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Michael D. Ramsey

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## A Textual Approach to Treaty Non-Self-Execution

*Michael D. Ramsey\**

Conventional wisdom holds that the doctrine of non-self-executing treaties<sup>1</sup> in the United States is conceptually confused and textually unjustified. This Article disagrees. It argues that a coherent, text-based approach to non-self-execution is available and consistent with the Constitution's text and with the Supreme Court's leading non-self-execution decision, *Medellín v. Texas*.<sup>2</sup>

To reach a satisfactory textual grounding for non-self-execution, it is necessary to reject two central ideas in leading non-self-execution dicta and commentary. The first is that non-self-execution means that some treaties are not part of the supreme law of the land (or, as it is sometimes said, not part of federal law). As discussed below,<sup>3</sup> that is not a possible reading of the Constitution's text, which says that "all" treaties are part of the supreme law of the land<sup>4</sup> (apart from treaty provisions that conflict with superior forms of law).<sup>5</sup> The second is that the unilateral intentions or preferences of U.S. treaty-makers can, without more, make a treaty unenforceable by courts.<sup>6</sup> As discussed below,<sup>7</sup> unilateral intentions and preferences cannot change the constitutional direction that judges "shall be bound" by treaties.<sup>8</sup>

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\* Hugh and Hazel Darling Foundation Professor of Law and Director of International and Comparative Law Programs, University of San Diego Law School. Thanks to David Moore, Lisa Ramsey, Michael Rappaport, David Sloss, Carlos Vázquez and participants in the *BYU Law Review* symposium on Treaties and the draft *Restatement (Fourth)* for helpful comments and discussions.

1. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3)–(4), reporter's note 5 (AM. LAW INST. 1987) (discussing non-self-executing treaties).

2. 552 U.S. 491 (2008).

3. See *infra* Section I.A.

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

5. See *infra* Section I.B.

6. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (AM. LAW INST. 1987); CURTIS BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 42–43 (2013).

7. See *infra* Sections I.C. & II.B.6.

8. See U.S. CONST. art. VI, cl. 2.

Rejecting these two propositions does not, however, reject the idea of non-self-executing treaties. This Article understands “non-self-executing” to describe a treaty provision that does not of its own force provide a rule of decision for a U.S. court. This result may arise in various ways, but they share a common characteristic: the treaty provision calls for an action that, in the U.S. constitutional system, is not appropriate for courts to take. In this situation, the courts are directly or implicitly instructed by the treaty’s text not to implement the treaty unless another branch provides guidance. Because the treaty is binding on the courts, this direction—contained within the treaty—is also binding on the courts. As a result, non-self-execution arises from the treaty’s text in combination with the court’s judicial power in the U.S. constitutional system.

This Article attempts to outline the textual approach to non-self-execution in a relatively brief and summary form, relying on extensive scholarship on the Constitution’s text and history relating to non-self-execution.<sup>9</sup> As such, it is designed as a “restatement” of textual approaches developed in part by others but presented here in

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9. In particular: David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equality, Duality and Non-Self-Execution*, 110 COLUM. L. REV. 2228 (2010); John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT’L L.J. 1209 (2009); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitution Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002) [hereinafter *Non-Self-Executing Treaties*]; David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT’L L.J. 135 (2012) [hereinafter *Executing Foster v. Neilson*]; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008) [hereinafter *Treaties as Law of the Land*]; Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) [hereinafter *Laughing at Treaties*]; Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter *Globalism and the Constitution*]; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999); Ernest A. Young, *Treaties as “Part of Our Law,”* 88 TEX. L. REV. 91 (2009). For my prior discussions of the issue, see Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1469–73 (2006) (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005) [hereinafter *Toward a Rule of Law*]) and Michael D. Ramsey, *The Supremacy Clause, Original Meaning and Modern Law*, 74 OHIO ST. L.J. 559, 594–97 (2013) [hereinafter *Supremacy Clause*].

This Article does not address the question of whether and when a treaty creates private rights of action, which it assumes to be a separate question from non-self-execution. See *Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (AM. LAW INST. 1987).

a more simplified manner.<sup>10</sup> Part I of the Article sets forth the basic constitutional rules. Part II explains how non-self-execution arising from a treaty's text is consistent with the Constitution's categorical rules on a treaty's status as law. Part III argues that the Court's opinion in *Medellin* is consistent with a textual approach to non-self-execution, and provides examples of post-*Medellin* lower court decisions implementing a textual approach. Part IV, in conclusion, provides a basic three-part "restatement" of the textual approach to treaty non-self-execution.

## I. NON-SELF-EXECUTION AND THE CONSTITUTION'S TEXT

### *A. The Constitution's Basic Rules*

The Constitution's treatment of the legal status of treaties appears straightforward and unqualified. Article VI, clause 2, 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.<sup>11</sup>

This language sets forth two related rules. First, *all* treaties, categorically, are the supreme law of the land. Put in the negative, no treaties are *not* the supreme law of the land. There can be no distinction among treaties for this purpose; they all have the same constitutional status. Further, this rule is embedded within the same constitutional provision that makes the Constitution and federal statutes the supreme law of the land. Thus, all treaties have the same legal character as the Constitution and statutes, or, again put in the negative, no treaties have a different legal character from the Constitution and statutes.<sup>12</sup> Thus, any proposition that there is a class of treaties, or a type of treaty provision, that is not part of federal law (or some similar phrase) should be rejected (except, as

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10. For more detailed commentary contributed to this symposium, see David Sloss, *Self-Execution in the Restatement (Fourth) on Treaties*, 2015 BYU L. REV. 1673 (2016); Carlos Manuel Vázquez, *Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution*, 2015 BYU L. REV. 1747 (2016).

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

12. Carlos Vázquez calls this the "requirement of equivalent treatment." Vázquez, *Treaties as Laws of the Land*, *supra* note 9, at 611.

explained below, when conflicts among the different kinds of supreme law arise).<sup>13</sup>

Second, under Article VI's text, *all* treaties are binding on judges—categorically, and to the same extent as statutes and the Constitution, whose obligations are described in parallel language. Again, to state the rule in negative form: no treaties are nonbinding on judges nor entitled to be treated differently by judges than statutes and the Constitution. Thus, to the extent there could be any doubt what “supreme Law of the Land” meant, the last clause of this paragraph of Article VI confirms that the phrase means, among other things, that “judges . . . shall be bound thereby.”<sup>14</sup>

### B. Exceptions

The two related rules described above require two—but only two—related qualifications, also arising from the second clause of Article VI. First, a treaty provision may conflict with the Constitution. The provision might purport to exercise a power that the Constitution denies to the United States as a whole; it might require that the United States alter the structure of government set forth in the Constitution; or it might assert a power that the Constitution exclusively vests in another branch of government. In these cases, the U.S. treaty-makers lack constitutional authority to undertake the treaty obligation because the United States is constitutionally prohibited from acting in ways that violate the Constitution.

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13. See *infra* Section I.B.

14. For similar textual accounts, see Vázquez, *Laughing at Treaties*, *supra* note 9, at 2169–73; Sloss, *Non-Self-Executing Treaties*, *supra* note 9, at 45–55. Although this Article presents a textual account, there is substantial historical evidence that the framers viewed Article VI's treatment of treaties in this way—that is, as making treaties equivalent to statutes. See, e.g., David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010); Ramsey, *Toward a Rule of Law*, *supra* note 9, at 1469–73; Vázquez, *Treaties as Law of the Land*, *supra* note 9, at 619–28; Parry, *supra* note 9, at 1214–62. Alexander Hamilton, for example, observed that treaties' “true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.” Alexander Hamilton, *Federalist 22*, in THE FEDERALIST PAPERS 143, 150 (Clinton Rossiter ed., 1961). Similarly, James Madison wrote that treaties “have [the] force and operation of laws, and are to be a rule for the courts in controversies between man and man, as much as any other laws.” James Madison, *Letters of Helvidius, No. 1*, in 6 WRITINGS OF JAMES MADISON 138, 148 (Galliard Hunt ed., 1906).

It may seem structurally obvious that a treaty cannot supersede the Constitution, but one need not resort to structure to answer the question. By Article VI's text, only treaties "made, or which shall be made, under the Authority of the United States" gain the supreme status that Article VI conveys.<sup>15</sup> The "Authority of the United States" is set forth by the Constitution, which (as confirmed by the Tenth Amendment) makes the U.S. government a government of delegated powers plus specific prohibitions.<sup>16</sup> Powers not delegated to the United States by the Constitution, and acts prohibited by the Constitution, are *ultra vires*—that is, not within the United States' authority.<sup>17</sup> So, for example, the United States does not have constitutional authority to grant titles of nobility;<sup>18</sup> a treaty provision granting a title of nobility is not within the United States' authority. Thus that provision would not be part of supreme law nor binding on judges (in the same manner that a statute granting a title of nobility would not be part of supreme law).<sup>19</sup>

Treaty provisions that exceed the constitutional authority of the United States could be called "non-self-executing," in the sense that they require "execution" (implementation) by passing a constitutional amendment before they can be part of supreme

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

16. U.S. CONST. amend. X.

17. See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 17–20, 302–03 (2007) (discussing delegated powers structure and its implications for the treaty-making power).

18. See U.S. CONST. art. I, § 9, cl. 8.

19. One might read "authority of the United States" to mean only "purported authority" of the United States—that is, to mean treaties made on behalf of, or in the name of, the United States. But that meaning could be achieved by just saying "Treaties made by the United States"—omitting the phrase "under the authority." To give effect to the phrase "under the authority of," the phrase must mean more than "by." The most natural reading of "under the authority" is that it includes the things the United States is authorized to do and excludes things the United States is not authorized to do.

It is true that Article VI's textual requirement for supreme treaties—that they be made under the authority of the United States—differs from its textual requirement for supreme statutes—that they be made "in pursuance" of the Constitution. The difference in wording is explained by the framers' desire to make pre-ratification treaties, but not pre-ratification statutes, part of supreme law. This is the obvious effect of the phrase "Treaties made, or which shall be made": existing treaties, or future treaties. Thus, a treaty is part of supreme law, from the perspective of 1789, if it was made under the authority of the United States pursuant to the Articles of Confederation or the Continental Congress' pre-Articles authority, or if it is made in the future under the authority of the United States pursuant to the Constitution.

domestic law.<sup>20</sup> But it seems less confusing simply to call them unconstitutional, and so reserve the label “non-self-executing” for a different phenomenon.

A treaty provision might also violate the Constitution by purporting to exercise a power the Constitution grants exclusively to another branch of government. Here, there is an even greater temptation to use the phrase “non-self-executing,” especially when an exclusive power of Congress is involved. Although a treaty provision purporting to exercise an exclusive power of Congress is unconstitutional, the constitutional violation could be cured by Congress exercising its power to do what the treaty purports to do. Thus, if Congress has an exclusive power to appropriate funds,<sup>21</sup> and a treaty purports to appropriate funds, the treaty provision is unconstitutional—but Congress can cure the violation by making the designated appropriation.

The term “non-self-executing” may seem somewhat more apt in this situation because Congress could “execute” the treaty by (for example) making the appropriation. But calling the treaty provision unconstitutional on its own (subject to cure by congressional action) is more precise. Conceptually, this type of provision is no different from the example of a treaty provision that purports to exercise a power constitutionally prohibited to the United States as a whole, except in one case the violation can be cured by statute and in the other it must be cured by constitutional amendment. In either case, the treaty provision cannot become part of the supreme law of the land because it is contrary to a superior form of law (the Constitution). This terminology also parallels terminology in analogous situations, where one branch purports to exercise the exclusive power of another. For example, if Congress has an exclusive power to suspend the writ of habeas corpus,<sup>22</sup> we would not say a

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20. See Ramsey, *Supremacy Clause*, *supra* note 9, at 596–97 (adopting this terminology); Vázquez, *Laughing at Treaties*, *supra* note 9, at 2177 (same). In an earlier work, see Ramsey, *Supremacy Clause*, *supra* note 9, at 596–97, I did not clearly distinguish between (a) a treaty provision that purports to accomplish an unconstitutional act in itself and (b) a treaty provision that commits the United States to perform in the future an act not permitted by the Constitution. For example, a treaty might itself grant a title of nobility or it might direct that the United States shall grant a title of nobility at a future time. The former provision is unconstitutional; at the time the treaty is signed, the United States lacks authority to grant the title. The latter provision, as explained in Part II *infra*, is non-self-executing (and can be executed only by a constitutional amendment).

21. See U.S. CONST. art. I, § 9, cl. 7.

22. See U.S. CONST. art. I, § 9, cl. 2.

presidential decree suspending the writ is non-self-executing; we would say it is unconstitutional. If Congress thereafter enacts legislation ratifying the President's action, we would say Congress has approved the action and cured the constitutional defect. There is no reason treaty terminology should differ.<sup>23</sup>

In any event, the terminological issue here is mostly theoretical. In practice U.S. treaties generally do not purport to exercise exclusive powers of Congress. Despite contrary arguments dating to the founding period, the textual list of Congress' exclusive powers is likely short, perhaps including only appropriations, declaring war and possibly raising revenue.<sup>24</sup> Treaties have not generally purported to exercise these powers. For example, although treaties routinely call for money to be spent, treaties do not purport to make an appropriation. Thus, what we would call a treaty provision that did purport to exercise an exclusive power of Congress remains largely

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23. Numerous commentators, most prominently Carlos Vázquez, describe these provisions as a “constitutionality” category of non-self-executing treaties. *See, e.g.*, Vázquez, *supra* note 10, at 1751–54. As Professor Vázquez explains, however, treaty provisions in this category are conceptually distinct from other types of non-self-executing treaty provisions because they are not part of supreme law:

The non-self-executing character of [treaties that purport to exercise a power not possessed by the treatymakers] is not just a matter of judicial enforceability. . . . Such treaties are unconstitutional and thus do, indeed, lack the force of domestic law. The fact that such treaties differ from other non-self-executing treaties because they lack the force of domestic law is another reason to make clear that the ‘constitutionality’ category is separate and distinct . . . .

Vázquez, *supra* note 10, at 1754. *See also* BRADLEY, *supra* note 6, at 49–50 (describing such treaties as non-self-executing). In my view, it is confusing to use the term “non-self-executing” to describe two such distinct types of treaty provisions, especially when unconstitutional treaty provisions can simply be described as unconstitutional.

24. Appropriations power is understood as exclusive because the framers appeared to understand it that way. *See* RAMSEY, *supra* note 17, at 303 n.7; the text requires that appropriations be made “by Law” but arguably treaties are laws for this purpose. Congress' declare-war power is generally understood as exclusive by negative implication, at least in the sense that the President cannot declare war. *See* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1597 (2002). If Congress' power to declare war is exclusive of the President, it seems also exclusive of the treatymakers for the same reason: the power to declare includes the power not to declare, and a war once declared cannot be “undeclared.” The exclusiveness of raising revenue arguably arises from the rule that bills for raising revenue must originate in the House. *See* U.S. CONST. art. I, § 7, cl. 1. A further textual candidate for an exclusive power is Congress' power to “dispose of . . . the Territory or other Property belonging to the United States.” *See* U.S. CONST. art. IV, § 3, cl. 2; *Edwards v. Carter*, 445 F. Supp. 1279 (D.D.C. 1978) (considering an exclusivity claim under the property clause but dismissing for lack of standing).



an academic question, and so to avoid confusion it remains best simply to call it an unconstitutional treaty.<sup>25</sup>

In sum, unconstitutionality is a textual exception to treaties' textual status as supreme law binding on judges. We can restate the rule as: All treaties are supreme law of the land and binding on judges to the same extent as statutes and the Constitution, except for treaty provisions that are unconstitutional because they purport (a) to exercise a power the Constitution denies to the United States or (b) to exercise a power the Constitution grants exclusively to another branch of the U.S. government.

A second exception to treaties' supremacy, which can be mentioned here only briefly, arises where a treaty obligation conflicts with a statute. The Constitution's text does not directly resolve this conflict because Article VI gives constitutional treaties and constitutional statutes the same status and priority (while making both superior to state laws and state constitutions). Modern law resolves it through the later-in-time rule (a later statute trumps an earlier treaty and vice-versa).<sup>26</sup> Assuming this is a correct reading of the text and its historical background,<sup>27</sup> that rule provides an additional exception to treaties' domestic legal status: a treaty provision is not part of the supreme law of the land, and not binding on judges, if it conflicts with a later-in-time statute. Again, one could call such a treaty obligation "non-self-executing" (because it could be "executed" by Congress passing a new statute) but nothing is gained from using that phrase and it risks confusion with other versions of non-self-execution. A better approach is simply to state the exception clearly.

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25. As noted, *see supra* note 20, treaties that call on Congress to take action (including actions within Congress' exclusive powers) are properly called non-self-executing; their role is discussed in the next Section.

26. *Whitney v. Robertson*, 124 U.S. 190 (1888); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (AM. LAW INST. 1987).

27. *See* Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005) (defending the later-in-time rule on the basis of text and original understanding). *But see* Vasana Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479 (2006) (arguing that all statutes override treaties (even later-in-time treaties) based on the relative placement of treaties and statutes in Article VI); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 210, 488 n.135 (2d ed. 1996) (suggesting possible bases for arguing that treaties are constitutionally superior to statutes).

*C. Summary and Implications*

We can sum the foregoing discussion with a straightforward rule: All treaties are supreme law of the land and binding on judges to the same extent as statutes and the Constitution, except for (1) treaty provisions that conflict with the Constitution because they purport (a) to exercise a power denied to the United States by the Constitution or (b) to exercise a power the Constitution grants exclusively to another branch, and (2) treaty provisions that conflict with a later-in-time statute. Or, putting the proposition as a negative, nothing other than the Constitution or a later-in-time statute can prevent a treaty provision from being part of the supreme law of the United States and binding on judges in the same respect as the Constitution and statutes.

In particular, the preferences or intent of U.S. treaty negotiators or approving Senators cannot keep a treaty from being supreme law of the land and binding on judges in the same manner as the Constitution and statutes. U.S. treaty makers may prefer that a treaty provision not have this status, perhaps to preserve flexibility. However, the Constitution commands (rightly or wrongly) that all treaties must have this status (unless displaced by a superior form of law). The unilateral acts or intents of U.S. treaty makers are not law (and, most importantly, are not part of the supreme law listed in Article VI). The negotiators' preferences cannot displace the Constitution—any more than, for example, the President's preferences can displace the constitutional status of any other form of law.<sup>28</sup> If it were otherwise, it could not be the case that “all” treaties have supreme status.

But even though all treaties have the same legal status (apart from those that conflict with the Constitution or later-in-time statutes), this does not mean that there are no such things as non-self-executing treaty provisions. Rather, it means that the provisions' non-self-executing character must arise from the treaty itself. And non-self-execution, in this sense, cannot mean that the treaty is not part of the supreme law of the land or that the treaty is not binding on judges. Instead, it must mean that the treaty obligation is not of

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28. See Sloss, *Non-Self-Executing Treaties*, *supra* note 9, at 12–18, 45–80 (explaining and criticizing doctrines that give effect to the intent of U.S. treaty makers regarding self-execution); Vázquez, *supra* note 10, at 1770–74 (criticizing the draft Restatement's position on intent of the U.S. treaty makers).

the nature that can form a rule of decision for U.S. courts. The next Section explains this proposition.

## II. NON-SELF-EXECUTION AND TREATY TEXT

### *A. The Textual Basis for Non-Self-Executing Treaty Provisions*

The foregoing discussion might seem to suggest that the Constitution does not allow non-self-executing treaty provisions (apart from treaty provisions inconsistent with superior law). If all treaties are part of the supreme law of the land and binding on judges, how can a treaty provision not be enforceable by a U.S. court? The key is to recognize that the question whether a treaty is supreme law is separate from the question whether its provisions create a rule of decision (meaning a rule capable of resolving disputes) for U.S. courts.

A treaty's text may indicate that it does not provide judicial rules of decision in a number of ways. Most obviously, it might expressly declare that its provisions are obligations of another branch of government, or it might expressly declare that its provisions are not subject to judicial remedies, perhaps by providing an exclusive alternative remedy. Article VI provides that U.S. courts are bound by a treaty's provisions,<sup>29</sup> so if the treaty's provisions preclude courts from using them as rules of decision, then courts are bound by that direction. This may appear a contradiction, but it is not—what is binding on the court is all of the treaty, including its direction not to use it as a rule of decision.

Alternatively, a treaty provision might preclude its use as a judicial rule of decision implicitly, by calling for a type of action that (at least in the U.S. system) is not appropriately performed by courts. Under Article III, Section 1, U.S. courts only exercise “the judicial Power.”<sup>30</sup> In their exercise of the judicial power, courts must use treaty provisions (if applicable) as rules of decision. But if a treaty provision calls on the United States to exercise something other than the judicial power, it does not contain a rule that U.S. courts can use to decide cases. This does not mean the provision is not part of the supreme law of the land; it means only that the provision does not require anything that is within U.S. courts' judicial power to do.

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

30. U.S. CONST. art. III, § 1.

Importantly, constitutional and statutory provisions are subject to a similar analysis. Sometimes they are found not to provide a rule of decision, even though they are supreme law of the land. For example, the political question doctrine holds that some constitutional provisions are directed exclusively to other branches, or do not provide a sufficiently definite rule to be a rule of decision for courts.<sup>31</sup> Further, as Ernest Young points out, “some statutes create judicially enforceable rights, but some do not; . . . some statutes are simply contracts between the states and the federal government, the performance of which are largely governed by politics and the good faith of the parties.”<sup>32</sup> Similarly, “a regulatory statute might direct an administrative agency to address a particular problem but leave development of the operative regulations to the agency.”<sup>33</sup> In sum, there is no necessary link between status as supreme law of the land and capacity to operate as a rule of decision in court. The former arises from the law’s source; the latter arises from the type of obligations it imposes.

It follows from this discussion that non-self-execution in this sense arises from the treaty’s text. The type of obligation the treaty creates is decisive. If the treaty’s text creates an obligation appropriate to serve as a rule of decision in U.S. courts in their exercise of “the judicial Power,” Article VI requires that U.S. courts use it as a rule of decision. No non-Article VI law or prudential consideration should stand in the way (assuming, of course, the case is properly before the court in other respects). But if the treaty’s text creates an obligation that is not appropriate to serve as a rule of decision for U.S. courts, judges should properly decline to apply it, without creating any tension with Article VI: they are simply following the direction of the treaty.<sup>34</sup>

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31. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427–30 (2012); see Vázquez, *Laughing at Treaties*, *supra* note 9, at 2180 (pointing out the relationship between non-self-execution doctrine and political question doctrine); Yoo, *Globalism and the Constitution*, *supra* note 9, at 1979 (same).

32. Young, *supra* note 9, at 113.

33. *Id.* at 110–11.

34. As discussed further below, I differ from Professor Vázquez in viewing non-self-execution in this sense as consisting of a single category rather than two. See Vázquez, *supra* note 10, at 1750 (separately describing a category of provisions that are non-self-executing because they are “too vague for judicial enforcement or otherwise require[] policy judgments of a nonjudicial nature” and provisions that are non-self-executing “because the treaty itself contemplates that its aims will be accomplished through the enactment of legislation”). I

*B. Applying Textual Non-Self-Execution**1. Treaty provisions expressly directed to the political branches*

The most obvious examples of treaty provisions that do not contain a rule of decision for courts are provisions that expressly call on another branch to act. For instance, Article 5 of the 1783 Treaty of Peace with Britain directed that “Congress shall earnestly recommend it to the Legislatures of the respective States” that confiscated loyalist property should be restored.<sup>35</sup> (Under the Articles of Confederation, Congress generally lacked legislative power and so could only “recommend” on this point;<sup>36</sup> a more modern version might read, “Congress shall provide” that loyalist property be restored.) Plainly, this provision leaves nothing for courts to do since the obligatory action is specifically designated as one to be taken by Congress.

This conclusion, however, does not come solely from the treaty. If U.S. courts had power to order Congress to enact legislation, such a provision could be a rule of decision in a suit requesting such an order (assuming a proper plaintiff could be found). But in the U.S. system, courts are not understood to have this power as an application of the political question doctrine: whether and how to enact legislation is a political question entrusted to Congress.<sup>37</sup> As a result, the non-self-executing status of the treaty provision arises from a combination of the treaty’s text (which imposes an obligation on Congress) and the constitutional power of U.S. courts (which does not include power to compel action by Congress).<sup>38</sup> It is not the case that the treaty is not binding on the judiciary (in the sense that the judiciary can disregard its directions); rather, the treaty is

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would instead describe a single phenomenon—treaty provisions that, expressly or implicitly, do not provide rules that U.S. courts can apply.

35. Definitive Treaty of Peace, art. 5, U.S.-Gr.Br., Sept. 30, 1783, 2 U.S.T. 151.

36. See ARTICLES OF CONFEDERATION of 1781, art. IX (listing powers of Congress).

37. I leave aside the question of whether Congress is constitutionally obliged to pass the acts called for in the treaty. See Parry, *supra* note 9, at 1276–94 (discussing the various opinions on this question expressed during the 1795 Jay Treaty debates).

38. See Sloss, *Executing Foster v. Neilson*, *supra* note 9, at 143–53 (describing this “two step” approach to non-self-execution). While I generally endorse the two-step approach described by Professor Sloss, I think the steps may not be as sharply distinct as he suggests. As discussed below, see *infra* Section II.B.2, the international obligation may often be drafted with an eye to how it will interact with domestic legal systems, as the example of the 1783 peace treaty shows.

binding but the provision does not give any direction to courts because it contains no rule a court can apply.

This point was well understood in the founding era. The Constitution's framers drafted Article VI with the 1783 Peace Treaty specifically in mind; that treaty contained the direction to Congress described above, but it also contained the requirement that British creditors "meet no legal obstacle" in recovering pre-war debts, a provision the Court famously found appropriate as a judicial rule of decision in *Ware v. Hylton*.<sup>39</sup> In *Ware*, Justice Chase observed: "No one can doubt that a treaty may stipulate, that certain acts shall be done by the Legislature; that other acts shall be done by the Executive; and others by the Judiciary."<sup>40</sup>

To be sure, treaties do not *directly* make this stipulation very often. But considering the result when they do illustrates that non-self-executing treaties are not a conceptual contradiction. A treaty provision expressly directed to Congress requires the courts to let Congress implement it.

## 2. *Treaty provisions implicitly directed to the political branches*

Although treaty provisions may not often expressly name a particular branch of government, they more commonly call for actions that in the U.S. system are not appropriately undertaken by courts. The effect is the same as for the type of provision discussed in the preceding Section, except the treaty's direction is implicit rather than explicit. But again, the courts are bound by the treaty's direction that it be implemented by another branch.

Consider, for example, a treaty provision directing criminal punishment of particular conduct. While a treaty probably could constitutionally define an offense and a punishment with enough

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39. 3 U.S. (3 Dall.) 199 (1796); see David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 7, 13–14 (David L. Sloss, Michael D. Ramsey & William S. Dodge, eds., 2011) (discussing *Ware*).

40. 3 U.S. (3 Dall.) at 244 (opinion of Chase, J.). See Parry, *supra* note 9, at 1266–67 & n.284 (pointing out other supporting passages in Chase's opinion). Notably, this treaty provision presumably was *not* self-executing in the United States prior to adoption of the Constitution, because courts in the United States previously followed the English understanding that treaty provisions were not judicially enforceable. See *Ware*, 3 U.S. (3 Dall.) at 271, 277 (opinion of Iredell, J.) (making this point).

specificity that a U.S. court could impose it,<sup>41</sup> typically treaties do not do so. Rather, they call for criminal penalties to be imposed in non-specific terms. For example, the Convention on the Prevention and Punishment of the Crime of Genocide provides: “[t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.”<sup>42</sup>

Although the treaty has a specific definition of genocide, it does not further specify what the “effective penalties” should be; at least in the modern U.S. system, our understanding is that the establishment of a range of penalties is a legislative act; further, the treaty’s reference to “enact[ing] . . . legislation,” although not specifically mentioning Congress, appears addressed to Congress in the U.S. system because only Congress can enact legislation. The same would be true of a treaty provision that more generally refers to an obligation to establish a criminal offense. Such provisions cannot be rules of decision in U.S. court, not because of anything the Constitution says about treaties, but because legislative power is vested in Congress and creating an offense and punishment is a legislative (lawmaking) power that cannot be undertaken by U.S. courts.<sup>43</sup> Thus, the treaty provision’s lack of effect in U.S. court arises from a combination of the treaty’s text and the Constitution’s assignment of powers.

In some cases, an implicit direction to Congress is necessary because the treaty cannot on constitutional grounds accomplish the objective directly—typically because Congress has an exclusive

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41. Commentators have often assumed that treaties cannot constitutionally provide for criminal punishment. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i (AM. LAW INST. 1987). I see no textual or historical basis for that view. Nothing in the Constitution’s text suggests that Congress has a general exclusive power of criminal punishment. Although the Fifth Amendment requires “due process of law” for the deprivation of life, liberty, or property, a treaty (being part of supreme law) would seem sufficient if it were adequately specific as to the crime and the punishment.

42. Convention on the Prevention and Punishment of the Crime of Genocide art. V, Dec. 9, 1948, S. TREATY DOC. NO. 81-1, 78 U.N.T.S. 277; *see also* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. VII, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 45 (calling for “penal legislation” regarding prohibited activities but not providing any penalties).

43. *See* U.S. CONST. art. I, § 1; *United States v. Hudson & Goodwin*, 11 U.S. 32 (1811).

power. For example, treaty provisions often call for the expenditure of money but do not make an appropriation.<sup>44</sup> Because under U.S. law an appropriation is required, and because appropriations can only be made “by Law,”<sup>45</sup> the treaty’s spending obligation does not involve courts, which cannot make “Law” in this sense. Thus, courts cannot make an appropriation, and in the U.S. separation-of-powers system they cannot order Congress to make an appropriation. As discussed above, if appropriation is an exclusive power of Congress, U.S. treaty obligations must be framed this way.<sup>46</sup> But in any event, U.S. treaty obligations invariably are framed this way, and thus they do not provide any rule for courts.<sup>47</sup>

Although non-self-execution in this sense is often discussed in connection with directions to Congress, treaty provisions also may be, and commonly are, addressed to the executive branch. For example, in the 1778 Treaty of Alliance with France, the United States undertook to “guarantee . . . from the present time and forever, against all other powers . . . the present Possessions of the Crown of [F]rance in America . . . .”<sup>48</sup> Although what this guarantee required seems somewhat ambiguous, in any event it involves decisions about the use of military force, a power of the President as commander-in-chief (perhaps, depending on the circumstances, in conjunction with Congress’ power to declare war). Under the U.S. system the courts cannot manage military operations nor tell the President how to manage military operations, as that is not part of their Article III judicial power.<sup>49</sup>

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44. For example, the 1794 Jay Treaty called for expenditures to support a claims commission, but did not purport to make an appropriation; Congress passed an implementing act that made the appropriate appropriation. See Parry, *supra* note 9, at 1276–94.

45. U.S. CONST. art. I, § 9, cl. 7.

46. See *supra* notes 24–25. That is, if Congress’ power is exclusive, treaty provisions cannot themselves purport to make an appropriation.

47. In connection with a proposed treaty with Algiers, Thomas Jefferson as Secretary of State advised that “where a treaty contains such articles only as will go into execution of themselves, or be carried into execution by the judges, they may be safely made: but where there are articles which require a law to be passed [afterwards] by the legislature, great caution is requisite.” Thomas Jefferson, *Memorandum of Conference with the President on Treaty with Algiers*, Mar. 11, 1792, 23 PAPERS OF THOMAS JEFFERSON 256 (Charles T. Cullen et al., eds. 1990). Jefferson was presumably speaking of appropriations, since the proposed treaty contemplated payment to Algiers. See Parry, *supra* note 9, at 1275.

48. Treaty of Alliance, U.S.-Fr., art. 11, Feb. 6, 1778, 2 U.S.T. 35.

49. Note that a treaty provision directed to the executive, although non-self-executing from the perspective of the judiciary, is binding on the President: it is part of the supreme law (as all treaties are, unless contrary to the Constitution or a later-in-time statute) and the



This framework is entirely consistent with Justice Chase's observation in *Ware* that treaties can "stipulate" for actions to be taken by the courts, the legislature, or the executive. Sometimes treaties make those stipulations directly, but sometimes the stipulation can arise from the type of action required.<sup>50</sup>

### 3. *Foster v. Neilson* and ambiguously directed treaty provisions

In contrast to the explicit or implicit directions to other branches discussed above, self-execution arises from a treaty provision that is directed to the judiciary. Again, this could be explicit. The Warsaw Convention on air carrier liability directly addresses what effect it will have in court,<sup>51</sup> and in the U.S. system there is no constitutional barrier to the courts adopting its directions as rules of decision. The Convention on the International Sale of Goods provides rules for courts to apply in adjudicating contract disputes; although it does not expressly say it is directed to courts, implicitly it addresses courts (in the U.S. system) because it is a set of rules that courts are obviously expected to apply in ordinary contract disputes.<sup>52</sup> These provisions are self-executing in the U.S. system because they "stipulate" (to use Justice Chase's word)<sup>53</sup> for actions by courts.

Sometimes, however, it may be difficult to tell how the treaty provision is directed, requiring close interpretation of the text. Chief Justice Marshall's opinion in *Foster v. Neilson*,<sup>54</sup> now seen as the

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President per Article II, Section 3 must take care that the laws are faithfully executed. Thus, as a constitutional matter the President was bound to faithfully execute the 1778 treaty's guarantee, albeit with considerable discretion and not subject to judicial oversight.

50. In countries such as Britain, where courts lack power to use treaty provisions as rules of decision without implementing legislation, even very specific court-oriented treaty provisions would be regarded as directed to another branch. See Vázquez, *Treaties as Law of the Land*, *supra* note 9, at 614–15. This point further illustrates that non-self-execution arises from a combination of the treaty's text and the constitution of the implementing nation (and thus, the treaty provision may be self-executing in one domestic system and non-self-executing in another). Again, this is not a contradiction but a logical result of the interaction between the treaty text and the domestic constitutional system.

51. Convention for the Unification of Certain Rules Relating to International Carriage by Air, arts. 17–30, *opened for signature* Oct. 12, 1929, 2 U.S.T. 983 (specifically describing the extent of the carrier's liability and directing how and where an "action for damages" can be brought).

52. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3.

53. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 244 (1796) (opinion of Chase, J.).

54. 27 U.S. (2 Pet.) 253 (1829).

foundation of U.S. non-self-execution doctrine, is an example of a court addressing this sort of ambiguity. A provision in a treaty between the United States and Spain stated (in the English language version) that certain land titles in land ceded from Spain to the United States “shall be ratified and confirmed to the persons in possession of the lands.”<sup>55</sup> Did this mean that the treaty itself confirmed the land titles, or did it mean that the treaty obligated the United States to take some future action to confirm the titles? Marshall in *Foster* thought the latter.<sup>56</sup> Although not spelled out in the opinion, Marshall apparently also thought that the future action could only be taken by Congress, not by courts (presumably because it was an act of lawmaking).<sup>57</sup> Thus Marshall in effect read the treaty provision as if it said: “Congress shall confirm all land titles.”

Assuming that is what the treaty provision meant, Marshall was correct that courts could not use it as a rule of decision. That is not because the treaty was not part of the supreme law of the land or because its provisions were not binding on courts, but rather because the relevant provision, by its own terms, did not provide a rule of decision for U.S. courts.<sup>58</sup> To be sure, commentators have criticized the way Marshall read the treaty as unhelpful and confusing, and in a later case Marshall changed his mind about the particular treaty: after seeing the Spanish language version of the same treaty, he concluded it was not a call for future lawmaking action but an immediate declaration that the titles were confirmed. Accordingly, he decided, the treaty provision did provide a rule of decision for courts.<sup>59</sup>

But whatever the correct reading of the Spanish treaty, Marshall’s underlying theory follows from Justice Chase’s observation in *Ware* that treaties might call for acts by the judiciary or for acts by non-judicial branches. As Marshall put it, the question was whether the

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55. Treaty of Amity, Settlement, and Limits, U.S.-Sp., art. 8., Feb. 22, 1819, 3 U.S.T. 3.

56. See *Foster*, 27 U.S. at 314–15 (“The article under consideration does not declare that all the grants . . . shall be valid. . . . It does not say that those grants are hereby confirmed. Had such been the language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it. . . .”). For discussion and criticism, see Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in INTERNATIONAL LAW STORIES 151, 152–68 (John E. Noyes et al. eds., 2007); Sloss, *Executing Foster v. Neilson*, *supra* note 9, at 153–62; Sloss, *Non-Self-Executing Treaties*, *supra* note 9, at 19–23.

57. See Sloss, *Executing Foster v. Neilson*, *supra* note 9, at 153–62.

58. See Vázquez, *Laughing at Treaties*, *supra* note 9, at 2181–82.

59. *United States v. Percheman*, 32 U.S. 51 (1833); see also Vázquez, *supra* note 56, at 169–74.

treaty “addresses itself to the political, not the judicial department” such that “the legislature must execute the contract before it can become a rule for the Court.”<sup>60</sup> Framing it as a question of what the treaty language directed, Marshall’s version of non-self-execution was entirely consistent with Article VI of the Constitution: it did not purport to make a treaty provision not part of supreme law or nonbinding—it only recognized that some binding supreme law nonetheless might not provide a rule of decision for courts because of the way it was drafted. In this sense, *Foster* was not the creation of new doctrine but an application of a judicial understanding dating at least to *Ware*.<sup>61</sup>

Some commentators have criticized focusing on treaty text to determine non-self-execution because (they say) treaties are not typically drafted with domestic implementation in mind; rather, treaties are international instruments often involving nations with various ways of implementing their obligations.<sup>62</sup> While of course it is true that every country has its own method of implementing treaties, this criticism seems misplaced on at least four grounds. First, treaty-makers often have an option between stating an obligation specifically and directly or framing an obligation more generally to allow some discretion in implementation. Regardless of the method of domestic implementation, the latter is likely chosen to provide flexibility in implementation, which is consistent with the obligation being treated, in the U.S. system, as addressed to Congress or the Executive.<sup>63</sup> Second, it seems untrue that treaty-makers are generally uninterested in domestic implementation; in the absence of strong international courts, the efficacy of the treaty may be linked to its domestic enforceability.<sup>64</sup> Third, U.S. treaty-makers are strongly interested in how the treaty will be implemented in the United

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

61. See Parry, *supra* note 9, at 1305–28 (illustrating continuity between *Foster* and earlier discussions of non-self-execution); John T. Parry, *The Political Theory of Treaties in the Restatements of Foreign Relations Law*, 2015 BYU L. REV. 1581, 1594–97 (2016) (same).

62. See, e.g., BRADLEY, *supra* note 6, at 42–43.

63. In countries where treaties are not directly part of domestic law, this distinction is of less consequence, because in either event the legislature must implement it before courts can act. But greater or lesser specificity will nonetheless affect how much implementation discretion the legislature has.

64. See HENKIN, *supra* note 27, at 201 n.\*\* (“Other parties to a treaty, of course, prefer that a treaty be self-executing in the United States in order that they may enjoy rights under it immediately upon proclamation of the treaty . . .”).

States, and while U.S. treatymakers cannot wholly control the way the treaty is drafted, they may have substantial influence upon it.<sup>65</sup> As a result, it does not seem anomalous to think that a treaty's language should shape the type of domestic obligation it represents. Fourth, in any event, the treatymakers' purpose in drafting the provision is not the touchstone of the inquiry. If the treaty creates obligations on the United States that U.S. courts cannot implement, it does not matter whether the treaty parties intended to have them enforced judicially. And conversely, if the treaty creates obligations U.S. courts can implement, the Constitution requires them to do so, irrespective of the intent (or lack of intent) of the treaty parties. Thus, intent of the treaty parties is neither necessary nor sufficient to determine self execution.

In sum, the rule can be stated thus: a treaty provision cannot be enforced by U.S. courts if the provision by its own terms is implicitly or explicitly directed to another branch of government. A treaty is implicitly directed to another branch if it (intentionally or not) calls on the United States to perform some action that is not appropriately performed by the judicial power.<sup>66</sup>

#### *4. Vague and aspirational provisions*

In modern law, it is commonly said that vague and aspirational provisions are non-self-executing. That is correct, but these provisions are best understood as an illustration of the foregoing rule. Their vague or aspirational nature makes clear that they are not directed to the judiciary because they do not contain a clear enough rule for U.S. courts (which are not lawmakers) to implement without legislative guidance.<sup>67</sup> As in the general case, the non-self-

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65. See *id.* at 201 ("In particular instances, United States negotiators have been careful to make clear that the treaty will require Congressional implementation: in the North Atlantic Treaty, for example, it was accepted by all parties that no events would put the United States automatically at war; if war were called for, Congress would have to declare it.").

66. Some language in *Foster*, and some interpretations of it, suggest that any time a treaty calls for future action it is not enforceable by courts. That is an oversimplification. Some future actions can be implemented by courts. For example, the treaty provision at issue in *Ware* required that impediments to collection of British debts be disregarded. Definitive Treaty of Peace, Gr. Brit.-U.S., art. 4, Sept. 3, 1783, 2 U.S.T. 151. Courts could implement that obligation (as the Supreme Court held in *Ware*) because courts had constitutional power to remove the legal impediments by disregarding them in judicial proceedings. See Sloss, Ramsey & Dodge, *supra* note 39, at 13-14.

67. See Vázquez, *Laughing at Treaties*, *supra* note 9, at 2178-80. As noted, Professor Vázquez treats these types of provisions as a distinct category from those expressly directed to Congress. See Vázquez, *supra* note 10, at 1749-50. I doubt anything substantive turns on the

executing character arises from the text of the treaty provision combined with the constitutional nature of the U.S. judiciary as an adjudicative body rather than a legislature. Because these provisions leave substantial discretion as to how they are implemented, they are not adjudicative rules in the sense that Marshall explained in *Marbury v. Madison*.<sup>68</sup> To be sure, it may be a very difficult question whether a provision is too vague or open-ended to be a judicial rule, especially because in the U.S. system courts commonly adjudicate open-ended constitutional provisions. But conceptually the point should be readily understood: a provision does not provide a rule of decision for courts if it leaves substantial legislative or executive policy discretion in how it is to be implemented.<sup>69</sup>

##### *5. Reservations and declarations of non-self-execution*

In modern law, the U.S. Senate in giving its advice and consent to a treaty sometimes includes a proviso that the treaty (or a provision of the treaty) is non-self-executing. This Section considers how such Senate actions should be understood under a textual approach to non-self-execution.<sup>70</sup>

To begin, the Senate cannot declare that a treaty is not supreme law of the land or that its provisions are not binding on judges. As discussed, Article VI says that *all* treaties have these characteristics and the Senate cannot change the Constitution.<sup>71</sup> However, the Senate can indicate that a treaty's provisions are directed to Congress and not to the courts.

The Senate could accomplish this outcome directly by requiring the President and the U.S. treaty partners to revise the treaty using

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different terminology, but I prefer to emphasize the conceptual similarity of the two. In particular, vague treaty provisions are often likely drafted as they are with the expectation that they generally will be implemented by legislatures or executives, rather than courts.

68. 5 U.S. (1 Cranch) 137, 170 (1803) (distinguishing between rules of decision for courts and political questions that involve the exercise of non-judicial discretion).

69. Moreover, by their nature as diplomatic instruments, treaties commonly contain vague or aspirational provisions. As a result, treaty provisions that are non-self-executing on this ground should not be regarded as an anomaly.

70. See generally Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991) (arguing for the unconstitutionality of declarations); Vázquez, *Treaties as Law of the Land*, *supra* note 9, at 672–85 (discussing the validity of non-self-executing reservations and declarations). For more detailed discussion of differing types of non-self-execution declarations, see Sloss, *supra* note 10, at 1714–21.

71. See *supra* Section I.A.

language expressly addressing Congress before giving its consent. Alternatively, it could adopt a reservation to the treaty stating something to the effect of “in the United States, provisions of this treaty will be implemented in a manner determined by Congress.” The latter seems equivalent to the former for non-self-execution purposes, as reservations become part of the treaty itself. In both situations, the treaty’s non-self-executing status is contained within the treaty’s text, and thus is a binding direction to U.S. courts to leave implementation to Congress. Treaty provisions covered by such reservations are thus non-self-executing without posing any textual difficulties, in the same manner as the treaty provisions discussed in prior Subsections.

A more difficult question arises if the Senate includes a non-self-execution proviso only in a unilateral declaration or understanding—a statement internal to the United States that does not become part of the treaty.<sup>72</sup> These declarations have been treated as binding on courts,<sup>73</sup> but textually there is little ground for doing so, and indeed they illustrate the key distinction between a textual and non-textual approach to non-self-execution. As set forth above, a treaty provision can be taken out of the competency of courts either (a) by a superior act of lawmaking (the Constitution or a subsequent inconsistent statute) or (b) by the treaty provision itself (by directing its obligation to another branch or precluding judicial remedies). Senate declarations are neither superior law in themselves (they are not law at all) nor are they part of the treaty. If a treaty provision is otherwise appropriate as a rule of decision for courts (that is, if it is not contrary to superior law and it is not directed to another branch), Article VI requires that judges apply it as a rule of decision (because judges are bound by it).<sup>74</sup> The Senate declaration amounts to a pronouncement that judges are not bound by it (contrary to Article VI).<sup>75</sup>

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72. *See, e.g.*, Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, S. Res., 102d Cong., 138 CONG. REC. S4783–84 (1992).

73. *See, e.g.*, *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc).

74. *See* U.S. CONST. art. VI, cl. 2.

75. One might attempt to avoid this conclusion by arguing that Article II conveys on the treaty-makers the power to decide unilaterally that treaty provisions are not binding on judges. However, the relevant Article II power is only to “make Treaties.” U.S. CONST. art. II, § 2, cl. 2. Nothing in Article II speaks at all to the relationship between treaties, once they are

Under a textual analysis, Senate declarations (and other indicia of the treaty-makers' understanding) would still be relevant where the effect of the treaty is unclear from the treaty language. Courts might appropriately treat them as evidence of the treaty's meaning on the question whether the treaty language creates a rule of decision for courts. But declarations and other unilateral acts cannot (under a textual analysis) be regarded as altering the treaty's status as binding domestic law.<sup>76</sup>

#### 6. *The intent of U.S. treaty-makers*

Some commentary and court decisions indicate that the touchstone of non-self-execution is the intent of the U.S. treaty-makers (assuming that this intent is not expressed in a Senate declaration).<sup>77</sup> The foregoing discussion should make clear that, under a textual approach, reliance on unexpressed intent carries the same difficulties as reliance on Senate declarations. Like declarations, evidence of (or even speculation about) the U.S. treaty-makers' intent may be relevant to assess the meaning of a treaty's text. For example, if it is plain that during negotiation of a treaty, the U.S. negotiators believed the treaty would not provide a rule of decision for U.S. courts absent implementing legislation, that would be evidence of

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made, and U.S. courts. That relationship is defined by Article VI, and it is stated in absolute terms. To the extent there is a power to modify a treaty's domestic effect, that power should be understood as a power of Congress, which can use its power to create later-in-time supreme law to direct how a treaty should be implemented. See Michael D. Ramsey, *Congress's Limited Power to Enforce Treaties*, 90 NOTRE DAME L. REV. 1539 (2015) (defending Congress's authority over treaty implementation as part of its power to make laws necessary and proper to carry into execution powers vested in other branches of government).

If there were founding-era history suggesting such an Article II power, that might be cause for reassessment, but there is none. As discussed, *Foster* and related founding-era commentary show how treaty language can make a provision unsuited to be a rule of decision for courts, and that conclusion is entirely consistent with Article VI. Article VI makes a treaty provision binding, but (of course) only to the extent of the obligation actually contained in the treaty. In contrast, the Senate declaration is not contained in the treaty, and so is an attempt to change the effect of Article VI. See Sloss, *Non-Self-Executing Treaties*, *supra* note 9, at 35–44 (making this argument while also accepting that a Senate declaration can preclude a private right of action in federal court).

76. To be clear, this analysis is limited to the Constitution's text. One could argue that non-self-executing declarations have been validated by practice. Further, it might be the case that the non-self-executing declaration is not severable from the Senate's consent, and thus if the declaration is invalid the Senate's consent (and thus the U.S. ratification) is defective from a constitutional standpoint.

77. *E.g.*, Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 149–57.

the treaty's meaning (although it might be outweighed by other evidence).

Ultimately, however, the touchstone is the treaty's meaning, not the unilateral intent of the U.S. treaty-makers, because only the treaty itself is part of supreme law. If a treaty provision, interpreted in accord with all relevant evidence, appears to establish a rule of decision suitable for U.S. courts, then as a constitutional matter U.S. courts must apply it, because pursuant to Article VI it is "supreme Law" and judges are "bound thereby." The U.S. treaty-makers cannot change that status, even if they would prefer a different one, because they cannot make supreme law under Article VI (other than by incorporating it into the treaty itself). As Carlos Vázquez concludes, the idea that unilateral intent of U.S. treaty-makers, not incorporated into the treaty's language, can make a treaty non-self-executing "would be to recognize a form of federal law-making not specified in the Constitution."<sup>78</sup>

To be clear, the matter does not necessarily turn on finding a shared intent of the treaty parties regarding self-execution or non-self-execution. The parties may not have had such a shared intent, because the non-U.S. party or parties may not have had a view on how the treaty should be enforced in the United States. The potential absence of a shared view does not, however, indicate that the unilateral view of the U.S. treaty-makers should prevail. Rather, the key question is not what the treaty parties intended to happen regarding domestic enforcement, but whether their mutually agreed text expressed the type of obligation that can be applied as a rule of decision in a U.S. court. Phrasing it in this way covers both (1) the situation in which the treaty parties intended to direct the treaty obligation to the U.S. political branches and (2) the situation in which the treaty parties created an obligation that in the U.S. system is necessarily directed to the political branches, whether or not they intended it to have that effect.

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78. Vázquez, *Treaties as Law of the Land*, *supra* note 9, at 638–41. Thus, as Professor Vázquez further explains, "the ultimate question is what the treaty means, and the expressed intent of the U.S. treaty-makers is relevant solely as evidence of that meaning." Vázquez, *supra* note 10, at 1770.



### 7. Summary: textual non-self-execution

In sum, non-self-execution arises when the text of a treaty provision directs itself to a part of government other than the judiciary. This may be done expressly, by reciting that Congress or the President shall take a designated action. It may also be done implicitly by calling on the United States to take an action that (in the U.S. constitutional system) cannot be taken by the judiciary. A vague or aspirational provision, or one that otherwise anticipates future acts of lawmaking or executive discretion, thus will be non-self-executing because (a) standing alone it is not a rule of decision, and (b) providing the specificity needed to make it a rule of decision is not a judicial act.

Notably, however, non-self-execution is a function of the way treaty obligations are drafted—principally, whether they provide a rule of decision in themselves or call for future development of a rule. A provision that is specific enough to provide a rule of decision and does not call for lawmaking action or executive policy discretion is binding on courts; it cannot be made nonbinding by unenacted intent or preferences of other branches.<sup>79</sup>

### III. APPLICATION IN *MEDELLÍN V. TEXAS* AND BEYOND

This Section considers whether the Supreme Court's non-self-execution ruling in *Medellín v. Texas*<sup>80</sup> follows the foregoing textual outline of non-self-execution.<sup>81</sup> It concludes that *Medellín*, read properly, deploys the textual framework although *Medellín*'s conclusion as to the particular treaty provision at issue may be doubted. This Section further examines two post-*Medellín* lower court opinions to illustrate how a textual approach to non-self-execution can be implemented in light of *Medellín*.

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79. See Vázquez, *Treaties as Law of the Land*, *supra* note 9, at 638–41 (rejecting idea that unilateral intent of U.S. treatymakers, not incorporated into the treaty's language, can make a treaty non-self-executing because that “would be to recognize a form of federal lawmaking not specified in the Constitution”).

80. 552 U.S. 491 (2008).

81. *Medellín* has been criticized as inconsistent with a text-based approach. See, e.g., Sloss, *Executing Foster v. Neilson*, *supra* note 9, at 182–87; Vázquez, *Treaties as Law of the Land*, *supra* note 9, at 646–68. For a defense of the case based on the U.S. treatymakers' intent, see Bradley, *supra* note 77.

*A. Medellín and the Textual Approach.*

Although not entirely free from doubt, the Court's decision in *Medellín* can be read to endorse a textual approach to treaty non-self-execution. Crucially, the *Medellín* majority emphasized the text of the treaty. Its substantive discussion of the issue (Section II.A of the opinion) begins:

The interpretation of a treaty, like the interpretation of a statute, begins with its text. Because a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the negotiation and drafting history of the treaty as well as the post-ratification understanding of signatory nations.<sup>82</sup>

After concluding that the relevant treaty provision in the case was Article 94(1) of the UN Charter, the majority then closely examined the text of Article 94(1), specifically the phrase that the United States “undertakes to comply with the decision” of the International Court of Justice in cases to which the United States is a party. From this text the majority concluded “[t]he Article is not a directive to domestic courts”; for this proposition it cited *Foster's* observation that the treaty was non-self-executing because “its text . . . did not act directly on the grants.”<sup>83</sup>

The majority then pointed to Article 94(2) of the Charter, which (according to the majority) “provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state.”<sup>84</sup> The opinion described executive branch materials indicating that at the time of ratification the U.S. executive branch understood Article 94(2) as an exclusive remedy, concluding that “*Medellín's* view that ICJ decisions are automatically enforceable as domestic law is fatally undermined by the

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82. *Medellín*, 552 U.S. at 506–07 (citations omitted). This opening paragraph cited four cases: *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996); *United States v. Stuart*, 489 U.S. 353 (1989); *Air France v. Saks*, 470 U.S. 392 (1985); and *Choctaw Nation v. United States*, 318 U.S. 423 (1943). *Id.* All four cases involved the interpretation of a treaty's terms in general, not specifically the question of self-execution. Thus the majority appeared to equate the self-execution inquiry to ordinary interpretation of a treaty's terms, which is consistent with the textual approach to self-execution.

83. *Medellín*, 552 U.S. at 508 (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314, 315 (1829)).

84. *Id.* at 509.

enforcement structure established by Article 94,”<sup>85</sup> and later that “where a treaty does not provide a particular remedy, . . . it is not for the federal courts to impose one on the States through lawmaking of their own.”<sup>86</sup> Responding to the dissent, the majority reemphasized that “Given our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue”—what it later described as “resorting to the text” and a “time-honored textual approach.”<sup>87</sup>

The *Medellin* majority’s approach seems consistent with the textual framework sketched in previous Sections of this Article. The majority understood the non-self-execution inquiry to be whether the treaty itself (as reflected mainly in its text) provided a rule of decision for U.S. courts, or whether it was directed to other branches, requiring them first to create a rule of decision before U.S. courts had anything to apply. It found the latter, based principally on two parts of the text: (a) that Article 94(1) called for future action, and (b) that Article 94(2) provided an exclusive remedy in the Security Council.

The first of these points, standing alone, seems inadequate. While it is true that the provision in question called for the United States to take future action, that is not enough to exclude the provision from courts. Courts, like other branches of government, can take actions within their constitutional powers to implement treaty obligations (as discussed above regarding *Ware*).<sup>88</sup> A U.S. court *might* have judicial power to assure future compliance with an ICJ judgment (depending on the nature of that judgment). For example, if the ICJ concluded that a U.S. treaty obligation required the United States to allow *Ware* to sue to collect his debt from *Hylton*, without legal impediments, a U.S. court would seem to have

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85. *Id.* at 511.

86. *Id.* at 513–14 (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006)). The *Medellin* Court added that its interpretation was consistent with the executive branch’s interpretation, which “is entitled to great weight.” *Id.* at 513 (quoting *Sumitomo Shoji American Inc. v. Avagliano*, 457 U.S. 176, 185 (1982), a case about ordinary treaty interpretation).

87. *Id.* at 514. In this passage the majority also described the *Foster/Percheman* episode, *see supra* text accompanying note 55, as evidence of the self-execution/non-self-execution question being resolved by the treaty’s text.

88. *See supra* note 66; *see also* Sloss, *Executing Foster v. Neilson*, *supra* note 9, at 145 (making this point).

judicial power to enforce that result without implementing legislation, even though the obligation is something to be performed in the future. To be sure, some ICJ judgments might involve future actions that could only be done by the political branches (for example, if the judgment expressly required the United States to enact legislation). But a requirement for future action does not categorically require non-self-execution.

Thus the *Medellín* majority's conclusion principally depends on the assertion of an exclusive Security Council remedy through Article 94(2). Here, the majority's conclusion seems correct (and consistent with the textual framework for non-self-execution) if its reading of the treaty language was correct. If the treaty had specifically stated that Security Council action would be the sole remedy for a nation's failure to comply with an ICJ ruling, then that would seem decisive: the treaty itself would declare that U.S. courts lack authority to use it as a rule of decision. Pursuant to Article VI of the Constitution, the exclusive remedy provision would be part of the supreme law of the land and binding on U.S. judges as much as any other provision in the Charter; thus the provisions relating to the ICJ would be non-self-executing by their terms. And if that is true of an express declaration of an exclusive remedy, it should also be true of an implicit declaration of an exclusive remedy. (One may question, however, whether the Court correctly found the Security Council remedy to be exclusive).<sup>89</sup> As a result, *Medellín* appears simply to illustrate another way a treaty provision may be non-self-executing: if the treaty itself provides for an exclusive alternative forum for enforcement.

Unfortunately, in its introduction and in parts of its later response to the dissent, the *Medellín* majority confused the matter in two ways. First, in its general opening overview of the law, it called

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89. In finding the Security Council remedy exclusive, the majority relied heavily on the practical advantages for U.S. policy makers of an exclusive remedy. See *Medellín*, 552 U.S. at 511–12 (concluding that “[i]n light of the U.N. Charter’s remedial scheme,” including the U.S. opportunity to veto Security Council action, “there is no reason to believe that the President and Senate signed up for [direct judicial enforcement]”). Although this passage relies on the probable intent of the U.S. treatymakers, it does so in order to interpret the treaty’s text—specifically to decide whether the treaty’s designated enforcement mechanism is exclusive. As discussed, this is an appropriate use of the U.S. treatymakers’ intent. See *supra* Section II.B.6.

Professor Sloss argues that, under this view, Texas’ execution of *Medellín*, in violation of the ICJ judgment, would violate the due process clause. See Sloss, *Executing Foster v. Neilson*, *supra* note 9, at 185–87. This Article expresses no opinion on that suggestion.

into question whether a non-self-executing treaty is part of domestic law: “This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that . . . do not by themselves function as binding federal law.”<sup>90</sup> In an associated footnote the majority added “What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification.”<sup>91</sup> These statements are misleading. As discussed, all treaties are part of U.S. domestic law; the self-execution question is whether their provisions establish a rule of decision for courts. These statements are also unnecessary, because nothing in the majority’s reasoning or holding required it to find that Article 94 was not part of U.S. domestic law. To the contrary, as discussed above, the Court concluded that Article 94, as part of domestic law, precluded a domestic judicial remedy by its own terms.

Second, the majority undermined its adherence to textual interpretation later in the opinion by referring to the “intent” of the President and the Senate.<sup>92</sup> In context, it appears that the majority meant the intent as discerned from the treaty’s text—several of the key passages refer to intent discerned from text, and they come after the textual discussion highlighted above. But in isolation, the language could be understood as making non-self-execution turn on the preferences—perhaps even the unexpressed or presumed preferences—of the U.S. treatymakers. As discussed, this is not consistent with Article VI.<sup>93</sup> The U.S. treatymakers cannot affect a treaty provision’s legal status except by changing its status in the treaty itself. It is the treaty, not the intent, that binds courts, so the only way a treaty provision is not a rule of decision for courts is if the treaty says it is not. Again, this misdirection was unnecessary. The majority’s reasoning and conclusion did not depend on appeal to

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90. *Medellín*, 552 U.S. at 504.

91. *Id.* at 505 n.2.

92. *See id.* at 523 (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006)) (“Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by ‘many of our most fundamental constitutional protections.’”); *see also id.* at 521 (“Our cases simply require courts to decide whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.”); *id.* at 519 (“[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.”).

93. *See supra* Section I.C. & II.B.6.

unenacted intent. It seems clear that the majority principally appealed to intent to assess whether the treaty's text created an exclusive remedy at the Security Council—otherwise, the references to intent are hard to reconcile with the opinion's strong focus on the text elsewhere.

In sum, *Medellín*'s basic approach was correct within a textual framework: one must examine the text of the treaty to see if the treaty provides a rule of decision for courts or whether it calls for an intermediate step whereby another actor (typically Congress, as the lawmaking body under the U.S. Constitution) creates a rule of decision to implement the treaty.<sup>94</sup> As I read its opinion, the *Medellín* majority concluded that the treaty's text identified the Security Council as the sole remedy for noncompliance with an ICJ judgment and thus by its terms precluded domestic judicial remedies. That is entirely consistent with the text-based approach sketched above.

### *B. Treaty Non-Self-Execution after Medellín*

This Subsection briefly considers two post-*Medellín* court of appeals decisions, one finding a treaty self-executing and one finding a treaty non-self-executing. It concludes that both decisions are

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94. Justice Breyer's dissent faulted the majority for an unduly text-bound approach. *See Medellín*, 552 U.S. at 548–49 (Breyer, J., dissenting). However, Breyer's complaint seems principally founded on his view that the majority insisted on an express embrace of self-execution in the treaty's text. That disagreement aside, Breyer's dissent also focused on the treaty's text. *See id.* at 549–50 (quoting *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (asking whether “the *treaty provision* ‘addresses itself to the political . . . department[s]’ for further action or to ‘the judicial department’ for direct enforcement” (emphasis added))). *See also id.* at 551–62 (discussing seven factors suggesting self-execution, of which at least the first three are based on the treaty's text). Thus Breyer's principal objection was not that the majority emphasized the text, but rather that (in his view) the majority unreasonably demanded that the text expressly call for self-execution.

If Justice Breyer correctly understood the majority to require an express statement of self-execution, his concerns seem valid. As he explained, often a treaty—especially a multilateral treaty—will not address domestic implementation directly because the treaty parties have differing domestic regimes regarding treaty obligations. However, the dissent likely overread the majority's requirement here. As discussed, the majority rested principally on the specific “undertakes to comply” language in Article 94(1) and the Security Council remedy in Article 94(2). Neither the Charter as a whole nor Article 94 has any specific direction of self-execution. If specific direction were required, analysis of the individual provisions would not have been necessary to demonstrate non-self-execution. Rather, the majority opinion seems better understood as deriving non-self-execution from the affirmative meaning of particular provisions rather than from the absence of a self-execution directive.

correct under a textual approach, thus indicating that the approach is a manageable one.

In *Brzak v. United Nations*,<sup>95</sup> the issue was whether the Convention on Privileges and Immunities of the United Nations (CPIUN)<sup>96</sup> was self-executing. Plaintiffs sued the United Nations and various U.N. officials for sex discrimination, but the CPIUN provides that “the United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”<sup>97</sup> According to the court of appeals, quoting *Medellín*, the self-execution question turned upon whether “the treaty contains stipulations which . . . require no legislation to make them operative.”<sup>98</sup> The court relied on the treaty’s text, its ratification history and post-ratification executive branch practice to find the provision self-executing (and thus it dismissed the suit).

Under a textual approach to treaty non-self-execution, this conclusion seems correct. Examining only the treaty text, one can see that the obligation established by the CPIUN is specific, not dependent on policy discretion for implementation, and addressed to the type of activity (management of litigation) within U.S. courts’ core constitutional powers. The text provides no reason to think it is addressed to a branch of domestic government other than the judiciary.<sup>99</sup> It is true that the CPIUN does not expressly say it is self-executing, but the court of appeals did not read *Medellín* to require such an express statement; creation of a judicially manageable obligation was sufficient. Notably, the conclusion as to self-execution can be reached without any investigation of the intent of the treaty parties apart from the text (although the court did go on to consider ratification and post-ratification evidence as well).

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95. 597 F.3d 107 (2d Cir. 2010).

96. Feb. 13, 1946, 21 U.S.T. 1418 (entered into force in the United States Apr. 29, 1970).

97. *Id.* at art. II.

98. *Brzak*, 597 F.3d at 111 (quoting *Medellín*, 552 U.S. at 505–06).

99. The court further pointed out that Section 34 of the CPIUN requires a country acceding to the treaty to be “in a position under its own law to give effect” to the treaty; the court interpreted this to mean that a country could accede only if no further domestic lawmaking was needed. *Id.* It then went on to consider the views of the executive and legislative branches.

In contrast, in *Doe v. Holder*,<sup>100</sup> the same court of appeals found the relevant provision of the U.N. Convention Against Transnational Organized Crime (CATOC)<sup>101</sup> to be non-self-executing. Doe, a citizen of Ghana, faced removal from the United States to Ghana based on his involvement in international drug smuggling; he sought protection under the CATOC because he had assisted U.S. authorities in arresting and convicting other members of his drug-smuggling operation. CATOC provides: “Each state party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by [the CATOC].”<sup>102</sup> The court found this provision non-self-executing (and thus of no assistance to Doe in resisting his removal to Ghana):

Under the CATOC, the signatories commit to provide “effective” witness protection . . . . “Effective” protection is not specifically defined. Rather, Article 24 explains later that such protection “may” consist of, “*inter alia*,” physical protection, relocation, non-disclosure of the witness’s identity and location, and the use of video-link testimony. It is therefore left to the signatory’s discretion to determine what measures are “appropriate” and “within its means,” and what protection is sufficiently “effective.”<sup>103</sup>

The court further noted that the CATOC directs that “[e]ach State Party shall take necessary measures, *including legislative and administrative measures*, . . . to ensure the implementation of its obligations under this Convention” and concluded that “[t]hus, the CATOC specifically envisions that it will be implemented by additional domestic legislative actions.”<sup>104</sup>

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100. 763 F.3d 251 (2d Cir. 2014). Coincidentally, *Brzak* and *Doe* were written by the same judge, Barrington D. Parker.

101. Nov. 15, 2000, T.I.A.S. 13127, 2225 U.N.T.S. 209 [hereinafter *CATOC*].

102. *Id.* at art. 24.

103. *Doe*, 763 F.3d at 256.

104. *Id.* (quoting *CATOC*, *supra* note 101, at art. 34). The court also noted the executive and legislative branches’ view that the CATOC was non-self-executing. Notably, the CATOC witness protection provisions seem most directly addressed to the executive branch, which would be the principal decision-maker as to what steps would be taken regarding particular witnesses. To reiterate an earlier point, the common formulation that non-self-executing treaties are addressed to Congress is an oversimplification. Non-self-executing provisions are addressed to a branch of government other than the judiciary. Further, because the CATOC is part of the supreme law of the land under Article VI, its provisions should be seen as part of federal law. *But see Doe*, 763 F.3d at 255 (describing non-self-executing treaty provisions as “not domestic law”) (quoting *Medellín v. Texas*, 552 U.S. 491, 504 (2008)).



As in *Brzak*, *Doe* indicates that non-self-execution issues can be resolved without appeal to an atextual intent of the treaty parties (or of the U.S. treaty-makers). Although in both cases the court noted the positions of the executive and legislative branches, reliance on these positions was not needed to reach the conclusion. Thus, the treaty provisions in the two cases provide a useful contrast between obligations that are self-executing under a textual approach and those that are not. They also indicate that the issue of treaty non-self-execution need not be a mysterious one.

#### IV. CONCLUSION: A TEXTUAL RESTATEMENT OF NON-SELF-EXECUTION DOCTRINE

The foregoing discussion supports the following restatement of non-self-execution law, derived from the Constitution's text and applied in *Medellin*:

- (1) All U.S. treaties are the supreme law of the land and binding on U.S. judges to the same extent and in the same manner as statutes and the Constitution, except for (a) unconstitutional treaties (treaties or treaty provisions that go beyond the constitutional authority of the U.S. treaty-makers) and (b) treaty provisions that conflict with subsequently enacted statutes.
- (2) U.S. courts must apply binding treaty provisions in cases properly brought before them to the extent the treaty provisions by their terms provide applicable rules of decision for courts.
- (3) A treaty provision does not provide a rule of decision for a U.S. court if it calls for action outside the constitutional judicial power of U.S. courts. Treaties that expressly or implicitly call for legislative or other non-judicial action, or preclude judicial remedies, do not provide rules of decision for courts. Whether a treaty calls for non-judicial action or precludes judicial remedies is a question of the meaning of the treaty's text, as interpreted using ordinary methods of determining textual meaning.

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Thus the executive branch should have understood itself to be under a (nonjusticiable) domestic law obligation to comply with CATOC (subject to considerable discretion as to what CATOC required). To the extent the court suggested otherwise, its discussion is not consistent with a textual approach to treaty non-self-execution. However, the court correctly concluded that the treaty provisions, because of the way they were written, did not create a rule of decision for U.S. courts.

This approach contrasts with the proposition that the intent of the U.S. treaty-makers can determine the status of treaty obligations. Under that approach, a treaty provision that by its terms establishes a rule of decision for U.S. courts would nonetheless not be a rule of decision if the President and/or the Senate intended that it should not be. That approach is contrary to the categorical rule of Article VI, which is binding on the President and the Senate. The only way the treaty-makers can prevent a treaty from being a rule of decision in U.S. courts is to draft the treaty so that by its terms it does not create a rule of decision for U.S. courts.

To be sure, it may often be a difficult inquiry whether the terms of a treaty create a rule of decision for U.S. courts. That is likely to be especially true because the treaty parties may not have domestic effect in mind in drafting and approving the treaty. Nonetheless, this account illustrates how non-self-execution can be understood conceptually as consistent with the text of Article VI, even if that concept is not always easy to apply in practice.

