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## Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution

*Carlos Manuel Vázquez\**

The American Law Institute has embarked on the challenging task of restating the confounding distinction between self-executing and non-self-executing treaties. In some respects, the current draft represents an advance from the treatment of the subject in the *Restatement (Third) of Foreign Relations Law of the United States*. At the same time, the current draft retains, and may even aggravate, some of the flaws of that earlier treatment. Such retrogression might be explained by the fact that the new project has to deal with a recent, puzzling Supreme Court decision on the subject. At the time of the *Restatement (Third)*, the Court had not addressed this distinction in any depth since its original decisions introducing the doctrine almost two centuries earlier, namely *Foster v. Neilson*<sup>1</sup> and *United States v. Percheman*.<sup>2</sup> The Court's 2008 decision in *Medellín v. Texas*,<sup>3</sup> the first since *Foster* to deny relief on the ground that the treaty being invoked was non-self-executing,<sup>4</sup> presents obvious challenges to any attempt to restate the law on this subject. The reporters are largely successful at avoiding the blind alleys down which *Medellín* might have led them. They rightly recognize that some of the views expressed in the opinion are untenable and conclude that "[t]he unusual circumstances of *Medellín* . . . counsels against generalizing too much from the Court's finding there of

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\* Professor of Law, Georgetown University Law Center. I am grateful to the organizers of and participants in the B.Y.U Treaty Symposium and to the editors of the law review.

1. 27 U.S. (2 Pet.) 253, 256 (1829).

2. 32 U.S. (7 Pet.) 51, 89 (1833).

3. 552 U.S. 491, 510–13, 523 (2008).

4. *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, 50 (1913), is a possible exception. See *Medellín*, 552 U.S. at 545 (Breyer, J., dissenting) (citing Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM J. INT'L L. 695, 716 (1995) [hereinafter *Four Doctrines*]). But cf. Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 601 n.8 (2008) [hereinafter *Judicial Enforcement*] (questioning whether *Cameron Septic Tank* really rested on the Court's conclusion that the relevant treaty was non-self-executing).

non-self-execution.”<sup>5</sup> On some issues, however, the reporters overlook this wise counsel. On others, the problems with the draft are not traceable to *Medellín*.

This Essay suggests four ways the current draft could be improved. First, the draft should explicitly recognize that the concept of self-execution is not a unitary one. The draft already implicitly recognizes this by distinguishing three of the issues that courts and commentators have analyzed under the “self-execution” label.<sup>6</sup> Explicit recognition of the non-unitary nature of self-execution doctrine would significantly advance clarity of analysis. The draft should also recognize a fourth distinct version of self-execution.

Second, the draft should abandon the claim that the self-executing or non-self-executing nature of a treaty is “essentially” about the treaty’s judicial enforceability. Only one of the four types of non-self-execution might be said to be essentially about judicial enforceability. With respect to the others, lack of judicial enforceability is just one of the consequences of a treaty’s non-self-executing character. The non-self-executing character of a treaty has important ramifications for state and federal executive officials and ordinary citizens as well as the judiciary. More importantly, the claim that self-execution is essentially about judicial enforceability can potentially distort the analysis of when a treaty is properly characterized as non-self-executing. The draft’s focus on judicial enforceability is perhaps a reflection of the fact that “[r]estatements are primarily addressed to courts.”<sup>7</sup> But it should be kept in mind that, for all but one of the categories of self-execution, a treaty’s unenforceability in court is *a consequence* of its non-self-executing character—one of a number of possible consequences—rather than its cause.

Third, the draft should qualify its claim that self-execution turns on the intent of the U.S. treaty makers. This claim

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5. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 3 (AM. LAW INST., April Discussion Draft 2015).

6. This is the main respect in which it represents an advance from the *Restatement (Third)*.

7. AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 3 (1st ed., rev. 2015), <https://www.ali.org/doc/StyleManual.pdf>.

perpetuates a mistake in the *Restatement (Third)*. The current version abandons the flawed logic that led to the *Restatement (Third)*'s mistaken conclusion, but it defends the mistaken conclusion on other grounds. In reality, only one of the categories of self-execution might be said to turn on intent at all. With respect to this category of non-self-execution, as originally explained in *Foster* and *Percheman*, the relevant intent is not that of the U.S. treaty-makers, but that of the parties to the treaty. Evidence of the intent of the U.S. treaty-makers is relevant in ascertaining the intent of the parties, and may be entitled to special deference by U.S. courts, but it is not conclusive.

In support of the claim that self-execution turns on the intent of the U.S. treaty-makers, the reporters rely on the *Medellin* opinion and on the recent practice of attaching declarations of non-self-execution to some treaties. *Medellin*, however, does not support the draft's claim. The practice of attaching declarations of non-self-execution supports the claim, but only in part. Although the validity of such declarations is disputed, the reporters' conclusion that the declarations are valid and effective is sound. The validity of such declarations, however, only supports the conclusion that the intent of the U.S. treaty-makers determines the issue of self-execution when the treaty-makers have expressed their intent in such a declaration. It does not support the draft's broader claim that the self-execution issue turns on the intent of the U.S. treaty-makers in the absence of such a declaration. The latter conclusion is not only lacking in judicial or other support, it also raises substantial constitutional problems not acknowledged or addressed in the current draft.

Fourth, and finally, the draft should modify its claim that there is no presumption either in favor or against self-execution. There is substantial support in case law for a presumption in favor of self-execution with respect to one of the categories of self-execution—the “intent-based” category. Because treaties generally do not address the issue raised by the self-execution doctrine (a proposition recognized by the reporters), a default rule is necessary and will wind up determining the self-executing or non-self-executing character of most treaties. The two available default rules are self-execution and non-self-execution. There is language in *Medellin* that might be read to support a default rule of non-self-execution, but there is also language in *Medellin* that points the other way. A default rule of non-self-execution is difficult to square

with the text of the Supremacy Clause, and the current draft rightly rejects it. A presumption of self-execution, on the other hand, is supported by the constitutional text, by Chief Justice Marshall's analysis in *Percheman*, and by the sheer number of cases in which the Supreme Court has either found treaties to be self-executing or enforced treaties without pausing to inquire about their self-executing character.

#### I. THE NON-UNITARY NATURE OF THE SELF-EXECUTION QUESTION

In previous work, I have identified four distinct categories of non-self-executing treaties—that is, four types of reasons why a treaty might be non-self-executing.<sup>8</sup> First, a treaty might be non-self-executing because it purports to accomplish something that, under our Constitution, may only be done by the lawmakers. For example, it is widely agreed that the criminalization of conduct can only be accomplished by statute.<sup>9</sup> This is the “constitutionality” category. Second, a treaty might be non-self-executing because the obligation it imposes is too vague for judicial enforcement or otherwise requires policy judgments of a nonjudicial nature. This category includes treaties that require parties to use their best efforts to accomplish certain goals<sup>10</sup> or broadly require that parties, for example, “promot[e] and encourag[e] respect for human rights[.]”<sup>11</sup> This is the “justiciability” category.<sup>12</sup> Third, a treaty might be non-self-executing because the treaty itself contemplates that its aims will be accomplished through the enactment of legislation. This is the “intent-based” category.<sup>13</sup> Fourth, a treaty might be non-self-

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8. See generally *Four Doctrines*, *supra* note 4; *Judicial Enforcement*, *supra* note 4, at 629–31.

9. See *Four Doctrines*, *supra* note 4, at 718–19 & n.108. Accord RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters' note 5 (AM. LAW INST., April Discussion Draft 2015).

10. See *Judicial Enforcement*, *supra* note 4, at 631.

11. See U.N. Charter art. 1, ¶ 3 (found to be non-self-executing in *Sei Fujii v. State*, 242 P.2d 617, 619 n.2, 630 (Cal. 1952)).

12. See *Four Doctrines*, *supra* note 4, at 710–18.

13. *Id.* at 700–10. For the reasons discussed *infra* note 87, a better name would be treaty-based non-self-execution.

executing because it does not create a private right of action. This is the “private right of action” category.<sup>14</sup>

The draft *Restatement (Fourth)* implicitly recognizes at least two distinct categories of non-self-execution, the intent-based category and the constitutionality category. It also recognizes the distinctness of the private right of action issue, albeit by insisting that this issue is not really a self-execution issue.<sup>15</sup> The draft’s recognition that self-execution is not a unitary concept is an important advance from the earlier *Restatement (Third)*. Unfortunately, the draft does not make this point explicitly. It should do so.<sup>16</sup> It should also recognize the “justiciability” category as distinct from the others.

*A. The Distinctness of the Constitutionality and Intent-Based Categories*

The structure of Section 106 of the draft *Restatement (Fourth)* supports the common-sense view that treaties that are non-self-executing because they purport to accomplish what, under our Constitution, may only be accomplished by statute fall into a completely distinct category than treaties that are non-self-executing because they were intended to be. In the third subsection of Section 106, the black letter provides that “a treaty provision [is] non-self-executing to the extent that implementing legislation is

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14. *Id.* at 719–22.

15. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. b (AM. LAW INST., April Discussion Draft 2015).

16. In his contribution to this symposium, Professor Sloss distinguishes three “concepts” of self-execution—the congressional-executive concept, the federal-state concept, and the political judicial concept. See David Sloss, *Taming Madison's Monster: How to Fix Self-Execution Doctrine*, 2015 BYU L. REV. 1691 (2016). These concepts differ from the ones identified here in that they refer to different *effects* of a conclusion that a treaty is self-executing or non-self-executing. Thus, a treaty that is not self-executing in the “federal-state” sense does not supersede state law, *see id.* at text accompanying note 26; a treaty that is non-self-executing in the “political-judicial” sense is not enforceable in the courts, *see id.* at text accompanying note 27; and a treaty that is non-self-executing in the “congressional-executive” sense “is not law for the executive branch unless it is implemented by Congress,” *see id.* at 1691. The categories identified in this Essay refer to the *causes* of non-self-execution. That is, they refer to distinct types of reasons why a treaty might be non-self-executing. As discussed below, the effects of a non-self-executing treaty will vary depending on the reasons for concluding that the treaty is non-self-executing.

constitutionally required.”<sup>17</sup> In the immediately preceding subsection, the draft provides that “[i]n determining whether a treaty provision is self-executing, courts will evaluate whether, in light of the provision’s terms and the treaty as a whole, the U.S. treaty-makers intended or understood the provision to be directly enforceable by the judiciary.”<sup>18</sup> Although the draft does not state in so many words that these are separate and distinct categories of non-self-executing treaties, that conclusion is inescapable under the draft’s own analysis.

It is clear that the non-self-executing character of the treaties addressed by Section 106(3) does not turn on the intent of the U.S. treaty-makers regarding the treaty’s direct judicial enforceability. Their non-self-executing character is a result of the fact that what they purport to accomplish is beyond the constitutional power of the treaty-makers to accomplish. A statute is required because the treaty purports to accomplish what, under the Constitution, may only be done by statute. Such a treaty would be non-self-executing even if the U.S. treaty-makers unambiguously intended to dispense with implementing legislation. Thus, if it is true that the Constitution does not empower the treaty-makers to create criminal liability under domestic law, as the draft *Restatement (Fourth)* suggests,<sup>19</sup> then a treaty purporting to create criminal liability under domestic law will be non-self-executing even if the U.S. treaty-makers clearly express their intent or understanding that the treaty is directly judicially enforceable. The draft implicitly recognizes this in Comment *g* when it asserts that “[w]hether congressional powers are exclusive in this sense is determined by constitutional text, structure, and practice[,]”<sup>20</sup> without mentioning the intent of the treaty-makers. The draft should take the obvious next step of explicitly recognizing that the constitutionality category of non-self-execution is distinct from the intent-based category.<sup>21</sup>

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17. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106(3) (AM. LAW INST., April Discussion Draft 2015).

18. *Id.* § 106(2).

19. *Id.* § 106 reporters’ note 5.

20. *Id.* § 106 cmt. g.

21. As discussed in Part III, the draft’s claim that non-self-execution turns on the unilateral intent of the U.S. treaty-makers is true only for a limited class of treaties—those to which the treaty-makers have attached a declaration concerning the self-execution question,

The “constitutionality” category of non-self-executing treaties is also distinct from the “intent based” category with respect to other broad claims about the concept of non-self-execution advanced in the current draft. For example, the draft rejects *Medellin*’s attempt to explain the basic nature of the concept of non-self-execution insofar as “the Court suggested that a non-self-executing treaty was not domestic law at all.”<sup>22</sup> The reporters maintain instead that the self-execution concept is “essentially” about a treaty’s judicial

perhaps only those to which the treaty-makers have attached a declaration of non-self-execution. *See infra* Part III. As for other treaties, both *Foster* and *Medellin* support the conclusion that self-execution turns on the meaning of the treaty itself, which is based on the intent of the parties to the treaty. In any event, a treaty that purports to accomplish what under the Constitution may only be accomplished by statute is non-self-executing even if the parties to the treaty intended to dispense with implementing legislation. Indeed, it is the unconstitutionality of what the treaty parties intended to accomplish that renders the treaty non-self-executing. The treaty, in other words, is non-self-executing *despite* the parties’ contrary intention.

22. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 6 (AM. LAW INST., April Discussion Draft 2015). The draft claims that *Medellin* is ambiguous on this point because the opinion sometimes refers to the fact that a non-self-executing treaty relates to its status as domestic law enforceable in the courts. *See Medellin v. Texas*, 552 U.S. 491, 519, 523 (2008) (quoted in RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 6 (AM. LAW INST., April Discussion Draft 2015)). But the draft understates the significance of the footnote in which the Court directly addresses the question of what it means by non-self-execution:

The label “self-executing” has on occasion been used to convey different meanings. What we mean by “self-executing” is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a “non-self-executing” treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.

*Medellin*, 552 U.S. at 505 n.2. The third sentence of the footnote states that a non-self-executing treaty is not “domestically enforceable federal law,” rather than that it lacks the force of domestic law at all. Even this formulation suggests that such a treaty is not enforceable by executive as well as by judicial officials. The second and fourth sentences suggest that such a treaty lacks the force of domestic law at all, as do all but a few of the Court’s statements in the opinion that shed light on its views on this question, including the two statements that the draft itself cites as support for the proposition that the Court understood the self-execution issue to turn on the intent of the U.S. treaty-makers. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. b (AM. LAW INST., April Discussion Draft 2015) (quoting two statements in *Medellin*, 552 U.S. at 519, 521, both of which refer to the intent of the President and the Senate regarding whether the treaty has “domestic effect”). *See also Medellin*, 552 U.S. at 527 (describing a non-self-executing treaty as one that was “ratified without provisions clearly according it domestic effect[.]”); *id.* at 527 (“A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force.”).

enforceability (or lack thereof). With respect to the intent-based category of non-self-execution, the draft is right to reject the understanding of the concept expressed in *Medellín*. Such a view is incompatible with the plain text of the Supremacy Clause, which declares “all” U.S. treaties to be supreme federal law. But the *Medellín* understanding is true with respect to treaties that are non-self-executing in the constitutional sense. The non-self-executing character of such treaties is not just a matter of judicial enforceability. Treaties that are non-self-executing because what they purport to accomplish is beyond the power of the treaty-makers are not “domestically enforceable” by courts *or* by executive law-applying officials. Such treaties are unconstitutional and thus do, indeed, lack the force of domestic law.<sup>23</sup> 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 from the intent-based category.

The current draft appears to recognize that the constitutional category of non-self-execution is separate and distinct from the intent-based category. It devotes a separate subsection of the black letter, a separate comment, and a separate reporters’ note to treaties that purport to do what may only be done by statute. Indeed, Comment *d*, which addresses the importance of the intent of the U.S. treaty-makers, appears to recognize that treaties that are constitutionally non-self-executing are an exception to this proposition.<sup>24</sup>

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23. This is not a defense of footnote 2 of *Medellín*, however, as the Court in *Medellín* clearly did not hold that the treaty-makers lacked the power to provide for direct enforceability of ICJ judgments. *See Medellín*, 552 U.S. at 519 (“We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments . . .”).

24. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. d (AM. LAW INST., April Discussion Draft 2015) provides that, “[i]n exceptional circumstances . . . the Constitution may require legislation before the judiciary may regard a treaty provision as enforceable by the judiciary, thereby limiting the significance of any intent or understanding concerning self-execution on the part of the U.S. treaty-makers.” Insofar as it suggests that such intent plays a “limit[ed]” role, the draft overstates the role of the intent of the U.S. treaty-makers with respect to this sort of treaty. *Id.* The treaty-makers’ intent is relevant to determining what the international obligation is, but (as explained above and implicitly recognized in Comment *g*) their intent regarding self-execution plays no role at all in determining whether the treaty is self-executing. On the other hand, the draft understates the effect of a conclusion that a treaty is non-self-executing for constitutional

The draft's (implicit) recognition that this is a distinct category of non-self-execution is important. It means that the self-execution concept is not a unitary one. The draft should expressly recognize the non-unitary character of the self-execution doctrine. Doing so would do much to clarify much of the confusion that currently surrounds this doctrine.

*B. The Distinctness of the Justiciability Category*

The current draft does not recognize the justiciability category as distinct from the intent-based category. Comment *e* includes among the “[c]onsiderations relevant to determining self-execution”<sup>25</sup> “whether a treaty provision is sufficiently precise or obligatory for judicial application.”<sup>26</sup> But the current draft appears to regard this and the other considerations discussed in Comment *e* as evidence of the intent of the U.S. treaty-makers regarding the treaty’s direct judicial enforceability.<sup>27</sup> The better view is that this “consideration” is a wholly distinct reason for finding a treaty not to be judicially enforceable.

As noted above, the justiciability category consists of treaties that may not be enforced directly in court because they are too vague or call for judgments not of a judicial nature. This version of the non-self-execution doctrine is analogous to the political question doctrine. Just as some constitutional principles are non-justiciable because of a lack of judicially manageable standards, or because their adjudication requires a policy determination of a kind clearly for non-judicial discretion,<sup>28</sup> treaties that are “too vague for judicial enforcement”<sup>29</sup> or that call for the exercise of non-judicial judgments

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reasons when it suggests that the constitutional question is relevant only to whether “the judiciary may regard a treaty provision as enforceable by the judiciary.” *Id.* As discussed above, to the extent the treaty purports to do what may only be done by the lawmakers, the treaty lacks the force of valid domestic law and is unenforceable by any domestic law-applying officials.

25. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. c (AM. LAW INST., April Discussion Draft 2015) (emphasis omitted).

26. *Id.*

27. *Id.* at cmt. d (explaining that, in the absence of a clear statement on the issue, the treaty-makers’ “intent or understanding commonly is determined in light of a range of considerations”).

28. See *Baker v. Carr*, 369 U.S. 186, 210–13 (1962).

29. See *Saipan v. U.S. Dep’t of Interior*, 502 F.2d 90, 99 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

are the supreme law of the land, but they are not judicially enforceable because of limitations on the power of the courts in our system of government. A common example of such a treaty is one that imposes an obligation on parties to use their best efforts to accomplish certain goals.<sup>30</sup> Determining the best efforts the nation can use to accomplish the specified goals requires the weighing and balancing of disparate demands on the nation's resources, which, in our system of government, is the type of judgment not allocated to the courts.<sup>31</sup>

With respect to the justiciability category, the self-execution question *is* essentially about judicial enforceability. But whether a treaty is non-self-executing in this sense does not turn on anyone's intent. Rather, the non-self-executing character of this type of treaty, like the non-self-executing character of treaties that purport to do what may only be done by statute, is based on the Constitution. Unlike the constitutionality category, the justiciability category is not based on the Constitution's allocation of certain law-*making* powers to the law-makers rather than the treaty-makers. Instead, it is based on the Constitution's allocation of *enforcement* powers to the political branches rather than the judicial branch.

Because the conclusion that a treaty is nonjusticiable turns on constitutional principles regarding the role of the courts with respect to certain types of norms, the non-self-executing character of these treaties does not turn on anyone's intent. If the treaty imposed an obligation to use best efforts to accomplish certain goals, or imposed a general obligation to, for example, "promot[e] . . . human rights,"<sup>32</sup> such an obligation would require implementation by the political branches because compliance with it requires judgments that, under our Constitution, are not for the courts to make. This would be so even if it could be shown that the

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30. See *Judicial Enforcement*, *supra* note 4, at 631. (internal quotation marks omitted).

31. See *id.* The best explanation of the Supreme Court's opinion in *Medellin* is that the Court found Article 94 to be non-self-executing for this reason. See *id.* at 660–65. The Court appears to have interpreted the provision's statement that the United States "undertakes to comply" with the judgments of the ICJ as imposing an obligation to endeavor or use its best efforts to comply. See discussion *infra* Part III.

32. See U.N. Charter art. 1, ¶ 3.

parties or the U.S. treaty-makers intended that the obligation be directly enforceable in court.<sup>33</sup>

The draft comes close to recognizing the distinctness of the justiciability category when it explains in Comment *e* that “whether a treaty provision is sufficiently precise or obligatory” is important to the self-execution inquiry because it tells us “whether a treaty provision is appropriate as such for judicial application.”<sup>34</sup> That treaties are non-self-executing when they are inappropriate for judicial enforcement appears to be an accurate description of how many lower courts have been approaching the self-execution issue in recent years.<sup>35</sup> But, though the courts have sometimes treated this question as an indirect way of ascertaining whether the treaty was “‘intended’ to be self-executing,”<sup>36</sup> their analyses show that they have really been making their own assessments of “appropriateness.” The issue in these cases turned on “a purely constructive intent (which is to say, not intent at all).”<sup>37</sup>

The question whether a treaty provision is “appropriate for judicial enforcement” turns on constitutional considerations about the appropriate role of the courts in our governmental system with respect to particular types of legal obligations. The relevant considerations are those set out in *Baker v. Carr*,<sup>38</sup> most relevantly the existence of judicially manageable standards and the need for policy judgments of a nonjudicial nature.<sup>39</sup> If the treaty-makers had an actual intent on the matter, that intent should be taken into account as part of the intent-based analysis. Otherwise, the courts should determine the appropriateness of judicial enforcement by reference to generally applicable constitutional considerations. To lump the justiciability category of non-self-execution in with the category that

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33. And it would also be so even if the obligation were one that the courts of other countries would enforce.

34. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. c (AM. LAW INST., April Discussion Draft 2015).

35. This was my conclusion twenty years ago. See *Four Doctrines*, *supra* note 4, at 711.

36. See *id.* (quoting *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985)).

37. *Id.* The courts taking this approach “did not search for an actual intent or even infer an intent; [they] imputed an intent based on” factors they considered relevant to the question of appropriateness. *Id.*

38. *Baker v. Carr*, 369 U.S. 186, 210–13 (1962).

39. See *generally Four Doctrines*, *supra* note 4, at 711–18.

turns on an actual intent regarding self-execution would produce confusion, inviting the courts to project onto the treaty-makers their own sense of the “appropriateness” of judicial enforcement.<sup>40</sup>

Because this category turns on constitutional notions of the judicial role rather than on intent, it should be distinguished from the intent-based category discussed in Section 106(2).<sup>41</sup> It could perhaps be considered part of the constitutional category discussed in Section 106(3), since the need for an implementing statute turns on constitutional considerations.<sup>42</sup> That subsection’s statement that “[c]ourts will regard a treaty provision as non-self-executing to the extent that implementing legislation is constitutionally required” would appear to apply to nonjusticiable treaty provisions, under my analysis.<sup>43</sup> The comments and reporters’ notes make clear that Section 106(3) is intended to cover only treaties that purport to accomplish what may only be done by statute, and the draft clearly regards the justiciability consideration as part of the intent-based category covered in Section 106(2). But it might be argued that, if one accepts the argument that this category of non-self-execution turns on constitutional considerations rather than intent, the better solution would be to group nonjusticiable with unconstitutional treaties under Section 106(3).

It would be preferable, however, to recognize the justiciability category as a third distinct category on non-self-executing treaties. Having implicitly recognized the constitutional category as a distinct one, there is little reason to limit the number of categories to two. The constitutional considerations relevant to determining whether a

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40. Professor Ramsey would collapse the “justiciability” and “intent-based” categories into a single category consisting of treaties that “call for actions that in the U.S. legal system are not appropriately undertaken by courts.” Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. REV. 1639, 1651 (2016). Although the two categories do overlap, I regard it as useful to distinguish, as Professor Ramsey does in the helpful restatement he provides in his conclusion, between treaties that “call[] for action outside the constitutional judicial power of the U.S. courts” (which fall within my “justiciability” category) and “treaties that expressly or implicitly call for legislative or other non-judicial action, or preclude judicial remedies” (which fall into my intent-based category). *See id.* at 1670–71. Professor Ramsey “prefer[s] to emphasize the conceptual similarity of the two,” *see id.* at 1658–59 n.67; in my view, distinguishing the two categories would promote analytical clarity.

41. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106(2) (AM. LAW INST., April Discussion Draft 2015).

42. *Id.* § 106(3).

43. *Id.*

treaty is nonjusticiable differ entirely from those that determine whether a treaty is constitutional in the sense contemplated by present Section 106(3). In the case of nonjusticiable treaties, the issue turns on a constitutional disability of the courts, whereas in the latter category, the issue turns on a constitutional disability of the treaty-makers. Finally, the draft's claim that self-execution is essentially about judicial enforceability is true of the justiciability category but not of the constitutionality category covered by present Section 106(3).

*C. The Distinctness of the Private-Right-of-Action Issue*

The fourth category of non-self-executing treaties consists of treaties that do not, of their own force, create a private right of action. The current draft clearly recognizes that this issue is distinct from the two categories of non-self-executing treaties it recognizes. It does so, however, by insisting that whether a treaty creates a private right of action is not really a "self-execution" issue at all. In this respect, the current draft follows the *Restatement (Third)*.<sup>44</sup>

The draft does not explain why this issue is not properly regarded as a self-execution issue. Cutting against the draft's position is the fact that the courts commonly use the term "self-executing" to refer to the question whether a treaty creates a private right of action.<sup>45</sup> This use of the term is consistent with its use in ordinary legal discourse.<sup>46</sup> For example, the Supreme Court has described the Takings Clause as self-executing because it establishes a remedy for its violation ("just compensation").<sup>47</sup> The current draft itself recognizes that the issue of whether statutes create a private right of action is analogous to the issue of self-

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44. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 (AM. LAW INST. 1987).

45. See cases cited in *Four Doctrines*, *supra* note 4, at 719 n.114.

46. See generally Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1117-18 (1992) [hereinafter *Treaty-Based Rights and Remedies*].

47. See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 305 (1987); *United States v. Clarke*, 445 U.S. 253, 257 (1980); *United States v. Testan*, 424 U.S. 392, 401 (1976).

execution of treaties,<sup>48</sup> and that the executive branch has regarded the issue of the self-execution of treaties as relating to whether the treaty creates a private right of action.<sup>49</sup>

The draft's position must, then, be based on the view that the term "self-execution" is a term of art with respect to treaties. But, as we have already seen, the concept of self-execution is not a unitary one. The current draft implicitly recognizes two distinct types of reasons why a treaty might be non-self-executing, and comes close to recognizing a third. If the reporters are willing to recognize that self-execution is not a unitary concept with respect to treaties, it is unclear on what basis it insists that the issue whether the treaty creates a private right of action is not also properly regarded as one of self-execution. What is it that the three categories of self-executing treaties have in common that distinguishes them from the fourth?

Perhaps the reporters would answer that the unifying thread is that the three true categories are essentially about the judicial enforceability *vel non* of a treaty, whereas the fourth category relates only to remedies. Even if a treaty does not create a private right of action, it may be enforceable in court defensively, or pursuant to rights of action created by statutes, such as the APA or Section 1983.<sup>50</sup> I have argued that the "constitutionality" category of non-self-execution is not just about judicial enforceability, and I shall argue below that the same is true of the intent-based category.<sup>51</sup> But it is true that a treaty that is non-self-executing in any of the three senses discussed above will not be judicially enforceable at all. Thus, lack of judicial enforceability is a characteristic of treaties that are non-self-executing in the first three senses that is not shared by treaties that do not create a private right of action.

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48. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters' note 6 (AM. LAW INST., April Discussion Draft 2015) (attempting to reconcile non-self-execution of treaties with the Supremacy Clause by noting that "[j]udicial enforcement of statutes can also be limited, such as by disallowing private enforcement" (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979))).

49. *Id.* at reporters' note 4 (discussing S. Exec. Rep. 102-23 (102d Cong., 2d Sess.), which explains that the declaration of non-self-execution attached to the ICCPR was intended to "clarify that the Covenant will not create a private cause of action in U.S. courts").

50. See *Treaty-Based Rights and Remedies*, *supra* note 46, at 1142-57 (discussing enforcement rights of action to enforce treaties under the APA and 28 U.S.C. § 1983).

51. See *infra* Part II.

Whether this is a sufficient basis for insisting that the private right of action issue does not relate to self-execution is debatable. Insisting that the private right of action issue is separate from self-execution may suggest erroneously that the self-execution concept is a unitary one. Treating the issue of private rights of action as a self-execution issue, on the other hand, would reinforce the idea that there isn't a single doctrine of self-execution. Rather, treaties might be non-self-executing for a number of different reasons, with varying consequences not just for courts but for other branches.<sup>52</sup> If the *Restatement (Fourth)* does take the position that that the term "self-executing" is a term of art with respect to treaties, referring only to reasons why a treaty might be entirely unenforceable in court, it should couple any such stipulation with an explicit statement that this term of art encompasses three distinct types of reasons why a treaty might be judicially unenforceable.

## II. WHAT SELF-EXECUTION IS ESSENTIALLY ABOUT

The draft *Restatement (Fourth)* takes the position that the self-execution issue is essentially about the treaty's judicial enforceability. Comment *b* indicates that "[t]he essential inquiry for self-execution . . . is whether a treaty provision is directly enforceable by the courts."<sup>53</sup> The black letter of Section 106 indicates that, "[i]n determining whether a treaty provision is self-executing, courts will evaluate whether, in light of the provision's terms and the treaty as a whole, the U.S. treatymakers intended or understood the provision to be directly enforceable by the judiciary."<sup>54</sup> We have already seen that self-execution doesn't always turn on intent.<sup>55</sup> As will be explained in Part III, when the issue does turn on intent, it does not

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52. Indeed, there might be an infinite number of respects in which a treaty might be non-self-executing, as the term is used in ordinary legal discourse—for example, a treaty might be said to be non-self-executing if it fails to create a particular remedy for its violation, such as exclusion of evidence (*see Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006))—just as there are an infinite number of ways in which another type of law might be self-executing (or not) (*see Four Doctrines, supra* note 4, at 723 n.140).

53. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. b (AM. LAW INST., April Discussion Draft 2015).

54. *Id.* § 106(2). *See also id.* § 106 reporters' note 1 (noting that the Court in *Medellin* asked whether the relevant treaties "reflected an intent 'to vest ICJ decisions with immediate legal effect in domestic courts.'" (quoting *Medellin v. Texas*, 552 U.S. 491, 508 (2008))).

55. *See supra* Section I.A.

always turn on the intent of the U.S. treaty-makers. This Part considers the draft's claim that the self-execution issue is essentially about judicial enforceability.<sup>56</sup>

As noted in Part I, the common thread linking the categories of non-self-execution recognized in the draft, and distinguishing what the draft appears to regard as true from false non-self-execution, is that treaties that are non-self-executing in the proper sense of the term are always judicially unenforceable. It is only in that sense that the draft can plausibly maintain—by stipulation—that self-execution is essentially about judicial enforceability. But, as we have already seen, the reasons for finding a treaty non-self-executing, and hence judicially unenforceable, vary. And, while the self-execution issue with respect to treaties that are non-self-executing in the justiciability sense might essentially be about judicial enforceability, the consequences of non-self-execution for treaties that are non-self-executing in the constitutional sense extend well beyond the courts.

The claim that self-execution is essentially about judicial enforceability is perhaps most problematic with respect to the intent-based category of non-self-execution—the category on which the current draft mostly focuses. With respect to this category of non-self-execution, a source of confusion for the courts has been what sort of “intent” is relevant. Courts and commentators have generally looked for an intent regarding what they have considered the self-execution issue to be “essentially” about. The Court in *Medellin* regarded the self-execution issue as essentially about whether the treaty had the force of domestic law.<sup>57</sup> Consistent with this understanding of the self-execution issue, the Court asserted that whether a treaty is self-executing depends on 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.”<sup>58</sup> The draft *Restatement (Fourth)* rejects the idea that a non-self-

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56. As discussed *infra* text accompanying notes 82–85, the draft is not entirely consistent in this regard. Some parts of Reporters’ Note 2 are consistent with the analysis presented in this Part. But those parts are inconsistent with the statements quoted in this paragraph. In this Part, I shall assume that the draft’s view on this issue is the one stated in the black letter and comments rather than the conflicting statements in Reporters’ Note 2. In any event, the draft is in need of clarification on this point.

57. See *supra* note 22 and accompanying text.

58. *Medellin*, 552 U.S. at 521.

executing treaty is one that lacks the force of domestic law, and asserts instead that self-execution is essentially about judicial enforceability. It thus concludes that self-execution turns on “whether . . . the U.S. treaty-makers intended or understood the provision to be directly enforceable by the judiciary.”<sup>59</sup>

As the doctrine was originally articulated by the Supreme Court, however, self-execution did not turn on intent about *either* domestic legal force or judicial enforceability. The question, rather, was whether the relevant treaty provision “acted directly” on the subject or instead imposed an obligation to pass legislation accomplishing certain aims. This was clearly how the Court understood the doctrine in *Foster v. Neilsen*,<sup>60</sup> the case that introduced the distinction between self-executing and non-self-executing treaties.

Chief Justice Marshall began his analysis by recognizing that the Supremacy Clause declares treaties to be the law of the land and that, consequently, treaties are generally “to be regarded in courts of justice as equivalent to an act of the Legislature.”<sup>61</sup> But the Court recognized an exception to the proposition that treaties are generally enforceable in court: This is so “whenever [the treaty] operates of itself, without the aid of any legislative provision.”<sup>62</sup> “[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”<sup>63</sup> This latter qualification of the general rule that treaties are judicially enforceable to the same extent as statutes is the basis of the distinction between self-executing and non-self-executing treaties.

The *Foster* opinion shows that the Court viewed the treaty in that case to be non-self-executing by virtue of the treaty itself. Thus, this category of self-execution differs from the two categories described above (the constitutionality and justiciability categories), which involved treaties that were non-self-executing by virtue of the

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59. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106(2) (AM. LAW INST., April Discussion Draft 2015).

60. 27 U.S. (2 Pet.) 253, 314–15 (1829).

61. *Id.* at 254.

62. *Id.*

63. *Id.*

Constitution.<sup>64</sup> In the Court's words, implementing legislation is required because the treaty "addresses *itself* to the political [branches]." <sup>65</sup> While the two categories of non-self-executing treaties discussed in Part I are non-self-executing by operation of the Constitution, regardless of any intent regarding self-execution, treaties are non-self-executing in the *Foster* sense by operation of the treaty itself. Self-execution turns on the content of the treaty obligation, which is, in important respects, a matter of intent.<sup>66</sup>

*Foster* makes clear that the question is not whether the treaty reflects an intent that the treaty have the force of domestic law or that it be judicially enforceable. As already noted, the Court recognized that the Supremacy Clause gives all U.S. treaties the force of domestic law. Treaties that are non-self-executing in the *Foster* sense are not judicially enforceable *despite being the law of the land*. As the current draft correctly notes, the Court in *Foster* did not question "the broader status of 'all' treaties as supreme law."<sup>67</sup>

Nor did the Court, in deciding whether the treaty before it was self-executing, look for an indication that the treaty was intended to be judicially enforceable. Rather, it asked whether the treaty "act[ed] directly on" the subject or instead constituted a promise to pass legislation. As noted above, the Court in *Foster* understood that a treaty is non-self-executing when either of the parties "engages to perform a particular act." It went on to clarify that the question is whether the parties engaged to perform a *legislative* act. The relevant article of the treaty provided, in its English version, that the United States "shall ratify and confirm" certain Spanish grants of land. The self-execution question, as the Court posed it, was: "Do these words act directly on the grants so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to *pass acts* which shall ratify and confirm them?"<sup>68</sup> The Court elaborated: "The article [under consideration] does not declare that all the grants

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64. See *supra* Sections I.A. & I.B.

65. *Foster v. Neilson*, 27 U.S. (2 Pet.) at 254 (emphasis added).

66. On the role of intent in treaty interpretation, see *infra* note 87.

67. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters' note 6 (AM. LAW INST., April Discussion Draft 2015).

68. 27 U.S. (2 Pet.) at 314–15 (emphasis added). See also *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833) (noting, in light of the Spanish text, that the treaty was self-executing because it did not "stipulat[e] for some future legislative act").

made by his catholic majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed.”<sup>69</sup> “Had such been its language,” the Court wrote, the article would have been self-executing, and, as a result, “it would have acted directly on the subject, and would have repealed those acts of Congress which were repugnant to it.”<sup>70</sup> But since the article provided instead that the grants “shall be ratified and confirmed,” it was non-self-executing and thus required implementation through legislation. “Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject.”<sup>71</sup>

The Court in *Foster* thus found the treaty not to be judicially enforceable because it did not purport to alter the rights and obligations of the parties before the court but rather imposed an obligation to enact legislation to accomplish the treaty’s particular aims.<sup>72</sup> So understood, a non-self-executing treaty is like a statute that delegates law-making power to an agency.<sup>73</sup> Such a statute

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69. *Foster*, 27 U.S. (2 Pet.) at 254.

70. *Id.* at 314–15.

71. *Id.*

72. According to Professor Sloss, the Court’s analysis in *Foster* consisted of two distinct steps. In the first step, the Court interpreted the treaty and concluded that it did not impose an immediate obligation to recognize Spanish grants as valid. The conclusion that an act of Congress was required to accomplish the treaty’s goals, however, was based on a separate separation of powers analysis, not on intent. See Sloss, *supra* note 16, at 1716; David Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT’L L.J. 135 (2012). It is true that the nature of the international obligation imposed by a treaty is distinct from the question whether legislation is required to implement the treaty for any given state-party, and that the latter is a question of each state-party’s domestic law. Thus, as noted below, in the United Kingdom, implementing legislation is required regardless of the intent of the treaty-makers or the content of the international obligation. The rule in the United States might have been that treaties can be enforced by the courts without implementing legislation even if the treaty does not purport to “act upon the subject.” See Vázquez, *Four Doctrines*, *supra* note 4, at 703. But Marshall in *Foster* blurred the two issues, holding that legislation was required because the international obligation imposed by the treaty was not one that “act[ed] directly upon the subject.” Professor Sloss acknowledges that the second step of Chief Justice Marshall’s analysis was “implicit.” See Sloss, *supra* note 16, at 1717. For my part, I agree that the *Foster* opinion “disguises an important separation of powers holding.” Vázquez, *Four Doctrines*, *supra* note 4, at 703; see also Carlos M. Vázquez, *Chief Justices Marshall and Roberts and the Non-Self-Execution of Treaties*, 53 HARV. INT’L L.J. ONLINE 213 (2012) (discussing Professor Sloss’s two-step interpretation of *Foster*).

73. See *United Shoe Mach. Co. v. Duplessis Shoe Mach. Co.*, 155 F. 842, 845 (1st Cir. 1907); see generally Adam M. Samaha, *Self-Executing Statutes in the Administrative State*, in

generally sets forth the aims to be achieved but does not purport to alter the rights and obligations of private parties of its own force. Until the agency enacts the contemplated regulations, the rights and obligations of private parties remain as before, and, in the words of the Court in *Foster*, the courts “are not at liberty to disregard the existing laws on the subject.”<sup>74</sup>

*Foster* thus establishes that, to the extent self-execution turns on intent, it does not turn on intent regarding judicial enforceability. Lack of judicial enforceability follows from the fact that the treaty does not purport, of its own force, to alter the rights and obligations of individuals. The *Foster* opinion also establishes that intent-based non-self-execution—like the constitutionality category but unlike the justiciability category—is not “essentially” about judicial enforceability. To be sure, the Court did state that, when confronted with a non-self-executing treaty, courts are not at liberty to disregard the preexisting law,<sup>75</sup> and that a self-executing treaty is “to be regarded *in courts of justice* as equivalent to an act of the legislature . . . .”<sup>76</sup> But this does not mean, as the draft contends, that “Chief Justice Marshall addressed non-self-execution as a matter of judicial enforceability” only.<sup>77</sup> The Court’s reference to courts’ lack of power to enforce non-self-executing treaties is understandable, as the treaty had been invoked in a judicial proceeding and the immediate question before the Court was whether it was enforceable in this context. But the Court’s reasoning shows that the consequences of *Foster*-type non-self-execution apply equally to executive officials, both state and federal. Because the treaty leaves unaltered the preexisting rights and obligations of private individuals, it is clear that executive officials and private individuals, not just judges, are legally obligated to abide by the rights and obligations established by preexisting law.

After the *Foster* decision, the Supreme Court did not deny relief on the ground that the treaty being invoked was non-self-executing

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THE TIMING OF LEGAL INTERVENTION (Frank Fagan & Saul Levmore eds., forthcoming 2016), <http://ssrn.com/abstract=2720309>.

74. 27 U.S. (2 Pet.) at 254.

75. *Id.* at 315; *see also* United States v. Percheman, 32 U.S. (7 Pet.) 51, 52 (1833).

76. 27 U.S. (2 Pet.) at 314 (emphasis added).

77. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 6 (AM. LAW INST., April Discussion Draft 2015).

until the very recent decision in *Medellín v. Texas*.<sup>78</sup> None of the Court's intervening decisions requires a reevaluation of the conclusions reached above on the basis of *Foster*. *Medellín* does contain some language in tension with the foregoing analysis of *Foster*, but, as noted above and discussed further below, *Medellín* takes the position that the self-execution issue is essentially about whether the treaty has the force of domestic law, a conceptualization that the current draft properly rejects.<sup>79</sup> The reporters are right to counsel against generalizing too much from *Medellín*,<sup>80</sup> since the opinion provides contradictory indications regarding the nature of the self-execution inquiry. Indeed, in agreeing with the executive branch's argument that the relevant treaty required legislative implementation, the Court in *Medellín* endorsed *Foster's* formulation of the issue as whether the treaty's text "act[ed] directly on [the subject of the treaty]" or instead "pledged the faith of the United States to pass acts" to accomplish the treaty's aims.<sup>81</sup> Far from rejecting *Foster's* conceptualization of the self-execution issue, the majority in *Medellín* purported to be adhering to it.

The draft *Restatement (Fourth)* provides mixed signals regarding the essential nature of the self-execution inquiry. Reporters' Note 2 is largely consistent with the above analysis. Quoting *Foster*, the note explains that, in determining whether a treaty is self-executing, "[t]he ultimate question is whether the treaty is one that 'operates of itself without the aid of any legislative provision,' or rather 'addresses itself to the political, not the judicial department.'"<sup>82</sup> The reporters' note goes on to say that "[t]he prevailing approach to self-execution . . . focuses on whether a treaty provision is appropriate for direct judicial application, based on the international obligations of the United States as they would have been understood by the U.S. treaty-makers."<sup>83</sup> This statement's recognition that the self-execution

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78. *But cf. supra* note 4 (noting that *Cameron Septic Tank* is a possible exception).

79. *See supra* note 22 and accompanying text.

80. *See supra* note 5 and accompanying text.

81. *Medellín v. Texas*, 552 U.S. 491, 508 (2008) (quoting *Foster*, 27 U.S. (2 Pet.) at 314–15).

82. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters' note 2 (AM. LAW INST., April Discussion Draft 2015) (quoting *Foster*, 27 U.S. (2 Pet.) at 314).

83. *Id.* (emphasis added).

determination is “based on the international obligations of the United States” is consistent with the *Foster* analysis.<sup>84</sup> The statement’s focus on appropriateness for judicial application harkens back to the claim that self-execution is essentially about judicial enforceability. But, as discussed in Part I, whether a treaty is “appropriate for direct judicial application” would not appear to be a matter of intent at all.

The examples given in the reporters’ note of “considerations relevant to determining self-execution” are consistent with the conclusion that, to the extent the issue does turn on intent, it turns on intent regarding whether the obligation imposed by the treaty is one to “pass acts” accomplishing certain aims. The first consideration discussed in the reporters’ note—“whether the treaty provision is sufficiently precise or obligatory to be suitable for direct application by the judiciary”<sup>85</sup>—is better understood as constitutionally based, that is as the application of the political question doctrine to treaties. So understood, it does not turn on intent at all. The second “consideration” discussed in Reporters’ Note 2 is whether the treaty “imposes obligations or creates authorities designed to have immediate effect, as opposed to contemplating additional legal measures.”<sup>86</sup> This seems consistent with the view, drawn above from *Foster*, that the self-executing character of a treaty turns on whether it “acts upon the subject” or instead imposes an obligation to “pass acts” to accomplish the treaty’s goals. As discussed above, this is a matter of treaty interpretation. The inquiry is about whether the treaty purports itself to alter the rights and obligations of the parties or instead calls for the enactment of legislation to accomplish its ends.

As noted at the beginning of this Part, however, other portions of the draft *Restatement (Fourth)* rather clearly state that the self-execution issue is essentially about judicial enforceability. On this point, Reporters’ Note 2 seems out of step with the rest of Section 106. For the reasons discussed above, however, Reporters’ Note 2 is

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84. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 2 (AM. LAW INST., April Discussion Draft 2015). What the statement suggests about the weight to be given to the views of the U.S. treaty-makers is discussed in Part III.

85. *Id.*

86. *Id.*

more faithful to the guidance provided by the Supreme Court in *Foster* regarding the nature of the self-execution inquiry than are the other portions of the Section 106. It is true that treaties that are non-self-executing (in the senses recognized by the current draft) are not judicially enforceable, but their unenforceability in the courts is a *consequence* of their non-self-executing character, not the *cause*. Moreover, it is only *one* of the consequences. It is thus not true that the “essential inquiry” for self-execution is whether the treaty provision is enforceable by the courts.

### III. THE RELEVANCE OF THE INTENT OF THE U.S. TREATYMAKERS

The *Foster* decision also provides rather clear guidance about whose intent matters. As the Court approached the issue in *Foster*, the self-executing character of a treaty turned on the content of the treaty itself—specifically on whether the treaty purported to act upon the subject or, instead, imposed an obligation to pass legislation to accomplish certain aims. The question is one of treaty interpretation, and, in treaty interpretation, the relevant intent is that of the parties to the treaty, not the unilateral intent of one of the parties.<sup>87</sup>

The intent of the U.S. treaty-makers is of course relevant to the determination of the intent of the parties, as it reflects the understanding of one of the parties. But it is just one type of evidence. The treaty’s meaning turns on the joint intent of the parties. It is perhaps appropriate for a U.S. court to defer to the declared intentions of the U.S. treaty-makers in interpreting a treaty if the meaning is ambiguous.<sup>88</sup> But, if the question is one of treaty

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87. Interpreting a treaty is not wholly a matter of ascertaining the actual intent of the parties. For the rules of international law on treaty interpretation, see Vienna Convention on the Law of Treaties arts. 31–33 May 23, 1969, 1155 U.N.T.S. 331. The extent to which the treaty’s text functions merely as evidence of the parties’ intentions or is binding even if it diverges from what the parties intended has been the subject of debate. See *Draft Articles on the Law of Treaties with Commentaries*, Int’l L. Comm’n art. 27 cmt. 2 (1966), reprinted in [1966] 2 Y.B. Int’l L. Comm’n, U.N. Doc A/CN.4/SER.A/1966/Add.1. Because treaty interpretation is not entirely a matter of intent, perhaps a more accurate name for this category of non-self-execution would be “treaty-based non-self-execution.” This label has the benefit of conveying that the main distinction between this category and the other two categories is that, with respect to this category, the treaty’s non-self-executing character derives from the treaty itself, as opposed to the Constitution.

88. Customary international law includes rules for interpreting treaties whose texts are ambiguous, and those rules do not provide for deference to the views of one of the treaty parties. See Vienna Convention on the Law of Treaties, *supra* note 87, at art. 32. Conceivably,

interpretation, 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.

*A. The Draft Restatement (Fourth)'s Position on the Role of the Intent of the U.S. Treaty-makers*

The draft *Restatement (Fourth)* repeatedly stresses the importance of the intent of the U.S. treaty-makers. But the draft gives mixed signals regarding whether it views the intent of the U.S. treaty-makers as itself determining the self-executing character of the treaty, and thus as binding and conclusive, or instead merely as evidence of the meaning of the treaty, entitled to deference but not itself binding. The draft provides some support for the latter view, but seems in the end to embrace the former view.

That the intent or understanding of the U.S. treaty-makers is merely entitled to deference as evidence of the meaning of the treaty is supported by the black letter of Section 106(2), which provides in its second sentence that, “[i]f the Senate specifies in its resolution of advice and consent that a treaty provision is self-executing or non-self-executing, courts will defer to this specification.”<sup>89</sup> This formulation suggests that that intent of the U.S. treaty-makers is not itself what makes a treaty self-executing or non-self-executing. Such specifications are, as the draft *Restatement (Fourth)* makes clear in Section 106, Comment *d*, “clear express[ions]” of the U.S. treaty-makers’ intent regarding self-execution.<sup>90</sup> If the self-executing or non-self-executing character of a treaty turned on the intent of the U.S. treaty-makers, these declarations would be conclusive and binding on the courts. Subsection 2’s assertion that the courts merely “defer” to these declarations suggests that the reporters view the intent of the U.S. treaty-makers to be relevant as evidence of the meaning of the treaty. The courts will perhaps give greater weight to the expressed intent of the U.S. treaty-makers than of the negotiators from other parties. But when a court defers to the views of the U.S.

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our domestic rules of treaty interpretation could diverge from these international rules by privileging the views of our treaty-makers. Whether it does so is beyond the scope of this article.

89. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 3 (AM. LAW INST., April Discussion Draft 2015).

90. *Id.* § 106 cmt. d.

treatymakers, it, by definition, does not treat those views as binding or conclusive; in the face of persuasive evidence to the contrary, the court could reject the views of the U.S. treatymakers.

That the reporters do not understand the U.S. treatymakers' intent or understanding as binding is also suggested by the statement in Comment *b* that "the question of self-execution is one for judicial resolution" as to which the U.S. treatymakers "may provide critical input."<sup>91</sup> If the views of the U.S. treatymakers are merely "critical input" contributing to the authoritative resolution of the question by the courts, those views are not themselves binding or authoritative.

Reporters' Note 2 is more ambiguous. As discussed above, this note states that "[t]he prevailing approach to self-execution . . . focuses on whether a treaty provision is appropriate for direct judicial application, based on the international obligations of the United States as they would have been understood by the U.S. treatymakers."<sup>92</sup> By affirming that the issue is based on "the international obligation" of the United States, the note seems to indicate that it is the intent of the parties that controls. The understanding of the U.S. treatymakers is evidence of the treaty's meaning, but it is not conclusive. But the note refers to "the international obligations of the United States *as they would have been understood by the U.S. treatymakers*."<sup>93</sup> The note might be saying that the ultimate question is how *the U.S. treatymakers* understood the nature of the obligation imposed by the treaty. If so, then the views of the U.S. treatymakers would be conclusive for the courts.<sup>94</sup> Alternatively, the note might be saying that the U.S. treatymakers' understanding of the meaning of the treaty on the question whether the treaty purports to act upon the subject is entitled to strong deference but is not conclusive. This interpretation would be more

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91. *Id.* § 106 cmt. b.

92. *Id.* § 106 reporters' note 2.

93. *Id.* (emphasis added).

94. As discussed in Part II, the relevant understanding is still about whether the treaty acts upon the subject, *not* about whether the treaty is judicially enforceable. *See supra* notes 60–81 and accompanying text. Judicial enforceability follows from the fact that the treaty purports to act upon the subject, and lack of judicial enforceability from the fact that the treaty does not purport to act upon the subject. Still, Reporter's Note 2 may be saying that the views of the U.S. treatymakers are conclusive on this question for the courts.

consistent with the second sentence of Section 106(2). It is also supported by the statement in Comment *e* that, in resolving the self-execution question, “courts have looked to the international obligations of the United States, construed according to conventional methods of treaty interpretation, as they would have been understood by the U.S. treaty-makers,” and by the more general statement, later in Reporters’ Note 2, that, “[a]s with other questions involving treaty interpretation, courts will attribute ‘great weight’ to the executive branch’s position.”<sup>95</sup>

But these indications that the intent or understanding of the U.S. treaty-makers is entitled to deference as evidence of the meaning of the treaty are contradicted by other portions of the draft *Restatement (Fourth)*, which fairly clearly reflect the view that the intent of the U.S. treaty-makers is itself what makes a treaty self-executing or not. Comment *d* claims that “the Supreme Court has indicated that whether a treaty provision is self-executing is normally determined by the intent or understanding of the U.S. treaty-makers, rather than the collective intent of the states that are parties to the treaty.”<sup>96</sup> In contrast to the second sentence of Section 106(2), stating that such intent is entitled to deference, the first sentence of Section 106(2) provides that, “[i]n determining whether a treaty provision is self-executing, courts will evaluate whether, in light of the provision’s terms and the treaty as a whole, the U.S. treaty-makers intended or understood the provision to be directly enforceable by the judiciary.”<sup>97</sup> This suggests that the intent or understanding of the U.S. treaty-makers is relevant more than just as evidence of the meaning of the treaty.<sup>98</sup> Indeed, it suggests that the treaty itself (“the provision’s terms and the treaty as a whole”) is relevant as evidence of the intent of the U.S. treaty-makers.<sup>99</sup> This appears to be confirmed by Reporters’ Note 2, which states that, even when the text of the treaty “indicate[s] that it is to be immediately effective in the U.S. legal system without the

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95. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 2 (AM. LAW INST., April Discussion Draft 2015). (quoting *Medellín v. Texas*, 552 U.S. 491, 513 (2008)).

96. *Id.* § 106 cmt. d.

97. *Id.* §106(2).

98. *See also id.* §106 cmt. d.

99. *Id.* §106(2).

need for prior legislation,” or when the text “indicate[s] that it is to be given effect initially through legislative or administrative implementation rather than through judicial enforcement,” these texts are relevant to the self-execution inquiry insofar as they “*may have a bearing on the intent or understanding of the U.S. treaty makers.*”<sup>100</sup> Thus, rather than regarding the intent of the U.S. treaty makers as evidence of the meaning of the treaty, the draft regards the treaty itself to be mere evidence of the intent of the U.S. treaty makers on the self-execution issue.

That the reporters regard the intent of the U.S. treaty makers as binding and authoritative, and not as merely evidence of the meaning of the treaty entitled to deference, is confirmed by Reporters’ Note 4, which addresses declarations of self-execution and of non-self-execution. As already noted, such declarations are clear expressions of the U.S. treaty makers’ views regarding self-execution.<sup>101</sup> Reporters’ Note 4 notes that “[c]ourts have generally treated Senate declarations of non-self-execution as authoritative.”<sup>102</sup> They have done so even though, “in the absence of [such] declarations, some of the treaty provisions in question would have been treated by the courts as self-executing . . . [because], for example, [they] are specific, are mandatory, and concern individual rights.”<sup>103</sup> The reporters’ note concludes that the validity and effectiveness of such declarations “appear to reflect an assumption that the Supremacy Clause of the Constitution does not deprive the U.S. treaty makers of the ability to determine the domestic judicial enforceability of treaties.”<sup>104</sup> The reporters then rely on the validity and effectiveness of such declarations as support for their more general focus on the intent or understanding of the U.S. treaty makers as the lodestar for determining the self-executing

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100. *Id.* §106 reporters’ note 2 (emphasis added); *see also id.* (“Treaty text is often cited as demonstrating the nature of the obligation as it would have been understood by the President and the Senate.”).

101. *See supra* note 90 and accompanying text.

102. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 4 (AM. LAW INST., April Discussion Draft 2015).

103. *Id.* (alteration in original).

104. *Id.*

nature of treaties, even in the absence of such declarations.<sup>105</sup> This analysis indicates that the reporters view the intent of the treaty-makers as dispositive, not just as evidence of the treaty's meaning—indeed, even when it contradicts the treaty's meaning. The treaty-makers can, by clearly expressing their intent about self-execution in a declaration of non-self-execution, *control* the judicial enforceability of treaties. And, according to the draft, the fact that the treaty-makers can do this through a non-self-execution declaration means that their intent on the self-execution issue controls even in the absence of such a declaration.

In sum, as with the question discussed in Part II, the draft *Restatement (Fourth)* points in conflicting directions on the question of whether the intent of the U.S. treaty-makers is relevant as evidence of the treaty's meaning, a “critical input” entitled to deference but not conclusive, or is instead the ultimate determinant of a treaty's self-executing status, binding and conclusive for the courts. Although the former view would be more consistent with the *Foster* opinion, the portions of the draft that support this view seem to be out of step with the overall thrust of the draft, which strongly suggests that the reporters embrace the latter view. In the remainder of this Part, I shall assume that the position of the draft *Restatement (Fourth)* is that the self-execution issue turns on the intent of the U.S. treaty-makers regarding the judicial enforceability of the treaty, which intent is binding and conclusive for the courts. In the next sections, I shall assess the support provided in the draft for those conclusions and discuss some constitutional problems posed by this understanding of the doctrine.

*B. The Claimed Support for the Draft Restatement (Fourth)'s Position on Intent*

With respect to the claim that self-execution turns on the intent of the U.S. treaty-makers rather than the joint intent of the parties, the view reflected in the current draft is not a new one. The *Restatement (Third) of Foreign Relations Law* also took that

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105. *Id.* (“Judicial enforcement of declarations of non-self-execution also supports the proposition, endorsed in this Section, that self-execution primarily concerns the intent or understanding of the U.S. treaty-makers rather than the collective intent of the various parties to a treaty.”).

position. Citing the *Restatement (Third)*, an earlier version of the draft *Restatement (Fourth)* reached this conclusion through the following reasoning:

It is ordinarily up to each nation to decide how to implement its international obligations. In part because of this, treaties, and especially multilateral treaties, typically do not address the issue of domestic implementation. The domestic status of treaties also varies across domestic legal systems. Whether a treaty provision is self-executing, therefore, is normally determined by the intent or understanding of the U.S. treaty makers concerning the issue rather than the collective intent of the parties to the treaty.<sup>106</sup>

The current version abandons this reasoning—a wise move, as the logic is demonstrably faulty. The first three quoted sentences are true, but the fourth sentence does not follow from them.

Specifically, it is true that international law ordinarily does not address how nations are to implement their international obligations domestically, and that treaties, in particular, ordinarily do not address the issue of domestic implementation. There is nothing in international law that prevents parties from addressing the issue of domestic implementation, and in rare cases a treaty will do so. This is more likely in the case of a bilateral treaty, or a plurilateral treaty with few parties. Such a treaty could specify that the obligations of the United States are subject to legislative implementation. A multilateral treaty, on the other hand, is highly unlikely to address issues of domestic implementation, be it the question whether the treaty directly alters the legal rights and obligations of individuals or the question whether the treaty is directly enforceable in court.<sup>107</sup> That is because of the true proposition stated in the third sentence quoted above: countries

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106. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmts. c, d (AM. LAW INST., Preliminary Draft No. 3, 2014). The first and fourth quoted sentences paraphrase the *Restatement (Third)*:

In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h. (AM. LAW INST. 1987).

107. See *Judicial Enforcement*, *supra* note 4, at 633–34.

have widely varying constitutional rules regarding the domestic legal effect of treaties. For example, in the United Kingdom and most countries of the British Commonwealth, treaties always require legislative implementation if they are to be enforced domestically.<sup>108</sup> For this reason, a multilateral treaty is highly unlikely to provide that its provisions directly alter the rights and obligations of private parties or that they are to be directly enforced in domestic courts.

Though the first three of the quoted sentences are true, the fourth sentence is a non sequitur.<sup>109</sup> The first three sentences state true propositions about international law and practice. If the fourth sentence followed from the first three, then it would be true for all nations that the self-executing nature of a treaty would be determined by the intent of that country's treaty-makers. Yet that is clearly not the case. For example, as noted, the constitutional rule in the United Kingdom is that treaties always require implementing legislation. In the United Kingdom, therefore, it is not true that the self-executing character of a treaty depends on the intent of the U.K. treaty-makers.

What does follow from the first three sentences is that the self-executing nature of a treaty is a matter of each nation's domestic law, not international law. But that does not mean that self-execution is governed by the U.S. treaty-makers' unilateral intent regarding judicial enforceability. Our domestic constitutional rule is set forth in the Supremacy Clause. The question we are examining is: What rule does that clause establish? The Court in *Foster* concluded that the clause establishes that a treaty that purports to act directly on the subject alters the rights and obligations addressed in the treaty, whereas a treaty that is framed as an obligation to "pass acts" accomplishing certain goals does not alter individual rights or obligations of its own force. Such a rule does not turn on the "intent" of the U.S. treaty-makers on the question of judicial enforceability or on whether implementing legislation is required. With respect to treaties that purport to act directly on the subject,

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108. See *id.* at 614.

109. I elaborate this critique of the *Restatement (Third)*'s reasoning on this point in *Four Doctrines*, *supra* note 4, at 707–08. See also *Judicial Enforcement*, *supra* note 4, at 638–41.

the Supremacy Clause itself dispenses with the need for implementing legislation.

In theory, our constitutional rule could have been that a treaty's enforceability in the courts is determined by the intent of the U.S. treaty-makers on that question. I have discussed at length elsewhere, and will not repeat here, why such a rule is difficult to square with the text of the Supremacy Clause as well as the case law.<sup>110</sup> The remainder of this Part addresses the support provided in the draft *Restatement (Fourth)* for concluding that this is the rule that our Constitution establishes. The main support provided are: (a) the Supreme Court's recent decision in *Medellín v. Texas*, discussed in Subsection 1, and (b) the assumed validity of declarations of non-self-execution, discussed in Subsection 2.

*1. Medellín v. Texas on whose intent matters*

In support of its view that self-execution turns on the intent or understanding of U.S. treaty-makers concerning the domestic enforceability of the treaty, the reporters rely heavily on the Supreme Court's recent opinion in *Medellín v. Texas*. But the statements that the draft quotes in this regard do not support the claim that the issue turns on the intent of the U.S. treaty-makers regarding the treaty's judicial enforceability. In one of the quoted statements, the Court says instead that "we 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."<sup>111</sup> In the other, the Court stated that a treaty is self-executing when its "terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect."<sup>112</sup> Rather than focusing on the U.S. treaty-makers' intent regarding judicial enforceability, these statements refer to the intent or understanding of the U.S. treaty-makers regarding whether the treaty has domestic legal

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110. See generally *Judicial Enforcement*, *supra* note 4; *Four Doctrines*, *supra* note 4.

111. *Medellín v. Texas*, 552 U.S. 491, 519 (2008), quoted in RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. d (AM. LAW INST., April Discussion Draft 2015).

112. *Medellín*, 552 U.S. at 521, quoted in RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 cmt. d (AM. LAW INST., April Discussion Draft 2015).

force. As noted above, this reflects the majority's stated view that a non-self-executing treaty lacks the force of domestic law.<sup>113</sup> The reporters rightly reject this understanding of the nature of intent-based non-self-execution. The draft claims that *Medellín* itself is ambiguous on the question,<sup>114</sup> but the statements quoted in this paragraph, and others—including in footnote 2, where the majority directly explains what it means by “self-execution”—appear to state its view clearly. The reporters are nonetheless right to reject this understanding as incompatible with the text of the Supremacy Clause.

Despite their rejection of what *Medellín* has to say about the nature of the self-execution question, and hence what sort of intent is relevant, the reporters lean heavily on the *Medellín* majority's suggestion that it is the intent of the U.S. treaty-makers that matters. It is true that the Court in *Medellín* refers repeatedly to how the U.S. treaty-makers must have understood the treaty. But this does not mean that the Court in *Medellín* regarded the intent of the U.S. treaty-makers as controlling in the way the draft *Restatement (Fourth)* seems to contemplate. Each time the Court refers to the presumed understanding of the U.S. treaty-makers, it refers to their intent *as reflected in the text of the treaty*, or, in one case, the treaty's “text, background, negotiating and drafting history, or practice among signatory nations.”<sup>115</sup> Given its focus on the treaty's text, it is likely that the Court viewed the understanding of the U.S. treaty-makers as relevant to interpreting the treaty. This conclusion is buttressed by the Court's clear understanding of the self-execution issue as one of treaty interpretation.<sup>116</sup> As discussed above, treaty interpretation turns on the joint intent of the parties; the intent of the U.S. treaty-makers is relevant, but it is not conclusive. The majority's many references in *Medellín* to the presumed intent of the U.S. treaty-makers may reflect the view that, for U.S. courts, the intent of the U.S. treaty-makers deserves more weight in treaty interpretation than the views of other parties. But it does not necessarily support

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113. See *supra* note 22 and accompanying text.

114. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters' note 6 (AM. LAW INST., April Discussion Draft 2015).

115. *Medellín*, 552 U.S. at 523.

116. *Id.* at 506 (“The interpretation of a treaty, like the interpretation of a statute, begins with its text.”).

the claim that the intent of the U.S. treaty-makers determines the self-execution question.

Indeed, the *Medellín* opinion suggests that giving conclusive effect to the intent of the U.S. treaty-makers in the manner the draft contemplates would raise significant constitutional difficulties. As discussed above, treaties rarely address matters of domestic implementation, including the question of direct judicial enforceability.<sup>117</sup> Consequently, treaties will rarely address the issue that the reporters regard as the “essence” of self-execution. The current draft does not dispute this point. To the contrary, it asserts that “[o]nly rarely will a treaty be regarded as addressing methods of domestic implementation for the United States.”<sup>118</sup> And, even when treaties do address that question, according to the current draft, any such provisions are not controlling, but are mere evidence of the intent of the U.S. treaty-makers, which is controlling.<sup>119</sup> As explained above, the current draft concludes that the U.S. treaty-makers have the power to *determine* the domestic judicial enforceability of the treaties they conclude.<sup>120</sup> The view reflected in the current draft is thus that the intent of the U.S. treaty-makers controls direct judicial enforceability *even when such intent does not bear upon the meaning of the treaty itself on this question*. We might call this the disembodied intent of the U.S. treaty-makers, since in most cases it is completely unconnected to what the treaty itself has to say on the question of judicial enforceability. In the vast majority of cases, the treaty will have nothing to say (either explicitly or implicitly) on that question.<sup>121</sup>

The Court’s analysis in the final section of the *Medellín* opinion strongly suggests that it would reject the draft’s claim that the disembodied intent of the U.S. treaty-makers controls. In this final section, the Court considered the validity of the President’s “memorandum” instructing states to comply with the International Court of Justice’s (ICJ) judgment in *Avena* by providing the hearing

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117. See *supra* note 107 and text accompanying.

118. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 2 (AM. LAW INST., April Discussion Draft 2015).

119. See *supra* text accompanying notes 99–100.

120. See *supra* text accompanying note 104.

121. See *supra* text accompanying notes 107–109. The reporters appear to agree. See *supra* text accompanying note 118.

required by the judgment.<sup>122</sup> Having concluded that Article 94 of the U.N. Charter was non-self-executing, and hence that the ICJ judgment was not directly enforceable in the courts, the Court considered whether the President had the power to require compliance with the judgment.<sup>123</sup> In concluding that he did not, the Court employed a highly formalistic analysis: preemptive federal law must take the form of, or be authorized by, either a treaty or a statute.<sup>124</sup> The President's memorandum does not qualify as either of those.<sup>125</sup> The Court's analysis in this section was reminiscent of the equally formalist analysis in *I.N.S. v. Chadha*,<sup>126</sup> in which the Court struck down the legislative veto because it was the act of one or both houses of Congress, which does not have the power to legislate without the involvement of the President (unless his veto is overridden).

This sort of analysis would appear to pose significant problems for the claim that the U.S. treaty-makers (the President and Senate) control the domestic judicial enforceability of treaties. Treaties are, of course, one of the three categories of supreme federal law, but treaties are not made by the President and the Senate alone. Treaties are agreements between the United States (acting through the President and Senate) and another country. When the treaty itself does not address this question of direct judicial enforceability either explicitly or implicitly (which will almost always be the case),<sup>127</sup> the intent of the U.S. treaty-makers on this question cannot be said to be part of the treaty or even relevant to its interpretation. And, of course, the intent of the U.S. treaty-makers regarding the direct judicial enforceability of a treaty is not a federal statute. It is thus at least doubtful that the Court that decided *Medellin* would give binding force to such a free-floating "intent" of the U.S. treaty-makers. Only the treaty is domestic law, and the treaty is by definition the agreement of the parties; the unilateral intent of the U.S. treaty-makers on an issue the treaty itself does not address is neither law nor relevant to interpreting a law.

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122. 552 U.S. at 525–30.

123. *Id.*

124. *Id.* at 526–27.

125. *Id.*

126. 462 U.S. 919 (1983).

127. *See supra* note 121 and accompanying text.

As noted, the Court in *Medellín* regarded the issue before it to be one of treaty interpretation.<sup>128</sup> It was in that context that it gave weight to the intent of the U.S. treaty-makers. The fact that it always referred to the intent of the U.S. treaty-makers in conjunction with the treaty's text suggests that it viewed the intent of the U.S. treaty-makers to be relevant in determining the meaning of the treaty. It is one thing to regard the views of the U.S. treaty-makers as relevant to the meaning of the treaty. It is quite another, and highly problematic from the perspective of cases like *Chadha* and *Medellín* itself, to give binding force to the intent of the U.S. treaty-makers *on a question that the treaty itself concededly does not address*.

*Medellín* is best interpreted as having held that Article 94, by which the United States “under[took] to comply”<sup>129</sup> with the judgments of the ICJ, imposes an obligation on parties to use their best efforts to comply with the judgments of the ICJ. Although this is contrary to the usual understanding of the term “undertakes” in international law,<sup>130</sup> it is supported by a secondary, colloquial meaning of the term “to undertake” as a synonym for “to endeavor.”<sup>131</sup> Moreover, the Court relied on the fact that the treaty did not say that the parties “shall” or “must” comply with the judgments of the ICJ.<sup>132</sup> This indicates that the Court understood the term “undertakes” to mean something other than “shall” or “must,” and thus that Article 94 left some discretion for non-compliance. Finally, this interpretation is consistent with the Court's apparent understanding of the issue before it as one of treaty

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128. See *supra* note 116 and accompanying text.

129. *Medellín*, 552 U.S. at 508.

130. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. v. Serb.*), Judgment, 2007 I.C.J. 188, ¶ 162 (Feb. 26) (“The ordinary meaning of the word ‘undertake’ is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligation of the Contracting parties. . . . It is not merely hortatory or purposive. The undertaking is unqualified. . . .”). That the term “undertakes” denotes an immediate, unqualified obligation was not briefed to the Court in *Medellín* because none of the briefs supporting Texas put forward the interpretation of the term apparently adopted by the majority. The idea that the term “undertakes” suggests an attenuated, qualified obligation made its first appearance in the case in a question asked at oral argument by Justice Alito. Oral Argument at 8:26, *Medellín v. Texas*, 552 U.S. 491 (2008) (No. 06-984), [http://www.oyez.org/cases/2000-2009/2007/2007\\_06\\_984](http://www.oyez.org/cases/2000-2009/2007/2007_06_984).

131. See *Judicial Enforcement*, *supra* note 4, at 661–62.

132. *Medellín*, 552 U.S. at 508.

interpretation. Concededly, other statements in the opinion appear to suggest that the Court read Article 94 to impose an obligation to comply with ICJ judgments.<sup>133</sup> But that reading of Article 94 conflicts with the Court's reliance on the fact that Article 94 does not say "shall" or "must," as well as with the statement that the United States retained the "option" of "[n]oncompliance."<sup>134</sup> Given the conflicting indications of the Court's reasoning, the interpretation that does the least violence to the constitutional text and precedents such as *Foster* should be preferred. If the Court did hold that Article 94 imposed an obligation to use best efforts to comply with ICJ judgments, then its conclusion that Article 94 was non-self-executing was correct, as the Article would have required a judgment of a non-judicial nature.<sup>135</sup>

Alternatively, the Court might be understood to have held that Article 94 establishes a nondiscretionary duty to "pass acts" requiring compliance with the judgments of the ICJ. This interpretation is supported by the majority's statement that it agreed with the executive branch's argument that "the phrase 'undertakes to comply' is . . . a *commitment* on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision."<sup>136</sup> It is buttressed by the Court's citation and quotation, as support for its agreement with the executive branch's interpretation of the treaty, of *Foster's* holding that the treaty in that

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133. See *id.* at 504 (noting that *Avena* "constitutes an international law obligation on the part of the United States") (emphasis omitted). But see *Judicial Enforcement*, *supra* note 4, at 662 (noting that these statements might be read to say that the United States had an international law obligation to use best efforts to comply).

134. See *Medellín*, 552 U.S. at 510.

135. As indicated in Part II, the conclusion that a treaty is non-self-executing because it is nonjusticiable turns on constitutional considerations, not on the intent of the U.S. treatymakers or of the parties. Nevertheless, it requires a prior interpretation of the treaty to determine the international obligation imposed by the treaty. The intent of the treaty parties, including of the U.S. treatymakers, is relevant to determining the nature of the international obligation. If *Medellín* is understood as I have suggested, the Court relied on the intent of the U.S. treatymakers as evidence of the treaty's meaning—that is, in determining that the treaty imposed an obligation to use best efforts to comply with ICJ judgments. If the treaty did impose such an obligation, its judicial unenforceability derives from a constitutional disability of courts, not on any intent of the U.S. treatymakers regarding direct judicial enforceability.

136. *Medellín*, 552 U.S. at 508 (quoting Brief for the United States as Amicus Curiae, *Medellín v. Dretke*, 544 U.S. 660 (2005) (per curiam) (No. 04-5928), at \*34 (emphasis in original)).

case “pledge[d] the faith of the United States to pass acts.”<sup>137</sup> It is hard to see how the treaty’s language actually supports such a reading, but whether this interpretation of Article 94 is correct is less important for present purposes than the fact that this is what the Court understood itself to be holding. The Court (a) clearly viewed the issue as one of treaty interpretation,<sup>138</sup> (b) viewed its holding as merely an application of the *Foster* principle that a treaty is non-self-executing if it “pledge[s] the faith of the United States to pass acts,”<sup>139</sup> and (c) agreed with the executive branch that the need for implementing legislation derived from the nature of the international obligation established by the treaty as it applies to all “U.N. Members.”<sup>140</sup> So understood, *Medellín* confirms that the self-execution issue turns on whether the international obligation established by the treaty is one that “acts directly on the subject” or is instead an obligation to pass legislation accomplishing certain specified aims. The intent of the U.S. treaty-makers is important evidence of the meaning of the obligation imposed by the treaty, entitled to deference in the U.S. courts, but it is not itself what controls the self-executing character of the treaty.

In the face of these well-supported alternative interpretations of the Court’s opinion, *Medellín* provides at best only highly ambiguous support for the claim that the intent of the treaty-makers concerning judicial enforceability determines whether a treaty is judicially enforceable, even when the treaty itself does not purport to address that issue.

## *2. Declarations of non-self-execution (and of self-execution)*

In support of its claim that self-execution turns on the intent of the treaty-makers regarding judicial enforceability, the draft *Restatement (Fourth)* also relies on the United States’ recent practice of attaching declarations of non-self-execution to some treaties. The draft asserts that the treaties to which these declarations have been attached have included provisions that, in the absence of the declaration, would appear to be self-executing

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137. *Id.* (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314–15 (1829)).

138. *See supra* note 116 and accompanying text.

139. *See supra* note 137 and accompanying text.

140. *See supra* note 136 and accompanying text.

because they are “specific, are mandatory, and concern individual rights.”<sup>141</sup> The draft notes that the courts “have generally treated Senate declarations of non-self-execution as authoritative.”<sup>142</sup> If these declarations are valid and effectively transform an otherwise self-executing treaty into a non-self-executing treaty, the draft *Restatement (Fourth)* reasons, they reflect the constitutional power of the U.S. treaty-makers to control the domestic judicial enforceability of the treaties they conclude.<sup>143</sup>

The draft *Restatement (Fourth)* is undoubtedly correct in noting that the treaties to which these declarations have been attached include provisions that would otherwise be self-executing and judicially enforceable. For example, the International Covenant on Civil and Political Rights (ICCPR), which was “declared” non-self-executing, includes a provision prohibiting the execution of pregnant women.<sup>144</sup> In the absence of the declaration of non-self-execution attached to the ICCPR, this provision would certainly be self-executing.<sup>145</sup> It purports to “act directly on” the subject,

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141. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 4 (AM. LAW INST., April Discussion Draft 2015).

142. *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004); *Renkel v. United States*, 456 F.3d 640, 644 (6th Cir. 2006)).

143. *See supra* note 104 and accompanying text.

144. International Covenant on Civil and Political Rights art. 6(5), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

145. The only possible basis for a contrary conclusion would be based on the fact that article 2(1) of the ICCPR provides that, “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,” and Article 2(2) provides that “[w]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” *Id.* If a court were to interpret the term “undertakes” in the way the Supreme Court did in *Medellin*, it could conclude that Article 2(1) renders the entire treaty non-self-executing. *See supra* text accompanying notes 130–135. However, for the reasons discussed above, this would be a misinterpretation of that term. *See supra* note 130. Article 2(2) should not be read as an indication that the entire ICCPR is an obligation to “pass acts” protecting the rights set forth in the Convention. The article requires legislation only where “necessary.” With respect to provisions that “act upon the subject,” such as the one barring the execution of pregnant women, legislation is not necessary in the United States (although it would be necessary in the United Kingdom). *See generally Four Doctrines, supra* note 4, at 709 & n.64. The reporters appear to agree that Article 2(2) does not render the ICCPR non-self-executing. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES:

prohibiting certain specific acts. Any pregnant woman threatened with execution would have standing to challenge the execution on the basis of the ICCPR, and, in the absence of the declaration of non-self-execution, a court with jurisdiction would be obligated to enjoin the execution on the basis of the treaty.<sup>146</sup> If that provision is non-self-executing, therefore, it is solely because of the declaration of non-self-execution.

It is also true that these declarations have been assumed by the Supreme Court to be valid and effective. The Court has not offered much analysis to support this view, however. *Sosa v. Alvarez-Machain*, the only Supreme Court opinion to address the issue, merely stated in conclusory fashion in dicta that “the United States ratified [the ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”<sup>147</sup> This case is weak support for the validity of the declarations.

Scholars have argued that these declarations are not valid,<sup>148</sup> and their arguments cannot be easily dismissed. As noted above, most treaties do not address the issue of domestic implementation.<sup>149</sup> They do not address whether the treaty directly alters the legal rights and obligations of individuals or instead requires legislative implementation. That certainly is true of the ICCPR, the treaty mentioned in *Sosa*. The Covenant leaves it to the domestic laws of the States’ parties to determine whether its provisions directly alter domestic legal rights and duties or instead are subject to legislative implementation.<sup>150</sup> Our domestic law is the Supremacy Clause, which, as interpreted in *Foster*, establishes that provisions that “act

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TREATIES § 106 reporters’ note 2 (AM. LAW INST., April Discussion Draft 2015) (noting that “general provisions in a treaty directing states parties to adopt necessary legislative measures under domestic law do not resolve the issue of self-execution under U.S. law, since in the U.S. domestic system, legislation is not necessarily required”).

146. See generally *Judicial Enforcement*, *supra* note 4, at 611–13.

147. *Sosa*, 542 U.S. at 735.

148. A list of these sources is provided in *Four Doctrines*, *supra* note 4, at 708 n.61. See also Ramsey, *supra* note 40.

149. See *supra* notes 107–109 and text accompanying.

150. See U.N. Human Rights Comm., *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 13, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (Mar. 29, 2004) (“Article 2 . . . does not require that the [ICCPR] be directly applicable in the courts[.]”).

directly on” the subject do alter domestic-law rights and duties of their own force.<sup>151</sup> The question is whether the declaration of non-self-execution, which purports to alter that conclusion, is valid. The analysis sketched above with respect to the disembodied intent of the U.S. treaty-makers is equally applicable here.<sup>152</sup> Since the declaration is obviously not a federal statute or part of the Constitution itself, a formalist would ask whether the declaration is part of the treaty. A treaty, however, consists of the agreement between the United States and the other States-parties. Because the treaty itself by hypothesis does not address, either explicitly or implicitly, the question of domestic implementation (including the question of direct judicial enforceability), the declaration of non-self-execution would appear to be merely a unilateral statement of the United States purporting to alter the ordinary domestic law effect of the treaty. As such, it would appear not to be part of the treaty itself. It would appear to be no more effective than the President’s unilateral attempt in *Medellín* to implement the non-self-executing treaty involved in that case.<sup>153</sup>

Most of the arguments that have been raised by defenders of the validity of these declarations are unpersuasive. One of the reporters has defended the validity of these declarations by analogy to the power lawmakers have to control the domestic legal effects of the statutes they enact, for example, by specifying that the statute will not preempt state law or will not create a private right of action.<sup>154</sup> Echoing that argument, Reporters’ Note 6 relies on the same analogy in attempting to reconcile the non-self-execution doctrine with the Supremacy Clause.<sup>155</sup> But the analogy is inapt. In the case of statutes, the limitation of the legal effects of the statute comes from the statute itself. In the case of the declaration of non-self-execution, as we have seen, the limitation would appear not to be a part of the treaty. The declaration reflects the views of the U.S. treaty-makers, but the U.S. treaty-makers do not make treaties by

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

152. *See supra* text accompanying notes 117–128.

153. *Medellín v. Texas*, 552 U.S. 491, 525–29 (2008).

154. *See* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 545–46 (2002); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 447–48 (2000).

155. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 6 (AM. LAW INST., April Discussion Draft 2015).

themselves. They make treaties by entering into agreements with other states. In the case of these treaties (as with virtually all treaties), the agreement with the other states did not include any agreement on the question of domestic implementation addressed by the declaration. The parties left that question to the domestic law of each state.<sup>156</sup> And a declaration of non-self-execution is not a domestic law of the United States.

There is one persuasive basis for concluding that declarations of non-self-execution are valid and effective, but this argument does not support the draft *Restatement (Fourth)*'s broader argument that the self-execution question turns more generally on the unilateral intent of the U.S. treaty-makers on the question of judicial enforceability.<sup>157</sup> The argument is based on the fact that a hypothetical reservation of non-self-execution would be valid (or at least effective). A reservation differs from a declaration in that it does purport to alter the mutual rights and obligations of the parties.<sup>158</sup> A statement of non-self-execution would thus be a reservation as opposed to a declaration if the statement were attached to a treaty that did purport to require that its provisions be treated as directly applicable law in the state's legal system. Such treaties are rare, but can in theory exist.<sup>159</sup> Thus, the same statement of non-self-execution that the United States has attached to the ICCPR and other treaties would constitute a reservation if the treaty required that its provisions be treated as self-executing. Because such a statement would purport to alter the mutual rights and obligations of the states-parties, it would clearly be a part of the treaty to which it is attached for purposes of Article II, and hence Article VI.

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156. For an explanation of why other defenses of these declarations are unpersuasive, see *Judicial Enforcement*, *supra* note 4, at 675–77.

157. I elaborate this argument in some detail elsewhere. See *Judicial Enforcement*, *supra* note 4, at 667–85. I shall only sketch its broad outlines here.

158. See Vienna Convention on the Law of Treaties, *supra* note 87, art. 2(1)(d) (defining reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”).

159. See, e.g., *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 159–62 n.9 (1940) (noting the self-executing character of the General Inter-American Convention for Trade Mark and Commercial Protection, which stipulated in part that its provisions “shall have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs”).

Under prevailing rules of customary international law, such a reservation would effectively preclude direct application of its provisions by judicial and executive officials. Ordinarily, the effect under international law of ratifying a treaty subject to such a reservation is to bind the reserving party to the treaty subject to the reservation.<sup>160</sup> If another state-party objects to the reservation, but does not object to the entry into force of the treaty with respect to the reserving state, the reserving state and the objecting state become parties to the treaty, except that the provision to which the reservation relates is not in force to the extent of the reservation.<sup>161</sup> If the objecting state objects to the entry into force of the treaty between it and the reserving state, the treaty does not come into force as between those states.<sup>162</sup> In all three cases, the treaty will not be directly applicable by executive or judicial officials in the United States—in the first two cases because the reservation deprives it of any such effect, and in the third case because the United States is not a party to the treaty vis-à-vis the objecting state.<sup>163</sup> The reservation will thus be valid (in the first two cases) or at least effective (in the third case).

A declaration of non-self-execution differs from a reservation of non-self-execution in that it is attached to a treaty that neither requires nor forbids that its provisions be directly applied as law in the states-parties' domestic legal systems.<sup>164</sup> That is, indeed, the feature of such statements that calls into question their status as part of the treaty for purposes of the Supremacy Clause: they do not purport to affect the international rights and obligations of the parties, but are mere unilateral statements regarding which of the mechanisms permitted by the treaty for carrying out the treaty's obligations the United States will employ. Nevertheless, the validity of a declaration of non-self-execution seems to follow from the

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160. See Vienna Convention on the Law of Treaties, *supra* note 87, at art. 21(1).

161. See *id.* art. 21(3).

162. See *id.* art. 20(4)(b).

163. A reservation is also invalid if it is contrary to the object and purpose of the treaty to which it is attached. For the reasons explained in *Judicial Enforcement*, *supra* note 4, at 679–80, it is almost certain that a reservation of non-self-execution will not be contrary to the object or purpose of the treaty to which it is attached.

164. As discussed above, treaties rarely address the details of domestic enforcement. See *supra* text accompanying notes 107–109.

conclusion that a reservation of non-self-execution would be valid (or at least effective). The difference between a reservation and a declaration of non-self-execution is that the former is attached to a treaty that otherwise requires direct application, while the latter is attached to a treaty that permits but does not require direct application. If the statement of non-self-execution is valid (or at least effective) when it goes *against* the desires of the other states-parties, then it seems absurd to conclude that the statement is invalid when—indeed, because—the other parties did not mean to require otherwise.<sup>165</sup>

The validity of a hypothetical reservation of non-self-execution thus suggests that the actual declarations of non-self-execution are valid and effective. If so, the response to the formalist objection to the validity of these declarations would be that these declarations *are* parts of the treaties to which they are attached, despite the fact that they do not purport to alter any of the United States' international obligations under the treaty. A functionalist defense of the validity of the declarations might note that, under *Foster*, a similar statement inserted into the text of the treaty would be effective, even if the other parties to the treaty did not care about the issue. If the validity of a statement in the text doesn't turn on whether the other parties would otherwise have wanted the treaty's provisions to be directly applicable as law in the United States, then the validity of a statement submitted with the instruments of ratification should also not turn on whether the statement contradicts the other parties' desires.

But it does not follow from the validity of declarations of non-self-execution that the self-execution question turns more generally on the intent of the U.S. treaty-makers on the question of domestic judicial enforceability, as the draft suggests. The case for the validity of these declarations rests on the validity of reservations of non-self-execution, which leads to the conclusion that the declarations are as much a part of the treaties, for purposes of Article VI, as reservations of non-self-execution are. But it is quite another matter to say that, in the absence of such formal declarations, the free-floating "intent" of the U.S. treaty-makers governs whether the treaty's provisions are directly applicable as law by executive and judicial officials. For the

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165. For elaboration of these absurdities, see *Judicial Enforcement*, *supra* note 4, at 682–83.

reasons noted, these declarations are acts of law-making. They transform treaty provisions that “act upon the subject” into provisions requiring the United States to “pass acts” accomplishing the treaty goals. Thus, the declaration attached to the ICCPR transforms the provision that reads “[the] [s]entence of death . . . shall not be carried out on pregnant women”<sup>166</sup> into one that provides “the United States shall pass legislation prohibiting the execution of pregnant women.” It is one thing to say that this act of lawmaking can be accomplished through a formal declaration deposited with the treaty’s instruments of ratification; it is quite another to say that such lawmaking can be accomplished through less formal acts, such as statements in executive or Senate reports or statements by the executive officials at Senate hearings.<sup>167</sup>

An intermediate case would be a declaration of non-self-execution included with the Senate’s resolution of advice and consent, but not deposited with United States’ instruments of ratification or otherwise formally communicated to the other parties.<sup>168</sup> Consistent with its view that the unilateral intent of the U.S. treaty-makers controls the self-execution question, the draft *Restatement (Fourth)* concludes that such declarations are binding.<sup>169</sup> It is uncertain whether the declarations would be regarded as a part of the treaties from the formalist perspective reflected in the final section of *Medellin*. To treat such declarations as effective at

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166. ICCPR, *supra* note 105, at art. 6(5).

167. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 4 (AM. LAW INST., April Discussion Draft 2015), indicates that, “[b]ecause these statements are not voted on by the Senate as a whole and do not formally condition its advice and consent to the treaty, there is less basis for treating them as authoritative.” Reporters’ Note 4 goes on to point out, however, that “[t]hey nevertheless may be taken into account as indicia of the views of the U.S. treaty-makers.” Given the draft *Restatement (Fourth)*’s position that self-execution turns on the intent of the U.S. treaty-makers, it would appear that the reporters’ hesitation in treating these less formal statements as authoritative derives solely from possible doubts about whether such statements truly reflect the view of two-thirds of the Senate.

168. Although the declarations of non-self-execution attached to the ICCPR and other human rights treaties were deposited with the instruments of ratification, more recent declarations have not been. *See Judicial Enforcement, supra* note 4, at 670, n.318.

169. Indeed, the draft *Restatement (Fourth)* refers to declarations of non-self-execution as being included in the Senate’s resolution of advice and consent without mentioning that they are also deposited with the instruments of ratification. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106(2) cmt. f (AM. LAW INST., April Discussion Draft 2015); *id.* § 106 reporters’ note 4.

transforming a self-executing treaty into a non-self-executing one, even when the declarations are not deposited with the instruments of ratification and thus could not plausibly be regarded as a part of the treaty, would appear to require the recognition of a new category of supreme federal law.

In recent years, the treaty-makers have been attaching declarations of self-execution to some treaties.<sup>170</sup> Whether such declarations are effective at transforming non-self-executing treaties into self-executing ones presents a harder question than whether declarations of non-self-execution are effective at transforming self-executing treaties into non-self-executing ones. The draft *Restatement (Fourth)*'s position that self-execution turns on the intent of the U.S. treaty-makers would appear to lead to the conclusion that declarations of self-execution are equally valid. But, because these declarations purport to enhance rather than to limit the domestic legal effect of the relevant treaties, the formalist objection to these reservations seems stronger. The argument based on the validity of reservations of non-self-execution does not apply to declarations of self-execution.<sup>171</sup> The Draft Restatement acknowledges that such declarations present more significant problems than declarations of non-self-execution and concludes that it is likely that the courts will give them "substantial weight,"<sup>172</sup> suggesting that it does not regard them as binding.<sup>173</sup>

Even if one regards such declarations as valid and effective at transforming a self-executing treaty into a non-self-executing treaty, and vice versa, such a conclusion does not establish that the intent of the treaty-makers governs the self-execution in the absence of such declarations. To the extent the treaty-makers continue the practice of expressing their intent through such declarations, the question of the relevance of their disembodied intent should become less significant

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170. See *Judicial Enforcement*, *supra* note 4, at 670 n.318.

171. For elaboration, see *Judicial Enforcement*, *supra* note 4, at 685–88.

172. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters' note 4 (AM. LAW INST., April Discussion Draft 2015).

173. If declarations of self-execution are valid and effective at transforming non-self-executing treaties into self-executing ones, even when not deposited with the instruments of ratification, then the question arises whether the treaty-makers have the power through such declarations to make law relating to the domestic enforcement of treaties in other respects. Many such declarations, for example, create private rights of action for damages for violation of the treaties' provisions, establish statutes of limitations, or waive sovereign immunity?

over time. Nevertheless, many important treaties were concluded before the treaty-makers developed this practice, so it remains important to understand how to determine the self-executing status of a treaty in the absence of such declarations. The draft should clarify that self-execution turns on the intent of the U.S. treaty-makers only when that intent is reflected in a declaration of non-self-execution (or possibly also when reflected in a declaration of self-execution).<sup>174</sup> In other cases, the issue turns on whether the treaty, as written, “acts directly on” the subject or instead imposes an obligation to “pass acts” accomplishing the treaty’s aims.

#### IV. THE PRESUMPTION OF SELF-EXECUTION

The draft *Restatement (Fourth)* takes the position that “the case law has not established a presumption for or against self-execution, in the sense of a clear statement or default rule that dictates a result in the absence of contrary evidence.”<sup>175</sup> It is true that the case law does not establish a presumption for or against self-execution with respect to the “constitutionality” category of non-self-execution, implicitly recognized by the draft *Restatement (Fourth)* as a distinct category. It is also true that there is no presumption for or against self-execution with respect to the justiciability category, which I have defended above as another distinct category.<sup>176</sup> But as this Part will show, there is substantial support for a presumption that treaties are self-executing in the intent-based sense recognized in *Foster*. Such a presumption is supported by the text of the Supremacy Clause in light of the Court’s understanding of the nature of the self-execution question in *Foster*. In addition, the Court’s analysis in *Percheman*, belatedly recognizing that the treaty held to be non-self-executing in *Foster* was actually self-executing, is best read as establishing such a presumption. As the current draft itself recognizes, the Supreme

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174. Even if there is a declaration of non-self-execution, there may be an issue about the meaning of the declaration. As the draft notes, the declaration of non-self-execution attached to the ICCPR was apparently intended to clarify that the Covenant would not create a private right of action. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 4 (AM. LAW INST., April Discussion Draft 2015).

175. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters’ note 3 (AM. LAW INST., April Discussion Draft 2015).

176. See *supra* Section I.B.

Court's practice in the nineteenth and early twentieth centuries can be read to "reflect[] a presumption in favor of judicial enforcement."<sup>177</sup> Finally, although *Medellín* has language that seems to apply a presumption against self-execution, parts of the Court's analysis also support a presumption in favor of self-execution.

Since the presumption defended here applies only to the intent-based category of non-self-execution, the analysis that follows assumes that the treaty obligation is neither vague nor aspirational, nor framed in a way that calls for policy judgments of a nonjudicial nature. Since the reporters have stipulated that remedial issues are separate,<sup>178</sup> I also assume that the treaty is being invoked by someone with standing who possesses a right of action. The question is thus whether a clear and specific treaty provision of this sort should nevertheless be considered non-self-executing because of the intent of the parties or of the U.S. treaty-makers. Because the Supremacy Clause altered the British rule, under which all treaties required implementing legislation, by giving "all" treaties the force of supreme federal law and instructing courts to give them effect, finding such treaties to be non-self-executing would appear to require some affirmative reason for believing that the parties or the treaty-makers intended to require implementing legislation. If so, the clause establishes a presumption, or at least a default rule, that a treaty is self-executing (in the intent-based sense).

As discussed above, the Court in *Foster* understood the issue to be whether the treaty, as framed, acts directly on the subject or instead commits the nation to pass acts accomplishing certain aims.<sup>179</sup> In answering that question with respect to the treaty before it, the Court in *Foster* concededly did not apply a presumption favoring the former reading. But the dangers of this approach were soon made evident to the Court. When faced with the Spanish text of the treaty

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177. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 106 reporters' note 3 (AM. LAW INST., April Discussion Draft 2015). The reporters' note refers to "courts" rather than the Supreme Court specifically. But the practice of the courts that leads the reporters to conclude that these cases might reflect a presumption of self-execution is the practice of "often enforc[ing] treaties without discussing the question of self-execution." *Id.* As the draft *Restatement (Fourth)* explains in Reporters' Note 1, this was the practice of the Supreme Court as well as the lower courts.

178. See *supra* note 15 and accompanying text.

179. See *supra* Part II.

in *Percheman*, the Court reversed itself and held the treaty to be self-executing.<sup>180</sup> But the Court in *Percheman* did not just rely on the clarity of the Spanish text. The Spanish text led the Court to realize that the English wording on which it had so confidently relied in *Foster* was actually ambiguous and could have been used to convey the same meaning as the Spanish text.<sup>181</sup> The closest the Court came to articulating a test for non-self-execution was its statement, in finding the clause to be self-executing, that the provision did not necessarily “stipulat[e] for [a] future legislative act.”<sup>182</sup> *Percheman* thus supports the conclusion that a treaty is self-executing unless it “stipulate[es] for [a] future legislative act.” This formulation suggests the need for clarity of language to support a determination that a treaty was meant to require implementing legislation.<sup>183</sup>

*Percheman*’s cautious approach is justified by the fact that states have different domestic constitutional rules regarding domestic implementation of treaties. As noted, the Court in *Foster* recognized that treaties in other countries generally do not effectuate their objects of their own force, but that the Supremacy Clause establishes a different principle for the United States.<sup>184</sup> Indeed, at the time of the Constitution’s adoption, the United States was one of only a few countries (possibly the only country) not to require legislative implementation of treaties.<sup>185</sup> It is because of the diversity of constitutional approaches to domestic implementation of treaties that treaties rarely address the question of domestic implementation. This, in turn, means that treaty language will rarely have been selected to convey some meaning on the question whether the treaty “acts directly on” the subject or instead pledges the nation’s faith to “pass acts” accomplishing its ultimate aims. Reading ambiguous language as establishing the latter obligation risks attributing to the parties a nonexistent intent.

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180. United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833).

181. *Id.* at 88–89.

182. *Id.* at 89.

183. See generally *Judicial Enforcement*, *supra* note 4, at 644–45.

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

185. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 277 (1796) (Iredell, J., dissenting) (noting that the U.S. Constitution “affords the first instance of any government . . . saying, treaties should be the *supreme law of the land*”).

*Percheman's* recognition of the likely ambiguity of treaty language on this question came in a case involving a bilateral treaty.<sup>186</sup> The need for a presumption is even greater for multilateral treaties. It is even less plausible with respect to a multilateral treaty than a bilateral treaty to think that the language was chosen with a view to addressing the issue posed in *Foster*. Multilateral treaties involve many potential parties with widely varying constitutional rules regarding domestic implementation. Because the same language will be equally applicable to all such countries, it is highly unlikely that the language chosen was designed to address the issue the Court posed in *Foster*. A presumption that the treaty was not intended to require implementing legislation has the benefit of according with the reality that the parties will not have intended anything regarding the need for legislative implementation. Thus, a presumption of self-execution is particularly important for multilateral treaties.

The case-law support for a presumption of self-execution includes not just *Percheman's* "stipulation" language, but also the overall thrust of the cases in the nineteenth and early twentieth centuries. The draft itself recognizes that the Court's approach during this period "might have reflected a presumption in favor of judicial enforcement."<sup>187</sup> As already noted, after *Foster*, with one possible exception, the Court did not hold a treaty to be non-self-executing again until its recent decision in *Medellín*.<sup>188</sup>

There is language in *Medellín* that suggests the Court was applying a presumption against self-execution.<sup>189</sup> Certainly, a finding of non-self-execution based on the treaty's use of the term "undertakes" is difficult to square with a presumption of self-execution. But the Court did not just rely on that treaty text. It also relied on the United States' retention of the veto and even on the

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186. Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in *INTERNATIONAL LAW STORIES* 151–74 (John E. Noyes et al. eds., 2007).

187. See *supra* note 177 and accompanying text.

188. See *supra* note 4; *Medellín v. Texas*, 552 U.S. 491, 518–19 (2008).

189. See, e.g., *Medellín*, 552 U.S. at 526 (describing a non-self-executing treaty as "a treaty . . . ratified without provisions clearly according it domestic effect").

fact that Mr. Medellín was not a party to the ICJ judgment.<sup>190</sup> The holding rests on all of those factors combined, not on any one of them. Indeed, some parts of the Court's analysis are consistent only with a presumption in favor of self-execution. In particular, the Court found that the existence of a non-self-executing treaty placed the President's memorandum in the third *Youngstown* category.<sup>191</sup> That would be so, however, only if a finding of non-self-execution rests on affirmative evidence that the parties (or the treaty-makers) intended to require legislation. If non-self-execution could be based on mere silence about the need for implementing legislation, then the existence of a non-self-executing treaty would have placed the memorandum in the second *Youngstown* category.<sup>192</sup> Given the mixed signals *Medellín* sends regarding what makes a treaty non-self-executing, the draft rightly rejects an interpretation of *Medellín* as establishing a presumption against self-execution. Indeed, the fact that the Court purported to be applying rather than changing prior law on self-execution<sup>193</sup> would appear to require rejection of such an interpretation. The Court's obvious intention to apply existing standards means that, to the extent the holding of the case cannot be squared with prior law, the holding should be limited to its facts (as the draft suggests).<sup>194</sup>

In light of the fact, recognized by the draft, that treaties rarely address the question whether its provisions shall be directly

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190. *Id.* at 509–14. Indeed, given the “inadequa[cy]” of the Court's reliance on the text of article 94(1), Professor Ramsey concludes that “the *Medellín* majority's conclusion principally depends on the assertion of an exclusive Security Council remedy through Article 94(2).” Ramsey, *supra* note 40, at 1665. As Professor Ramsey concedes, however, the latter conclusion was itself “question[able].” *Id.* For a criticism of this part of the Court's analysis, see Vázquez, *Judicial Enforcement*, *supra* note 4, at 663–64.

191. *Id.* at 527. The Court's reference was to the tripartite analysis elaborated by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The President's actions fall into the third *Youngstown* category when he acts in defiance of congressional will. The President's actions fall in the second category—the “zone of twilight”—when he acts in the face of congressional silence.

192. See *Judicial Enforcement*, *supra* note 4, at 657–58; Carlos Manuel Vázquez, *Less Than Zero?*, 102 AM. J. INT'L L. 563, 569 (2008).

193. See *Judicial Enforcement*, *supra* note 4, at 653–54 n.250.

194. See *supra* text accompanying note 5. Indeed, if *Medellín* is understood as suggested above, *supra* text accompanying notes 129–35, then it applied the “justiciability” category of non-self-execution and has no bearing on my argument here that there is a presumption that treaties are self-executing in the “intent-based” sense.

applicable as domestic law or directly enforceable by executive or judicial officials, the courts will rarely find an answer to the self-execution question in the treaty's terms or in the intent of the parties to the treaty. As Justice Breyer wrote in his dissenting opinion in *Medellin*, to seek an answer to that question in the treaty itself is like hunting for the snark.<sup>195</sup> If so, then it would appear that an intent-based test has to be coupled with a default rule of either self-execution or non-self-execution. Given that (in the absence of a declaration of non-self-execution) the default rule will rarely be rebutted, a default rule of non-self-execution will mean that most treaties will be non-self-executing. Such a result seems incompatible with the text of the Supremacy Clause as well as with the many cases in which the Supreme Court has either found treaties to be self-executing or enforced them without pausing to inquire about their self-executing character. If a presumption is necessary, and the presumption of non-self-execution is untenable, then the presumption must be one in favor of self-execution.

The draft *Restatement (Fourth)* escapes this dilemma by insisting that the issue does not turn on the treaty itself or on the joint intent of the parties (as there will rarely be such an intent), but on the unilateral intent of the U.S. treaty-makers.<sup>196</sup> As discussed in Part III, the intent of the U.S. treaty-makers does control when it is manifested in a declaration of non-self-execution. To the extent the treaty-makers may make their intent clear through a declaration, a presumption in favor of self-execution should pose no difficulties going forward. Indeed, if one believes that the issue should turn on the intent of the U.S. treaty-makers on the issue, a presumption of self-execution is better than a presumption of non-self-execution because, as the draft acknowledges, declarations of non-self-execution stand on firmer constitutional footing than declarations of self-execution.<sup>197</sup>

As discussed above, in the absence of a declaration regarding self-execution, reliance on the intent of the U.S. treaty-makers presents severe constitutional problems. Reliance on such intent is, moreover, inconsistent with how the Courts in both *Foster* and *Medellin*

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195. See *Medellin*, 552 U.S. at 549 (Breyer, J., dissenting).

196. See *supra* Section III.A.

197. See *supra* text accompanying note 172.

understood the issue before them. The Court in both cases understood the issue as one of treaty interpretation and looked for the meaning of the treaty as reflected (primarily) in the treaty's text. For the reasons discussed, if the issue turns on the meaning of the treaty, and if most treaties do not address the issue, then the courts need a presumption or default rule on which to base their self-execution determinations, lest they rest their holdings on language that was not intended to have any bearing on that question. From the perspective of constitutional text and precedent, the superior default rule is self-execution.

### CONCLUSION

This Essay has proposed four improvements to the draft *Restatement (Fourth)*'s provisions on self-execution of treaties. First, the Restatement should recognize that the self-execution concept is not a unitary one. The current draft implicitly recognizes at least two distinct categories – the “constitutionality” category and the “intent-based” category – and it recognizes the distinctness of a third – the “private right of action” category – albeit by insisting that it is not really a self-execution issue. The Restatement should state explicitly that the self-execution concept is not a unitary one, and it should further distinguish the “justiciability” category from the “intent-based” category.

Second, the Restatement should qualify the claim that the self-execution issue is essentially about judicial enforceability. Although lack of judicial enforceability is one consequence of a conclusion that a treaty is not self-executing (at least as the reporters have implicitly defined the term), it is not the only consequence. With respect to the constitutionality and intent-based categories, the conclusion that a treaty is not self-executing also has important implications for executive officials and private parties. More importantly, the claim that the self-execution issue is essentially about judicial enforceability distorts analysis of when a treaty is non-self-executing by sending courts on a vain search for evidence that the treaty was intended to be judicially enforceable.

Third, the Restatement should qualify the claim that the self-execution issue turns on the intent of the U.S. treaty-makers. Intent matters at all only with respect to one of the categories of non-self-

execution—the intent-based category. But the relevant intent is not that of the U.S. treatymakers regarding judicial enforceability; it is that of the parties to the treaty regarding whether the treaty “acts upon the subject” or obligates the parties to “pass acts” accomplishing the treaty’s aims. The intent of the U.S. treatymakers regarding self-execution is conclusive when reflected in a declaration of non-self-execution attached to the instruments of ratification, but it is not conclusive in the absence of such a declaration.

Finally, the Restatement should qualify the claim that there is no presumption for or against self-execution. Although there is no presumption that a treaty is self-executing in the constitutionality or justiciability senses, there is substantial support in the constitutional text and in case law for a presumption that a treaty is self-executing in the intent-based sense.

