,⁷¹ this principle may warrant some degree of interpretive deference to foreign courts in certain circumstances (although it also suggests that foreign courts should sometimes defer to *our* courts).

Treaty cases often involve questions, however, with respect to which uniform treaty interpretation is impossible or irrelevant. Consider, for example, the two VCCR questions in *Sanchez-Llamas*: Should courts remedy VCCR violations by excluding evidence at trial? And should the doctrine of procedural default bar defendants from asserting claims under the VCCR? These questions simply do not arise in the same way—if at all—in other legal systems. Most other legal systems do not exclude evidence as a primary remedy for governmental misconduct,⁷² so a “uniform” interpretation might either impose an unfamiliar remedy on other systems or carve out an odd exception to a common remedy in ours. It follows that the *Sanchez-Llamas* majority would have been wrong to rely upon the failure of other signatories to the VCCR to adopt an exclusionary remedy as a reason to deny such a remedy in *our* legal system.⁷³ Instead, the Court properly framed the relevant question as whether “suppression is required because it is the appropriate remedy for an Article 36 violation under United States law,”⁷⁴—without regard to whether that remedy would promote uniform procedures across signatory nations.

Similarly, the issue of procedural default arises only if a legal system allows some form of collateral review of an initial criminal conviction, but

70. See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) (“We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently.”).

71. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1579–80 (2008) (surveying courts’ and analysts’ acceptance of the goal of uniformity as desirable without critical analysis supporting it).

72. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (proclaiming that the exclusionary rule “is unique to American jurisprudence”); Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399 (2001) (“[T]he second component of *Mapp* has been universally rejected. That is, that once a violation of search and seizure rules has been found, evidence *must* be excluded.”).

73. See 548 U.S. 331, 343–44 (2006) (“The exclusionary rule as we know it is an entirely American legal creation[, and i]t is implausible that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law.”).

74. *Id.* at 345.

most other countries provide nothing analogous to the United States’ habeas system.⁷⁵ American-style habeas is, in fact, an artifact of our federal system and its distrust of state criminal justice systems after the Civil War.⁷⁶ It is accordingly difficult to speak of uniform treaty interpretation with respect to procedural default. More generally, treaty cases in domestic courts often involve the interface between treaty provisions and the domestic legal system. Since the domestic component of that interface obviously varies from country to country, nations cannot settle on uniform answers to these questions.⁷⁷

Chief Justice Roberts reasoned in *Sanchez-Llamas* that “[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department,’ headed by the ‘one supreme Court’ established by the Constitution.”⁷⁸ If there is a case to be made for deference to some other interpreter, it will have to be made by analogy to forms of deference that do apply to domestic law.

C. *Three Models of Deference in Domestic Law*

Justice O’Connor’s influential call for a “federalism of free nations” explicitly invoked not only the “federalist ideal of healthy dialogue and mutual trust” but also the more specific principles of abstention and interpretive deference that undergird that ideal as models for “the proper relationship between domestic courts and transnational tribunals.”⁷⁹ A number of familiar rules require federal courts to defer to other actors—such as state courts or federal administrative agencies—concerning the interpretation of laws that are indisputably part of the domestic legal system. The fact that a law is

75. See Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1182–83 n.174 (2005) [hereinafter Young, *Institutional Settlement*] (distinguishing the American habeas corpus regime from the more limited types of postconviction review or collateral attack that other legal systems offer, such as the Canadian “miscarriage of justice” standard or the French and Italian systems, which seem to offer relief only for “errors that go to the actual innocence of the defendant”).

76. See Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 526 (1983) (“Congress had designed the Habeas Corpus Act of 1867 as a means of enforcing reconstruction policies by giving blacks and unionist white southerners a federal remedy for unconstitutional arrests by state officials.”).

77. Young, *Institutional Settlement*, *supra* note 75, at 1236–37.

78. 548 U.S. 331, 353–54 (2006) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The Chief Justice also cited Justice Stevens’s opinion in *Williams v. Taylor*, 529 U.S. 362, 378–79 (2000)—an opinion rejecting pleas for interpretive deference to state courts on questions of federal law in habeas cases—for the proposition that “[a]t the core of [the judicial] power is the federal courts’ independent responsibility—independent from its coequal branches in the Federal Government and independent from the separate authority of the several States—to interpret federal law.” *Id.* at 354.

79. Sandra Day O’Connor, *Federalism of Free Nations*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 17–18 (Thomas M. Franck & Gregory H. Fox eds., 1996).

“part of our law,” in other words, does not mean that federal courts must have the last word in interpreting it.

Consider first the interpretive deference federal courts deciding issues of state law owe to state courts.⁸⁰ Under *Murdock v. City of Memphis*,⁸¹ state supreme courts are supreme when expounding the content of state law.⁸² (As I frequently remind my students, that’s why they call them “state *supreme* courts.”) The U.S. Supreme Court ordinarily lacks jurisdiction to review a state supreme court’s interpretation of state law, and in those rare cases in which protection of federal rights requires such review, the state court’s interpretation is nonetheless entitled to “respectful consideration and great weight.”⁸³ Likewise, federal courts sitting in diversity must apply state law under *Erie Railroad Co. v. Tompkins*,⁸⁴ and they must defer to the state supreme court as to the meaning of state law.⁸⁵ All of this deference, however, arises from the fact that state law “belongs” to the state courts in a fundamental sense, even though state law is part of the same domestic legal system as federal law. Indeed, state courts may possess—especially with regard to common law matters—broad *lawmaking* authority under state law.⁸⁶

Treaties do not “belong” to foreign courts or supranational courts in the way that state law belongs to the state courts. International law, by definition, is not identified with a particular sovereign.⁸⁷ No foreign or supranational tribunal, therefore, has a greater claim to interpretive authority over a treaty than do the courts of this country.⁸⁸ Unless the United States

80. For a suggestion that domestic courts should apply the same model of deference to ICJ decisions interpreting the VCCR that federal courts apply to state court interpretations of state law, see Robert Greffenus, Comment, *Selling Medellin: The Entourage of Litigation Surrounding the Vienna Convention on Consular Relations and the Weight of International Court of Justice Opinions in the Domestic Sphere*, 23 AM. U. INT’L L. REV. 943, 972–73 (2008).

81. 87 U.S. (20 Wall.) 590, 635–36 (1875).

82. *Id.* at 635–36.

83. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938).

84. 304 U.S. 64 (1938).

85. *See, e.g.*, *King v. United Order of Commercial Travelers*, 333 U.S. 153, 158 (1948) (“[W]hen the issue confronting a federal court has previously been decided by the highest court in the appropriate state; the *Erie R. Co.* case decided that decisions and opinions of that court are binding on federal courts.”); *Cent. Union Tel. Co. v. Edwardsville*, 269 U.S. 190, 195 (1925) (stating that, even where a federal right turns upon a state court’s construction of state law, the construction “declared by the state court . . . should bind [the U.S. Supreme Court] unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it”).

86. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491–94 (1954) (describing the lawmaking authority of the state courts).

87. *Cf.* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 140–41 (Isaiah Berlin, Stuart Hampshire & Richard Wollheim eds., 1954) (1832) (arguing that a law imposed by general opinion, such as international law, is not properly a law because it lacks an institution with power to enforce it).

88. Moreover, the jurisdictional provisions governing many supranational tribunals purport strictly to limit the impact of those tribunals’ decisions to the case before them. *See, e.g.*, Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (“The decision of the Court has no binding force except as between the parties and in respect of that particular

has joined a treaty or passed a law that confers interpretive authority to an international or supranational body, those courts enjoy no greater interpretive authority than American courts. Moreover, the Supremacy Clause, by making treaties “the supreme Law of the Land,” assimilates them to the regime of federal law.⁸⁹ Just as federal courts need not defer to state courts concerning the interpretation of federal statutes, they also need not defer to foreign or supranational tribunals when interpreting federal treaties.

Another form of deference arises from the delegation of primary interpretive authority under *federal* statutes to federal administrative agencies. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁹⁰ courts defer to a federal agency’s interpretation of an ambiguous statute, so long as that interpretation is reasonable.⁹¹ That deference, under current doctrine, is contingent on a delegation of authority to the agency not simply to interpret the statute but also to act with the force of law.⁹² Some of Justice Breyer’s language in *Sanchez-Llamas* seemed to suggest a delegation of this sort: “[T]he ICJ’s position as an international court specifically charged with the duty to interpret numerous international treaties (including the Convention) provides a natural point of reference for national courts seeking . . . uniformity [of treaty interpretation].”⁹³ But the ICJ is only one court among many that must interpret the VCCR. That treaty, if it is to make any real difference in the thousands of cases each year that potentially arise under its provisions, must be enforced primarily by domestic courts.⁹⁴ More generally, treaties rarely designate a foreign or supranational court as the primary interpreter of the agreement, much less authorize that court to act with the force of law required for deference under domestic law.⁹⁵

This is not surprising, since none of the traditional domestic checks on delegated authority are present for foreign or supranational courts. Although

case.”); *see also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 21 (6th ed. 2003) (“Strictly speaking, the [ICJ] does not observe a doctrine of precedent.”).

89. *See, e.g., Vázquez, Treaties as the Law of the Land, supra* note 4, at 606.

90. 467 U.S. 837 (1984).

91. *Id.* at 843.

92. *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001).

93. 548 U.S. 331, 383 (2006) (Breyer, J., dissenting).

94. *See* Ernest A. Young & Carina Cuellar, *Supranational Courts, Presidential Power, and the Medellín Case*, 18 FED. SENT’G REP. 240, 242 (2006) (noting that, aside from enforcement in domestic courts, “[n]o other mechanism—suits at the ICJ, diplomatic efforts by the sending state—seems suited to deal with the thousands of cases likely to arise [under the VCCR] each year”). The ICJ, after all, has only heard 144 cases since its inception in 1947, and most of them do not involve the VCCR. International Court of Justice: Cases, <http://www.icj-cij.org/docket/index.php?p1=3>. Moreover, individuals cannot invoke the ICJ’s jurisdiction. *See* Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1055, T.S. No. 993 (“Only States may be parties in cases before the Court.”).

95. *See, e.g.,* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations art. 3.2, Apr. 15, 1994, 33 I.L.M. 1125 (1994) (providing that “recommendations and rulings of the [World Trade Organization’s Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements”).

the Constitution plainly vests legislative authority in Congress, not in administrative agencies, American administrative law has sought to justify agencies' exercise of broad lawmaking authority by highlighting a number of institutional constraints on agency action. These constraints include broad public participation rights before the agency,⁹⁶ congressional oversight⁹⁷ and budgetary control of agencies,⁹⁸ democratic accountability through the President,⁹⁹ and judicial review for compliance with the agency's statutory mandate under the Administrative Procedure Act.¹⁰⁰ None of these constraints have good analogs at the supranational level, and the absence of these constraints makes broad delegations to supranational actors considerably harder to justify than similar domestic delegations.¹⁰¹

Finally, *Skidmore v. Swift & Co.*¹⁰² represents a lesser form of deference to agency interpretations of statutes. Under *Skidmore*, "[t]he weight of [an agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."¹⁰³ Deference in such cases thus rests not on delegation but on the persuasive quality of the agency's expertise or its deliberative processes.¹⁰⁴ *Skidmore* deference is thus more broadly available than *Chevron* but less categorical in its effect.

96. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1748–56 (1975) (indicating that as courts expanded standing rights in agency proceedings, so too “they have mandated a corresponding expansion of the right to intervene in agency proceedings”).

97. See generally Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165 (1984) (discussing the ways in which Congress oversees agency action).

98. See Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy Decisionmaking in Administrative Agencies*, 75 U. CHI. L. REV. 75, 85 (2008) (“Congress possesses, through its committee structure and budget oversight, the capacity to engage in . . . ongoing oversight of agency implementation of statutes.”).

99. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–39 (2001) (advocating for presidential leadership over administrative agencies that “enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power” and, secondly, “establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former”).

100. See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 143 (1990) (“Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.”).

101. See Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1560–66 (2004) [hereinafter Swaine, *International Delegation*] (identifying special concerns arising from delegations of authority to supranational institutions).

102. 323 U.S. 134 (1944).

103. *Id.* at 140.

104. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1249 (2007) (noting that *Chevron* deference rests on a

It will generally be difficult to make the case, however, that foreign or supranational courts have any clear entitlement to deference on *Skidmore*'s criteria.¹⁰⁵ In *Sanchez-Llamas*, for instance, the ICJ is no less a generalist court than is the U.S. Supreme Court; it hears disputes concerning a wide variety of international law principles, and VCCR cases make up a small proportion of its docket.¹⁰⁶ It would be difficult, moreover, to defend the ICJ's deliberative processes as plainly superior to those of the domestic courts.¹⁰⁷ In certain circumstances—if, for example, a particular foreign court has extensive experience with a particular type of claim or issue arising under a particular treaty—a *Skidmore*-type rationale may favor some degree of deference to a foreign or supranational tribunal. But this model hardly affords a basis for any sort of broad or categorical deference to such courts in treaty cases.

These examples do not exhaust the situations in which federal courts may defer to other actors' interpretations of domestic law.¹⁰⁸ They ought to suffice to illustrate my fundamental point, however, that the usual reasons for deference evaporate when treaties are not considered to be mysterious or alien, but rather part of our law. Chief Justice Roberts was thus correct to say, in *Sanchez-Llamas*, that if “treaties are to be given effect as federal law under our legal system,” then American courts must be willing “to say what the law is” without deference to foreign or supranational tribunals.¹⁰⁹

II. Self-Execution

Not long after its decision in *Sanchez-Llamas*, the Supreme Court addressed an even more fundamental question concerning the domestic status of treaties—that is, when treaties should be considered self-executing within the domestic legal system. The self-execution issue is typically traced to

“presumption that Congress chose an agency rather than the courts to be the primary interpreter of a given statutory scheme,” while *Skidmore* deference “merely reflects a policy of judicial prudence”).

105. See Young, *Institutional Settlement*, *supra* note 75, at 1243–48 (discussing the institutional competence of supranational courts).

106. See John R. Crook, *The International Court of Justice and Human Rights*, 1 NW. U. J. INT'L HUM. RTS. 2, 2–3 (2003) (“There have been a few ICJ . . . decisions significantly contributing to human rights law, but historically they have been a small part of the docket.”).

107. See, e.g., Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 618–26 (2005) (finding bias by ICJ judges in favor of their home state and similarly situated states).

108. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (illustrating the Court's deference to a federal agency's interpretation of its own regulations).

109. 548 U.S. 331, 353–54 (2006) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see also Paulsen, *supra* note 28, at 1796 (“*Sanchez-Llamas* and [*Medellin*] stand for the proposition that the constitutional power to interpret international treaties to which the United States is a party is a domestic U.S. constitutional power to be exercised by U.S. constitutional actors (including the federal courts), and that such a power can never be deemed ceded to non-U.S. actors or institutions.”).

Chief Justice Marshall's opinion in *Foster v. Neilson*,¹¹⁰ which said that because a treaty is "the law of the land" under the Supremacy Clause, it must "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."¹¹¹ Marshall added, however, that "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."¹¹² American law thus occupies an uncomfortable middle ground between the theoretical extremes of "monism" and "dualism";¹¹³ sometimes treaties have direct effect within the domestic legal system, and sometimes they must be implemented by the political branches. Almost two centuries after *Foster*, there is little consensus about how to approach these questions.¹¹⁴

The Supreme Court confronted the self-execution issue most recently in *Medellín v. Texas*¹¹⁵—another case involving the effect of the ICJ's judgment in the *Avena* case on domestic litigation under the VCCR.¹¹⁶ *Medellín* held that the *Avena* judgment was not self-executing and, therefore, did not bind either the Texas courts or the Supreme Court in the absence of domestic legislation implementing that judgment.¹¹⁷ Because it involved the self-executing effect of a *judgment* rather than a treaty and because the Court did not offer any hard-and-fast rules concerning the self-execution question, *Medellín* did not answer the self-execution question nearly so definitively as *Sanchez-Llamas* answered the question of interpretive deference.

110. 27 U.S. (2 Pet.) 253 (1829).

111. *Id.* at 314.

112. *Id.* Professor Vázquez has argued that the Marshall Court overruled *Foster* just four years later in *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88–89 (1833), which held the same treaty involved in *Foster* self-executing in different circumstances. Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 628, 644–45. As Professor Bradley points out, however, *Percheman* is distinguishable from *Foster* on the important ground that, in the latter case, the treaty provision in question "did not pose a potential conflict with preexisting statutes." Bradley, *Self-Execution*, *supra* note 26, at 162.

113. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 31–32 (7th ed. 2008); Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530 (1999) [hereinafter Bradley, *Our Dualist Constitution*] (both defining "monism" and "dualism"). It bears emphasis that each nation's choice of how to implement its international obligations is a question of *domestic* law. See Bradley, *Self-Execution*, *supra* note 26, at 157 ("Although this decision may have international consequences, it does not typically involve an international bargain, and it is not determined by international law.").

114. See Bradley, *Our Dualist Constitution*, *supra* note 113, at 530–31 (explaining that the two basic viewpoints concerning the relationship between international and domestic law are monism and dualism, and although dualism was the prevailing view throughout the second half of the twentieth century, there has been a revival of monist thought); Wu, *supra* note 3, at 579 ("[S]elf-execution problems are universally regarded as both confusing and confused.").

115. 128 S. Ct. 1346 (2008).

116. *Id.* at 1352–53.

117. *Id.* at 1373–74.

Nonetheless, I want to argue that the general thrust of *Medellín*—that nothing in the Constitution requires that treaties be self-executing and the matter is one of interpreting the intent of the treaty makers under any given agreement—is correct.

A. *The Debate About Self-Execution*

The leading foreign-relations-law casebook defines a self-executing treaty “at the most general level” as “a treaty that can be enforced by courts without domestic implementing legislation.”¹¹⁸ As Carlos Vázquez has shown, however, “self-execution” really encompasses a category of distinct questions concerning a treaty’s domestic legal effect.¹¹⁹ The latest version of Professor Vázquez’s account defines the following four categories of non-self-executing treaties:

- “treaties that do not create a private right of action”;¹²⁰
- “treaties that purport to accomplish something for which the Constitution requires a statute”;¹²¹
- “treaties that impose obligations that are nonjusticiable because they call for judgments of a nonjudicial nature”;¹²² and
- *Foster v. Neilson* non-self-execution—that is, “treaties that require prior implementation because of what the treaty itself has to say about the need for legislative implementation.”¹²³

The first of these categories—no private right of action—is not necessarily a doctrine of non-self-execution at all because it leaves open the possibility that a court could enforce the treaty in some other ways. These alternative mechanisms might include recognizing a defense based on the treaty or allowing a plaintiff to assert treaty rights offensively where some other vehicle (such as 42 U.S.C. § 1983) provides the private right of action.¹²⁴ As these mechanisms make clear, the private-right-of-action issue is simply one of a variety of remedial questions that must be addressed under each treaty, even if that treaty is self-executing in some sense. In many cases, these sorts of specific remedial questions may be considerably more

118. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 377 (2d ed. 2006).

119. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 695 (1995) [hereinafter Vázquez, *Four Doctrines*] (proposing that there are four distinct doctrines of self-executing treaties).

120. Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 629.

121. *Id.* at 630.

122. *Id.* at 631.

123. *Id.* at 628–29, 631–32.

124. *Id.* at 630.

salient than the general issue of whether the treaty has *any* self-executing effect.¹²⁵

Professor Vázquez's second category describes treaties calling for actions—such as appropriating funds or imposing criminal penalties—that only Congress can perform under our Constitution.¹²⁶ The third is a doctrine of nonjusticiability similar to the domestic political question doctrine, which forecloses judicial enforcement of constitutional provisions when there is “a lack of judicially discoverable and manageable standards” or a court cannot decide “without an initial policy determination of a kind clearly for nonjudicial discretion.”¹²⁷ And the fourth is “primarily a matter of intent”¹²⁸—that is, the parties (or perhaps the U.S. treaty makers unilaterally)¹²⁹ can require legislative implementation before a treaty has domestic legal effect if they so choose. According to Vázquez, only this fourth sort of non-self-execution “is unique to treaties.”¹³⁰

At the risk of complicating matters further, I think we can be still more specific about the ways in which a treaty might be non-self-executing in the *Foster* sense. The initial two categories have to do with the nature of the obligations the treaty imposes. First, the treaty's provisions may be so open-ended or vague as to suggest that the parties intended the treaty (or portions thereof) to be hortatory or aspirational. A number of multilateral human rights instruments have this quality.¹³¹ U.S. treaty makers have often appended reservations or declarations to treaties explicitly denying them self-executing effect,¹³² but treaties have been held non-self-executing even in the absence of such measures.¹³³ Second, a treaty may contemplate specific ac-

125. In this vein, Mr. Sanchez-Llamas's argument for exclusion of evidence as a remedy for violation of a defendant's VCCR rights posed a more specialized remedial question. See *supra* notes 72–76 and accompanying text.

126. Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 630.

127. *Id.* at 631 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

128. Vázquez, *Four Doctrines*, *supra* note 119, at 722.

129. Scholars have debated whether the relevant intent for American courts construing a treaty under *Foster* is that of the signatory nations or of the U.S. treaty makers only. Compare, e.g., Bradley, *Self-Execution*, *supra* note 26, at 132 (arguing that courts should focus on the intent of the U.S. treaty makers), with Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 640 (rejecting the view that only U.S. intent counts). For the remainder of this Section, I want to bracket that debate and refer simply to the parties for reasons of word economy.

130. Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 632.

131. See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 n.4 (7th Cir. 1985) (finding Article 55 of the UN Charter, commanding “universal respect for, and observance of, human rights and fundamental freedoms,” non-self-executing on this ground).

132. See, e.g., David Sloss, *The Domestication of International Human Rights: Non-self-executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 131 (1999) (describing the United States' inclusion of “not self-executing” declarations in the ratification instruments of three recent, major human rights treaties).

133. See, e.g., *Goldstar (Pan.) S.A. v. United States*, 967 F.2d 965, 968–69 (4th Cir. 1992) (holding that the Hague Convention is not self-executing because the document does not evidence an intent to provide a private right of action); *Frolova*, 761 F.2d at 374 (giving reasons that the UN Charter is not self-executing); Bradley, *Our Dualist Constitution*, *supra* note 113, at 540–41

tion by national governments to implement its terms, much as a regulatory statute might direct an administrative agency to address a particular problem but leave development of the operative regulations to the agency. In these circumstances, the treaty is simply a directive to legislate at the domestic level.

The other two categories go to remedies. In the third category, a treaty may impose obligations that bind domestic actors without further action by domestic governments but leave enforcement of those obligations to alternative, nonjudicial mechanisms. In *Medellín*, for example, the Court held that ICJ judgments are not directly enforceable in domestic courts in part because the UN Charter provides a different procedural mechanism for their enforcement by the Security Council.¹³⁴ Finally, a treaty may not envision some specific alternative enforcement mechanism but instead rely “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.”¹³⁵ In such cases, “the judicial courts have nothing to do and can give no redress.”¹³⁶

The multiplicity of questions marching under the banner of non-self-execution makes it difficult to talk about the issue in any sort of general way. Nonetheless, I think it might be fair to sum up the current debate roughly in the following manner: Everyone agrees there are some things the treaty makers must leave to Congress (Professor Vázquez’s second category), and most thoughtful observers recognize that remedial questions like the availability of a private right of action (the first category) will remain even if a treaty is found to be self-executing generally. Vázquez’s third and fourth categories (nonjusticiability and *Foster* non-self-execution) are then commonly lumped together for purposes of arguing about whether treaties should generally, or presumptively, be considered self-executing or non-self-executing. I do not mean to quarrel overmuch with this sort of rough cut at the question, although I do think that disaggregating nonjusticiability and the various forms of *Foster* non-self-execution can help us to identify analogous phenomena in domestic law.

The argument that treaties should generally—or always—be treated as self-executing purports to derive straightforwardly from the Supremacy

(explaining that U.S. treaty makers often attach the condition that the treaty is not self-executing; even without such an express statement, courts essentially presume treaties are not self-executing).

134. *Medellín v. Texas*, 128 S. Ct. 1346, 1359 (2008) (“The remainder of Article 94 confirms that the U.N. Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts. Article 94(2)—the enforcement provision—provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state.”).

135. *The Head Money Cases*, 112 U.S. 580, 598 (1884).

136. *Id.*

Clause.¹³⁷ That clause explicitly incorporates treaties into domestic law, and the relevant history strongly suggests that this language was a deliberate attempt to depart from the British rule, which held that a treaty could not alter domestic law without action by Parliament.¹³⁸ One of the principal defects of the Articles of Confederation had been its lack of a mechanism for guaranteeing the enforcement of international agreements, such as the Treaty of Paris that ended the Revolutionary War.¹³⁹ According to Professor Vázquez, “The Founders were anxious to avoid treaty violations because such violations threatened to provoke wars and otherwise complicate relations with more powerful nations. The Founders also wanted to establish a reputation for treaty compliance to induce other nations to conclude beneficial treaties with the new nation.”¹⁴⁰ Vázquez argues that the Supremacy Clause furthered these goals by rendering treaties “enforceable in court without the need for prior legislative implementation or incorporation into domestic law.”¹⁴¹

This history is not undisputed,¹⁴² and one may question more fundamentally the extent to which originalist materials should dominate contemporary debates about foreign relations law, given the many radical changes in both the nature of international law and the United States’ place in the world since the founding.¹⁴³ For the most part, however, I want to side-

137. See, e.g., Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760 (1988) (“The distinction found in certain cases between ‘self-executing’ and ‘non-self-executing’ treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that ‘all Treaties . . . shall be the supreme Law of the Land.’”).

138. Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 614–16. The British rule appears to have originated in the fact that treaty making was part of the Crown’s prerogative power, but the power to alter domestic law remained vested in Parliament. *Id.* at 614 (quoting 14 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 67 (1964)).

139. See BRADFORD PERKINS, THE CREATION OF A REPUBLICAN EMPIRE, 1776–1865, at 61 (1993) (observing that under the Articles of Confederation state action on occasion contradicted treaties and these violations served as an impetus to the reform movement).

140. Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 617–18; see also Carlos Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1102–03 (1992) (recounting the framers’ concerns about treaty compliance).

141. Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 618. *But see* Bradley, *Self-Execution*, *supra* note 26, at 146–47 (arguing that the Supremacy Clause was oriented toward the federalism problem of ensuring state compliance with treaties, not toward the separation-of-powers problem of self-execution).

142. See, e.g., John C. Yoo, *Globalism and the Constitution: Treaties, Non-self-execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1955 (1999) (arguing that the framers believed the Constitution required the consent of Congress before treaties could have any domestic effect).

143. See, e.g., Bradley, *Self-Execution*, *supra* note 26, at 131–32 (questioning originalism’s ability to address contemporary issues, such as legislative-style multilateral treaties, which were not contemplated by the founders); Ernest A. Young, *Historical Practice and the Contemporary Debate over Customary International Law*, 109 COLUM. L. REV. SIDEBAR 31, 35–39 (2009), http://www.columbialawreview.org/Sidebar/volume/109/31_Young.pdf [hereinafter Young, *Historical Practice*] (noting that changes in the United States’s status as an international actor, increases in the amount and complexity of international relations, and growing complexity in

step each of these debates here. Accepting that the Supremacy Clause requires courts to treat treaties similarly to federal statutes, I argue here that internationalist conclusions on self-execution do not follow. Supreme federal law in the domestic context actually takes a variety of forms: some statutes create judicially enforceable rights, but some do not; some judicially enforceable rights may be enforced by private rights of action, but some may not; some statutes are simply contracts between the states and the federal government, the performance of which are governed largely by politics and the good faith of the parties. This multifarious view of supreme federal law mirrors, in important respects, the various approaches to particular treaties that result from rejecting a blanket view of self-execution. The idea that some treaties are not self-executing, in other words, is wholly consistent with the notion that treaties are “part of our law.”

B. Medellín, Supranational Judgments, and the Treaty Debate

The VCCR claim in *Medellín* was similar to that raised by Mr. Bustillo in *Sanchez-Llamas*. José Ernesto Medellín was a Mexican national who had lived in the United States since the age of three.¹⁴⁴ In 1993, Mr. Medellín participated in the brutal gang rape and murder of two teenage girls in Houston.¹⁴⁵ Medellín later confessed to having strangled one of the two girls with her own shoelaces.¹⁴⁶ He was convicted of capital murder in Texas state court and sentenced to die, and the Texas courts affirmed both the conviction and sentence on direct review.¹⁴⁷ Not until his first application for state postconviction relief did Medellín raise the objection that the Houston police had failed to notify him of his rights under the VCCR.¹⁴⁸ Medellín’s claim thus faced the same procedural default obstacle that derailed Bustillo’s claim in *Sanchez-Llamas*; like Bustillo, moreover, Medellín invoked the ICJ’s ruling in *Avena* that the VCCR trumps state procedural default rules.¹⁴⁹

Unlike Mr. Bustillo, however, Mr. Medellín was one of the fifty-one Mexican nationals encompassed by the *Avena* ruling.¹⁵⁰ Medellín was thus at least arguably entitled to invoke *Avena*, not simply as a possibly authoritative

international law limit the usefulness of historical perspectives in evaluating current international law).

144. *Medellín Execution Draws Little Attention in Mexico*, DALLAS MORNING NEWS, Aug. 6, 2008, available at <http://www.dallasnews.com/sharedcontent/dws/news/world/mexico/stories/080608dnintmedellinmexico.1df0681e.html>.

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

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1356.

150. *Id.* at 1350.

construction of the VCCR by the ICJ, but as a *judgment* in a case to which he and the United States were both parties.¹⁵¹ As Justice Breyer explained,

This Court's *Sanchez-Llamas* interpretation binds our courts with respect to individuals whose rights were not espoused by a state party in *Avena*. . . . [T]he question here is the very different question of applying the ICJ's *Avena* judgment to the very parties whose interests Mexico and the United States espoused in the ICJ *Avena* proceeding.¹⁵²

When a party to a prior decision seeks to invoke the judgment against another party, of course, it is generally no defense to say that the prior decision was wrong on the merits.¹⁵³ The principal question in *Medellín* was thus whether the Court would accord more deference to the judgment force of *Avena* than *Sanchez-Llamas* accorded to that case's *precedential* force.¹⁵⁴

Given this posture, *Medellín* did not raise directly the question whether the VCCR itself is self-executing.¹⁵⁵ Most observers have assumed that it is, in the sense that the treaty bound the Houston police to provide consular notification to Mr. Medellín even in the absence of a statute implementing the VCCR's obligations on host countries.¹⁵⁶ The Executive Branch said as much when it transmitted the VCCR to the Senate for ratification in 1969, declaring that the treaty was "entirely self-executing and does not require any

151. The majority and dissent sparred over this point. Chief Justice Roberts invoked the terms of the ICJ's statute, which provide that only states may be parties before the ICJ, Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1055, 1059, T.S. No. 993, to conclude that "Medellín does not and cannot have a case before the ICJ under the terms of the ICJ Statute," *Medellín*, 128 S. Ct. at 1360 n.7. In response, Justice Breyer noted that claims such as Mexico's before the ICJ, which espouse the claims of particular individuals, "are a well-established feature of international law" and "treated . . . as the claims of the represented individuals themselves." *Id.* at 1387 (Breyer, J., dissenting). "In particular, they can give rise to remedies, tailored to the individual, that bind the Nation against whom the claims are brought." *Id.* (citing 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. a-b (1987)). Justice Breyer is certainly right that Mr. Medellín was no stranger to the ICJ litigation in the way that a nonparty would generally be to an ordinary domestic civil suit. But the sources Justice Breyer cited hardly establish the proposition that an individual may invoke as binding, in a domestic court, a judgment secured on his behalf by his government in a supranational suit against another nation. In any event, the majority did not treat this point as crucial.

152. *Medellín*, 128 S. Ct. at 1386 (Breyer, J., dissenting).

153. *See, e.g.*, 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 106 (1971) ("A judgment will be recognized and enforced in other states even though an error of fact or law was made in the proceedings before judgment . . .").

154. *See generally* Young, *Judgments and Precedents*, *supra* note 65, at 489–91 (discussing *Medellín*).

155. *See Medellín*, 128 S. Ct. at 1357 n.4 (reserving this question).

156. *See, e.g.*, *Medellín v. Dretke*, 544 U.S. 660, 686 (2005) (O'Connor, J., dissenting) ("Article 36 of the Vienna Convention on Consular Relations is, as the United States recognizes, a self-executing treaty."). This is the view of the Houston police. *See* Houston Police Dep't, Circular No. 06-0821-246, Aug. 21, 2006 (on file with Texas Law Review) (stating that federal and state decisions limiting the enforceability of VCCR rights "do not relieve government entities of their duty to comply with the treaty").

implementing or complementing legislation.”¹⁵⁷ It is less clear whether the VCCR confers rights on individuals that are directly enforceable by them in domestic courts.¹⁵⁸ The Court assumed in both *Sanchez-Llamas* and *Medellín* that the VCCR does confer such rights, but the Supreme Court did not actually decide that question and the federal circuit courts are divided.¹⁵⁹

The issue in *Medellín*, by contrast, concerned whether the ICJ’s judgment in *Avena*, which restricted the effect of procedural defaults in VCCR cases, was self-executing in the absence of direction from Congress as to the effects of ICJ judgments. As Chief Justice Roberts put it, “The question is whether the *Avena* judgment has binding effect in domestic courts under the Optional Protocol, ICJ Statute, and U.N. Charter.”¹⁶⁰ These three sources—all treaties of the United States—provide the procedural framework for resolving disputes under the VCCR. The Optional Protocol provides that “[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice.”¹⁶¹ Article 94 of the United Nations Charter, in turn, says that “[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.”¹⁶² And the ICJ Statute further provides that a “decision of the [ICJ] has no binding force except between the parties and in respect of that particular case.”¹⁶³

157. S. EXEC. REP. NO. 91-9, app. at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Dep’t of State).

158. See, e.g., Young & Cuellar, *supra* note 94, at 241–42 (surveying this issue).

159. See *Medellín*, 128 S. Ct. at 1357 n.4 (noting that it was unnecessary to resolve whether the Vienna Convention is itself “self-executing” or whether it grants individually enforceable rights but stating that the Court would assume that Article 36 of the VCCR grants foreign nationals an individually enforceable right); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 342–43 (2006) (stating that for the purposes of addressing the petitioners’ claims, the Court would assume, without deciding, that Article 36 of the VCCR does confer individually enforceable rights). Compare, e.g., *United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002) (assuming an individually enforceable right under the VCCR to deny a remedy sought—restriction on the range of penalties available to federal prosecutors), with *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990) (denying standing to individuals to challenge violations of international treaties without the involvement of their sovereigns). For criticism of the Court’s failure to decide whether the VCCR creates individually enforceable rights in *Sanchez-Llamas*, see *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 310–12 (2006). The circuits are also divided as to whether foreign nationals may bring a VCCR claim under 42 U.S.C. § 1983. Compare, e.g., *Jogi v. Voges*, 480 F.3d 822, 826–28 (7th Cir. 2007) (holding that they can), with *Cornejo v. County of San Diego*, 504 F.3d 853, 855 (9th Cir. 2007) (holding that they cannot).

160. *Medellín*, 128 S. Ct. at 1357 n.4.

161. Optional Protocol Concerning the Compulsory Settlement of Disputes, art. I, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. Only 44 of the 170 states that are party to the VCCR itself are also parties to the Optional Protocol. Young, *Judgments and Precedent*, *supra* note 65, at 487 n.44. The U.S. withdrew from the Optional Protocol in the wake of the *Avena* decision. See *supra* note 55.

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

163. Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 1062, T.S. No. 993.

The straightforward Supremacy Clause argument for self-execution of treaties is plainly unavailable for judgments, which that Clause does not mention.¹⁶⁴ Within the domestic legal system, judgments are rendered effective by the Full Faith and Credit Clause and its accompanying statute,¹⁶⁵ not by the Supremacy Clause. And as the *Medellín* majority pointed out, Congress has frequently enacted legislation specifying the effects of judgments rendered by supranational and foreign courts.¹⁶⁶ The Court cited, for example, explicit federal legislation rendering judgments under the International Convention on the Settlement of Investment Disputes and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards enforceable in domestic courts.¹⁶⁷ It could also have cited legislation implementing the World Trade Organization (WTO) and North American Free Trade Agreements, which both provide procedures for enforcing arbitral awards rendered under those agreements and sharply limit the extent to which those decisions can directly affect domestic law.¹⁶⁸ Absent an implementing statute, the Court concluded that “while the ICJ’s judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that preempts state restrictions on the filing of successive habeas petitions.”¹⁶⁹

164. One might have argued that American courts were obligated to respect the *Avena* judgment as a matter of international comity rather than relying on the Supremacy Clause. See, e.g., Anne-Marie Slaughter, *Agora: Breard: Court to Court*, 92 AM. J. INT’L L. 708, 709 (1998) (“[I]nternational comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and competence of foreign tribunals.”). Neither the majority nor the dissent in *Medellín* relied on this argument, and Paul Stephan has explained why it does not fly: Comity is based on reciprocity, and reciprocity can exist only among States. Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. 11, 17–20 (2009). Domestic courts thus have no reciprocal obligations of comity toward stateless international organizations like the ICJ. *Id.*

165. See U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”); Act of June 25, 1948, ch. 646, 62 Stat. 947 (codified as amended at 28 U.S.C. § 1738 (2006)) (“The records and judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.”).

166. *Medellín v. Texas*, 128 S. Ct. 1346, 1365–66 (2008).

167. *Id.* at 1366 (citing 22 U.S.C. § 1650a(a) (2006); 9 U.S.C. §§ 201–208 (2006)). On the binding effects of foreign arbitral awards, see generally Young, *Judgments and Precedents*, *supra* note 65, at 480–84, 512–13.

168. See, e.g., North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3512(a)(1) (2000) (“No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”); *id.* § 3512(c)(1)(B) (prohibiting challenges to government conduct on the ground that the conduct violates WTO obligations); NAFTA, 19 U.S.C. § 3312(b)(2) (2000) (“No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid.”).

169. *Medellín*, 128 S. Ct. at 1367.

Although the Court’s conclusion in *Medellín* is best understood as a holding that the *Avena* judgment itself was not self-executing, one might alternatively think of the case as implicating the self-executing effects of the underlying treaties—not the obligations of the VCCR itself, but rather the dispute-resolution provisions of the Optional Protocol and, more directly, Article 94 of the UN Charter.¹⁷⁰ The key question of treaty construction was thus what the parties to the Charter meant by saying that each Member of the UN “undertakes to comply” with ICJ judgments. The majority read this language *not* to confer self-executing force on the ICJ’s judgments for three reasons: first, the treaty lacked any language indicating that ICJ judgments would have that effect;¹⁷¹ second, the Executive’s position that Article 94 did not have that effect was “entitled to great weight”;¹⁷² and third, “[t]he UN Charter’s provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts.”¹⁷³

Justice Breyer’s dissent in *Medellín*, as well as much of the commentary on the case, focused on the first of these arguments at the expense of the other two. Because different legal systems have quite different approaches to the self-execution question—that is, some are monist, some are dualist, and some occupy intermediate positions—Justice Breyer suggested that it would be unrealistic to expect state parties to multilateral instruments like the VCCR to agree on explicit language specifying a treaty’s domestic effect.¹⁷⁴ Hence, Breyer concluded,

[T]he absence or presence of language in a treaty about a provision’s self-execution proves nothing at all. At best the Court

170. *See id.* at 1358 (“The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions.”).

171. *See id.* at 1358–59 (stating that Article 94 lacks language indicating that the United States “shall” or “must” comply with ICJ decisions, does not require the U.S. Senate to give ICJ decisions immediate legal effect in U.S. courts upon ratification of the UN Charter, and only provides a nonjudicial remedy for aggrieved states, referral to the UN Security Council); *see also id.* at 1373 (Stevens, J., concurring in the judgment) (“In my view, the words ‘undertakes to comply’—while not the model of either a self-executing or a non-self-executing commitment—are most naturally read as a promise to take additional steps to enforce ICJ judgments.”).

172. *See id.* at 1361 (majority opinion) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)) (holding that the United States’ interpretation of a treaty is “entitled to great weight”).

173. *Id.* at 1359. This argument was predicated on Article 94 of the Charter, which provides, If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. U.N. Charter art. 94, para. 2.

174. *Medellín*, 128 S. Ct. at 1381 (Breyer, J., dissenting); *see also* Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 607 (“Domestic constitutional rules on treaty enforcement . . . differ widely among states. Thus, except in the rarest of cases, courts searching for a common intent of the parties regarding the need for implementing legislation do so in vain.”).

is hunting the snark. At worst it erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.¹⁷⁵

Rather than look to the language of the treaty itself, Justice Breyer proposed an open-ended analysis based on “practical, context-specific criteria” to answer the self-execution question.¹⁷⁶ And he gave short shrift to the majority’s remaining arguments. Breyer largely ignored the majority’s deference to the President’s determination that ICJ judgments are not self-executing, in contrast to Breyer’s apparent willingness to accord the President broad authority to implement international obligations without congressional action.¹⁷⁷ And Breyer found the existence of an alternative-dispute-resolution procedure at the Security Council wholly irrelevant,¹⁷⁸ notwithstanding an established line of cases on the domestic side inferring that specific dispute mechanisms under a statute impliedly exclude recourse to more general rights of action like *Bivens*¹⁷⁹ or § 1983.¹⁸⁰

Some commentators have read *Medellín* as establishing a presumption that treaties are *not* self-executing.¹⁸¹ I think this rather drastically overreads Chief Justice Roberts’s opinion, which I take to stand for the simple proposition that “some treaties are self-executing and some are not, depending on the

175. *Medellín*, 128 S. Ct. at 1381–82 (Breyer, J., dissenting). *But see* Bradley, *Self-Execution*, *supra* note 26, at 21 (“Treaty text is relevant [to self-execution] because it is what the Senate and President specifically approve This is true . . . regardless of whether the treaty text would mean something different to other treaty parties on this question of self-execution . . .”).

176. *Compare Medellín*, 128 S. Ct. at 1382–83 (Breyer, J., dissenting) (looking to factors such as the treaty’s text, history, and subject matter, to whether it set forth “specific, detailed individual legal rights,” and to the likelihood of “undesirable conflict with the other branches”), *with id.* at 1362 (majority opinion) (calling the dissent’s approach “arrestingly indeterminate” and warning that it would allow courts to “pick and choose which [treaties] shall be binding United States law”).

177. *See id.* at 1390 (Breyer, J., dissenting) (“It is difficult to believe that in the exercise of his Article II powers pursuant to a ratified treaty, the President can *never* take action that would result in setting aside state law.”). Justice Breyer also joined majority opinions deferring to executive foreign affairs powers in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), and *American Insurance Ass’n v. Garamendi*, 539 U.S. 396 (2003).

178. *See id.* at 1385 (“But what has that to do with the matter?”). Justice Breyer suggested that the Security Council procedure should be reserved for “politically significant ICJ decisions, not, e.g., the bread-and-butter commercial and other matters that are the typical subjects of self-executing treaty provisions.” *Id.* Breyer did not explain why he thought overturning a capital murder conviction in a high-profile case was not “politically significant.”

179. *See, e.g.,* *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *Bush v. Lucas*, 462 U.S. 367, 375–76, 390 (1983) (both holding that no implied right of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is available where Congress has provided an alternative statutory remedial scheme).

180. *See, e.g.,* *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 14–15 (1981) (holding that plaintiffs could not sue under § 1983 for federal statutory violations where the specific statutes involved provided their own mechanisms for relief).

181. *See, e.g.,* Posting of Mike Dorf to Dorf on Law, <http://michaeldorf.org/2008/03/more-medellin-musings.html> (Mar. 26, 2008, 13:33 EST) (reading *Medellín* to establish a “presumption that, absent language to the contrary, a treaty should be deemed non-self-executing”).

treaty.”¹⁸² The anti-self-execution reading relies heavily on the Court’s directive to look to the treaty’s text, coupled with the expectation—voiced by Justice Breyer—that treaty text almost never says anything useful about the question. By requiring evidence of self-execution that almost never exists, the argument goes, the Court has effectively guaranteed that courts will find many or most treaties are non-self-executing.¹⁸³ But this reading ignores the importance that the majority attached to the Executive’s interpretation of the treaty and to the treaty’s *structure*—that is, to its provision of an alternate remedial scheme outside the realm of judicial enforcement.

More generally, the Court’s decision was likely driven by the extraordinary nature of what Mr. Medellín asked the Court to do. The question before the Court was not simply whether a particular substantive treaty provision was self-executing, but rather whether the relevant treaties empowered the ICJ—a supranational court—to *make* law that would become binding domestically without further intervention by the national political branches.¹⁸⁴ As Curt Bradley has noted, U.S. treaties generally do not “purport to convert the decisions and actions of international institutions into self-executing federal law.”¹⁸⁵ *Medellín* interpreted the VCCR and its Optional Protocol to be consistent with this pattern.

An important objection to this view proceeds by analogy to domestic statutes delegating lawmaking authority to federal administrative agencies. Ed Swaine points out that “if the treaties in question do not themselves give domestic legal force to the delegated actions . . . then international delegations are qualitatively different from domestic delegations, since legislative authority exercised by executive agencies typically *does* have legal force.”¹⁸⁶ The Supreme Court has acknowledged, for example, that “[f]ederal regulations have no less pre-emptive effect than federal statutes,”¹⁸⁷ even though the Supremacy Clause speaks only of “the Laws of the United States which shall be made in Pursuance” of the Constitution—not of actions by adminis-

182. *Medellín*, 128 S. Ct. at 1365; accord Posting of Nick Rosenkranz to The Federalist Society Ongoing Debate Series: *Medellín v. Texas*, Part I: Self-Execution, <http://www.fed-soc.org/debates/dbtid.17/default.asp> (Mar. 28, 2008) (“[I]t is noteworthy that none of the Justices (expressly) resorted to a *presumption* to resolve this question [of self-execution].”).

183. See *Medellín*, 128 S. Ct. at 1381–82 (Breyer, J., dissenting) (lamenting that almost no treaties—including those held to be self-executing—contain direct textual cues saying that they are self-executing).

184. Moreover, Mr. Medellín asked the Court to so hold in a case where the particular law being made by the ICJ had already been rejected by one of the Court’s decisions not two years before. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006) (declaring that default state procedural rules must be followed despite an inconsistent result with the ICJ’s interpretation of Article 36 of the Vienna Convention).

185. Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-self-execution*, 55 STAN. L. REV. 1557, 1589 (2003).

186. Swaine, *International Delegations*, *supra* note 101, at 1553.

187. *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

trative agencies.¹⁸⁸ If this analogy holds, then perhaps the works of supranational institutions exercising delegated authority—perhaps including the ICJ’s judgments—should be accorded the status of supreme federal law.

The Court has never explained, however, why it is appropriate to treat administrative agency actions as equivalent to federal statutes, even though the Supremacy Clause mentions the latter but not the former. Moreover, the Court has continued to insist that real lawmaking power cannot be delegated,¹⁸⁹ and even in administrative preemption cases, the Court has generally kept its focus squarely on Congress’s actions and Congress’s intent.¹⁹⁰ In any event, the analogy does not hold; supranational delegations are far more problematic, and consequently much more limited and rare, than domestic ones.¹⁹¹ As I have already mentioned, Congress has ample mechanisms for supervising and checking administrative agency action that simply do not exist with respect to supranational courts.¹⁹² The lack of checks makes it singularly inappropriate to treat a supranational judgment as equivalent, for Supremacy Clause purposes, to the act of the treaty makers themselves.

Medellín was an unusual case, and it seems risky to draw from it a categorical rule that self-execution either is or is not presumptively favored in treaty cases.¹⁹³ But given the increasing pervasiveness of treaty law,¹⁹⁴ as

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

189. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472–73 (2001) (re-emphasizing that Article I, Section 1 of the Constitution precludes the delegation of lawmaking powers).

190. See *Fid. Fed. Sav. & Loan*, 458 U.S. at 152–54 (discussing the modes of analysis used to determine congressional intent in preemptive legislation); see also Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2133–35 (2008) (concluding that the preemptive effect of an administrative regulation depends on Congress’s intent).

191. See Stephan, *supra* note 164, at 14 (“[A]s a practical matter, we have yet to encounter a pure delegation by the United States of legislative or executive power to an international organization.”).

192. See *supra* notes 96–101 and accompanying text.

193. Professor Vázquez argues that *Medellín* is best read as recognizing—or at least accepting—a presumption favoring self-execution. Vázquez offers a whole range of interpretations of the Court’s opinion, one of which would “embrace[] a default rule of self-execution rebuttable by evidence of an intent to require implementing legislation.” Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 657. This reading rests on an idiosyncratic reading of the Court’s *Youngstown* analysis, and Vázquez admits that *Medellín*’s “tone and much of its analysis point the other way.” *Id.* He also offers a somewhat more plausible reading of *Medellín* as an instance of nonjusticiability because “Article 94 left the parties to the Charter . . . with some discretion not to comply,” and this discretion was nonjudicial in nature. *Id.* at 660. If this is the case, Vázquez contends, then *Medellín* would represent an entirely distinct form of non-self-execution from that involved in *Foster* and *Percheman* and would not disturb the general presumption in favor of self-execution that he finds in those cases. *Id.* at 608, 660–65. This reading, too, seems strained. As the overwhelming majority of commentators have concluded, the *Medellín* opinion is hardly friendly to self-execution, even if it did not adopt a presumption the other way.

194. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS I* (1995) (observing the number of ways in which international agreements have become more complex).

well as the general utility of default rules for interpreting ambiguous texts,¹⁹⁵ it seems likely that the Court will have to return to the self-execution question sooner rather than later. I address the more general debate about whether the Supremacy Clause generally requires self-execution in the next section.

C. *Self-Execution, Supremacy, and Equivalent Treatment*

All participants in the self-execution debate seem to accept one obvious set of counterexamples to the proposition that the Supremacy Clause requires all treaties to be self-executing. Because Article I provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,”¹⁹⁶ commentators agree that “any financial undertaking by the United States . . . requires implementation by appropriation from Congress.”¹⁹⁷ Most likewise concede that imposing criminal penalties requires congressional action,¹⁹⁸ and both Congress and the Executive have taken the view that a self-executing treaty cannot take the country to war.¹⁹⁹ The Supremacy Clause thus does not foreclose non-self-executing treaties in these areas. Nor does it help to say that these exceptions are constitutionally required: The point is simply that a treaty requiring the expenditure of funds or imposition of a criminal penalty is no less a treaty under the Supremacy Clause—no less a part of supreme federal law—than any other treaty. Self-execution, then, cannot be a *sine qua non* of the supreme law of the land.

These constitutionally prescribed categories of non-self-execution point toward a more fundamental conceptual difficulty in the internationalist position. That position is generally framed as deriving directly from the Supremacy Clause’s categorical language: “*all* Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”²⁰⁰ And yet few commentators actually say that *all* treaties

195. See, e.g., EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 20–22 (2008) (developing a theory of statutory default rules).

196. U.S. CONST. art. I, § 9, cl. 7.

197. HENKIN, *supra* note 22, at 203.

198. *Id.* According to Professor Henkin, this requirement is tied to the settled proposition that there is no federal common law of crimes. *Id.* at 479 n.105. In *United States v. Hudson & Goodwin*, the Court declared that before there can be a federal criminal prosecution, “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.” 11 U.S. (7 Cranch) 32, 34 (1812).

199. HENKIN, *supra* note 22, at 203 (citing *Documents Relating to the North Atlantic Treaty: Hearing on the North Atlantic Treaty Before the S. Comm. on Foreign Relations*, 81st Cong. 11 (1949) (statement of Dean Acheson, Sec’y of State of the U.S.) (“Under our Constitution, the Congress alone has the power to declare war.”)); see also War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 558 (1973) (codified as amended at 50 U.S.C. § 1547(a) (2006)) (seeking to foreclose the implication from any treaty provision of authorization to use military force).

200. U.S. CONST. art. VI, cl. 2 (emphasis added); see also, e.g., Flaherty, *supra* note 4, at 2095 (noting that the text of the Supremacy Clause makes treaties self-executing upon ratification); Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 614 (arguing that the “bare text of [the Supremacy Clause] establishes that treaties are to be given effect by judges”).

must be self-executing; instead, they argue for the more modest proposition that treaties are *presumptively* self-executing. Louis Henkin, for example, states the position as follows:

What seems clear, from the language of the Constitution and of John Marshall, is that in the United States the strong presumption should be that a treaty or a treaty provision is self-executing, and that a non-self-executing promise is highly exceptional. A tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of Article VI of the Constitution.²⁰¹

The problem is that Article VI's categorical language does not speak in terms of presumptions—even strong ones. If treating a treaty as non-self-executing “runs counter to the language, and spirit, and history”²⁰² of the Supremacy Clause, then that treatment is unconstitutional, even if it only happens in a small fraction of the cases.

The alternative, however, is to admit that self-execution is not inherent in supremacy. Both Professors Henkin and Vázquez do admit this possibility when they acknowledge the exception that Chief Justice Marshall recognized in *Foster v. Neilson*—that is, that sometimes a 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.”²⁰³ Henkin says simply that “Marshall . . . felt obliged to read an exception into the Supremacy Clause.”²⁰⁴ If that was what the great Chief Justice was up to, however, then it was an act of judicial usurpation; judges have no warrant to read in exceptions to categorical constitutional text. The more plausible explanation is that Marshall was simply according supremacy to the actual intent of the treaty makers, which might be to confer self-executing rights in some cases but simply to mandate further lawmaking in others.²⁰⁵ Self-execution is a

201. HENKIN, *supra* note 22, at 201; *see also* Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 602 (“I argue that the Supremacy Clause is best read to create a presumption that treaties are self-executing in the *Foster* sense, a presumption that can be overcome only through a clear statement that the obligations in a particular treaty are subject to legislative implementation.”).

202. Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 602.

203. 7 U.S. (2 Pet.) 253, 314 (1829); *see also* HENKIN, *supra* note 22, at 199 (quoting *Foster* for the proposition that not all treaties are automatically the law of the land); Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 607 (discussing lower courts' difficulties in applying *Foster* to determine if a treaty is self-executing).

204. HENKIN, *supra* note 22, at 199.

205. For example, the famous case of *Missouri v. Holland*, 252 U.S. 416 (1920), involved an agreement between the United States and Great Britain to protect migratory birds that lived, at various times of the year, in both the United States and Canada, *id.* at 431. That treaty was understood simply as an agreement that each contracting state would enact legislation implementing the treaty, which the United States did in the Migratory Bird Treaty Act of 1918, ch. 128, 40 Stat. 755. *See* 252 U.S. at 431 (“It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out.”).

function of the intent of federal lawmakers, not of the supremacy of federal law in and of itself.

Seen from this perspective, presumptions for or against self-execution are not manifestations of a treaty’s status as supreme federal law,²⁰⁶ but rather interpretive rules for resolving ambiguities in the meaning of particular treaties. These presumptions are much like the more familiar canons of *statutory* construction, which likewise provide default rules that come into play in cases of ambiguous meaning.²⁰⁷ These canons take many different forms and derive from different bases of authority; some canons represent a best guess at what Congress would have intended under certain circumstances, while others serve to implement certain normative values irrespective of Congress’s intentions.²⁰⁸ The sheer variety of interpretive canons in the statutory context suggests that a blanket presumption for all treaties either for or against self-execution may fit poorly with the complex set of relevant institutional considerations.

One possible rejoinder to my argument that the Supremacy Clause does not itself mandate a presumption in favor of self-execution would begin from the proposition that some canons of statutory construction are, in fact, grounded in the Constitution.²⁰⁹ I have argued elsewhere, for example, that canons disfavoring broad delegations of authority to administrative agencies or readings of federal statutes that would broadly preempt state law derive their force from constitutional values of separation of powers and federalism, respectively.²¹⁰ One might thus ground a presumption in favor of self-execution in the founders’ concern that treaty enforcement generally be automatic, lest the nation become embroiled in disputes with foreign nations

206. See Bradley, *Self-Execution*, *supra* note 26, at 148 (“[I]f there is no inherent conflict between non-self-execution and the Supremacy Clause, it is more difficult to justify a general presumption in favor of self-execution, at least one premised on the purported policies of that Clause.”).

207. See, e.g., ELHAUGE, *supra* note 195, at 9–14 (identifying and explaining judge-made statutory default rules); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 323–28 (1994) (collecting canons of statutory construction employed by the Rehnquist Court).

208. See Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (categorizing canons of construction as either descriptive canons—predictions of what the legislature actually meant—or normative canons—default rules that exist to further a specific constitutional value or policy objective).

209. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611–29 (1992) (comparing the Burger and Rehnquist Courts’ application of constitutionally grounded canons of construction); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEXAS L. REV. 1549, 1551 (2000) (arguing that the avoidance canon, as applied in judicial power cases, is a normative canon developed to protect the values in Article III, the Due Process Clause, and the Suspension Clause of the Constitution).

210. See Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CAL. L. REV. (forthcoming 2009); see also Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 399, 403 (2005) (crediting the canon of avoidance with preserving underlying constitutional values).

that might lead to war or other unpleasantness.²¹¹ But when such an interpretive rule is not compelled by the constitutional text, it becomes vulnerable to arguments that changed circumstances since the founding render a different approach more appropriate.²¹²

Two changes in particular are relevant here: First, the nature of international law has changed, so that treaties increasingly regulate traditional domestic concerns and thus overlap with the legislative prerogatives of both Congress and state legislatures.²¹³ There is, moreover, simply a great deal more domestic law that treaties must be integrated with than there was at the time of the founding.²¹⁴ Under modern circumstances, the need to respect domestic legislatures, as well as the existence of other domestic interpretive canons that may reflect countervailing values, counsels against a blanket presumption of self-execution. Moreover, modern treaty making often delegates legal authority to supranational institutions,²¹⁵ and one may doubt whether the treaty makers would always prefer self-execution in that context. Absent such a presumption, after all, the decision whether to execute a supranational institution's directives provides a domestic back-end check on supranational lawmaking.

Second, the United States is no longer a new and vulnerable player on the international stage, so that breaches of a treaty are not nearly so likely to provoke attack by the offended nation or other grave threats to national security.²¹⁶ Our nation may have a significant interest in maintaining flexibility with regard to issues like self-execution, and that interest may fa-

211. See Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 605–06 (“In order to avoid the foreign relations difficulties that would result from treaty violations, and to capture the benefits of a reputation for treaty compliance, the Founders gave treaties the force of domestic law enforceable in domestic courts.”).

212. Cf. Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1750–58, 1848–50 (2005) (developing an argument for interpretive rules as a form of “compensating adjustment” for historical changes that threaten constitutional balances).

213. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1671–72 (1997) (giving examples of the increasing overlap between international relations and domestic affairs).

214. See OONA A. HATHAWAY, *THE CASE FOR REPLACING ARTICLE II TREATIES WITH EX POST CONGRESSIONAL-EXECUTIVE AGREEMENTS* 18–19 (2008), <http://www.acslaw.org/files/Hathaway%20Issue%20Brief.pdf> (noting that the overlap between international agreements and domestic law has grown enormously since the founding, complicating the integration of the two bodies of law).

215. See CHAYES & CHAYES, *supra* note 194, at 1 (“In earlier times, the principal function of treaties was to record bilateral (or sometimes regional) political settlements and arrangements. But in recent decades, the main focus of treaty practice has moved to multilateral regulatory agreements addressing complex economic, political, and social problems that require cooperative action among states over time.”); Young, *Historical Practice*, *supra* note 143, at 37 (observing that modern international law differs from international law at the time of the founding in that modern international law may be developed by supranational institutions).

216. Young, *Historical Practice*, *supra* note 143, at 35–36; see also Thomas H. Lee, *The Relevance of America’s Status in the World in Interpreting the Constitution* 4–5 (Feb. 4, 2009) (unpublished manuscript, on file with the Columbia Law Review).

vor deference to executive views on the matter rather than a blanket pro-self-execution presumption. Likewise, the contemporary United States has created a variety of supranational institutions where it exercises considerable influence, and the existence of these alternative options for enforcing federal law—as with Security Council enforcement of ICJ rules—may likewise favor non-self-execution. Under contemporary geopolitical circumstances, then, no presumption or even a presumption *against* self-execution may be more appropriate.

More recent versions of the internationalist argument stress the Supremacy Clause’s mandate for “equivalent treatment” of treaties, federal statutes, and constitutional provisions.²¹⁷ Professor Vázquez, for example, insists that “by virtue of the Supremacy Clause, treaties are presumptively enforceable in court in the same circumstances as constitutional and statutory provisions of like content.”²¹⁸ On this version of the argument, self-execution inheres, not in the nature of supremacy itself, but rather in the failure of the Supremacy Clause to distinguish among treaties, statutes, and constitutional provisions for purposes of the domestic legal effect of enactments. It may be, as my colleague Curt Bradley has pointed out, that treaties are simply different from statutes by their nature and that these differences are sufficient to justify a different default rule on self-execution.²¹⁹ I want to quarrel with Vázquez’s unspoken premise, however, that federal statutes and constitutional provisions are themselves invariably “self-executing.” To the extent that they are not, a presumption in favor of self-execution becomes difficult to justify on equivalent treatment grounds.

D. *Non-self-executing Statutes*

I have already noted that people mean a variety of things when they say a treaty is “non-self-executing.”²²⁰ The treaty may not create a private right of action,²²¹ it may create no judicially enforceable rights at all; it may represent purely a bargain among sovereigns who have agreed to take further measures in the future.²²² The important point for present purposes is that duly enacted federal statutes may also be non-self-executing in each of these senses. That fact does not make such statutes any less “supreme” within the

217. Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 621–22; *see also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (“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.”).

218. *Id.* at 611.

219. *See* Bradley, *Self-Execution*, *supra* note 26, at 157 (“[T]here are important differences between statutes and treaties that are relevant to judicial enforceability, and these differences suggest less of a judicial role for enforcing treaties than for statutes.”).

220. *See, e.g., supra* notes 118–23 and accompanying text.

221. Vázquez, *Four Doctrines*, *supra* note 119, at 719.

222. *See id.* at 712 (“Some treaties do not impose obligations but, instead, set forth aspirations.”).

meaning of the Supremacy Clause; it simply reflects the limited intentions of Congress in enacting such measures.

Private rights of action have been a controversial subject in federal courts law over the past several decades.²²³ Sometimes Congress expressly confers a right to sue on a particular class of potential plaintiffs, but frequently statutes are silent on the question. The Supreme Court was once quite willing to imply private rights in the latter case, but its enthusiasm for implied rights of action has ebbed considerably in recent years.²²⁴ To my knowledge, no one thinks that the absence of a private right of action renders the underlying statutes any less “supreme.” They remain enforceable by public officers in most instances,²²⁵ they may be enforceable by private plaintiffs in suits against state officers under § 1983,²²⁶ and they may be asserted in appropriate cases as a defense against claims under state law.²²⁷

Some statutes not only fail to create a private right of action; they may not create any private *substantive* rights at all. The classic case is *Pennhurst State School & Hospital v. Halderman*,²²⁸ which involved a federal statute regulating state hospitals.²²⁹ The statute included a “bill of rights” provision stating that disabled persons “have a right to appropriate treatment, services, and habilitation for such disabilities . . . in the setting that is least restrictive of . . . [their] personal liberty.”²³⁰ When plaintiffs attempted to sue under this provision, however, the Supreme Court held that the “bill of rights” provision was merely “precatory” and did not create any enforceable rights.²³¹ Presumably, a statutory provision of this type not only would not create a

223. See generally RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 758–89 (5th ed. 2003) [hereinafter HART & WECHSLER] (summarizing the law concerning implied private rights of action under federal statutes).

224. Compare, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 426 (1964) (implying a private right of action under § 14(a) of the Securities Exchange Act of 1934), with *Alexander v. Sandoval*, 532 U.S. 275, 287–88 (2001) (refusing to imply a private right of action for disparate-impact discrimination under Title VI of the Civil Rights Act of 1964).

225. See, e.g., *Touche Ross & Co. v. Redington*, 442 U.S. 560, 570 n.10 (1979) (refusing to imply a private right of action to enforce recordkeeping and reporting requirements of the Securities Exchange Act of 1934, but noting that the Securities Exchange Commission had authority to enforce those requirements).

226. See, e.g., *Alexander*, 532 U.S. at 299–300 (Stevens, J., dissenting) (suggesting that even though the majority had found no implied private right of action under Title VI of the Civil Rights Act of 1964, the relevant provision might nonetheless be enforceable against state actors by way of 42 U.S.C. § 1983); HART & WECHSLER, *supra* note 223, at 787 (“In 42 U.S.C. § 1983, Congress created an *express* private remedy for violations of federal law committed ‘under color of’ state law.”).

227. See, e.g., *Rice v. Panchal*, 65 F.3d 637, 641 (7th Cir. 1995) (explaining that “unless the federal law has created a federal remedy . . . the federal law, of necessity, will only arise as a defense to a state law action”).

228. 451 U.S. 1 (1981).

229. *Id.* at 1.

230. 42 U.S.C. § 6010 (1981).

231. 451 U.S. at 18.

private right to sue, but it also could not be enforced through an action by the government or by way of a defense to a state law claim or some similar posture.²³²

There is, in addition, a far more commonplace sense in which federal statutes do not themselves create enforceable legal rights. Many regulatory statutes sketch out the broad outlines of the legislative program—e.g., “Clean up the water!”—but leave the operative details to be filled in by agency regulations—e.g., “Don’t discharge more than x parts per million of dioxin into the water.”²³³ It is hard to say that the statute itself is “binding,” in the absence of such implementing regulations, upon anyone but the agency tasked with implementation. And yet I doubt anyone would say that these commonplace regulatory statutes are not “supreme” federal law under the Supremacy Clause. They are simply not self-executing.²³⁴

Finally, a number of recent decisions have concerned efforts by private individuals to enforce federal statutory conditions on the receipt of federal funds by state governments. In *Gonzaga University v. Doe*,²³⁵ for example, the Court considered a claim that state officials had disclosed the plaintiff’s educational records in violation of the Family Educational Rights and Privacy Act (FERPA).²³⁶ The Court held that the plaintiff was not entitled to sue under § 1983, noting that the relevant provisions were conditions on the states’ receipt of federal funds rather than laws of general applicability and that the sole remedy prescribed in the statute was federal withholding of funds.²³⁷ While *Gonzaga* and other recent cases have considered only the availability of § 1983 relief, it seems unlikely that such spending conditions would be enforceable in any other way, apart from cutting off the funding itself. In this sense, spending-condition statutes seem directly analogous to the view of treaties as contracts among sovereigns.²³⁸

232. The Victims Rights and Restitution Act likewise created no enforceable rights of any kind. 42 U.S.C. § 10606 (1990) (repealed 2004); *see also* *United States v. McVeigh*, 106 F.3d 325, 335 (1997) (holding that the Act created no enforceable right of access to trials). The 1990 Act was ultimately repealed and replaced with the Crime Victims’ Rights Act, 18 U.S.C. § 3771 (2004), which does have some enforceable provisions. On the meaning of the new statute, *see generally* Erin C. Blondel, Note, *Victims’ Rights in an Adversary System*, 58 DUKE L.J. 237, 256–72 (2008).

233. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1251 (1995) (“The Administrator shall, after careful investigation, . . . prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.”); 40 C.F.R. § 141.61 (2000) (limiting the maximum contaminant level of dioxin in drinking water to thirty parts per quadrillion).

234. I do not concede, however, that treaties may delegate lawmaking authority to executive officials in the same way that regulatory statutes do. *See infra* text accompanying notes 252–73.

235. 536 U.S. 273 (2002).

236. *Id.* at 277; 20 U.S.C. § 1232g (2000).

237. 536 U.S. at 287–90.

238. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (“A treaty is in its nature a contract between two nations, not a legislative act.”); Wu, *supra* note 3, at 580 (“[C]reation of a treaty can be described generally as a bargained-for exchange of promises between nations that creates an obligation under international law.”).

In each of these contexts, the critical consideration is the intent of Congress in enacting the relevant statutes. Within constitutional limits, and with the concurrence of the President, Congress is sovereign: it can tailor the effect of its laws according to its purposes. If it wishes, as in *Pennhurst*, to state aspirational values while waiting to enforce them until a later date, it is entitled to do that, just as it may choose to make rules that are binding and enforceable by private individuals. It is hard to see why treaties should not be treated the same way—that is, why the treaty makers should not be offered the same authority to modulate the effect of a treaty within the domestic legal system according to their particular purposes. This freedom may well be, in fact, part of what “supremacy” is all about.

As a distinguished scholar not only of foreign relations law but also of federal courts, Professor Vázquez is naturally aware of these complexities. He thus acknowledges that,

[T]he requirement that self-executing treaties be treated by courts as equivalent to federal statutory and constitutional provisions does not mean that treaty enforcement will be simple. It leaves us with all of the sometimes very difficult questions that arise when federal statutes and the Constitution are invoked by individuals in our courts.²³⁹

Nonetheless, I submit that the complexities concerning execution of federal statutes and constitutional provisions are such that they cannot be captured in any blanket presumption in favor of (or against) self-execution, with the result that such a presumption cannot be justified for treaties on equivalency grounds. Truly equivalent treatment would require breaking down the different senses in which a treaty may be self-executing and developing local doctrines analogous to those that exist on the statutory side.

E. What’s “Supreme” About a Non-self-executing Treaty?

The Restatement of Foreign Relations Law suggests that “[e]ven a non-self-executing agreement of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be federal policy superseding State law or policy.”²⁴⁰ This may well be so, provided that we emphasize the “sometimes” and acknowledge the paucity of direct authority or even obviously applicable analogies. In the following sections, I offer three brief speculations as to what the supremacy of a non-self-executing law might mean.

1. The Supremacy of Non-self-executing Federal Law.—One aspect of treaty supremacy should not be discounted: Non-self-executing treaties bind the United States on the international plane, and they are supreme domesti-

239. Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 627.

240. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 115 cmt. e (1987).

cally in the sense that state governments cannot nullify or exempt themselves from that obligation. This principle may seem obvious and of little practical significance today, but in the early Republic the principle that all states are bound by a U.S. treaty and cannot “opt out” by withholding their consent may have had considerably greater significance. Under the Articles of Confederation, after all, a treaty could not become law without the agreement of nine states.²⁴¹ The new Constitution eliminated this direct role for the states, and it may well have seemed important to underscore the national government’s power to bind the states by treaty without their direct consent.

The simple existence of an international legal obligation may have legal consequences, moreover, as a matter of state law. In *Sanchez-Llamas*, for example, Virginia law allowed Mr. Bustillo to seek release from custody on the ground that he was “detained without lawful authority”,²⁴² as Justice Breyer noted, the existence of this state-law vehicle obviated the question whether the VCCR itself creates a private right of action.²⁴³ Likewise, Mr. Medellín erred by insisting that the ICJ’s *Avena* decision bound the Texas courts to reopen his case,²⁴⁴ but it is possible that even a non-self-executing judgment could provide the previously unavailable legal basis necessary to reopen the case under the Texas jurisdictional rules.²⁴⁵

Second, a non-self-executing treaty may guide the conduct of the Executive Branch, and particularly officials subordinate to the President. This possibility raises questions concerning the power of the Executive to violate international law and abrogate treaties that are beyond the scope of this Article,²⁴⁶ but it seems possible that a non-self-executing treaty might nonetheless trigger the Executive’s authority and obligation to “take Care that the Laws be faithfully executed.”²⁴⁷ The President might order federal officials to comply with a non-self-executing treaty’s provisions,²⁴⁸ even if he would lack, under *Medellín*, authority to supersede otherwise valid state laws.²⁴⁹

Paul Stephan has argued for a stronger position, which is that a non-self-executing treaty may authorize the President to make binding federal

241. ARTS. OF CONFEDERATION art. IX.

242. VA. CODE ANN. § 8.01-654(A)(1) (2006).

243. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 372 (2006) (Breyer, J., dissenting) (observing that the question is not whether the Convention creates a private right of action, rather whether it provides law applicable in legal proceedings that might have been brought irrespective of the Vienna Convention claim).

244. Reply Brief of Applicant José Ernesto Medellín at 2, *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75207), *aff’d sub nom.* Medellín v. Texas, 128 S. Ct. 1346 (2008).

245. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (Vernon 2009).

246. Jonathan I. Charney, *The Power of the Executive Branch of the United States to Violate Customary International Law*, 80 AM. J. INT’L L. 913 (1986).

247. U.S. CONST. art. II, § 3, cl. 4.

248. See *Medellín*, 128 S. Ct. at 1371 (acknowledging the President’s authority to comply with treaty obligations by means that are consistent with the Constitution).

249. *Id.*

law, much as a federal statute may delegate lawmaking authority to the executive, even though the treaty is not itself “binding” in that sense.²⁵⁰ Professor Stephan “cannot conceive . . . [of any argument] why in principle a treaty cannot delegate lawmaking authority to the Executive in the same fashion as a statutory delegation.”²⁵¹ That strikes me as a leap, however. First of all, as already noted, the Court has denied that even statutes may delegate lawmaking authority.²⁵² This is a crucial point because it means that delegations must observe the customary separation-of-powers divide between legislative and executive functions.²⁵³ Even if treaties and statutes are equivalent, then, a treaty could only delegate to the President authority to take actions that were not necessarily legislative in character. As I have suggested,²⁵⁴ preempting otherwise valid state laws—the action at issue in *Medellín*—should fall into this excluded category.

One must acknowledge, of course, that the distinction between essentially “legislative” and essentially “executive” actions is elusive²⁵⁵ and that the Court has approved delegations of authority that must be admitted as “lawmaking” in any practical sense of the word.²⁵⁶ But there are strong functional reasons to insist that actions like preempting state law should be hard, if not impossible to delegate.²⁵⁷ More important, it is not obvious that Professor Stephan is correct to equate treaties and statutes for delegation purposes. Delegations to agencies have been accepted in our legal culture primarily because both the courts and Congress retain significant control over the exercise of delegated authority.²⁵⁸ This occurs through judicial review under the Administrative Procedure Act,²⁵⁹ on the one hand, and

250. See Stephan, *supra* note 164, at 22–32.

251. *Id.* at 24.

252. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

253. See *INS v. Chadha*, 462 U.S. 919, 954 (1983) (holding that acts legislative in character must be taken in accord with Article I, Section 3).

254. See *supra* notes 249–50 and accompanying text.

255. See *Whitman*, 531 U.S. at 488 (Stevens, J., concurring) (“The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it.”).

256. See *id.* (stating that it would be wise in delegation cases “to admit that agency rulemaking authority is ‘legislative power’”).

257. Benjamin & Young, *supra* note 190, at 2114. Professor Stephan suggests that the Optional Protocol and the UN Charter must have authorized the President to take various actions pursuant to participating in ICJ litigation, and that “[i]nferring . . . capacity to settle a dispute with which an international tribunal is seized from an express authority to bring and defend claims in that tribunal does not seem all that great a stretch.” Stephan, *supra* note 164, at 26–27. But this ignores the preemptive effect of the President’s action on state law. Preemption involves an exercise of lawmaking authority in a way that managing litigation does not.

258. See Benjamin & Young, *supra* note 190, at 2134 (quoting *INS*, 462 U.S. at 953–54 n.16, for the proposition that “executive action under legislatively delegated authority that might resemble ‘legislative’ action in some respects . . . is always subject to check by the terms of the legislation that authorized it . . .”).

259. 5 U.S.C. § 702 (2006); see also SUNSTEIN, *supra* note 100, at 143 (noting the importance of APA review for legitimating broad delegations of power to agencies).

through confirmation of officials, budgetary authority, and oversight hearings on the other.²⁶⁰ One would want to know whether these checks operate in an equally effective way for treaty delegations, which may often be to the President in general rather than a specific agency and which may also be far more general substantively (and therefore less susceptible to APA review) than statutory delegations. The answers are not obvious. Moreover, these considerations compound when the treaty delegation to the executive is one of authority to enforce a product of delegated authority to an international organization—e.g., a judgment of the ICJ.²⁶¹

In any event, accepting Professor Stephan’s argument that treaties may delegate authority to domestic executive actors proves my broader point, which is that treaties may function as supreme federal law even if they are not directly enforceable by courts. Nor would accepting the possibility of treaty-based delegations make executive enforcement *mandatory* in all cases. First, whether a treaty in fact delegates such authority is a question of the treaty makers’ intent—not an ineluctable consequence of the treaty’s status as supreme federal law.²⁶² And second, the President might well retain discretion *not* to exercise his delegated authority in any given case.²⁶³

Finally, laws often have legal force beyond the sphere of their direct enforcement. Enacted statutes, for example, are often an important source for divining the government’s interests and purposes; these interests and purposes may be important for the application of constitutional tests or the interpretation of other laws.²⁶⁴ It is plausible that even non-self-executing treaties that cannot be directly enforced would be relevant in defining the interests and purposes of the government for these sorts of purposes.

2. *The International Obligation to Legislate.*—More fundamentally, a finding that a treaty is non-self-executing on the domestic plane does not al-

260. See *supra* notes 97–100 and accompanying text; see also Benjamin & Young, *supra* note 190, at 2143 (indicating that scholars and judges have “reconciled the administrative state with constitutional principles of both federalism and separation of powers by emphasizing the key role of Congress”).

261. In *Medellín* there was the further difficulty that the Supreme Court had already interpreted the VCCR not to override state procedural default rules in *Sanchez-Llamas*. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006) (“[C]laims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims.”). In order for Professor Stephan’s delegation argument to work, then, one would have to read the Optional Protocol, the UN Charter, or both as delegating authority to the President to override state law in ways that were in fact *contrary* to the substantive treaties ratified by the Senate. That would be an odd delegation.

262. See *supra* subpart II(D).

263. See Stephan, *supra* note 164, at 28 (stating that such a delegation “would confer a power, but not a duty, on the President”).

264. See William N. Eskridge, Jr. & John Ferejohn, *Super Statutes*, 50 DUKE L.J. 1215, 1215–16 (2001) (describing “super statutes” that “successfully penetrate public normative and institutional culture” so deeply that they become baselines against which other sources of law are read).

ter the binding nature of the obligation on the international plane; it simply means that the signatory nation is obliged to take further steps to comply with that international obligation. A non-self-executing treaty, in other words, obliges the nation to *execute* the treaty's terms by taking action under domestic law.²⁶⁵ This obligation may, depending on the treaty's provisions and the circumstances, leave signatory governments with considerable discretion concerning the form of domestic action to be taken.²⁶⁶ But it is nonetheless a binding legal obligation, both on the international plane and—on account of the Supremacy Clause—as a matter of federal law.

An obvious objection to this point holds that the obligation to legislate is meaningless if its practical vindication is dependent on future discretionary action by the national political branches. As I have already noted,²⁶⁷ however, treaties that require appropriations or impose criminal penalties are non-self-executing in this way, and yet no one seems to think that those treaties are not the law of the land under the Supremacy Clause.²⁶⁸ More fundamentally, similar objections could be leveled in any number of familiar statutory situations. Many modern regulatory statutes impose no direct obligations on private actors until administrative agencies take further action to implement their terms. The Clean Air Act, for example, delegates authority to the Environmental Protection Agency to identify dangerous pollutants and directs the agency to issue rules regulating emissions of those pollutants.²⁶⁹ Many of the more contentious battles in administrative law have, in fact, involved an alleged failure by the implementing agency to promulgate rules that adequately “execute” the intent of Congress.²⁷⁰ No one contends, however, that the underlying statute directing the agency to act is somehow not supreme federal law or that because the agency enjoys considerable discretion concerning implementation, it is altogether free not to execute the

265. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 111 reporters' note 5 (1987) (“A treaty is generally binding on states . . . from the time it comes into force for them, whether or not it is self-executing. If a treaty is not self-executing [a] state is obliged to implement it promptly, and failure to do so would render it in default on its treaty obligations.”).

266. See, e.g., HENKIN, *supra* note 22, at 205 (“[T]he independence of the legislative process . . . has given Congress opportunities to interpret the need for implementation and to shape and limit it in important details.”).

267. See *supra* notes 196–99 and accompanying text.

268. One would be hard pressed to say that the Supremacy Clause requires such treaties to be self-executing. After all, most commentators agree that the Constitution requires such treaties to be *non-self-executing* by vesting criminal and appropriation powers exclusively in Congress. See HENKIN, *supra* note 22, at 203 (“Some obligations, it is accepted, cannot be executed by the treaty itself. A treaty cannot appropriate funds A treaty, it is accepted, cannot itself enact criminal law”).

269. Clean Air Act, 42 U.S.C. § 7412 (2000).

270. See Stewart, *supra* note 96, at 1682 (“A second theme of contemporary criticism of agency discretion has been the agencies’ asserted failure affirmatively to carry out legislative mandates.”). For an example of such criticism regarding the EPA’s regulation of greenhouse gas emissions, see *Massachusetts v. EPA*, 549 U.S. 497, 533–34 (2007).

statute if it prefers not to do so.²⁷¹ Many contemporary treaties have a similar structure.²⁷²

Even when a federal statute imposes binding obligations that are not dependent on implementing regulations, government actors may nonetheless enjoy considerable discretion concerning the execution of those obligations.²⁷³ Executive authorities generally must make difficult decisions about which legal obligations to prioritize for enforcement purposes, especially when resources are limited.²⁷⁴ And although private parties who benefit from the underlying legal obligations sometimes ask courts to *force* executive actors to execute the statute, those parties have not generally enjoyed much success.²⁷⁵ Every federal statute that depends on public enforcement is thus non-self-executing in the practical sense that actual enforcement depends on the further choices of government actors.

My argument thus far has emphasized the fact that typical federal statutory obligations frequently are more discretionary than we commonly recognize. But the converse point also bears emphasis—that is, that “discretionary” obligations to take further action at the national level may have a more forceful bite than one might think. In *Medellín*, that force was sufficient to prompt President George W. Bush to do something he otherwise cannot possibly have been inclined to do—that is, to issue an order requiring the state courts to reconsider the capital sentence of a convicted murderer.²⁷⁶ Although the President chose to fulfill this obligation “on the cheap”—by executive order rather than by proposing real legislation—he was nonetheless willing to risk considerable political costs to demonstrate the United States’ willingness to comply with an international judgment.²⁷⁷ In other treaty

271. *See id.* at 1682–83 (ordering the EPA to move forward on promulgating rules where directed to do so by Congress).

272. *See generally* CHAYES & CHAYES, *supra* note 194, at 14 (explaining that “contemporary regulatory treaties” generally count on state parties to enact implementing legislation to regulate the private behavior that is the true object of the treaty regime).

273. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”).

274. *See id.* (noting that agencies must assess “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all”).

275. *See, e.g., Allen v. Wright*, 468 U.S. 737, 739–40 (1984) (denying standing to parents of black public-school children seeking to force the Internal Revenue Service to adopt sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools as required by 26 U.S.C. §§ 501(a) and (c)(3)).

276. *See supra* notes 12–13, 246–49 and accompanying text. For varying viewpoints on the *Medellín* execution, the ICJ judgment, and President Bush’s memorandum, see Allan Turner, *In Case that Shook City, Controversial Execution Nears*, HOUS. CHRON., Aug. 4, 2008, at A1.

277. *See, e.g., Patty Reinert, Murder Case Pits Texas Against Bush as U.S. Justices Consider Local Killer’s Consular Issue, Control of Courts Is at Stake*, HOUS. CHRON., Oct. 8, 2007, at A1 (describing the conflicting positions of President Bush and Texas officials following the executive order).

contexts, such as the NAFTA and WTO agreements, the possibility of severe economic sanctions creates further incentives to execute supranational judgments that plainly lack, in and of themselves, self-executing force.²⁷⁸ An obligation to legislate or take other action to execute a non-self-executing treaty is hardly an empty formality.²⁷⁹

3. *The International Obligations of States.*—I have already noted that non-self-executing treaties are “supreme” federal law in that no state has the power to opt out of a treaty obligation the nation as a whole has entered into.²⁸⁰ Ordinarily, we think of the obligation to execute a non-self-executing treaty as falling on the political branches at the national level. Justice Stevens’s concurrence in *Medellín*, however, raised the fascinating question whether an individual state might have obligations of its own under a non-self-executing treaty in the absence of action by the national political branches.²⁸¹ I submit that Justice Stevens was right, and that this is a third, important sense in which even a non-self-executing treaty may be “supreme” federal law.

After noting his agreement with the majority that the ICJ’s judgment was not itself binding federal law, Justice Stevens observed that “[u]nder the express terms of the Supremacy Clause, the United States’ obligation to ‘undertak[e] to comply’ with the ICJ’s decision falls on each of the States as well as the Federal Government.”²⁸² After all, he said,

One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas’[s] duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another.²⁸³

278. See, e.g., Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations art. 22.2, Apr. 15, 1994, 33 I.L.M. 1125 (1994) (inducing compliance with WTO provisions by authorizing sanctions); see also Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT’L L.J. 527, 535–36 (2003) (noting strong pressures to comply with WTO and NAFTA panel rulings).

279. See HENKIN, *supra* note 22, at 205 (“In general, Congress has responded to a sense of duty to carry out what the treaty makers promised, to a reluctance to defy and confront the President . . . , to an unwillingness to make the U.S. system appear undependable, even ludicrous.”); see also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997) (observing that international obligations “are rarely enforced, but usually obeyed”).

280. See *supra* text accompanying note 241.

281. *Medellín v. Texas*, 128 S. Ct. 1346, 1374 (2008) (Stevens, J., concurring in the judgment).

282. *Id.*

283. *Id.*; see also Vázquez, *Treaties as the Law of the Land*, *supra* note 4, at 612 (“[T]he Supremacy Clause, by declaring treaties to be domestic law, transforms the obligations of the United States under a treaty into the obligations of all domestic law-applying officials whose conduct would be attributable to the United States under international law, unless a narrower category is specified.”).

Justice Stevens also pointed out that, in a similar post-*Avena* case, the State of Oklahoma “unhesitatingly assumed” this obligation by commuting the death sentence of another capital prisoner covered by the ICJ’s judgment.²⁸⁴

To define the nature of the obligation falling on Texas, Oklahoma, California, Illinois, Arizona, Arkansas, Ohio, Oklahoma, and Oregon—the nine states holding *Avena* prisoners,²⁸⁵ one must carefully parse what was self-executing in *Medellín* and what was not. As already noted,²⁸⁶ all parties assumed in *Medellín* that the VCCR’s basic obligation—to notify the national of a signatory nation of his VCCR rights “without delay” following his arrest—bound all American law enforcement officials even in the absence of executory action by the national political branches. On the other hand, the *Avena* judgment was not itself a treaty obligation, and no treaty conferred self-executing force on that judgment for purposes of domestic law.²⁸⁷ Nonetheless, the UN Charter’s statement that nations submitting to the jurisdiction of the ICJ “undertake[] to comply” with its rulings was a binding international legal obligation of the United States and, under the Supremacy Clause, part of supreme federal law binding on the States.²⁸⁸

Virtually no authority speaks to this question, but my own view is that the primacy of the national government in guaranteeing treaty compliance stems from its right to preempt, in most cases, state actions that might threaten compliance or otherwise diverge from federal policy—not from any *bar* to unilateral state compliance measures in the absence of national action.²⁸⁹ And to the extent that a treaty binds state and federal actors alike under the Supremacy Clause, a state government stands in the same position vis-à-vis a non-self-executing treaty that the national political branches do—that is, the State has an obligation to implement the treaty by taking whatever

284. *Medellín*, 128 S. Ct. at 1375 & n.4 (citing *Torres v. Oklahoma*, 120 P.3d 1184 (2005); Press Release, Office of Governor Brad Henry, Governor Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004) (on file at http://www.ok.gov/governor/display_article.php?article_id=301&article_type=1)).

285. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 24 (Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8190.pdf>.

286. See *supra* notes 156–59 and accompanying text.

287. *Medellín*, 128 S. Ct. at 1357.

288. *Id.* at 1358 (“The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions. Article 94(1) provides that “[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.”).

289. I suppose that, in a case in which the national government had adopted a policy of noncompliance with a treaty, but not embodied that policy in binding legislation or executive orders, unilateral state action to comply with the treaty might interfere with the conduct of U.S. foreign policy and thus encounter the “dormant” preemption principle of *Zschernig v. Miller*, 389 U.S. 429 (1968). But *Zschernig* is hardly a robust principle these days, and in any event a state ought to be on solid ground whenever it acts to comply with a treaty that remains binding under the Supremacy Clause, whatever the informal stance taken by the national political branches. See, e.g., *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 751–52 (9th Cir. 2001) (“[T]he Supreme Court has not applied [*Zschernig*] in more than 30 years . . .”).

steps are necessary to do so. The Supreme Court's conclusion that the relevant treaties did not confer self-executing force on the ICJ's judgment in *Avena* thus affected the federal and state courts' power to enforce that judgment against Texas but not Texas's underlying obligation to comply.²⁹⁰

In this connection, it bears noting that Texas may well *have* complied with the *Avena* judgment. That judgment required the United States to provide "review and reconsideration" of Medellín's sentence, but authorized it to employ "means of its own choosing."²⁹¹ Several domestic courts, including the state trial court, the Texas Court of Criminal Appeals, and the federal district court on habeas review, concluded that Medellín was not in fact prejudiced by the violation of his VCCR rights.²⁹² Hence, in response to Medellín's final petition to the U.S. Supreme Court for a stay of execution, Texas maintained that these courts' consideration of the prejudice issue satisfied the ICJ's mandate.²⁹³ While reasonable persons may differ as to what standard the ICJ would adopt if it were to rule on the question,²⁹⁴ no court, supranational or domestic, has authoritatively rejected Texas's position.²⁹⁵

In any event, the important point is that treaty obligations do not become a dead letter simply because they are non-self-executing. These obligations may have legal effects in a number of different ways, and they impose important obligations on both federal and state nonjudicial actors to take affirmative steps to comply with the treaty in question. If noncompliance persists in the teeth of these obligations, it is unclear that interpreting the underlying treaty as self-executing would make a great deal of difference.

III. The Normalization of Treaty Law

In this last Part, I wish to step back from debates about the VCCR to consider the more general implications of the Court's approach in *Sanchez-*

290. It is worth noting, however, that both *Medellín* and *Sanchez-Llamas* stand as important counter-examples to Tim Wu's recent argument that, as a descriptive matter, the Supreme Court has vigorously enforced treaties against state governments in order to prevent individual states from placing the United States in breach of its international law obligations. *See* Wu, *supra* note 3, at 583–87 (reporting that the Supreme Court vigorously enforces treaties against states); *see also id.* at 573 (“[J]udicial treaty enforcement turns mainly on who is accused of being the party in breach and the perceived competence of the judiciary to offer a remedy.”).

291. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 73 (Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8190.pdf>.

292. Brief in Opposition at 4–5, *Medellín*, 128 S. Ct. 1346 (No. 08-5573).

293. *See id.* at 1 (“[W]hen his first application for state habeas relief was adjudicated, Texas courts provided the merits review of Medellín's conviction and sentence ultimately required by *Avena*.”).

294. *See generally* M. Todd Parker, “Review and Reconsideration”: In Search of a Just Standard of Review for Violations of Article 36 of the Vienna Convention on Consular Relations, 12 U.C. DAVIS J. INT'L L. & POL'Y 225, 226 (2006) (discussing the “questionable” standards of review used to determine whether a violation of the VCCR is prejudicial to a defendant).

295. Like many American jurisdictions, moreover, Texas has taken affirmative steps to improve compliance with the VCCR's underlying mandate of notice. *See, e.g.*, *Houston Police*, *supra* note 156 (detailing measures taken to notify foreign arrestees of their rights).

Llamas and *Medellín* and its treatment of treaties and, perhaps, of foreign relations law generally. My view is that these cases represent a step away from what my colleague Curt Bradley has called “foreign affairs exceptionalism,” that is, a set of legal doctrines that “distinguishes sharply between domestic and foreign affairs.”²⁹⁶ Instead, *Sanchez-Llamas* and *Medellín* may point toward a “normalization” of treaty law—toward an abandonment of specialized rules governing the interpretation and legal effect of treaties and toward assimilating those rules to the ones that govern the treatment of federal statutes.²⁹⁷ Given the increasing difficulty and questionable desirability of drawing sharp lines between foreign and domestic affairs, such a normalizing course would be a salutary development.

As I demonstrated in Part I, according deference to supranational courts’ interpretations of treaties to which the United States is a party would produce an anomaly in American law: It would require an Article III court, normally entrusted with the power to “say what the law is,” to defer to some other actor’s interpretation of that law, notwithstanding the absence of any delegation of lawmaking or interpretive authority to that actor and also notwithstanding the absence of traditional checks on delegated authority. Such a regime would not, in other words, approach treaties in the same way that American courts interpret other forms of supreme federal law. By rejecting pleas for deference to the ICJ’s interpretation of the VCCR in *Sanchez-Llamas*, the Roberts Court instead applied the same interpretive regime to treaties that it applies to statutes.

Likewise, the Supreme Court’s cautious approach to self-execution in *Medellín* recognized that simply because a legal rule is part of federal law, many questions remain as to that rule’s legal effect and its enforceability by private individuals. Federal statutes may provide no private right of action, or they may confer no enforceable legal rights at all. Domestic law approaches these statutory questions through a variety of local doctrines; a blanket presumption of self-execution for treaties, on the other hand, would create an exceptional rule quite different from the regime governing statutes. Here, too, the Roberts Court’s approach has tended to “normalize” the treatment of treaties.

Exceptional rules for treaty interpretation and enforcement may have made sense in an era when treaties were uncommon, dealt with quite different concerns from domestic legislation, and regulated delicate

296. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 461 (1988). For a canonical statement of the exceptionalist position, see *United States v. Belmont*, 301 U.S. 324, 330–31 (1937). In that case, the Court stated that, “In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.” *Id.*

297. Cf. Ernest A. Young, *It’s Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 517–21 (2004) (opining that foreign affairs law should be normalized and explaining how maritime law could act as a guide in that process).

relationships with more powerful and potentially hostile nations.²⁹⁸ But that is no longer our world. As Professor Bradley has observed,

In the modern era, both statutes and treaties have proliferated, and the content and structure of treaty-making has changed such that treaties are often the vehicle for broad-based legislative efforts. These developments mean, among other things, that statutes and treaties are much more likely to overlap with one another and to express potentially different policy choices. . . . One should expect, therefore, that in the modern era courts would become less willing to apply treaties directly as rules of decision, and this is precisely what appears to have happened.²⁹⁹

The broader distinction between foreign and domestic affairs is likewise under siege.³⁰⁰ For example, commercial markets and environmental hazards—and the regulatory imperatives that go with them—no longer stop at the water’s edge.³⁰¹ As Barry Friedman has put it, “the globalizing process mirrors the process of ‘nationalization’ that has occurred in this country.”³⁰² Moreover, the *form* that treaties take increasingly duplicates that of regulatory statutes, sometimes complete with the presence of a supranational agency exercising delegated power.³⁰³ With respect to both substance and structure, then, it makes increasingly less sense to have radically different rules governing foreign and domestic affairs in general, or treaties and statutes in particular.

This normalization approach makes particular sense when considered in conjunction with the widespread tendency to replace Article II treaties with “congressional–executive” agreements.³⁰⁴ According to the Restatement,

298. See PERKINS, *supra* note 139, at 58 (explaining that one of the primary reasons for calling the 1787 Constitutional Convention was concern over American weakness in the world and the fear that under the Articles of Confederation, Congress could not effectively conduct foreign policy).

299. Bradley, *Self-Execution*, *supra* note 26, at 162–63.

300. See generally Goldsmith, *supra* note 213, at 1617 (“This Article challenges [the traditional] understanding of the relationship between federalism and foreign affairs in several respects.”); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 141–42 (2001) (criticizing the approach to the relationship between federalism and foreign affairs that is predicated on a sharp line between foreign and domestic concerns).

301. See, e.g., ROBERT GILPIN, *THE CHALLENGE OF GLOBAL CAPITALISM* 19–20 (2000) (describing the globalization of the world’s commercial markets).

302. Barry Friedman, *Federalism’s Future in the Global Village*, 47 VAND. L. REV. 1441, 1444 (1994).

303. See CHAYES & CHAYES, *supra* note 194, at 14 (describing contemporary regulatory treaties).

304. See generally Oona Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1239–41 (2008) (noting that U.S. international lawmaking is currently divided between the Article II treaty route and the congressional–executive-agreement route and arguing that the congressional–executive-agreement route should become the sole path). According to a recent study, the United States concluded 11,698 executive agreements between 1939 and 1989, as opposed to only 702 treaties. See Congressional Research Service, *Treaties and Other International Agreements: The Role of the*

“[t]he prevailing view is that the Congressional–Executive agreement can be used as an alternative to the treaty method in every instance.”³⁰⁵ A congressional–executive agreement, of course, simply *is* a statute; by enacting such a law, Congress both ratifies and implements an agreement with a foreign nation at the same time. And because a congressional–executive agreement is a statute, it makes sense that all the usual interpretation and self-execution questions—for example, Should American courts defer to other tribunals in interpreting the agreement? Does the agreement create enforceable rights at all? Does it create a private right of action?—should be answered in the same way that we answer similar questions for ordinary domestic statutes. Normalizing treaties thus facilitates a uniform set of interpretive and executory rules that can govern treaties and congressional–executive agreements alike.³⁰⁶

Normalizing treaties likewise facilitates more consistent treatment of executive power questions. The Supreme Court has developed a relatively well-established framework for analyzing claims of presidential authority to act in areas in which Congress may also legislate; in these cases, presidential power is largely a function of congressional approval, acquiescence, or disapproval.³⁰⁷ In *Hamdan v. Rumsfeld*,³⁰⁸ the Supreme Court applied this framework to reject a claim of presidential power to establish military commissions to try suspected terrorists without any contemporary authorization from Congress.³⁰⁹ Yet two years later in *Medellín*, the President was able to claim even broader authority to act—without any express congressional authorization and arguably in the teeth of the federal statutory scheme governing federal interference with state criminal proceedings³¹⁰—simply

United States Senate, S. Rpt. 106-71, 106th Cong., 2d Sess. 39 (2001) (compiling the number of treaties and executive agreements by year). The overwhelming numbers of these executive agreements were congressional–executive agreements. *See id.* at 41 (reporting the percentage of international agreements that were reached based on (1) statutory authority, (2) treaties, and (3) solely executive authority).

305. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 303 cmt. e. *Compare* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 805 (1995) (arguing that this view is largely correct), *with* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1286 (1995) (arguing that the Constitution does not permit interchangeable use of treaties and congressional–executive agreements). I do not mean to take any position on this debate here.

306. *Cf.* Bradley, *Self-Execution*, *supra* note 26, at 163–64 (arguing that congressional–executive agreements are preferable to treaties because courts have some tendency to interpret treaties differently than statutes).

307. *See generally* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (setting forth a tripartite framework to evaluate the separation of powers between the Executive and Legislative Branches); *see also* *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981) (adopting, in large part, Justice Jackson’s framework).

308. 548 U.S. 557 (2006).

309. *Id.* at 590–95.

310. Amicus Curiae Brief of Constitutional and International Law Scholars in Support of Respondent State of Texas at 14–17, *Medellín v. Texas*, 129 S. Ct. 290 (2008) (No. 06-984).

because he was implementing a treaty.³¹¹ The *Medellín* Court's rejection of this extraordinary claim, and of the exceptional approach to treaties that it embodied, may well pave the way for a more consistent approach to issues of executive authority.

It may sound strange to treat internationalist positions on the interpretation and legal effect of treaties as instances of foreign relations "exceptionalism." Especially in the context of self-execution, internationalists typically wrap their case in the familiar language of the Supremacy Clause, which says that treaties—like statutes—are "the supreme Law of the Land."³¹² What could be less exceptionalist than that? And yet, it turns out that categorical positions like a blanket presumption in favor of self-execution ignore many complexities concerning the treatment of statutes in domestic law. Statutes have multifarious effects, depending on the intent of the enacting Congress. If treaties, like statutes, are "part of our law," then our approach to treaties will have to be similarly nuanced.

IV. Conclusion

Much of the debate in foreign affairs law over the past several decades has concerned the degree of separation that exists between the international and domestic legal systems. This is true not only with respect to treaties but also with respect to customary international law and the powers of supranational courts. It seems likely, however, that the future will see increasing degrees of interpenetration between these two legal systems. If that is so, it is time to think more systematically about what follows from such interpenetration.³¹³ My purpose here has been to suggest that accepting treaties as "part of our law" in a strong sense would *not* necessarily require adopting internationalist views on interpretive deference or self-execution.

The trouble with many assertions about the effect of assimilating international law into the domestic legal system is that these assertions take too simplistic a view of domestic law. The domestic fields of administrative law and federal jurisdiction have long encompassed vigorous debates about the interpretation and enforceability of federal statutes, regulations, and common law principles that parallel, in important respects, current debates about the interpretation and enforceability of international law. Treating international law, including treaties, as "part of our law" would not resolve these questions; rather, it would simply situate debates about the interpreta-

311. See Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Medellín v. Texas*, 129 S. Ct. 290 (2008) (No. 06-984) ("[W]hen the President acts pursuant to a duly ratified treaty on his own constitutional authority, he acts with the full authority of the United States, and his authority is as its zenith . . .").

312. See, e.g., Flaherty, *supra* note 4, at 2095 (arguing that the Supremacy Clause makes treaties self-executing).

313. For a broader assessment of the "interjurisdictional problem" created by the interaction of international and domestic legal systems, see Young, *Institutional Settlement*, *supra* note 75, at 115–58.

tion and enforceability of international law within this broader domestic context.

That is hardly to say, however, that treating treaties and other forms of international law as “part of our law” would be futile. I have argued here that “normalizing” international law—that is, treating it in much the same way we treat domestic law—would be salutary for a number of reasons. The line between foreign and domestic affairs is becoming increasingly difficult to draw in a globalized world, and treaties in particular are coming to look more like domestic regulatory statutes in their institutional structure, substantive concerns, and impact on the domestic legal system. Under these circumstances, maintaining highly distinct sets of interpretive and enforcement rules for treaties and for statutes makes little sense. Better to approach these difficult questions with tools that have already been developed and tested in domestic contexts. Under these rules, accepting treaties as “the supreme Law of the Land” is simply the beginning of a conversation—not the end.