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David H. Moore
BYU Law, moored@law.byu.edu

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ESSAY

DO U.S. COURTS DISCRIMINATE AGAINST TREATIES?: EQUivalence, DualITY, AND NON-SELF-EXECUTION

David H. Moore*

Despite the inclusion of treaties in the Supremacy Clause, only self-executing treaties are immediately enforceable in U.S. courts. The Supreme Court confirmed as much in its recent decision in Medellin v. Texas, which adopted a broad notion of non-self-execution. Most foreign relations law scholars seek to limit the incidence of non-self-execution. They argue, among other things, that non-self-execution violates the Supremacy Clause, which mandates equivalent treatment of the Constitution, statutes, and treaties. A minority of scholars have responded by arguing variously that the doctrine of non-self-execution does not discriminate against treaties, that the Constitution does not require equivalence, and that differential treatment is justified by treaties’ dual nature—they are, first, instruments of foreign affairs and, second, domestic law.

This Essay introduces a new argument in favor of a broad notion of non-self-execution. Rather than emphasize the unique duality of treaties, this Essay highlights that the Constitution and statutes also possess a dual nature. While their primary role is as domestic law, they also play a role in foreign relations, particularly when they apply extraterritorially. Recent guidance from the Supreme Court on the extraterritorial application of the Constitution and statutes permits a timely comparison of the judicial treatment of all three sources of supreme law in their areas of secondary application. Comparison along this new axis reveals that treaties fare better than statutes under even a broad notion of non-self-execution. The new analysis thus advances the argument for non-self-execution. The comparison also has important implications for other issues bearing on the domestic status of treaties.

INTRODUCTION

Article II of the Constitution authorizes the President, "by and with the Advice and Consent of the Senate, to make Treaties, provided two

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thirds of the Senators present concur." The Supremacy Clause declares that, like the Constitution and statutes, "all" treaties "shall be the supreme Law of the Land." Despite use of the word "all," some treaties are not automatically enforceable in U.S. courts. The Supreme Court held in 1829, in the landmark case of Foster v. Neilson, that only self-executing treaties immediately provide rules of decision. The majority of foreign relations scholars oppose expansive classification of treaties as non-self-executing.

That opposition has recently trained on the Supreme Court's decision in Medellín v. Texas, and understandably so, as Medellín arguably eclipsed Foster as the Court's most important pronouncement on the domestic status of treaties and endorsed a broad notion of non-self-execution.

One of the grounds on which foreign relations law scholars challenge non-self-execution is that it violates a constitutional principle of equivalence. The Supremacy Clause designates the Constitution, statutes, and treaties as supreme federal law.

Defenders of non-self-execution respond, in effect, by arguing variously

2. Id. art. VI, cl. 2. In its entirety, the Supremacy Clause states:
   This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. 27 U.S. (2 Pet.) 253, 314–15 (1829) (recognizing that some treaties are non-self-executing and require congressional implementation to be judicially enforceable), abrogated by United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833) (concluding that treaty provision found to be non-self-executing in Foster was self-executing, but not rejecting the notion of non-self-execution).
   But cf. Tim Wu, Treaties' Domains, 93 Va. L. Rev. 571, 578, 607–08 (2007) (tracing doctrine of non-self-execution to 1788 state decision, Camp v. Lockwood, 1 U.S. (1 Dall.) 393, 403–04 (Pa. Ct. C.P. 1788) (holding Treaty of Peace required legislative action to secure restitution for prior confiscations), and to Supreme Court's 1796 decision in Ware v. Hylton, 3 U.S. (3 Dall.) 199, 244 (1796) (Chase, J.) (acknowledging possibility that "treaty may stipulate, that certain acts shall be done by the Legislature," but holding Treaty of Peace required no legislative action before courts could enforce)).

4. See infra Part I (discussing scholarly opposition to broad non-self-execution).
7. U.S. Const. art. VI, cl. 2.
8. See infra notes 19–27 and accompanying text (discussing equivalence principle).
that treatment of the Constitution and statutes is equivalent with the
treatment of treaties that results from the doctrine of non-self-execution,
that the Supremacy Clause does not require equivalence, and that the
dual international and domestic nature of treaties warrants differential
treatment.9

This Essay takes a new approach. It accepts that treaties have a dual
nature. They principally affect foreign relations, but they also play a role
as domestic law. The Essay does not, however, rely on treaty duality to
question whether the Constitution requires equivalent treatment of con-
stitutional, statutory, and treaty law, as past arguments have. Rather, the
Essay highlights that the Constitution and statutes also have a dual na-
ture. Like treaties, the Constitution and statutes play a role in foreign
relations, most obviously when they apply extraterritorially. While this
foreign relations role is primary for treaties, it is secondary for the
Constitution and statutes. Once the dual role of all three sources of su-
preme federal law is recognized, it becomes apparent that those who
complain that non-self-execution produces differential treatment are
comparing judicial treatment of the Constitution and statutes in their pri-
mary (domestic) role against the treatment of treaties in their secondary
(domestic) role. This Essay employs a new comparative axis: treatment
of all three sources in their areas of secondary application. Comparing
judicial treatment of the Constitution, statutes, and treaties in their sec-
ondary arenas reveals, critically, that treaties fare well even under a broad
conception of non-self-execution, lending support to the minority posi-
tion in the contemporary debate over self-execution. The comparison
also has important implications for other issues surrounding the domes-
tic status of treaties.

To develop these insights, Part I surveys scholarly opposition to the
document of non-self-execution, with particular emphasis on the equiva-
ience argument. Part II notes academic responses to the equivalence the-
thesis, including arguments based on the duality of treaties. Parts III and IV
demonstrate the dual nature of the Constitution and statutes and justify
comparison of the judicial treatment of all three sources in their sec-
ondary roles. Part V details the judicial treatment of each source in its area
of secondary application. Part VI compares this judicial treatment, con-
cluding that even a broad doctrine of non-self-execution does not dis-
criminate against treaties and that the comparison has important implica-
tions for other issues touching on treaties’ domestic status.

I. OPPOSITION TO NON-SELF-EXECUTION

While scholars often cast their opposition to non-self-execution in
sweeping terms, antagonism toward non-self-execution is a matter of

9. See infra Part II (discussing various responses to equivalence principle).
Opponents of non-self-execution agree that treaties that attempt certain tasks constitutionally assigned to Congress are non-self-executing. They disagree only over which obligations Congress must perform. Some would impose non-self-execution only if a treaty attempts to declare war. Others would also treat as non-self-executing treaty attempts to appropriate funds, criminalize conduct, and/or raise revenue through new taxes or tariffs.

Likewise, some critics of non-self-execution concede that U.S. treatymakers may render a treaty non-self-executing through a clear statement to that effect. For some, the statement may appear in the treaty

10. See, e.g., Jordan J. Paust, International Law as Law of the United States 67 (2003) [hereinafter Paust, International Law] (noting "[t]he distinction found in certain cases between 'self-executing' and 'non-self-executing' treaties is a judicially invented notion that is patently inconsistent with [the] express language" of the Supremacy Clause); Moore, Medellín and the ATS, supra note 6, at 488-90 (reviewing scope of scholarly critiques of non-self-execution).

11. See Restatement (Third) of the Foreign Relations Law of the United States § 111(4)(c) (1987) (noting non-self-execution is generally assumed where international agreement would achieve what lies within Congress’s exclusive lawmaking power under Constitution); id. § 111 cmt. i (same); id. § 111 reporter’s note 6 (same); Ernest A. Young, Treaties as “Part of Our Law,” 88 Tex. L. Rev. 91, 121 (2009) (noting “[a]ll participants in the self-execution debate seem to accept . . . constitutionally prescribed categories of non-self-execution”).


13. Restatement (Third) of the Foreign Relations Law of the United States § 111(4)(c) (discussing support for position that treaties that declare war, criminalize conduct, or appropriate funds are non-self-executing); id. § 111 cmt. i (same); id. § 111 reporter’s note 6 (same); David Sloss, Non-Self-Executing Treaties: Exposing a Constitutional Fallacy, 36 U.C. Davis L. Rev. 1, 49 (2002) [hereinafter Sloss, Non-Self-Executing] ("[A] treaty provision requiring a contribution of funds would not be 'made . . . under the [A]uthority of the United States' for purposes of domestic law, because the treaty makers lack the authority to appropriate funds themselves, and they lack the authority to compel Congress to appropriate funds." (quoting U.S. Const. art. VI, cl. 2)); Carlos Manuel Vázquez, Laughing at Treaties, 99 Colum. L. Rev. 2154, 2177–78 (1999) [hereinafter Vázquez, Laughing at Treaties] ("One example of something that, under our Constitution, can only be done by statute is the appropriation of money."); Carlos Manuel Vázquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, 122 Harv. L. Rev. 599, 630, 668 (2008) [hereinafter Vázquez, Treaties as Law of the Land] (stating, at minimum, treaties attempting to criminalize or appropriate are non-self-executing); cf. Louis Henkin, Foreign Affairs and the United States Constitution 203 (2d ed. 1996) (agreeing that treaties cannot appropriate money or criminalize conduct without taking position on whether treaties may declare war).

14. See, e.g., Vázquez, Laughing at Treaties, supra note 13, at 2174–75, 2186–88 (accepting constitutionality of reservations declaring treaties non-self-executing); Vázquez, Treaties as Law of the Land, supra note 13, at 609, 643, 694 (concluding Constitution grants treatymakers power to attach declarations of non-self-execution and to render treaties non-self-executing “through a clear statement that the obligations imposed by the treaty are subject to legislative implementation”); cf. Paust, International Law, supra note 10, at 71–73, 80 (recognizing treaties may “by their terms” be non-self-executing); Jordan J. Paust, Medellín, Avena, the Supremacy of Treaties, and Relevant Executive Authority, 31 Suffolk Transnat’l L. Rev. 301, 329 (2008) ("[S]elf-execution analysis] involves attention to
itself or in a declaration accompanying U.S. ratification of the treaty.\textsuperscript{15} For others, declarations of non-self-execution are unconstitutional.\textsuperscript{16} Indeed, some perceive self-execution as a constitutional mandate that cannot be overcome by a clear statement of U.S. intent, regardless of where the statement appears.\textsuperscript{17}

the text of the treaty in light of the treaty's context and object and purpose and can include inquiry with respect to the probable intent (express and implied) of its creators as well as in light of other international law and subsequent international practice and expectations." (footnotes omitted)).

15. See Vázquez, Laughing at Treaties, supra note 13, at 2158 (arguing self-execution is default rule but rule "may be reversed by the treatymakers through a clear statement in the treaty itself (or reservation thereto)"); Vázquez, Treaties as Law of the Land, supra note 13, at 609, 611, 681–85, 694 (concluding that declarations of non-self-execution are valid "as long as the declarations are deposited along with the United States's instruments of ratification").


17. See, e.g., Henkin, supra note 13, at 202–03 ("[N]othing in the Constitution . . . suggested that treaties which the Constitution declares to be law of the land need not be 'faithfully executed' by the President, or enforced by the courts, because the President or the Senate (or both) so decided."); Sloss, Non-Self-Executing, supra note 13, at 45–70 (criticizing declarations of non-self-execution as unconstitutional); David Sloss, Schizophrenic Treaty Law, 43 Tex. Int'l L.J. 15, 18 (2007) (arguing treatymakers do not have "the constitutional power to opt out of the Supremacy Clause by 'manifesting an intention' that a particular treaty 'shall not become effective as domestic law'" (quoting Restatement (Third) of the Foreign Relations Law of the United States § 111(4)(a)))). But cf. David Sloss, Medellín v. Texas: Part I: Self-Execution, The Federalist Society Online Debate Series (Mar. 28, 2008) [hereinafter Sloss, Self-Execution Debate], at http://www.fed-soc.org/debates/dbtid.17/default.asp (on file with the Columbia Law Review) (suggesting that conditions attached to treaty by President and Senate are generally binding as matter of federal law, at least insofar as conditions address which branch of government is required to take action to implement treaty).
Finally, some find it uncontroversial that treaty obligations may be non-self-executing if they are vague or precatory, or perhaps if they address only state-to-state obligations or speak to nonjudicial branches of the government, as an arms control treaty might. In short, non-self-execution, in retail form, generates little to no controversy. The target of scholarly criticism is a more wholesale doctrine of non-self-execution.

One basis for challenging a broad notion of non-self-execution, such as that found in the Supreme Court's recent decision in Medellín v. Texas, is the principle of equivalence. In its fullest form, the equivalence principle holds that the Supremacy Clause mandates the same judicial treatment for domestic, constitutional, and international law. As a result, the last-in-time rule arguably bears on the equivalence thesis. The rule does not support equivalency in principle or practice. The rule only permits self-executing treaties to trump prior inconsistent statutes. See Medellín, 552 U.S. at 518 (citing Cook v. United States, 288 U.S. 102, 119 (1933), for proposition that "later-in-time self-executing treaty supersedes a federal statute if there is a conflict"); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("If a treaty and a statute are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self executing."). But cf. Sloss, United States, supra note 18, at 509 (arguing "some non-self-executing treaties . . . trump prior inconsistent statutes"). The rule thus assumes that some—but does not dictate whether—treaties will be non-self-executing and requires equivalent treatment only for self-executing treaties. Bradley, Treaty Duality, supra note 6, at 160; see also Wu, supra note 3, at 595-96 ("[N]on-self-
cial treatment of the Constitution, statutes, and treaties. Of course, the principle immediately admits one exception. The Constitution trumps statutes and treaties that run afoul of its terms. Consequently, leading treaty scholar Carlos Vázquez admits that “[t]he Constitution is . . . superior to federal statutes and treaties,” and Tim Wu claims only that the text of the Supremacy Clause “suggests a rough equivalence in the legal status of” statutes and treaties.

Similarly, the equivalence thesis has been defined with more or less exactitude. Under Wu’s “rough equivalence” standard, “treaty language, when raised in court, usually ought to have effects no different from the exact same language found in the United States Code.” Under a more exacting view of equivalence, “treaties are presumptively enforceable in court in the same circumstances as constitutional and statutory provisions of like content.” This does not mean that treaties are always enforceable. Like other sources of law, a treaty might be unenforceable because, inter alia, the plaintiff lacks standing, the remedy sought is inappropriate, execution . . . can be, and [is], used to prevent a later-in-time treaty from abrogating an earlier statute.”

In practice, moreover, any suggestion of equivalence has not been realized. See Bradley, Treaty Duality, supra note 6, at 160 (“[D]espite the [last-in-time] doctrine, it appears that courts have been quite reluctant to allow treaties to displace statutes.”); Wu, supra note 3, at 595–97 (“[I]t might be clearer and more reflective of treaty practice to say that a later-in-time treaty will override an earlier-in-time statute only when it explicitly does so.”). First, in the only Supreme Court case to have enforced a treaty over a prior statute, Cook, 288 U.S. 102, the treaty was enforced against the United States at the United States’ request. Wu, supra note 3, at 596–97. That is, the treaty was enforced against the Coast Guard at the Solicitor General’s urging as the Coast Guard’s actions not only violated the treaty but contravened instructions from the Justice Department. Id.

Second, “because non-self-execution or other doctrines of deference can be, and are, used to prevent a later-in-time treaty from abrogating an earlier statute, the last-in-time rule is not a full or accurate portrayal of judicial practice.” Id. at 595–96. Professor Bradley makes this point in reading Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829), and United States v. Perchman, 32 U.S. (7 Pet.) 51 (1833), as well as Power Authority of New York v. Federal Power Commission, 247 F.2d 538 (D.C. Cir. 1957), as illustrating judicial “reluctance to allow treaties to displace” statutes. Bradley, Treaty Duality, supra note 6, at 160–62. The practical application of the last-in-time rule thus undercuts the equivalence thesis.

Finally, although the last-in-time rule is not the focus of this Essay, this Essay has obvious implications for that rule. If a broad formulation of the non-self-execution doctrine is appropriate, the last-in-time rule will apply in fewer instances.

23. Id. at 577–78.
or the provision invoked calls for the exercise of nonjudicial discretion.  
But the notion that a treaty otherwise may be unenforceable in domestic courts in the absence of a clear statement to that effect, the argument goes, knows no parallel in the constitutional or statutory contexts and therefore runs afoul of the Supremacy Clause.  
Under both the rough and more exacting versions of the equivalence thesis, a broad formulation of the doctrine of non-self-execution violates the equivalence requirement. "The full legal effects that equivalence promises are blocked by . . . the doctrine of non-self-execution."  

II. RESPONSES TO THE EQUIVALENCE THESIS  

Responses to the equivalence thesis have followed three tracks (often melding more than one).  
First, scholars have argued that non-self-execution does not result in differential treatment. The Constitution and statutes, they note, also may be non-self-executing. These arguments tend to focus on the scope of lawmaking authority, rather than the status of resulting law, and assert that lawmakers can create non-self-executing constitutional and statutory provisions just as they can create non-self-executing treaty obligations. The other two tracks seek to undercut the equivalency requirement, albeit in different ways. The second approach, which takes various forms, looks to constitutional text, history, purpose, and precedent to argue that there is no equivalency requirement. The

25. See Bradley, Treaty Duality, supra note 6, at 141 (discussing ways in which designation "as supreme law of the land" does not equate "with automatic judicial enforceability"); Vázquez, Treaties as Law of the Land, supra note 13, at 602–03, 605, 627 (suggesting questions regarding standing, appropriateness of remedy, and existence of judicially enforceable standards "generate impressive difficulties" in "[a]ttempts to enforce the Constitution[,] . . . federal statutes," and treaties); see also Sloss, Self-Execution Debate, supra note 17 (noting "Article III 'case or controversy' requirement" applies equally to treaties and statutes). Vázquez harmonizes


27. Wu, supra note 3, at 578; cf. Duncan B. Hollis, Treaties—A Cinderella Story, 102 Am. Soc'y Int'l L. Proc. 412, 412 (2008) (lamenting that, due to current conception of non-self-execution, "U.S. courts are increasingly reluctant to employ the treaty in exercising their judicial function with the same fervor as its two Supremacy Clause siblings—the Constitution and the statute"). At the same time, Professor Wu "takes no particular position on whether more or less judicial enforcement of treaties is a good thing." Wu, supra note 3, at 577. Instead, his goal is to identify what actually motivates judges in deciding whether to enforce treaty provisions. Id. at 599–600. He concludes that self-execution is, in actuality, a doctrine of deference based on "concern for domestic government structure"; the doctrine leads to great deference to congressional breach, no deference to state breach, and some deference to executive interpretation of treaties that results in differing levels of deference to executive breach. Id. at 576–77, 579, 580, 583–94.

28. I use the term "response" not because all these arguments expressly addressed the equivalence thesis but because these arguments, in effect, counter that thesis.
third approach asserts that treaties' dual nature justifies differential treatment.

A. Non-Self-Execution Does Not Discriminate Against Treaties

Non-self-execution, the first argument asserts, does not result in differential treatment of treaties. Instead, it produces effects that lawmakers also attach to the Constitution and statutes. Just as treatymakers may create something less than a judicially enforceable treaty, those authorized to amend the Constitution or to make statutes may create something less than preemptive, judicially enforceable federal law. Statutes may "expressly eschew preemption of state law, . . . authorize states to opt out of federal requirements, . . . and . . . not impose binding obligations." Congress may, to some extent, limit federal jurisdiction to hear federal statutory claims. Congress may also enact "[c]onditional spending provisions and statutory delegations of discretionary authority to the Executive" that often are "not judicially enforceable." Many believe that Congress may also limit judicial enforcement of congressional-

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29. David H. Moore, Law(makers) of the Land: The Doctrine of Treaty Non-Self-Execution, 122 Harv. L. Rev. F. 32, 34 (2009) [hereinafter Moore, Law(makers) of the Land], at http://www.harvardlawreview.org/issues/122/december08/forum_57.php (on file with the Columbia Law Review); see also Young, supra note 11, at 95, 113, 125-28, 137, 140 (explaining that statutes can be non-self-executing in same manner as treaties). Defenders of non-self-execution have also relied on the fact that principles of standing and the political question doctrine may prevent judicial enforcement of statutory or constitutional claims. See Bradley, Treaty Duality, supra note 6, at 141-42 ("[J]udicial enforceability is not a prerequisite for status as supreme law of the land."). As noted above, critics of non-self-execution generally accept that treaties also may be subject to these limitations. See supra text accompanying note 25 (listing ways in which claims, including treaty claims, may be nonjusticiable). This section focuses, not on this common ground, but on other reasons why the Constitution and statutes effectively may be non-self-executing.

30. Moore, Law(makers) of the Land, supra note 29, at 34 (footnotes omitted); see also Bradley, Treaty Duality, supra note 6, at 141 & n.42 ("[E]ven though the Supremacy Clause makes statutes supreme over state law, Congress sometimes enacts statutes that expressly do not preempt state law."); Young, supra note 11, at 126-27 (describing types of statutes that do not create enforceable rights); Nick Rosenkranz, Medellín v. Texas: Part I: Self-Execution, The Federalist Society Online Debate Series (Mar. 28, 2008), at http://www.fed-soc.org/debates/dbtid.17/default.asp (on file with the Columbia Law Review) (noting "Congress regularly passes non-binding resolutions" and enacts nonpreemptive and aspirational statutes). But see Sloss, Non-Self-Executing, supra note 13, at 42 (arguing that under Supremacy Clause statutes may disclaim field preemption but not conflict preemption); Vázquez, Safeguard of Nationalism, supra note 6, at 1620-21 (disputing analogy between nonbinding resolutions and non-self-executing treaties). Congress also enacts legislation that does not preempt existing federal law. Bradley & Goldsmith, Conditional Consent, supra note 16, at 447 & n.216.


32. Id. at 141; see also Young, supra note 11, at 127 (discussing non-self-executing statutes that leave "operative details to be filled in by agency regulations" and conditional spending provisions that appear judicially unenforceable).
executive agreements, which are approved through the normal statutory process. In addition, "Congress routinely delegates to the executive the opportunity to define the domestic effect of laws by enacting regulations and to decide when to prosecute violations of the law, profoundly affecting the law's domestic application." Non-self-execution has a similar effect, delegating to the President and Congress "the task of giving treaty obligations domestic content and effect." And, at least when it comes to the exercise of lawmaking power, delegation to the primary federal lawmakers is less problematic than delegation of effective lawmaking authority to the Executive.

Just as Congress may create something less than preemptive, enforceable statutes, so those with authority to enact constitutional law have crafted constitutional provisions with limited reach. Initially, the Constitution was amended to add "a Bill of Rights applicable only to the federal government." Even the Fourteenth Amendment has not led to wholesale application of Bill of Rights guarantees to the states. Article III of the Constitution, addressing the existence and authority of the federal judiciary, contemplates legislative implementation. And certain

33. See Bradley, Treaty Duality, supra note 6, at 142 & n.44, 164 (noting congressional-executive agreements "actually are statutes" and that "[i]t is . . . widely accepted that Congress can limit the domestic enforceability of" such agreements); Bradley & Goldsmith, Conditional Consent, supra note 16, at 447 ("[I]t is widely accepted that Congress and the President can limit the self-executing effect of [congressional-executive] agreements.").

34. Moore, Law(makers) of the Land, supra note 29, at 41; see also John C. Yoo, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution, 99 Colum. L. Rev. 2218, 2244–45 (1999) [hereinafter Yoo, Public Lawmaking] ("Administrative law schemes recognize that certain federal mandates are to be enforced by the executive branch, rather than by Congress or the courts."); Young, supra note 11, at 127, 152–33 (describing statutes that "impose no direct obligations on private actors until administrative agencies take further action" and "statute[s] impos[ing] binding obligations that" nonetheless permit "considerable [government] discretion concerning the execution of those obligations"). But cf. Vázquez, Safeguard of Nationalism, supra note 6, at 1616–17 (acknowledging analogy between non-self-execution and delegation of regulatory authority but asserting analogy's limitations). Congressional delegation to the Executive may be explicit or implicit. See John O. McGinnis, Medellín and the Future of International Delegations, 118 Yale L.J. 1712, 1731–32 (2009) (discussing express and implied delegations to executive agencies).

35. Moore, Law(makers) of the Land, supra note 29, at 41; see also Bradley, Treaty Duality, supra note 6, at 142 ("In a treaty, the Senate and President might similarly delegate domestic implementation discretion to nonjudicial actors—that is, to either Congress or the Executive Branch.").

36. See, e.g., Young, supra note 11, at 130 (noting that, at least in theory, statutes may not delegate lawmaking authority to executive agencies).

37. Moore, Law(makers) of the Land, supra note 29, at 34; see Christina Duffy Burnett, A Convenient Constitution? Extraterritoriality After Boumediene, 109 Colum. L. Rev. 973, 977 (2009) [hereinafter Burnett, Convenient Constitution] (noting not all Bill of Rights guarantees have been applied to the states via Fourteenth Amendment).


39. Yoo, Public Lawmaking, supra note 34, at 2246.
provisions of the Constitution are nonjusticiable.\textsuperscript{40} In short, the Constitution and statutes may also partake of the qualities of non-self-executing treaties, rendering non-self-execution consistent with an equivalence mandate.

B. \textit{The Constitution Does Not Require Equivalence}

Alternatively, scholars have argued that the Constitution does not require equivalence. Various (sometimes overlapping) theories have been advanced along this line. The first, which has emerged ad hoc from arguments by various scholars, relies on the Supremacy Clause’s text, context, and purpose in concluding that the Clause does not require equivalence. A second, more comprehensive position asserts that treaties that address matters within Congress’s enumerated powers are non-self-executing. A third posits that the Supremacy Clause creates three tiers of federal law, with treaties as the bottom tier. At the bottom tier, treaties may be self-executing only when they do not conflict with existing legislation.

1. \textit{The Text, Context, and Purpose of the Supremacy Clause Do Not Require Equivalence}. — The text of the Supremacy Clause provides some general support for an equivalence requirement.\textsuperscript{41} After all, the Clause declares each source of law—Constitution, statutes, and treaties—to "be the supreme Law of the Land" and expressly declares that "all Treaties" shall have that status.\textsuperscript{42} The Clause itself, however, differentiates between the Constitution and statutes on the one hand and treaties on the other. The Constitution and statutes enacted pursuant to the ratified Constitution are supreme federal law while treaties made both before and after constitutional ratification are supreme.\textsuperscript{43} The distinction is arguably unimportant for present purposes: Post-ratification, the Constitution as well as any statutes or treaties thereafter created qualify for supreme status. Thus, although the text explicitly differentiates between items in the list on this issue, one might assert that in every other sense these sources of law should be treated as equal.


\textsuperscript{41} See Jordan J. Paust, Self-Executing Treaties, 82 Am. J. Int’l L. 760, 760 (1988) [hereinafter Paust, Self-Executing] (arguing distinction between self-executing and non-self-executing treaties is "patently inconsistent with express language" of Supremacy Clause); Vázquez, Treaties as Law of the Land, supra note 13, at 614 ("[The Supremacy Clause’s bare text] strongly suggests that treaties are to be applied by judges in the same circumstances as federal statutes and . . . the Constitution."); Wu, supra note 3, at 577 (noting text of Supremacy Clause "suggests a rough equivalence in the legal status of" treaties and statutes); Yoo, Globalism, supra note 24, at 1978 (summarizing textual argument for equivalence).

\textsuperscript{42} U.S. Const. art. VI, cl. 2; see also Vázquez, Laughing at Treaties, supra note 13, at 2169 ("No interpretation is necessary to conclude that [the Supremacy Clause] purports to give ‘all’ treaties the status of domestic law.").

\textsuperscript{43} U.S. Const. art. VI, cl. 2.
Yet the equivalence perspective accepts that the Constitution is superior in stature to laws and treaties. The notion that inclusion in the same list suggests equivalent treatment does not hold with regard to the Constitution. Once the presumption of equivalence is overcome in such a critical respect, the assertion that equivalence prevails in any other context is at least suspect. One might respond that the Supremacy Clause’s grouping of the Constitution, statutes, and treaties nonetheless supports equivalent treatment in all other respects once the Clause is read in its broader context. That is, once one recognizes that the Constitution creates and defines the authority to make treaties and statutes, one can easily conclude that the Constitution is more fundamental than treaties and statutes.

However, just as there is no sense that the Supremacy Clause limits the Constitution’s superior status as the source of lawmaking and treaty-making authority, there is no reason to believe that the Supremacy Clause precludes authority to enter treaties that attempt less than the Supremacy Clause allows. The Supremacy Clause explicitly binds state judges to the Constitution, laws, and treaties in the face of inconsistent state constitutional and statutory law. This provision requires judges to follow the dictates of the federal Constitution, treaties, and laws, but it does not say that these sources must preempt state law. The Supremacy Clause does not attempt to limit the authority of the lawmakers to create something less than preemptive law. Indeed, the Constitution autho-

44. See Vázquez, Treaties as Law of the Land, supra note 13, at 611 (“The Constitution is, of course, superior to federal statutes and treaties.”). There are a variety of arguments as to why the Constitution is supreme. See, e.g., Vasan Kesavan, The Three Tiers of Federal Law, 100 Nw. U. L. Rev. 1479, 1499 n.99, 1502, 1633 (2006) (“The Constitution is higher law made by We the People—it is more democratic than any other law.”).

45. See Moore, Law(makers) of the Land, supra note 29, at 40 (“The Constitution is ‘more supreme,’ perhaps given its role as the organic document giving rise to, defining the creation of, and, at least as to statutes, delineating the content of the other forms of law.”).

46. See Bradley & Goldsmith, Conditional Consent, supra note 16, at 446 (“[T]he [Supremacy] Clause does not . . . operate as a limit on federal lawmaking power.”); Moore, Law(makers) of the Land, supra note 29, at 34–35 (describing instances where lawmakers have “create[d] something less than what the Supremacy Clause allows”); cf. Bradley, Treaty Duality, supra note 6, at 179 (suggesting Medellín Court endorsed lesser included power to decide domestic effect of treaties when it concluded President acted against treaty-makers’ will in attempting to execute U.S. treaty obligations toward ICJ). But see Vázquez, Safeguard of Nationalism, supra note 6, at 1620–21 (asserting Constitution cannot accommodate lesser power to enter treaties that are not domestic law).

47. U.S. Const. art. VI, cl. 2.

48. See, e.g., Bradley, Treaty Duality, supra note 6, at 143 (“The inclusion of treaties in the Supremacy Clause simply, but very importantly, allows the U.S. treaty-makers to preempt state law [through judicial enforcement] if they want to . . . .”); id. at 147 (“The federalism orientation of the Supremacy Clause is further reflected in the fact that it refers only to state judges and state laws and does not mention the federal political branches.”); Moore, Law(makers) of the Land, supra note 29, at 33–34 (arguing Supremacy “Clause was not designed to address the scope of the federal treaty-makers’ authority to control the
rizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution [not only legislative powers but] all other Powers vested by this Constitution in the Government of the United States." The Constitution thus anticipates that Congress may step in to execute obligations assumed through the treaty power.

Moreover, the Supremacy Clause does not explicitly address how the supreme status of treaties might limit statutory or constitutional lawmaking authority. One might expect a Constitution grounded in checks and balances to address that issue before it would address limitations on the treatymakers’ ability to create something less than the Supremacy Clause allows. The Supremacy Clause, however, simply fails to address the relation of all three sources of federal law. Its very placement outside Articles I to III, which address the relative powers of the three federal branches, bolsters this conclusion. The fact that the Take Care Clause separately addresses the Executive’s obligations with regard to statutes and perhaps treaties likewise suggests that the Supremacy Clause
domestic implementation of treaty duties" and "its textual focus remains on limiting the discretion of judges, . . . not of treatymakers").

49. U.S. Const. art. I, § 8, cl. 18.

50. See Moore, Law(makers) of the Land, supra note 29, at 34 ("[F]ew would argue that the authority of Congress and the President to enact law is somehow constrained by treaties' status as supreme law of the land.").

51. See id. ("In light of the Constitution's carefully crafted checks and balances, one might expect the ability of one set of lawmakers to override the lawmaking of another set to receive more explicit treatment than the discretion of any given set of lawmakers to limit the exercise of its own authority.").

52. See, e.g., Henkin, supra note 13, at 210 (noting "Supremacy Clause . . . does not establish" equality of statutes and treaties); Kesavan, supra note 44, at 1499 ("[T]he Supremacy Clause does not explicitly indicate that the Constitution is superior to treaties [or] . . . the hierarchical relationship between statutes and treaties."); John T. Parry, Congress, the Supremacy Clause, and the Implementation of Treaties, 32 Fordham Int'l L.J. 1209, 1212, 1328–29 (2009) [hereinafter Parry, Implementation] (arguing "ambiguity, disagreement, and debate surrounding the implementation of treaties in the early years . . . under the Constitution" showed "lack of consensus" and "considerable confusion about how the treaty power, legislative powers, and Supremacy Clause would interact"); John T. Parry, Rewriting the Roberts Court’s Law of Treaties, 88 Tex. L. Rev. See Also 65, 76–77 (2010) [hereinafter Parry, Rewriting], at http://www.texasrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSeeAlso65.pdf (on file with the Columbia Law Review) ("[T]he Supremacy Clause's seemingly absolute or 'categorical' language is ambiguous in the context of separation of powers. . . . [T]he Clause does not specify the relationship between statutes and treaties."); Yoo, Public Lawmaking, supra note 34, at 2249–51 (noting Supremacy Clause "fails to address the relationship of the treaty power and the legislative power" and "does not alter the existing relationships between different types of federal law").

53. Yoo, Public Lawmaking, supra note 34, at 2250–51.

54. U.S. Const. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . .").
focused on the vertical status of treaties, omitting a horizontal requirement of equivalence.55

The treaty power’s placement in Article II, which addresses the President’s power, is also significant.56 Unlike Article I, Article II does not expressly speak of legislative power.57 Thus, unlike the Constitution and statutes, treaties would appear to be, foremost, instruments of foreign affairs rather than of domestic lawmaking. This contextual difference may justify differential domestic treatment.58

Looking beyond the text and context of the Supremacy Clause to its purpose also indicates that treaties need not receive equivalent treatment. The Constitution and statutes were included in the Supremacy Clause to secure the domestic lawmaking supremacy of the federal government in areas of delegated authority. Treaties, by contrast, were not included to secure another avenue of supreme domestic lawmaking, but to secure federal foreign affairs supremacy.59 The states had demon-

55. Bradley, Treaty Duality, supra note 6, at 147; Moore, Law(makers) of the Land, supra note 29, at 34; cf. Yoo, Public Lawmaking, supra note 34, at 2249–51 (arguing Supremacy Clause is “federalism provision” and not “separation of powers provision”).

56. U.S. Const. art. II, § 2, cl. 2; see Yoo, Globalism, supra note 24, at 1966 ("The Treaty Clause’s location suggests that treaties are executive, rather than legislative, in nature."); Yoo, Public Lawmaking, supra note 34, at 2254 ("By its placement in Article II, . . . treaty-making is clearly an executive power.").

57. See Medellin v. Texas, 552 U.S. 491, 527–28 (2008) (explaining President’s Article II power to make treaties does not include power to make law by “unilaterally . . . giv[ing] the effect of domestic law to obligations under a non-self-executing treaty”); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952) (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). Compare U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress . . . .”), and id. art. I, § 8, cl. 18 (authorizing Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States”), with id. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . . .”). But cf. Kesavan, supra note 44, at 1508–12 (noting, inter alia, Article II includes powers typically associated with Executive, including powers to recommend legislation or to enter agreements with foreign nations, that partake of legislative or foreign affairs authority rather than purely power to execute law).

58. Cf. infra Part II.C (defending differential treatment of treaties given treaties’ dual role as foreign affairs instruments and domestic law).

59. See, e.g., Henkin, supra note 15, at 199 ("[The Supremacy C]lause [was] designed principally to assure the supremacy of treaties to state law . . . ."); Bradley, Treaty Duality, supra note 6, at 144–47 ("Almost everyone agrees that the inclusion of treaties in the Supremacy Clause was a response to a specific problem under the Articles of Confederation, which is that the Articles did not give the national government sufficient authority to ensure state compliance with treaty obligations."); Bradley & Goldsmith, Conditional Consent, supra note 16, at 448–49 ("[T]he Framers wished to give the national government the power to prevent treaty violations by U.S. states if they so desired."); Kesavan, supra note 44, at 1512 ("Statutes are intended to regulate domestic conduct, whereas treaties regulate domestic conduct only because that is the 'price paid' for promoting national interests with foreign nations."); Moore, Law(makers) of the Land, supra note 29, at 33 ("[T]he Supremacy Clause was adopted to restrict the sort of subnational treaty compliance that plagued the country during the period of
strated a propensity to disregard treaties, particularly the Treaty of Peace with Britain, leading to serious foreign affairs problems for the United States.\textsuperscript{60} Treaties were listed in the Supremacy Clause in response.\textsuperscript{61} While inclusion resulted in treaties becoming domestic law (though not always judicially enforceable domestic law),\textsuperscript{62} treaties were included on the understanding that they were primarily foreign relations tools that should appear in the Supremacy Clause to ensure federal management of foreign affairs.\textsuperscript{63} To the extent that non-self-execution turns, for example, on treatymaker intent, it appears consistent with the purpose behind inclusion in a way that similar treatment of the Constitution and statutes might not.\textsuperscript{64}

Confederation[... not... to address the scope of the federal treatymakers' authority to control the domestic implementation of treaty duties." (footnote omitted)); Yoo, Globalism, supra note 24, at 1964, 1978-80 ("Both the text of the Supremacy Clause and its history indicate that its primary purpose was to guarantee the primacy of federal law over state law.").

60. See, e.g., Bradley, Treaty Duality, supra note 6, at 144 (noting states had passed laws conflicting with 1783 Treaty of Peace, resulting in Great Britain's refusal to fulfill treaty duty to remove troops); Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695, 698-99 (1995) [hereinafter Vázquez, Four Doctrines] ("Among the pressing problems of the period of the Articles of Confederation were the repeated violations by the states of the Treaty of Peace with Great Britain."); Vázquez, Treaties as Law of the Land, supra note 13, at 605-06, 617-19, 621, 642 ("Congress had concluded a number of treaties, most importantly the Treaty of Peace with Great Britain, but the states violated them, causing significant problems for the fledgling nation." (footnote omitted)); Sloss, Self-Execution Debate, supra note 17 ("The Framers of the Constitution included treaties in the text of the Supremacy Clause to address...[the] problem...[of] judges in state courts...refusing to enforce Article IV of the Peace Treaty with Great Britain.").

61. See supra note 60 (describing state violations of treaty obligations as motivating treaties' inclusion in Supremacy Clause).

62. But cf. Moore, Medellín and the ATS, supra note 6, at 491 n.46 (documenting ambiguity Medellín introduced regarding whether non-self-executing treaties are merely judicially unenforceable or not domestic law).

63. See Bradley, Treaty Duality, supra note 6, at 146-47 ("[T]he entire thrust of the adoption of the Supremacy Clause was one of empowering the national government to operate more effectively...The Supremacy Clause simply ensures that in the United States [decisions regarding treaty compliance] rest[...] at the federal rather than state level."); Vázquez, Treaties as Law of the Land, supra note 13, at 605-06, 616-19 ("There was general agreement at the Constitutional Convention that the new Constitution had to empower the federal government to enforce treaties.").

64. The empirical observation that U.S. courts tend to enforce treaties against the states but not against Congress or consistently against the President likewise confirms the Supremacy Clause's federalist focus. See Bradley, Treaty Duality, supra note 6, at 147-48 ("The pattern of judicial enforcement of treaties throughout U.S. history...comports with a federalism rather than separation-of-powers understanding of the Supremacy Clause."); Wu, supra note 3, at 575-75 (finding "direct treaty enforcement in U.S. courts consists mostly of enforcement against State breach of U.S. treaty obligations"; courts do not enforce treaties when faced with congressional breach and show varying levels of deference when faced with executive breach); cf. Sloss, United States, supra note 18, at 534-36, 535-54 (finding non-self-execution is more common in cases against government actors than in litigation between private parties).
2. Treaties in Areas of Congressional Authority Are Non-Self-Executing. — A second theory that undercuts a constitutional requirement of equivalence has been offered by John Yoo. Professor Yoo posits an original intent under which non-self-execution is consistent with the Supremacy Clause because it protects Congress’s assigned role as domestic lawmaker, a role that would be infringed if treaties inevitably created domestic law.\(^6\) In his view, the Framers inherited and preserved a distinction between the power to make treaties and the power to legislate.\(^6\) This fact has gone unappreciated in part because proponents of self-execution have focused inordinately on the workings of the Constitutional Convention.\(^7\) The Constitutional Convention excluded the House of Representatives from treaty-making on the ground that the House was ill-suited to the secrecy and dispatch often required in treaty negotiation.\(^8\) The Convention likewise adopted a Supremacy Clause that included treaties among the sources of supreme federal law while rejecting Madison’s proposal that Congress deal with state treaty violations through legislation negating state laws.\(^9\)

While these developments have been cited to support treaty self-execution, Yoo maintains that proponents of self-execution neglect the more important evidence from the state ratifying conventions where the authority to approve the Constitution was actually exercised.\(^1\) In those conventions, constitutional critics cited the exclusion of the House from treaty-making.\(^1\) "When initial responses that the House was ill-suited for diplomacy did not seem to gain traction, leading Federalists fell back" on the distinction between treaty and lawmaking powers, "downplayed the

\(^{65}\) Yoo, Globalism, supra note 24, at 1961–62. Not only would self-execution allow treaty-makers to exercise legislative power, but it might allow treaty-makers to evade constitutional restraints that apply to legislation, resulting in superior treatment of the treaty-making power. Yoo, Public Lawmaking, supra note 34, at 2237–39, 2242. Self-execution would also infringe on the political branches' supremacy in foreign affairs. Id. at 2248.

\(^{66}\) Yoo, Globalism, supra note 24, at 1961–62, 1986–2027, 2040–56, 2058–59, 2063–66, 2071–74, 2078–86, 2091–94; see also Yoo, Public Lawmaking, supra note 34, at 2223 ("[T]he Framers saw a tension between the Supremacy Clause's efforts to make treaties binding on the nation . . . and Article I's vesting of all federal legislative power in Congress.").

\(^{67}\) See Yoo, Globalism, supra note 24, at 2037–40, 2069–70 (disputing internationalists' conclusions from Constitutional Convention and focus on Convention which "had no official authority to make the decisions that gave the Constitution its political legitimacy" (citing Paust, Self-Executing, supra note 41, at 761–62; Vázquez, Treaty-Based Rights, supra note 18, at 1097–110)).

\(^{68}\) See id. at 2025–39 ("[T]he Convention . . . reject[ed] a treaty-making role for the House . . . because [it] concluded that [the House] was structurally unsuited for the task of conducting diplomacy.").

\(^{69}\) See id. at 2026–39 ("[T]he Convention did select the Supremacy Clause approach over Madison's more aggressive effort to place the federal government in the position of a state legislature of last resort.").

\(^{70}\) Id. at 2039–40; Yoo, Public Lawmaking, supra note 34, at 2222, 2231–32.

\(^{71}\) Yoo, Globalism, supra note 24, at 2025, 2040.
Supremacy Clause," and explained that the federal government would implement treaties through legislation. Based on this evidence, Yoo concludes that treaties should be non-self-executing if they address matters within Congress's legislative powers, or, second best, that treaties be presumed non-self-executing absent a clear statement to the contrary.

3. The Three Tiers Hypothesis. — Vasan Kesavan advances a third theory against a constitutional requirement of equivalence. Kesavan argues, based on the text, structure, and history of the Constitution, that "statutes are superior to treaties." Textually, the Constitution appears first in the Supremacy Clause, followed by statutes, then treaties. Structurally, statutes have a stronger democratic pedigree as their enactment involves all three actors in the political branches, including the House of Representatives, the organ most representative of the people. And constitutional structure manifests a presumption of hierarchy rather than co-equality in situations of overlapping authority. Federal courts and state courts as well as Congress and state legislatures possess concurrent authority, but the Supreme Court controls the interpretation of federal law and Congress may preempt state law. This supremacy principle places a "thumb on the scale[ ] against the notion of co-supremacy of the lawmaking and treaty-making powers." 

History likewise supports a hierarchical relationship between statutes and treaties. In eighteenth-century British practice, some treaties—including "those involving matters of revenue and conflicts with existing

72. Id. at 2025, 2040, 2073.
73. Id. at 2093.
74. See id. ("At the very least, courts should obey the presumption that when the text of a treaty is silent, courts ought to assume that it is non-self-executing."); Yoo, Public Lawmaking, supra note 34, at 2219–20, 2255–56 ("Under the 'soft' rule [of non-self-execution], courts can remain true to the text, structure, and original understanding of the Constitution by requiring the treatymakers to issue a clear statement if they want a treaty to be self-executing."). For responses to Professor Yoo's thesis, see Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land," 99 Colum. L. Rev. 2095, 2095 (1999) (arguing "careful [historical] examination of the self-execution assumption" confirms Founders' intended treaties to be self-executing . . . without implementing legislation"); Vazquez, Laughing at Treaties, supra note 13, at 2154 (asserting that treaties are presumptively self-executing and "constitutional text, doctrine, and structure—to say nothing of the Founders' intent—rule out Professor Yoo's claim that all or most treaties categorically or presumptively lack the force of domestic law"); see also Henkin, supra note 13, at 203 n.103 (rejecting Yoo's thesis prior to Yoo's article). For Professor Yoo's reply, see Yoo, Public Lawmaking, supra note 34, at 2218 (responding to Professors Flaherty and Vázquez "by advancing textual and structural constitutional arguments in defense of the doctrine of non-self-execut[ion]").
75. Kesavan, supra note 44, at 1486.
76. Id. at 1500–01.
77. Id. at 1612–15.
78. See id. at 1615–16 ("There is no constitutional basis for a notion of co-supremacy among overlapping powers granted to different actors.").
79. Id.
80. Id. at 1616.
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statutes"—required parliamentary "participation in order to take effect as a matter of domestic law." Of the few Framers who addressed British practice during the Philadelphia Convention, the majority "understood British practice to require non-self-execution in the specific case of statute-treaty conflict" and "presumably [and in some cases clearly] thought that this limitation would apply to the Constitution." In the debates between the Federalists and Anti-Federalists, the shared understanding seemed to be that Article II treaties generally would be self-executing, an arrangement the Anti-Federalists opposed. There was some recognition, however, that certain treaties would require implementation, possibly including treaties that would conflict with existing laws. The issue was addressed in greater detail in certain state ratifying conventions. The state debates manifest an understanding of general self-execution with an exception, consistent with British practice, for treaties that conflict with present statutes. Fast-forwarding to the contemporary, the three tiers thesis is substantially consistent with the way the last-in-time rule has been applied to trump prior treaties rather than prior statutes as well as with the modern dominance of congressional-executive agreements, the judicial tendency to presume non-self-execution, and the treaty makers' practice of attaching declarations of non-self-execution.

While Kesavan's primary target ostensibly is the last-in-time rule, the three tiers thesis expressly undermines the equivalence thesis as well. As Kesavan explains: "If statutes are superior to treaties . . . then treaties that conflict with statutes must be non-self-executing." Other types of treaties may also be non-self-executing but the three tiers thesis

81. Id. at 1524–25.
82. Id. at 1540.
83. Id. at 1559–60.
84. Id. at 1560.
85. Id. at 1561.
86. Id.; see also id. at 1564–92 (discussing debates in Pennsylvania, South Carolina, Virginia, and North Carolina). Kesavan also addresses "early post-Founding history," which he concludes "neither supports nor weakens the partial non-self-execution thesis to any material extent." Id. at 1594; see also id. at 1592–612 (discussing post-Founding evidence).
87. See id. at 1618–29, 1633–34 ("[M]odern practice soundly resonates with the three tiers of federal law thesis and the partial non-self-execution thesis, two sides of the same coin.").
88. Id. at 1485, 1633.
89. See, e.g., id. at 1489, 1498 ("Under the [three tiers] thesis, treaties must be non-self-executing when they conflict with existing statutes.").
90. Id. at 1488; see also id. at 1486, 1489, 1503 (describing non-self-execution that results from three tiers thesis). Kesavan recognizes one possible exception. Based on the particular separation of powers regarding war and peace and arguments from necessity, Kesavan recognizes that peace treaties might displace prior inconsistent statutes. Id. at 1616–18.
minimally requires non-self-execution for treaties that conflict with existing laws.91

C. The Dual Nature of Treaties Justifies Non-Self-Execution

A final argument against constitutional equivalence focuses on treaty duality. Treaties not only function as domestic law, they also play a role in foreign relations.92 Indeed, they are primarily instruments of foreign affairs and secondarily domestic law. A treaty cannot exist without consent from a foreign sovereign. Thus, even when treaties address and might affect arguably domestic matters like human rights, they are initially and always pacts between sovereigns. As noted above, the inclusion of treaties in Article II, rather than in Article I, highlights the international nature of treaties. Article II addresses executive power and does not speak expressly of legislative authority.93

The dual view of treaties has also been confirmed by the Supreme Court. In the Head Money Cases, for example, the Court explained that "[a] treaty is primarily a compact between independent nations."94 However, "a treaty may also contain provisions which confer certain rights" that are enforceable among private parties.95 The Supremacy Clause "places such provisions . . . in the same category as other laws of Congress."96

91. E.g., id. at 1489 (noting non-self-execution required by three tiers thesis "is to be added to other cases where non-self-execution is properly required as a matter of text, history, and structure").

92. See Bradley, Treaty Duality, supra note 6, at 133, 182 (noting that treaties’ dual political and legal nature, including treaties’ "status within international law, and potentially also within domestic law"); see also Moore, Law(makers) of the Land, supra note 29, at 40 ("Treaties give rise to obligations to and from coequal sovereigns. At the same time, the Constitution assigns treaties a domestic function."); Yoo, Globalism, supra note 24, at 1958, 1970–71 (noting "process and objectives of treatymaking are quite different from other forms of public lawmaking" and that treaty violations are political in nature); Young, supra note 11, at 95 ("Treaties have a dual existence; they are part of international law and, by virtue of the Supremacy Clause, simultaneously part of the ‘the supreme Law of the Land.’" (footnote omitted) (quoting U.S. Const. art. VI, cl. 2)).

93. See U.S. Const. art. II, § 2 (enumerating executive powers); Yoo, Globalism, supra note 24, at 1966 ("The Treaty Clause’s location suggests that treaties are executive, rather than legislative in nature."); Yoo, Public Lawmaking, supra note 34, at 2234 (noting notwithstanding fact that “Constitution does not embody a pure separation of powers,” “[b]y its placement in Article II, . . . treatymaking is clearly an executive power”); supra notes 56–58 and accompanying text (discussing treaty power’s placement in Constitution). But cf. Kesavan, supra note 44, at 1508–12 (noting, inter alia, Article II includes powers typically associated with executive but not purely executive in nature, such as power to recommend legislation or to enter agreements with foreign nations).

94. Head Money Cases, 112 U.S. 580, 598 (1884); see also Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("A treaty is primarily a contract between two or more independent nations.").

95. Head Money Cases, 112 U.S. at 598 (emphasis added).

96. Id.
A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.  

Thus, treaties are primarily international agreements but may also, under certain circumstances, provide rules of decision for U.S. courts.

Scholars favoring self-execution resist the characterization of treaties as primarily international, at least to the extent that this characterization leads to a reduced domestic role for treaties. Notwithstanding this opposition, the Supreme Court in Medellín reaffirmed as self-evident the observation that a treaty's primary role is international. This observation is buttressed by the fact that, as the Court noted, treaty provisions that are non-self-executing and therefore unenforceable by domestic courts remain binding internationally. They continue to play their primary role even when they are unenforceable in their secondary, domestic dimen-

97. Id. at 598-99.

98. See Bradley, Treaty Duality, supra note 6, at 158-59 (noting "proponents of presumptive self-execution understandably bristle when courts . . . quote from the Head Money Cases for the proposition that '[a] treaty is primarily a compact between independent nations'" where "the Court further observed in that case that 'a treaty may also contain provisions . . . which partake of the nature of municipal law and which are capable of [judicial] enforcement as between private parties'" (quoting Head Money Cases, 112 U.S. at 598)); Vázquez, Treaties as Law of the Land, supra note 13, at 602-06 (rejecting notion that treaties are primarily compacts whose enforcement depends "on the interest and honor of the" parties by arguing "Supremacy Clause . . . supplements international law mechanisms for enforcing treaties by adding domestic mechanisms" thereby "assimilat[ing] treaties to federal statutes and the Constitution" (emphasis omitted) (quoting Hamdan v. Rumsfeld, 415 F.3d 33, 38-39 (D.C. Cir. 2005), rev'd, 548 U.S. 557 (2006))).

99. Medellín v. Texas, 552 U.S. 491, 505 (2008) ("A treaty is, of course, 'primarily a compact between independent nations.'" (quoting Head Money Cases, 112 U.S. at 598)); see also Bradley, Treaty Duality, supra note 6, at 180-81 (discussing ways in which Court took account of treaties' dual nature).

100. See Medellín, 552 U.S. at 504 ("[W]hile the ICJ's judgment in Avena creates an international law obligation on the part of the United States[, ] . . . not all international law obligations automatically constitute binding federal law enforceable in U.S. courts." (emphasis omitted)); id. at 505 ("[W]hile treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms.'" (quoting Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc))); id. at 520 ("[A] judgment of an international tribunal might not automatically become domestic law [but it] would still constitute [an] international obligation[, ] , the proper subject of political and diplomatic negotiations."); id. at 592-23 ("[W]hile the ICJ's judgment in Avena creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state [habeas law]."); id. at 536 (Stevens, J., concurring) ("Even though [the Avena judgment] is not 'the supreme Law of the Land,' no one disputes that it constitutes an international law obligation . . . ." (quoting U.S. Const. art. VI, cl. 2)).
sion, whereas the reverse is not true; a treaty that has been dissolved internationally would not constitute domestic law.¹⁰¹

Treaties' dual nature as instruments of foreign affairs and domestic law produces a variety of differences between statutes and treaties, as Curtis Bradley has noted. First, treaties often use broad terminology to extract consent from global diversity.¹⁰² This terminology and the concepts it reflects may not readily cohere with U.S. law, the operation of the U.S. legal system, or typical U.S. terminology, "even when the policies of the treat[y] are otherwise [consistent] with U.S. law."¹⁰³ Second, because treaties are drafted in a decentralized international regime comprised of diverse legal orders, they are less likely than statutes to anticipate judicial enforcement, particularly judicial enforcement through domestic courts.¹⁰⁴ Third, treaties are a mix of contract and law.¹⁰⁵ Their contractual character arises from the fact that treaties record commitments between states.¹⁰⁶ In their contractual dimension, treaties "implicate considerations of international politics and diplomacy, considerations that are particularly the domain of the Executive Branch," leaving the Executive a greater role in treaty interpretation and termination than in statutory interpretation and termination.¹⁰⁷ Fourth, treaties engage less of the democratic process than statutes as they require the participation of only one house of Congress and principally, if not exclusively, at the ratification rather than negotiation stage.¹⁰⁸ These differences, the argument goes, justify differential treatment and, in particular, less judicial enforcement of treaties than is afforded statutes—notwithstanding the Supremacy Clause's crude lumping of the Constitution, statutes, and treaties.¹⁰⁹

¹⁰¹. An implementing statute may continue in force after a treaty has dissolved, but the treaty itself would not be domestic law. Cf. Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. h (1987) (explaining when non-self-executing treaty is implemented, "strictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States").

¹⁰². See Bradley, Treaty Duality, supra note 6, at 158 ("[T]he need to find common ground among countries with widely varied legal systems, cultures, and preferences often results in a lack of linguistic precision.").

¹⁰³. Id. at 157–58.

¹⁰⁴. Id. at 158; see also id. at 180 (discussing Supreme Court's observation "that the requirement of compliance with ICJ decisions was situated within an international legal system that emphasized political rather than judicial enforcement").

¹⁰⁵. Id. at 158–59.

¹⁰⁶. See id. at 158 ("Treaties inherently involve contractual commitments to other nations . . . ").

¹⁰⁷. Id.; see also id. at 180–82 (noting concern about "undermining political branch management of foreign relations" when enforcing treaties domestically as well as "longstanding doctrine of deference to Executive Branch treaty constructions").

¹⁰⁸. Id. at 159; see also id. at 181 (noting enforcement of ICJ judgments raised Supreme Court concern for "democratic process and sovereignty").

¹⁰⁹. See id. at 132–33, 157, 182 (discussing differences between treaties and statutes that justify different judicial treatment); see also Moore, Law(makers) of the Land, supra note 29, at 40–41 ("Given treaties' dual character, it is not clear that a doctrine that
III. AN EXPANDED DUALITY

The dual nature of treaties, upon which this final argument relies, has been widely acknowledged and is not particularly controversial or refutable.\textsuperscript{110} The controversy results from reliance on treaty duality to undercut the equivalence thesis and support non-self-execution.\textsuperscript{111} Resistance to the notion that treaty duality supports non-self-execution rests on the fact that the Supremacy Clause identifies treaties as a source of domestic law notwithstanding the international role that treaties play.\textsuperscript{112} British practice perceived treaties primarily as tools of international relations; they only became domestic law through an act of Parliament.\textsuperscript{113} The United States opted for a different arrangement.\textsuperscript{114} Through the Supremacy Clause, the United States gave treaties a role in domestic law.\textsuperscript{115} Critics of non-self-execution thus assert that treaties' dual nature should not affect treaties' domestic status.\textsuperscript{116} Under-
lying this argument is a sensitivity to an exclusive focus on treaty duality.\footnote{117}{See Vázquez, Treaties as Law of the Land, supra note 13, at 602–06 (acknowledging treaties possess dual nature but rejecting conclusion that they should therefore receive different treatment). But see Bradley, Treaty Duality, supra note 6, at 157–60 ("[T]here are important differences between statutes and treaties[, stemming from treaties’ dual nature,] that are relevant to judicial enforceability, and these differences suggest less of a judicial role for enforcing treaties than for statutes . . . ").}

This Essay accommodates that concern, at least partially, by taking treaty duality only as a starting point. The Essay goes further to introduce, and build on, the duality of the Constitution and statutes. Given the inordinate focus on treaty duality, the dual nature of the Constitution and statutes has been overlooked in the self-execution debate. Many have noted that “treaties are different from the Constitution and statutes. Treaties serve an external role that the Constitution and statutes do not. Treaties give rise to obligations to and from coequal sovereigns.”\footnote{118}{Moore, Law(makers) of the Land, supra note 29, at 40; see also Bradley, Treaty Duality, supra note 6, at 159 ("[U]nlke statutes, treaties operate not only within the domain of law, but also within the domain of international politics.").}

These observations, while true, neglect other important considerations. First, statutes can also give rise to obligations to and from coequal sovereigns. In fact, the United States enters international agreements through the process of bicameralism and presentment far more often than it does through the Article II treaty process.\footnote{119}{Oona A. Hathaway, Treaties' End: The Past, Present, and Future of International Lawmaking in the United States, 117 Yale L.J. 1236, 1258 tbl.1, 1260 tbl.2 (2008) (identifying 375 Article II treaties and 2,744 congressional-executive agreements between 1980 and 2000); Kesavan, supra note 44, at 1625–26.} Of course, these agreements do not become binding internationally through that process alone. The President must complete the process provided in the agreement for expressing consent. The key point, however, is that the normal statutory process may also be invoked in the course of creating international obligations. Second, in addition to creating specific obligations, treaties play a more general role in international relations.\footnote{120}{See Bradley, Treaty Duality, supra note 6, at 133 (describing treaties' operation within both "domain of international politics as well as within the domain of law").} As Professor Bradley has observed, “every treaty is a contract that implicates the U.S. relationship with one or more other nations, and such a relationship inherently includes political as well as legal elements, such as considerations of reciprocity, reputation, and national interest.”\footnote{121}{Id.}

Third, and critically for this Essay, treaties are not the only source of law that affects international affairs.

Statutes affect foreign relations in many ways. At one extreme, statutes applied within U.S. territory can have foreign relations impacts even when applied to U.S. nationals. Statutes of this type might include the

Constitution, thus obviating the differences in enforcement mechanisms that would otherwise exist given treaties’ role as international contracts).
federal death penalty, which generates opposition from abolitionist countries.\textsuperscript{122} Indeed, in extradition treaties with the United States, many states ensure that extradition is not required if the United States seeks capital punishment.\textsuperscript{123} Other statutes have an even more direct impact: namely, statutes that specifically target foreign nationals—such as immigration laws\textsuperscript{124}—or that authorize or command foreign actions by U.S. officials.\textsuperscript{125}


\textsuperscript{123} See, e.g., Convention on Extradition, U.S.-Swed., art. VIII, Oct. 24, 1961, 14 U.S.T. 1845 (“If the offense for which extradition is requested is punishable by death under the law of the requesting State and the law of the requested State does not permit this punishment, extradition may be refused unless the requesting State gives such assurance as the requested State considers sufficient that the death penalty will not be carried out.”).


\textsuperscript{125} For example, the sanctions statute involved in Crosby v. National Foreign Trade Council directed the President to develop a multilateral strategy to deal with the human rights situation in Burma and gave him discretion to increase or waive sanctions in light of, inter alia, progress or regression there. 530 U.S. 363, 368–70 (2000); cf. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 311–12 (1936) (addressing constitutionality of Joint Resolution giving President discretion to criminalize certain sales of arms to countries involved in Chaco War). Various other statutes likewise authorize or direct the executive branch to carry out certain acts. See, e.g., 22 U.S.C. §§ 6441–6442, 6445, 6450 (2006) (directing President to respond to foreign states’ religious freedom violations, including by entering international agreements with those states, and prohibiting judicial
Arguably, statutes that regulate not only actions at home but actions abroad, especially the acts of foreign nationals, are prototypical of statutes' secondary, foreign affairs role. Such statutes are not uncommon; the United States has regulated foreign activity through, inter alia, antitrust, securities, copyright, trademark, intellectual property, bankruptcy, tax, corporate, criminal, labor, civil rights, and environmental law. The extraterritorial expansion of U.S. law has, unsurprisingly, been met with opposition from other states. Foreign governments have, inter alia, protested, refused to recognize U.S. judgments or extraterritorial U.S. laws in judicial proceedings, ordered their citizens not to adhere to review of relevant “Presidential determination[s] or agency action[s]”; id. § 7555 (requiring President to “formulate [and submit to various congressional committees] a 5-year strategy for Afghanistan”); id. § 7814 (authorizing President to “increase the availability of information not controlled by the Government of North Korea”); id. § 7112(b) (directing Secretary of Labor to “carry out [various] . . . activities to monitor and combat forced labor and child labor in foreign countries”); 22 U.S.C. § 7624 (Supp. II 2009) (authorizing United States Agency for International Development Administrator “to strengthen the capacity of developing countries’ governmental institutions to” facilitate development and delivery of new vaccines). An important component of these statutes addresses domestic, rather than foreign, relations in managing the shared foreign affairs authority of the political branches.

126. See Curtis A. Bradley, Territorial Intellectual Property Rights in an Age of Globalism, 37 Va. J. Int’l L. 505, 556 (1997) [hereinafter Bradley, Territorial] (noting “common sense notion that conflicts with foreign nations are more likely with respect to extraterritorial applications than with respect to territorial applications” of U.S. law); William S. Dodge, Understanding the Presumption Against Extraterritoriality, 16 Berkeley J. Int’l L. 85, 115 (1998) (“[T]he surest way to avoid having more than one law apply to the same activity is to assign prescriptive jurisdiction exclusively on the basis of where the conduct occurs.”).


128. Parrish, supra note 127, at 857–58, 864–65; see also Raustiala, supra note 127, at 95, 115 (noting after World War II, United States “creatively flexed its jurisdictional muscles in what, to many of its closest allies, was an alarmingly aggressive and unilateral fashion” that “provoked strident protests from major trading partners”).
U.S. law, and enacted clawback provisions enabling entities who incur liability to plaintiffs under extraterritorial U.S. law to recover damages from those plaintiffs. Relatedly, the United States’s extraterritorial extension of its law has motivated other countries to follow suit, producing more domestic law that attempts to regulate the international sphere. Extraterritorial application of United States statutes has thus had a direct impact on foreign relations.

With regard to the Constitution, a similar spectrum exists. Constitutional limitations on domestic regulation of domestic conduct, such as limitations on regulation of hate speech, can produce foreign relations issues. In ratifying the International Covenant on Civil and Political Rights, for example, the United States entered a reservation, refusing to assume an obligation to prohibit “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” insofar as such a prohibition would contravene constitutional (and statutory) free speech protections. The scope of government actors’ constitutional authority both to make decisions related to foreign affairs and to take actions outside U.S. terri-


132. See 138 Cong. Rec. 8070 (1992) (consenting to International Covenant on Civil and Political Rights with reservation that treaty “does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States”).

133. See, e.g., Medellin v. Texas, 552 U.S. 491, 524 (2008) (concluding President lacked authority to make ICJ’s Avena judgment binding federal law while recognizing “plainly compelling” “interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law”); id. at 537 (Stevens, J., concurring) (recognizing same compelling interests); id. at 566 (Breyer, J., dissenting) (asserting Court’s non-self-execution and presidential powers holdings “increase the likelihood of Security Council Avena enforcement proceedings, of worsening relations with our neighbor Mexico, of precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or of diminishing our Nation’s reputation abroad as a result of our failure to follow the ‘rule of law’ principles that we preach”); Barclay’s Bank v. Franchise Tax Bd., 512 U.S. 298, 324–28 (1994) (refusing to strike down California’s multinational corporate tax scheme notwithstanding protests from foreign governments); United States v. Pink, 315 U.S. 203,
tory also bears heavily on foreign relations. The scope of constitutional protections available to aliens likewise affects our relations with others. Numerous foreign and international officials, for instance, filed amicus briefs in support of the Guantanamo detainees in *Boumediene v. Bush.* Indeed, at the heart of the Constitution’s secondary role seems to lie the question whether constitutional limits constrain federal conduct outside U.S. territory.

227–34 (1942) (upholding President’s authority to settle American citizens’ claims against Russia in process of recognizing Russia’s new Soviet government); Made in the USA Found. v. United States, 242 F.3d 1300, 1319–20 (11th Cir. 2001) (dismissing on political question grounds challenge to constitutionality of using congressional-executive agreement rather than Article II treaty to enter into North American Free Trade Agreement); see also infra note 136 (noting foreign and international concern over President’s authority to hold enemy combatants at Guantanamo without habeas review).

134. See Raustiala, supra note 127, at 36–38 (discussing critical nineteenth-century question of whether Constitution authorized federal government to acquire new territory).


136. See Amicus Curiae Brief of 383 United Kingdom and European Parliamentarians in Support of Petitioners, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (No. 06-1196), 2007 WL 4790793, at *2 (“Amici share a concern that the treatment of [the detainees] currently falls short of [international humanitarian and human rights] standards and urge the Court to ensure that these standards are observed in relation to [the detainees].”); Brief of Amici Curiae Canadian Parliamentarians and Professors of Law in Support of Reversal, *Boumediene*, 128 S. Ct. 2229 (No. 06-1196), 2007 WL 2456943, at *2 (“The interests of the United States and the global community are best served by an approach that hews closely to existing standards of customary international law.”); Brief of Amicus Curiae United Nations High Commissioner for Human Rights in Support of Petitioners, *Boumediene*, 128 S. Ct. 2229 (No. 06-1196), 2007 WL 2441586, at *5 (“As a matter of international law, the United States is obliged to respect and ensure the rights set forth in the [International Covenant on Civil and Political Rights] . . . with regard to these [detainees].”). Although their advocacy understandably relied on international law, their briefs demonstrate the foreign affairs impact of a domestic decision regarding the Constitution’s application to aliens.

137. The extent to which constitutional limits apply abroad is a separate question from, and has generated more controversy than, the extent to which the federal government may act abroad. See Raustiala, supra note 127, at 132 (noting constitutional powers have not been “thought to change outside the borders of the nation” while constitutional limits have); Burnett, Convenient Constitution, supra note 37, at 993 n.70 (explaining whether constitutional authority to take certain acts permits extraterritorial action and whether constitutional limits on exercise of authority apply to extraterritorial actions are separate questions and may require separate analyses). Indeed, authority to act abroad is often assumed and scrutiny is focused on whether that authority is subject to constitutional limitations. See Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 5 (1996) [hereinafter Neuman, Strangers]
The Constitution's and statutes' effects on international and domestic affairs are not completely separable. As the above examples illustrate, domestic applications of the Constitution and statutes can impact foreign affairs. At the same time, somewhere along the spectrum of effects a shift occurs from primarily domestic to primarily international. As a general rule, one might conclude that the Constitution and statutes have a domestic focus, but certain applications of both sources primarily impact foreign affairs. Wherever the shift from domestic to international occurs, this Essay identifies the extraterritorial reach of statutes and of constitutional limitations as the core of each source's role in foreign affairs.

IV. A NEW COMPARATIVE AXIS

Given the dual nature of the Constitution, statutes, and treaties, domestic judicial treatment of these sources might be compared along several axes. Critics of non-self-execution compare the judicial treatment of these sources in their domestic roles. This assessment involves either comparing two things (constitutional and statutory law) that do not possess a dual nature (if one is unpersuaded by the prior section) with one (treaty law) that does, or comparing three things that have a dual nature.

("Since Reid v. Covert, it has generally been recognized that the Constitution as such 'applies' wherever the government of the United States may act, and provides the source of the federal government’s authority to act there—the disputable question is whether a particular constitutional limitation on the government’s authority to act . . . includ[es] within its prohibitions unusual categories of places or persons."); Sarah H. Cleveland, Embedded International Law and the Constitution Abroad, 110 Colum. L. Rev. 225, 240 (2010) (“[I]n the nineteenth- and early twentieth-century decisions addressing application of constitutional rights abroad . . . [t]he principle of territorial jurisdiction was applied, not to address whether the United States had authority to act, but to hold that constitutional limitations should not confine that action.”). Structural limits have been accepted more readily than individual rights limits, though the difference between these categories of limitation may be more constructed than real. See Raustiala, supra note 127, at 244–45 (noting “[b]ecause [structural provisions] determine the scope of federal power, they apply everywhere the federal government acts” and “distinction between structural and individual rights provisions[, though questioned by some,] . . . undergirded the Supreme Court’s reasoning in the Insular Cases, and can be traced through many later judicial decisions”).

138. See Smith v. United States, 507 U.S. 197, 204 n.5 (1993) (explaining presumption against extraterritoriality is rooted in, inter alia, “the commonsense notion that Congress generally legislates with domestic concerns in mind”); see also Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (citing Smith for this point); Small v. United States, 544 U.S. 385, 388 (2005) (quoting Smith on this point); Bradley, Territorial, supra note 126, at 557 (“[E]ven if Congress is more globally focused today than in the past, there is no empirical evidence suggesting that Congress generally wishes to regulate foreign conduct.”); Dodge, supra note 126, at 112, 117–18 (concluding Smith’s rationale is “the only legitimate reason for the presumption” in part because it is empirically accurate); cf. Neuman, Strangers, supra note 137, at 4 (“United States citizens within the borders of the states . . . [are] the core situation for which constitutional rights were created.”).

139. See, e.g., Vázquez, Treaties as Law of the Land, supra note 13, at 611, 613 (arguing differential judicial treatment of Constitution, statutes, and treaties violates Supremacy Clause).
but comparing the treatment of two sources (the Constitution and statutes) in their primary function and a third (the treaty) in its secondary function.

The latter approach is better than comparing the treatment of all three sources in their foreign affairs applications. In the foreign affairs arena, the relevance of constitutional limits and statutes is governed by domestic law. While international law certainly addresses states' authority to act in certain ways and, in particular, to apply their law outside their borders, \textsuperscript{140} neither Congress in enacting statutes\textsuperscript{141} nor the Constitution\textsuperscript{142} is confined in U.S. courts by the dictates of international law. Thus, domestic law controls the extraterritorial roles of statutes and constitutional constraints. By contrast, the United States recognizes that treaties, at least in their extraterritorial legal dimension, are governed by international law, which defines such things as what qualifies as a treaty, how treaties are formed and terminated, and rights upon breach.\textsuperscript{143} The comparison of the Constitution, statutes, and treaties in their foreign affairs roles thus mixes bodies of law.

Comparing judicial treatment of the Constitution, statutes, and treaties in their areas of secondary application avoids this problem. The legal treatment of the Constitution, statutes, and treaties in their areas of secondary application is a matter of domestic law.\textsuperscript{144} Granted, the applica-

\begin{itemize}
  \item \textsuperscript{140} See Restatement (Third) of the Foreign Relations Law of the United States §§ 402–404 (1987) (delineating scope of states' authority to prescribe their law).
  \item \textsuperscript{141} See, e.g., id. §§ 402 cmt. i, 403 cmt. g ("[I]t is presumed that Congress does not intend to violate international law . . . . However, when the intent of Congress to apply United States law in particular circumstances is clear, courts and agencies will apply that law notwithstanding any inconsistency . . . .").
  \item \textsuperscript{143} See, e.g., Vienna Convention on the Law of Treaties art. 1, May 23, 1969, S. Exec. Doc. L, 92:1, 1155 U.N.T.S. 331 ("The present Convention applies to treaties between States."); Letter of Submittal from the Department of State to the President, Vienna Convention on the Law of Treaties, supra (noting Vienna Convention "is already generally recognized as the authoritative guide to current treaty law and practice"); supra note 100 and accompanying text (discussing Court's observation in \textit{Medellín} that treaties and ICJ judgments may impose obligations under international law even if domestically non-self-executing). By contrast, domestic law addresses such things as who can exercise the treaty power or terminate treaties on the United States' behalf. See, e.g., Goldwater v. Carter, 444 U.S. 996, 999 (1979) (Powell, J., concurring) (discussing "whether the President may terminate a treaty under the Constitution without congressional approval").
  \item \textsuperscript{144} See, e.g., Boumediene v. Bush, 128 S. Ct. 2229, 2244–62 (2008) (analyzing, inter alia, Framers' intent and Supreme Court precedent in fixing extraterritorial reach of constitutional habeas); \textit{Medellín} v. Texas, 552 U.S. 491, 504 (2008) ("No one disputes that the \textit{Avena} decision . . . constitutes an international law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts."); id. at 519 ("[W]hether the treaties underlying a
tion of the Constitution in extraterritorial affairs may be controlled by the Constitution more generally rather than by the Supremacy Clause specifically, while the extraterritorial effectiveness of statutes is presumably governed by the Supremacy Clause, but the extraterritorial application of both statutes and the Constitution are at least governed by domestic law rather than separate bodies of law.\textsuperscript{145} Thus, notwithstanding possible weaknesses, there is reason for comparison along this axis.

V. TREATMENT OF THE CONSTITUTION, STATUTES, AND TREATIES IN THEIR AREAS OF SECONDARY APPLICATION

Comparison of the judicial treatment of the Constitution, treaties, and statutes in their areas of secondary application is a timely enterprise judgment are self-executing . . . is, of course, a matter for this Court to decide.

145. Compare, e.g., Neuman, Strangers, supra note 137, at 75–76, 87–88 (noting historical arguments that constitutional rights extend to United States territories under Supremacy Clause), with Reid v. Covert, 354 U.S. 1, 5–6 (1957) (plurality opinion) (explaining constitutional rights extend extraterritorially at least in part because “[t]he United States is entirely a creature of the Constitution [and] . . . [i]t can only act in accordance with all the limitations imposed by the Constitution” (footnote omitted)).
as the Supreme Court has recently issued relevant opinions for each source of law. This Part’s overview of the opinions sets the stage for Part VI’s comparison of the judicial analysis of the secondary application of all three sources, a comparison that analyzes commitment to lawmaker intent, the role of functional considerations, and judicial discretion, and reveals that treaties fare relatively well in U.S. courts even under a broad notion of non-self-execution.

A. Constitution

The Court’s most recent foray into the extraterritorial\textsuperscript{146} application of the Constitution occurred in \textit{Boumediene v. Bush}.
\textsuperscript{147} In that case, the Court considered whether petitioners—aliens detained as enemy combatants at Guantanamo Bay—“have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause.”\textsuperscript{148} In answering this question, the Court first looked to original intent,\textsuperscript{149} asking whether petitioners’ status as enemy aliens or their location at Guantanamo deprived them of constitutional rights.\textsuperscript{150} The Framers of the Constitution envisioned a central role for the writ of habeas corpus.\textsuperscript{151} Common law sources, however, did not settle whether the right to seek habeas would run to individuals who, like petitioners, were deemed enemy combatants under a definition like that employed by the government, and “held in a territory . . . over which the Government has total military and civil control.”\textsuperscript{152}

Unable to find a definitive answer in the evidence of original intent, the Court looked for other ways to assess the government’s argument that habeas rights did not reach Guantanamo because it is not sovereign territory.\textsuperscript{153} The Court “accept[ed] the Government’s position that Cuba, and not the United States, retains \textit{de jure} sovereignty over Guantanamo Bay,” but rejected the suggestion “that \textit{de jure} sovereignty is the touchstone of habeas corpus jurisdiction.”\textsuperscript{154} Not only did that suggestion lack common law support, but it was also inconsistent with separation of powers norms and precedent.\textsuperscript{155}

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\item \textsuperscript{146} But cf. Rasul v. Bush, 542 U.S. 466, 480 (2004) (treating Guantanamo as “within ‘the territorial jurisdiction’ of the United States” for purpose of presumption against extraterritoriality (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)); Raustiala, supra note 127, at vii (describing “claim that some constitutional rights do not apply in some American territory,” such as Guantanamo, as issue of intraterritoriality).
\item \textsuperscript{147} 128 S. Ct. 2229 (2008).
\item \textsuperscript{148} Id. at 2240.
\item \textsuperscript{149} See id. at 2244–51 (discussing origin and history of writ of habeas corpus in seeking Framers’ intent).
\item \textsuperscript{150} Id. at 2244.
\item \textsuperscript{151} Id. at 2244–47.
\item \textsuperscript{152} Id. at 2248.
\item \textsuperscript{153} Id. at 2251.
\item \textsuperscript{154} Id. at 2253.
\item \textsuperscript{155} Id. at 2247, 2253.
\end{itemize}
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Precedent on the Constitution's extraterritorial scope is relatively scarce as U.S. history has provided limited opportunity for the judiciary to definitively fix "the Constitution's geographic reach." According to the Court, for much of U.S. history, Congress effectively treated the Constitution as non-self-executing outside the territory of the states. As Congress "create[d] new territories, it guaranteed constitutional protections to the inhabitants by statute," obviating the need for the Court to fix the Constitution's boundaries.

156. Id. at 2253. Professor Neuman criticizes the Court's historical review of constitutional extraterritoriality for its insufficient attention to the first century of U.S. experience and for its sanitized perspective of the Insular Cases, which "underplay[s] the racial element in U.S. colonialism, and overemphasiz[es] the usefulness of the doctrine in temporary governance of a territory that would later be granted independence." Neuman, After Boumediene, supra note 144, at 270; see also Raustiala, supra note 127, at 218 (criticizing Boumediene's "reading of history" as "somewhat tendentious"). For a more fulsome account of the U.S. experience with extraterritoriality, both constitutional and statutory, see id. at 31-247.

157. Boumediene, 128 S. Ct. at 2253; cf. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (holding any restrictions on searches and seizures of property owned by nonresident alien in foreign country "must be imposed by the political branches" rather than by Fourth Amendment). Under the conventional view, the Supreme Court's nineteenth-century jurisprudence "established that the Constitution applied to the United States' nonstate territories," but not beyond. Burnett, Convenient Constitution, supra note 37, at 984; see Neuman, Strangers, supra note 137, at 4, 72-83, 106 (discussing geographical limits on Constitution's reach through nineteenth century). Professor Burnett, however, argues that the nineteenth-century jurisprudence "was far more ambiguous." Burnett, Convenient Constitution, supra note 37, at 985; see Christina Duffy Burnett, Untied States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797, 804, 815-16, 819, 824-34 (2005) [hereinafter Burnett, Untied States] (discussing Supreme Court's nineteenth-century case law on Constitution's application in territories and noting "the status of constitutional provisions in the territories had long been a source of confusion, and continued to be so even up to 1901"); see also Raustiala, supra note 127, at 98-52, 57-72, 77 (discussing "nettlesome and contentious" debate over whether "the Constitution [bound] the government within new territories"). It was unclear "how the Constitution operated in the territories." Burnett, Untied States, supra, at 801 n.11. Among other things:

Some organic acts required that territorial legislatures not act inconsistently with the applicable provisions of the Constitution, while others expressly "extended" the Constitution to a given territory, again insofar as applicable. As a result, even those decisions applying constitutional rights in the territories usually left open the question whether the relevant constitutional provision applied of its own force or by legislative grace.

Burnett, Convenient Constitution, supra note 37, at 985 (footnote omitted). And, while Dred Scott held "that the Constitution applied of its own force in the territories," the decision was "severely undermined" by the Civil War. Id.; see also Raustiala, supra note 127, at 292 (noting under Dred Scott United States could not "acquire new territory to rule despotically" though "the outcome of the Civil War and the repudiation of slavery appeared to inter Dred Scott forever"). Later cases were decided against the backdrop of congressional extension of "the Constitution to all existing territories." Burnett, Convenient Constitution, supra note 37, at 986. These cases did not always decide whether the Constitution applied on its own to the territories and, in Burnett's view, did not leave the question free of doubt. Id.; Burnett, Untied States, supra, at 824-34 (discussing ambiguity regarding Constitution's application to territories).
It was not until the United States acquired a number of distant lands, through its annexation of Hawaii and Spain’s cession of the Philippines, Guam, and Puerto Rico, that the issue of the Constitution’s application beyond contiguous territory reached the Court.\footnote{Boumediene, 128 S. Ct. at 2253.} Congress discontinued the practice of statutorily guaranteeing constitutional rights, leaving the Court, in the \textit{Insular Cases},\footnote{See Neuman, After \textit{Boumediene}, supra note 144, at 263 n.22 (describing \textit{Insular Cases}).} to decide the extent to which “the Constitution, by its own force, applies in any territory that is not a State.”\footnote{Boumediene, 128 S. Ct. at 2254.} Based on the difficulty, resulting uncertainty, and ultimate futility of applying the Constitution wholesale in territories that had different legal systems and were not destined for statehood, the Court adopted “the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.”\footnote{Id. Professor Burnett disputes that the \textit{Insular Cases} endorsed the doctrine of territorial incorporation as understood by \textit{Boumediene} and by the conventional wisdom. Burnett, \textit{United States}, supra note 157, at 801–02, 820–24, 836–53. Among other things, she contests the assertion that the Constitution applied fully in incorporated territories, noting that “every constitutional provision held inapplicable in the unincorporated territories was also inapplicable somewhere within the boundaries of the ‘United States.’” Id. at 816. At the same time, she acknowledges that “[c]ourts at all levels have accepted and reiterated [the conventional] understanding of the [\textit{Insular Cases}] and, in so doing, they have created a legal doctrine attributed to the \textit{Insular Cases}” that “has by now become law.” Id. at 869, 870; see, e.g., \textit{Verdugo-Urquidez}, 494 U.S. at 268–69 (discussing \textit{Insular Cases} and general rule that “[o]nly ‘fundamental’ constitutional rights are guaranteed to inhabitants of [unincorporated] territories”).} In unincorporated territories, absent further strengthening of ties to the United States, only individual constitutional rights that are fundamental apply.\footnote{Boumediene, 128 S. Ct. at 2255–57.} This territorial incorporation principle allowed the Court to take account of practical difficulties in enforcing constitutional guarantees.\footnote{Id. at 2255.}

“Practical considerations” guided the Court in later cases as well.\footnote{Id. at 2254.} In \textit{Reid v. Covert},\footnote{354 U.S. 1 (1957) (plurality opinion).} where the Court concluded that civilian dependents of military personnel stationed overseas were entitled to jury trial in facing capital charges, various Justices expressly endorsed the relevance of practical considerations in addition to citizenship in deciding the extra-territorial reach of constitutional rights.\footnote{Id. at 2255.} \textit{Reid} was also significant because “it rejected the long-standing view that treaties with foreign sovereigns (such as status of forces agreements) determined not only the powers the United States wielded in those foreign lands, but also the rights the United States was bound to respect.”

\footnote{Raustiala, supra note 127, at 242.}
Constitution was effectively non-self-executing in foreign lands until executed by treaty. Reid concluded that the Constitution could itself be self-executing at least under certain conditions.\textsuperscript{168}

In \textit{Johnson v. Eisentrager},\textsuperscript{169} the Court again emphasized practical considerations—"the difficulties of ordering the Government to produce . . . prisoners in a habeas corpus proceeding"—in concluding that enemy aliens convicted of law of war violations and detained in postwar, Allied-occupied Germany were not entitled to pursue habeas relief.\textsuperscript{170} "[A] common thread unit[es] the \textit{Insular Cases}, \textit{Eisentrager}, and \textit{Reid}: the idea that questions of extraterritoriality turn on objective factors and practical considerations, not formalism."\textsuperscript{171}

The \textit{Boumediene} Court rejected the government's formalist sovereignty argument on separation of powers grounds as well. If the political branches could avoid constitutional constraints by disclaiming formal sovereignty while retaining plenary control over unincorporated territory, they would trim the judiciary's authority to interpret and enforce the Constitution.\textsuperscript{172}

Having disposed of the government's formalist position, the Court engaged in a functional analysis to fix the reach of the constitutional right to habeas.\textsuperscript{173} The Court identified "at least three factors . . . rele-

\begin{footnotes}
\footnote{168. See \textit{Reid}, 354 U.S. at 6 ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."); id. at 16 (rejecting notion that "agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution").}
\footnote{169. 339 U.S. 763 (1950).}
\footnote{170. \textit{Boumediene}, 128 S. Ct. at 2257.}
\footnote{171. Id. at 2258.}
\footnote{172. Id. at 2258-59, 2277. But see id. at 2297-98, 2302-03, 2307 (Scalia, J., dissenting) (arguing Court failed to grasp that limitations on constitutional right to habeas were intended to limit judicial authority to intervene just as reach of right was intended to limit executive's authority to detain).}
\footnote{173. See Neuman, \textit{After Boumediene}, supra note 144, at 259, 261 ("\textit{Boumediene} confirms and illustrates the current Supreme Court's 'functional approach' to the extraterritorial application of constitutional rights."). It appears that, given his pendular position, Justice Kennedy was able to convert the functional approach he began to articulate in \textit{concerunce in Verdugo-Urquidez} into the majority position on constitutional extraterritoriality. See United States \textit{v. Verdugo-Urquidez}, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring) (reasoning application of “Fourth Amendment’s warrant requirement” to search of “foreign home of a nonresident alien” would be “impracticable and anomalous”); Raustiala, supra note 127, at 217–18 (arguing \textit{Boumediene} is noteworthy “for its willingness to further extend a functional approach to the geographic reach of American law”); Neuman, \textit{After Boumediene}, supra note 144, at 263–65 (noting Justice Kennedy, through discussion of “Court’s prior exploration of the Constitution’s geographic scope, . . . amplified the methodology he had outlined in his short concurring opinion in \textit{United States v. Verdugo-Urquidez}”). But cf. \textit{Boumediene}, 128 S. Ct. at 2998–307 (Scalia, J., dissenting) (rejecting Court’s functional analysis of habeas’s extraterritorial reach as inconsistent with precedent, separation of powers, and original understanding and text of Suspension Clause).}
\end{footnotes}
vant" to that analysis: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ." 

As to the first factor, petitioners were foreign nationals who contested their designation as enemy combatants. They were provided limited procedural protections in disputing that designation before Combatant Status Review Tribunals (CSRTs). In regard to the second consideration, petitioners were apprehended and detained outside sovereign U.S. territory, which weighed against concluding that habeas rights attached. Nonetheless, Guantanamo is only formally non-U.S. territory. "In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." Finally, practical considerations did not prevent extension of constitutional habeas. Finding a constitutional right to habeas corpus “in a case of military detention abroad” might be costly and divert military personnel. However, “[t]he Government present[ed] no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims,” nor were any such arguments apparent in light of the complete control the United States exercised over Guantanamo. The detainees, though potentially dangerous if released, were being held “in a secure prison facility on an isolated and heavily fortified military base” outside the combat theater. Moreover, “[t]here [was] no indication . . . that adjudicating a habeas corpus petition would cause friction with the host government” as no Cuban court had jurisdiction over Guantanamo personnel or detainees and the United States did not answer to any “other sovereign for its acts on the

174. Boumediene, 128 S. Ct. at 2259 (majority opinion); see Neuman, After Boumediene, supra note 144, at 287 (observing both that “[t]his nonexclusive list was tailored to the Suspension Clause and its case law, and would presumably need modification to address other rights” and that “[t]he importance of the habeas right itself was an unlisted factor that apparently argued in favor of broader reach”).

175. Boumediene, 128 S. Ct. at 2259.

176. Id. at 2259–60.

177. Id. at 2260.

178. See id. at 2251–53 (concluding United States “maintains de facto sovereignty over” Guantanamo).

179. Id. at 2261; see also id. at 2252–53 (noting “uncontested fact that the United States” exercises “complete jurisdiction and control over” Guantanamo).

180. Id. at 2261.

181. Id. But see id. at 2296 (Scalia, J., dissenting) (arguing Court lacks competence “to second-guess the judgment of Congress and the President” in balancing individual liberty and national security).

182. Id. at 2261 (majority opinion); see id. at 2262 (“The detainees . . . are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government.”).
base” outside the terms of its lease with Cuba. Any practical barriers that might arise could likely be addressed by modifying habeas procedures. As a result, the Court concluded that the constitutional right to habeas protected by the Suspension Clause extended to detainees at Guantanamo.

Just as the Court grounded the reach of the habeas right in functional considerations, the Court determined the nature of the right through a functional analysis as well. First, the Court recognized that:

[I]t likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment [a foreign citizen apprehended abroad] is taken into custody. . . . [P]roper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. . . . [A] relevant consideration is . . . whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power.

Similarly, the judiciary might need to craft “sensible rules for staying habeas corpus proceedings” when exceptional domestic circumstances prevent the government from being able to respond responsibly to habeas petitions. Thus, although “requiring temporary abstention or exhaustion of alternative remedies” was not appropriate in the Boumediene petitioners’ case (given their lengthy detentions and the lack of evidence that the Executive faced burdens preventing response to habeas suits), abstention and exhaustion would be proper in other circumstances.

Second, the Court explained that “[c]ertain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.” Such accommodations include channeling cases to the District Court for the District of Columbia and exercising judicial discretion to accommodate “to the greatest extent possible” the government’s “legitimate interest in protecting sources and methods of intelligence gathering.”

183. Id. at 2261.
184. Id. at 2262.
185. Id. at 2262, 2277.
186. See id. at 2275 (“Practical considerations and exigent circumstances inform the definition and reach of the [writ of] habeas corpus.”); see also id. at 2286 (Roberts, C.J., dissenting) (agreeing with majority that “precise application [of habeas] . . . change[s] depending upon the circumstances” (quoting id. at 2267 (majority opinion))).
187. Id. at 2275 (majority opinion).
188. Id.
189. Id. at 2276.
190. Id.; cf. id. at 2288 (Roberts, C.J., dissenting) (defending adequacy of detainees’ “right to call witnesses who are reasonably available” in CSRT proceedings as “entirely consistent with the Government’s interest in avoiding a ‘futile search for evidence’ that might burden warmaking responsibilities” (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 532).
Finally, "[i]n considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches." 199 In contrast to "most federal judges," officials within those branches "begin the day with briefings that may describe new and serious threats." 193 The Executive must possess "substantial authority to apprehend and detain those who pose a real danger to our security," but under our rights-protecting separation of powers regime, the judiciary must "hear challenges to the" exercise of that authority.194

What appears from the Court's analysis in Boumediene is an initial effort to focus on original intent. Had original intent been clear, it may have been controlling.195 In the absence of such clarity, the Court engaged in a functional analysis that considered such things as alternative means of protecting petitioners' rights (other than through constitutional habeas), deference to the Executive (at least ostensibly), the practical consequences of recognizing habeas rights in aliens at Guantanamo, and ways to mitigate untoward consequences. As will be seen, this analysis of the Constitution's role in its area of secondary application bears certain parallels, but also critical differences, to the treatment of the other Supremacy Clause sources of federal law.

B. Treaties

The domestic legal status of treaties has long been a matter of debate. The debate was spurred in part by the paucity of Supreme Court precedent discussing the issue. In Medellín v. Texas, the Supreme Court handed down its most important decision on the domestic status of treaties in roughly two hundred years, and perhaps ever.196 The Medellín Court assessed whether U.S. treaty commitments in relation to the International Court of Justice (ICJ) were self-executing, rendering ICJ judgments preemptive, judicially enforceable federal law.197 Endorsing a

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192. Id. at 2276 (majority opinion). But see id. at 2296 n.1 (Scalia, J., dissenting) (chiding Court's "faux deference to Congress and the President"); id. at 2296-97 (arguing deference to Congress's views of law's constitutionality should be particularly great in matters of military and foreign affairs and should have dictated outcome in case if common law left constitutional reach of habeas ambiguous as majority claimed).
193. Id. at 2276 (majority opinion).
194. Id. at 2277.
195. See infra text accompanying notes 326-329 (discussing Boumediene Court's treatment of original intent).
196. See Bradley, Treaty Duality, supra note 6, at 132 ("Medellín v. Texas contains the most extensive discussion of treaty self-execution in the Court's history.").
broad notion of non-self-execution, the Court concluded that the relevant treaty obligations were not self-executing.

In reaching this conclusion, the Court focused foremost on the U.S. treatymakers' intent in ratifying the relevant treaty obligations. This focus was most evident in the Court's concluding remark that "[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections.'" It also appeared in the Court's reliance on statements of the Executive during the senatorial consent process, and in the Court's focus on treaty text. As the Court explained, "we have held treaties to be self-executing when the textual provisions indicate that

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198. Moore, Medellín and the ATS, supra note 6, at 490–91 (arguing "fewer treaties will be deemed self-executing" as result of Medellín).
199. See Medellín, 552 U.S. at 506, 513–14, 518 (holding ICJ judgment was "not automatically binding domestic law because "none of [the relevant] treaty sources create[d] binding federal law in the absence of implementing legislation").
200. Bradley, Intent, supra note 40, at 543–45 (acknowledging Court's "mixed signals" but arguing Medellín "is best interpreted as endorsing an intent-of-the-U.S. approach"); Bradley, Treaty Duality, supra note 6, at 176–79 ("The Medellín decision is . . . generally consistent with [the] claim . . . that the relevant intent for self-execution is that of U.S. treaty-makers."); Moore, Medellín and the ATS, supra note 6, at 499 ([T]he primary consideration guiding the [Medellín] Court's self-execution analysis is . . . the intent of the President and Senate that adopted the treaty obligation."); Young, supra note 11, at 109 (arguing question whether treaty is self-executing after Medellín "is one of interpreting the intent of treaty makers under any given agreement").
201. Medellín, 552 U.S. at 523; see also id. at 505 (holding that treaty is self-executing if it "conveys an intention that it be self-executing and is ratified on these terms" (quoting Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)) (internal quotation marks omitted)); id. at 508 ("[U]ndertakes to comply . . . [does not] indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts." (emphasis omitted)); id. at 509–10 (reasoning—based on Executive's statements—that "the President and Senate were undoubtedly aware" in ratifying U.N. Charter that United States could veto Security Council attempts to enforce ICJ judgments); id. at 510–11 (noting "the Executive and ratifying Senate" always regarded a Security Council veto "as an option . . . during and after consideration of the U.N. Charter, Optional Protocol, and ICJ Statute" and "there is no reason to believe that the President and Senate signed up for" regime of automatic enforcement in domestic courts that would undermine that option); id. at 514 (defending reliance on treaty's text on grounds text "is . . . what the Senate looks to in deciding whether to approve the treaty"); id. at 515 (asserting Framers did not envision self-execution as hinging "on ad hoc judgment of the judiciary without looking to the treaty language—the very language negotiated by the President and approved by the Senate"); id. at 521 ("Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect."); id. at 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."); Moore, Medellín and the ATS, supra note 6, at 499 & n.98 (describing Medellín's focus on intent). For some contrary indications from Medellín, see, for example, Bradley, Treaty Duality, supra note 6, at 176–77.
the President and Senate intended for the agreement to have domestic
effect." Evaluating the text in question, the Court concluded that the
treaty obligation to "undertake[ ] to comply with" ICJ judgments did not
contemplate immediate judicial enforcement, but future steps by the po-
litical branches. The conclusion that the treaty's text (with its absence of imperative language and
suggestion of a range of future acts) belied self-execution was con-
firmed by the treaty's provision of an international, nonjudicial remedy
for noncompliance. Even that remedy could be blocked through invo-
cation of the U.S. veto at the Security Council. Treating ICJ judgments
as immediately enforceable federal law would obviate the need to turn to
the Security Council and would eliminate political branch discretion to
avoid enforcement. The result would be the transfer of "sensitive for-
eign policy decisions" to the judiciary, where there would be no discre-
tion to ignore the judgment. Such a shift would contravene the con-
stitutional assignment of foreign relations to the political branches.

Justice Breyer's proposed multifactored, case-by-case determination
of self-execution under which a treaty might be self-executing in one con-
text but not another would effect a similar shift. It "would assign to the
courts—not the political branches—the primary role in deciding when

203. Id. at 519; see also Bradley, Treaty Duality, supra note 6, at 177-78 (discussing
treaty text's relevance in ascertaining U.S. treatymakers' intent).
204. Medellín, 552 U.S. at 508-09 & n.5; see also id. at 533 (Stevens, J., concurring)
("[T]he words 'undertakes to comply' . . . are most naturally read as a promise to take
additional steps to enforce ICJ judgments.").
205. Cf. Vázquez, Four Doctrines, supra note 60, at 711 (suggesting consideration of
factors like those Medellín consulted produces "a purely constructive intent (which is to say,
no[ ] intent at all)").
206. See Moore, Law(makers) of the Land, supra note 29, at 45 (noting Medellín
Court's search for actual intent "was also guided by separation of powers judgments").
207. Medellín, 552 U.S. at 508-09 & n.5; see also id. at 534 (Stevens, J., concurring)
("[T]he best reading of the words 'undertakes to comply' is . . . one that contemplates
future action by the political branches.").
208. Id. at 509 (majority opinion); cf. Young, supra note 11, at 124-25 (doubting
treatymakers consistently desire self-execution when treaty delegates authority to
international institution).
209. Medellín, 552 U.S. at 509.
210. Id. at 510.
211. Id. at 511.
212. Id.
213. Id. at 515-16; see Moore, Medellín and the ATS, supra note 6, at 490-91
("[G]iven his focus on the objective, contextual character of the treaty[,] . . . Justice Breyer
arguably gives the judiciary greater discretion than does the majority with regard to the
domestic status of treaties . . . ."); Parry, Implementation, supra note 52, at 1533-34
(characterizing Justice Breyer's jurisprudence as giving judges "broad case-by-case policy-
making power").
and how international agreements will be enforced.” To allow the judiciary to decide that a treaty sometimes creates domestic law and sometimes does not would essentially “vest[] with the judiciary the power not only to interpret but also to create the law.”

The constitutional division of authority that led the Court to reject this realignment of power motivated the Court in two other respects as well. It led the Court to reject Justice Breyer’s court-centered approach for the additional reason that the uncertainty it would create with regard to self-execution “could hobble the United States’ efforts to negotiate and sign international agreements.” It likewise motivated the Court’s observation that the Executive’s “interpretation of a treaty 'is entitled to great weight.’” The Executive had unfailingly maintained that the pertinent treaty obligations were non-self-executing.

Other states had treated ICJ judgments in the same way. The briefs identified no “nation that treats ICJ judgments as binding in domestic courts.” The practical consequences of deviating from this shared practice gave the Court pause. Mexico had asked the ICJ to annul convictions and sentences corrupted by U.S. violation of the Vienna Convention on Consular Relations. While the ICJ ordered only “review and reconsideration” of those convictions and sentences, the Court noted that if ICJ judgments were unassailable federal law, the ICJ could preempt state and federal law without resistance from U.S. courts.

All these considerations led the Court to conclude that the treatymakers who approved the nation’s obligations to the ICJ did not intend those obligations to be self-executing. As discussed more fully below, the Court’s analysis centered on treatymaker intent, informed by functional considerations that served to maintain political branch supremacy in lawmaking and foreign affairs.

214. *Medellin*, 552 U.S. at 516; see also id. at 518 (suggesting dissent’s recognition that some politically sensitive ICJ judgments should not be treated as self-executing should have guided dissent to narrower role for judiciary in identifying self-execution); id. at 534–35 (Stevens, J., concurring) (same).
215. Id. at 516 (majority opinion).
216. Id. at 515–16.
217. Id. at 513 (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982)).
218. Id.
219. Id. at 516.
220. Id. at 517–18.
221. Id. at 497–98.
222. Id.
223. Id. at 518.
The uncertainty that has dogged self-execution analysis is not unique. There has long been uncertainty regarding how to ascertain the extraterritorial reach of statutes. Despite divergent views in the literature and even in Court precedent, two relatively recent cases arguably provide a general framework: *Hartford Fire Insurance Co. v. California* and *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, each of which addressed application of statutes beyond U.S. borders.

*Hartford Fire* involved allegations that foreign and domestic participants in the insurance industry had conspired to manipulate the U.S. market in violation of the Sherman Antitrust Act. The Court fractured in identifying the issues presented in the relevant portion of the case. The majority, led by Justice Souter, concluded that "[t]he parties do not question [either] prescriptive jurisdiction—they conceded that the Sherman Act applied to their conduct—or the existence of subject matter jurisdiction. Rather, the defendants argued that "the District Court should have declined to exercise [subject matter] jurisdiction under the principle of international comity." The majority, therefore, focused its opinion on the propriety of comity-inspired abstention.

At the same time, the majority recognized that the question of prescriptive jurisdiction precedes the question whether comity counsels abstention. According to the majority, "concerns of comity"—the reasonableness considerations Justice Scalia invoked in his extraterritoriality analysis in dissent—"come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction." The majority therefore quickly noted that the Sherman Act applied to the reinsurers' foreign conduct as "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."

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227. For a history of statutory extraterritoriality in the United States, see generally Raustiala, supra note 127, at 93–125.
228. *Hartford Fire*, 509 U.S. at 769–70.
230. *Hartford Fire*, 509 U.S. at 796 n.22; see id. at 795 ("[T]he District Court undoubtedly had jurisdiction of these Sherman Act claims, as the [defendants] apparently concede.").
231. Id. at 797.
232. Id. at 795–99.
233. Id. at 797 n.24; see Alford, supra note 129, at 220–21 (noting "court must first determine whether it has statutory jurisdiction . . . and only then consider whether to" abstain based on international comity).
235. Id. at 796 & n.22.
The statement suggests that an intentional domestic effects test governs questions of statutory extraterritoriality.\textsuperscript{236} That conclusion is suspect for several reasons, however. The quick conclusion that jurisdiction existed was, in the majority's view, supported by the concession of the parties and was not at issue.\textsuperscript{237} And the Court clearly tagged as dicta the suggestion that jurisdiction arises solely from effects.\textsuperscript{238} More significantly, the Court's subsequent opinion in \textit{Hoffmann-La Roche} invoked principles of prescriptive comity in ascertaining the extraterritorial reach of statutory proscriptions.\textsuperscript{239} The Court reasoned, not that domestic effects immediately justify extraterritorial application of a statute, but that "application of our antitrust laws to foreign anticompetitive conduct is . . . reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."\textsuperscript{240} That is, domestic effects play a role in the comity analysis that informs extraterritoriality; they do not establish extraterritoriality. The \textit{Hartford Fire} majority's passing suggestion that domestic effects themselves warrant extraterritoriality is thus a shaky foundation on which to construct the Court's views on statutory reach.

The surer foundation comes from the dissent. While the majority saw the principal issue as abstention, Justice Scalia perceived the case very differently. In his view, the case turned on a question of prescriptive jurisdiction: whether certain claims against foreign defendants "constitute an inappropriate extraterritorial application of the Sherman Act."\textsuperscript{241} Consequently, the dissent alone fully analyzed the extraterritorial application of U.S. statutes.\textsuperscript{242}

\textsuperscript{236} See Born \& Rutledge, supra note 127, at 658 ("\textit{Hartford Fire} embraced a relatively expansive effects test . . . ."); Dodge, supra note 126, at 100 (reading \textit{Hartford Fire} to "suggest that acts of Congress are presumed to apply to conduct that causes effects in the United States").

\textsuperscript{237} \textit{Hartford Fire}, 509 U.S. at 795, 796 n.22, 797 n.24; see Born \& Rutledge, supra note 127, at 670 ("Almost all the defendants in \textit{Hartford Fire} conceded that the Sherman Act applied to their conduct, thereby granting the district court . . . [prescriptive] jurisdiction.").

\textsuperscript{238} See \textit{Hartford Fire}, 509 U.S. at 797 n.24 ("[T]he parties conceded jurisdiction at oral argument, and we see no need to address [the] . . . contention" "that comity concerns figure into the . . . analysis whether jurisdiction exists under the Sherman Act." (citation omitted)).

\textsuperscript{239} See F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."); see also infra text accompanying notes 293–302 (describing application of prescriptive comity in \textit{Hoffmann-La Roche}).

\textsuperscript{240} \textit{Hoffmann-La Roche}, 542 U.S. at 165.

\textsuperscript{241} \textit{Hartford Fire}, 509 U.S. at 812 (Scalia, J., dissenting); see also id. at 796 n.22 (majority opinion) ("Justice Scalia believes that what is at issue in this litigation is prescriptive . . . jurisdiction.").

\textsuperscript{242} The fact that the dissent, but not the majority, referenced the presumption against extraterritoriality has led some to conclude that the Supreme Court is "inconsistent in its application of the presumption." Bradley, Territorial, supra note 126, at 507; see also
The dissent observed that Congress may only enact legislation having extraterritorial application as authorized by the Constitution.\(^\text{243}\) Congress undoubtedly had authority under the Foreign Commerce Clause to apply the Sherman Act to the foreign defendants in *Hartford Fire*, because their alleged conduct affected U.S. interests.\(^\text{244}\) "[T]he question . . . [was] whether, and to what extent, Congress . . . exercised that undoubted legislative jurisdiction . . . ."\(^\text{245}\)

The Sherman Act's extraterritorial reach thus turned on congressional intent. Two interpretive canons guided ascertainment of that intent: the canon against extraterritoriality and the *Charming Betsy* canon.\(^\text{246}\) The first canon presumes that when Congress legislates, it legislates only for U.S. territory.\(^\text{247}\) This presumption can be overcome by

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\(^{243}\) See *Hartford Fire*, 509 U.S. at 813–14 (Scalia, J., dissenting) (concluding Congress undoubtedly had constitutional authority to apply Sherman Act to conduct at issue in *Hartford Fire*); see also Born & Rutledge, supra note 127, at 578–79, 581–82 (noting "Framers granted Congress only limited legislative powers" and even "foreign commerce power is not without limits"). For a discussion of federal limits on state legislation with extraterritorial application or effects, see id. at 584–612.

\(^{244}\) *Hartford Fire*, 509 U.S. at 813–14.


\(^{246}\) *Hartford Fire*, 509 U.S. at 814–15.

\(^{247}\) Id. at 814. The Supreme Court had endorsed a strong version of this presumption only two years earlier in *Aramco*. See *Aramco*, 499 U.S. at 248–59 ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume [a statute] 'is primarily concerned with domestic conditions.'" (citations omitted)); see also Curtis A. Bradley, Book Review, 104 Am. J. Int'l L. 146, 148–49 (2010) [hereinafter Bradley, Book Review] (discussing *Aramco*'s strong reaffirmation of the presumption). Moreover, the Court invoked the presumption in two other cases decided
evidence of contrary intent.\textsuperscript{248} Broad boilerplate language referring, for example, to \textit{any} business is insufficient.\textsuperscript{249} While the Sherman Act contained such boilerplate, prior decisions had found the presumption of territoriality overcome so the dissent did not have to analyze that issue afresh.\textsuperscript{250} It was "well established that the Sherman Act applies extraterritorially."\textsuperscript{251} 

In light of precedent establishing that antitrust law extends extraterritorially, neither \textit{Hartford Fire} nor Hoffmann-La Roche focused on the presumption against extraterritoriality.\textsuperscript{252} The status of the presumption has been a matter of debate.\textsuperscript{253} The Court recently entered the debate in a

\textsuperscript{248} \textit{Hartford Fire}, 509 U.S. at 814 (Scalia, J., dissenting). However, "[t]he presumption that United States law governs domestically but does not rule the world applies with particular force in patent law." Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454-55 (2007).

\textsuperscript{249} \textit{Hartford Fire}, 509 U.S. at 814 (Scalia, J., dissenting).

\textsuperscript{250} Id. Justice Scalia indicated that "if the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here." Id.; see also Born & Rutledge, supra note 127, at 647 (suggesting presumption would have prevented extraterritorial application of Sherman Act absent reliance on precedent).

\textsuperscript{251} \textit{Hartford Fire}, 509 U.S. at 814.

\textsuperscript{252} Cf. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2891 n.7 (2010) (Stevens, J., concurring in the judgment) (describing \textit{Hartford Fire} as "declining to apply presumption against extraterritoriality in assessing question of Sherman Act extraterritoriality"); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158-59 (2004) (focusing on whether, under Foreign Trade Antitrust Improvements Act of 1982, extraterritorial Sherman Act applied to certain independent foreign injury); Dodge, supra note 126, at 99-100 (arguing precedent did not require extraterritorial application of Sherman Act in \textit{Hartford Fire} and Court did not invoke presumption against extraterritoriality because of "the fact that the defendant[s'] extraterritorial conduct had caused harmful effects within the United States").

\textsuperscript{253} Compare Raustiala, supra note 127, at 99 ("Today the presumption is frequently overcome, sometimes because Congress does make clear its intent to regulate extraterritorially and sometimes because courts simply soften the test.").
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case that supplements Hartford Fire and Hoffmann-La Roche. In Morrison v. National Australia Bank Ltd., which addressed the reach of section 10(b) of the Securities Exchange Act of 1934, the Court emphasized that the presumption against extraterritoriality applies "in all cases" and has teeth: "When a statute gives no clear indication of an extraterritorial application, it has none." 254 That does not mean that a statute must clearly state that it applies abroad; context may disclose an extraterritorial reach. 255 In Morrison, there was no contextual evidence to overcome the presumption. 256 When the presumption holds, a statute may nonetheless reach multinational action as a result of domestic elements of that action, provided that those domestic elements are "the focus of the" statute. 257 This possibility moderates the effect of the presumption, though it does not eliminate its constraints. 258 Among other things, the presumption against extraterritoriality still guides the search for the statute's focus. 259 In Morrison, this search, conducted in the presumption's light, led to the conclusion that section 10(b) applies "[to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities,"

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254. 130 S. Ct. at 2878.
255. Id. at 2883.
256. As the Court explained, in a statute governing actions in interstate commerce, a "general reference to foreign commerce in the definition of 'interstate commerce'" is insufficient to overcome the presumption. Id. at 2874.
257. Id. at 2884.
259. See Morrison, 130 S. Ct. at 2885 & n.10 (concluding that presumption against extraterritoriality required statutory phrase "'purchase or sale, of . . . any security not'" registered on a domestic exchange to refer only to "domestic purchases and sales" (emphasis omitted)). Principles of prescriptive comity may also guide the search. See id. at 2885 ("reject[ing] the notion that [section 10(b)] reaches [non-transactional] conduct in this country affecting exchanges or transactions abroad" given obvious "probability of incompatibility with the applicable laws of other countries").
but not to deceptive "conduct in this country affecting exchanges or transactions abroad."260

In reaffirming the propriety and strength of the presumption against extraterritoriality, the Morrison Court expressly rejected deviations from the presumption that had embroiled lower courts in "divining what Congress would have wanted if it had thought of the [extraterritorial] situation before the court."261 That analysis had embraced considerations such as whether the targeted action involved conduct on U.S. territory or substantially affected the United States or its citizens.262

Morrison's reaffirmation of the presumption, though relatively strong, does not mean that the presumption will always hold. In United States v. Bowman, the Court explained that the very nature of the conduct Congress prohibited, and the consequences of limiting the statute's application to U.S. borders, may demonstrate that Congress intended to apply the statute extraterritorially notwithstanding the presumption.263 Bowman involved a conspiracy to charge a U.S.-owned company, the Emergency Fleet Corporation, for more fuel than was actually delivered.264 The alleged conspiratorial acts occurred variously on the high seas, on a U.S.-owned vessel in a foreign port, and in a foreign city.265 The statute on which the indictment rested did not explicitly define its territorial reach.266 It referred generally to the knowing presentment of "a false claim against the United States . . . to any officer of the civil, military or naval service . . . or any corporation in which the United States is a stockholder."267 The reference to a corporation in which the United States owned stock was evidently crafted to reach fraud against the Emergency Fleet Corporation, which "was expected to engage in, and did en-

260. Id. at 2884, 2885.
261. Id. at 2881; see also id. at 2877–81 (describing and rejecting lower courts' application of balancing test rather than presumption against extraterritoriality). But see id. at 2890 (Stevens, J., concurring in the judgment) (arguing in section 10(b) context that Court has unanimously recognized that courts must "divin[e] what Congress would have wanted" (alteration in original)).
262. Id. at 2879.
263. United States v. Bowman, 260 U.S. 94, 97–102 (1922). This is not to suggest that the Bowman principle will be invoked to overcome the presumption in any case where a suspect may otherwise go free. See Raustiala, supra note 127, at 148–49, 213–14 (noting until Military Extraterritorial Jurisdiction Act of 2000 (MEJA) many civilians accompanying military overseas escaped prosecution due to jurisdictional gap caused by territorial nature of "relevant federal criminal statutes" and explaining MEJA did not entirely close gap). But the principle expands the extraterritorial reach of criminal law by shifting "from a theory of 'territorial commission' to a theory of 'territorial security.'" Id. at 164 (quoting Lawrence Preuss, American Conception of the Jurisdiction with Respect to Conflicts of Law on Crime, 30 Transactions Grotius Soc’y 184, 198 (1944)). For a brief discussion of how the circuit courts have understood (and arguably misinterpreted) Bowman, see John H. Knox, A Presumption Against Extrajurisdictionality, 104 Am. J. Int’l L. 351, 393 (2010).
265. Id.
266. Id. at 97–100 & n.1.
267. Id. at 101; see also id. at 100 n.1 (providing full statutory language).
gage in, a most extensive ocean transportation business” touching “every
great [open] port of the world. . . . [Moreover, t]he same section of the
statute protect[ed] the arms, ammunition, stores, and property of the
army and navy from [similar] fraudulent devices.”

Given the international activities of the Emergency Fleet Corporation and the Army and Navy, the fraud sought to be prohibited could occur as easily abroad as at home. In light of these functional considerations, the Court could not conclude that Congress intended to exclude from the statute’s reach fraud committed by U.S. nationals on “private and public vessels of the United States on the high seas and in foreign ports and beyond” U.S. territory.

The statute fit within a class of criminal statutes “enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.”

A conclusion that a statute applies extraterritorially does not mean that it applies without limitation, however. How far statutes like the Sherman Act apply extraterritorially is informed by the second canon: the Charming Betsy canon. Under the Charming Betsy canon:

“[A]n act of congress ought never to be construed to violate the
law of nations if any other possible construction remains.”

Though it clearly has constitutional authority to [legislate in ex-
cess of international restraints], Congress is generally presumed
not to have exceeded . . . customary international-law limits on
jurisdiction to prescribe.

268. Id. at 102.
269. See id. at 99–102 (noting “wide field for such frauds upon the Government . . . beyond the land jurisdiction of the United States”).
270. Id. at 102.
271. Id. at 98.
272. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814 (1993) (concluding extraterritorial reach of statute depends both on “whether, and to what extent, Congress has exercised” its prescriptive jurisdiction to regulate extraterritorial actors and activities (emphasis omitted)); id. at 815 (“[E]ven where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.”); id. at 817 (noting courts enforce prescriptive comity in “interpreting the scope of laws their legislatures have enacted”); id. at 817–18 (explaining prescriptive comity is “part of determining whether the Sherman Act prohibits the conduct at issue”); see also Bradley, Territorial, supra note 126, at 533 (“Only after [the] question [of extraterritoriality] is answered in the affirmative is it proper . . . to consider whether the facts ‘of this case’ fall within the intended extraterritorial reach of the legislation.”); cf. Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2884 n.9 (2010) (noting if section 10(b) applied extraterritorially “we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)”).
273. Hartford Fire, 509 U.S. at 814–15 (Scalia, J., dissenting) (citations omitted) (quoting Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)); see also id. at 817 (reasoning prescriptive comity “is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted”).
This presumption is consistent with the notion of "'prescriptive com-
ity': the respect sovereign nations afford each other by limiting the reach of
their laws."\textsuperscript{274}

In applying the \textit{Charming Betsy} canon, the \textit{Hartford Fire} dissent did
not clearly define international law on prescriptive jurisdiction.\textsuperscript{275}
Rather, the dissent relied on the Restatement's\textsuperscript{276} summary of that law as
that summary "appear[ed] fairly supported" by Supreme Court and other
federal precedents and as the outcome in \textit{Hartford Fire} would be the same
"under virtually any conceivable test that takes account of foreign regula-
tory interests."\textsuperscript{277} International law, per the Restatement, recognizes that
states may enact laws with extraterritorial application or effect on several
grounds:\textsuperscript{278}

(a) the territorial principle, which permits a state to regulate
actors, property, and actions within its territory, including certain actions
that are intended to or actually produce effects, or that take place only in
part, within the territory;\textsuperscript{279} (b) the nationality principle, which allows a
state to govern its nationals at home or abroad;\textsuperscript{280} (c) the passive person-
ality principle, which authorizes a state to prohibit certain extraterritorial
acts by non-nationals against its nationals;\textsuperscript{281} (d) the protective principle,
which permits a state to legislate regarding extraterritorial conduct by
non-nationals "that is directed against the security of the state or against a
limited class of other state interests";\textsuperscript{282} and (e) the universal principle,
which allows a state to regulate offenses that do not fit within the previous
grounds but that the international community recognizes as offenses "of
universal concern."\textsuperscript{283}

\textsuperscript{274.} Id. at 817.

\textsuperscript{275.} See id. at 818 (relying instead on Restatement (Third) but acknowledging
"[w]hether the Restatement precisely reflects international law in every detail matters little
here").

\textsuperscript{276.} Restatement (Third) of the Foreign Relations Law of the United States § 403

\textsuperscript{277.} \textit{Hartford Fire}, 509 U.S. at 818 (Scalia, J., dissenting). Professor Phillip Trimble
has argued that Justice Scalia "got the law wrong," both as a matter of customary
international law and as a matter of domestic law of extraterritoriality. Phillip R. Trimble,
The Supreme Court and International Law: The Demise of Restatement Section 403, 89

\textsuperscript{278.} Justice Scalia noted that under international law a nation must first possess
"some 'basis' for jurisdiction to prescribe" before determining whether the exercise of that
jurisdiction is reasonable. \textit{Hartford Fire}, 509 U.S. at 818. Justice Scalia did not explicitly
identify the international law basis for applying the Sherman Act to the London reinsurers
in \textit{Hartford Fire}, but the territorial principle (in its objective form) certainly provided a
basis. See id. at 796 (majority opinion) ("[I]t is well established . . . that the Sherman Act
applies to foreign conduct that was meant to produce and did in fact produce some
substantial effect in the United States.").

\textsuperscript{279.} Restatement (Third) of the Foreign Relations Law of the United States § 402(1).

\textsuperscript{280.} Id. § 402(2).

\textsuperscript{281.} Id. § 402 cmt. g.

\textsuperscript{282.} Id. § 402(3).

\textsuperscript{283.} Id. § 404.
If the first four principles provide grounds for applying a state’s law but the legislation will apply to actions or persons connected to another state, extraterritorial application of the legislation must not be unreasonable.\(^{284}\) Whether exercising prescriptive jurisdiction is unreasonable in any particular case is a multifactored inquiry that may consider such things as the ties between the regulating state and the actor regulated or person protected, the regulating state’s interest in the regulation, “the extent to which other states regulate” and welcome regulation of the behavior, the regulation’s consistency with the international order and with other states’ regulation, and the impact of the regulation on justified expectations.\(^{285}\)

In *Hartford Fire*, these considerations clearly pointed “against application of United States [antitrust] law” to the foreign reinsurers.\(^{286}\) The relevant activity “took place primarily in the United Kingdom” and the defendants were “British corporations and British subjects having their principal place of business or residence outside the United States.”\(^{287}\) Britain had a weighty regulatory interest with regard to reinsurance and had “established a comprehensive regulatory scheme governing the London reinsurance markets.”\(^{288}\) By contrast, the United States’s regulatory interest was slight, as evidenced by the fact that federal law permits state legislation “to override the Sherman Act in the insurance field” with limited exception.\(^{289}\) As a result, it was unreasonable to apply the Sherman Act and improper to assume, absent contrary indication from the statute, that Congress intended to do so.\(^{290}\)

While the prescriptive jurisdiction analysis in *Hartford Fire* occurred only in dissent, it was largely endorsed by the Court in *Hoffmann-La Roche*.\(^{291}\) There the Court addressed the prescriptive scope of the Foreign Trade Antitrust Improvement Act (FTAIA).\(^{292}\) The FTAIA excludes from Sherman Act liability conduct tied to international commerce unless “(roughly speaking) that conduct significantly harms im-

284. Id. § 403(1); see also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818–19 (1993) (Scalia, J., dissenting) (applying Restatement (Third)’s reasonableness requirement). But see Knox, supra note 263, at 361 & n.59 (noting Restatement’s unreasonableness analysis “has been criticized as not reflecting customary international law”).


287. Id.

288. Id.

289. Id.

290. Id.

291. See Born & Rutledge, supra note 127, at 577 (reading *Hoffmann-La Roche* as “suggest[ing] that principles of international comity serve to guide the interpretation of federal statutes that could have extraterritorial effect”).

ports, domestic commerce, or American exporters." The Court was asked to decide whether, under the FTAIA, Sherman Act liability extends to "significant foreign anticompetitive conduct with . . . an adverse domestic effect" in a suit based solely on foreign harm. The Court concluded that the FTAIA does not impose Sherman Act liability "for two main reasons." Both reasons bear on congressional intent, indicating that congressional intent controls the extraterritorial reach of statutes as Hartford Fire had suggested.

First, the Court "must assume" that "Congress ordinarily seeks to follow" customary international law. This principle, the Court (including Justice Souter) noted, is reflected in the Restatement, the Charming Betsy canon, and Justice Scalia's Hartford Fire dissent. Because of this principle, the "Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." Application of U.S. antitrust law to foreign activity "can interfere with a foreign nation's ability independently to regulate its own commercial affairs." The application "is nonetheless reasonable" to the extent it "reflect[s] a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused." But interference with foreign sovereign authority is not reasonable where anticompetitive conduct is foreign, "causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim." In such a case, the Restatement factors that inform reasonableness—"connections with [the] regulating nation, harm to that nation's interests, [the] extent to which other nations regulate [the conduct], and the potential for conflict"—provide insub-

293. Id. at 158.
294. Id. at 159.
295. Id. at 164; see also id. at 159 (holding "a purchaser [abroad] could not bring a Sherman Act claim based on foreign harm").
296. Id. at 164; see also id. at 169 (arguing that Court must assume Congress would not impose "America's antitrust policies . . . in an act of legal imperialism, through legislative fiat").
298. Hoffmann-La Roche, 542 U.S. at 164.
299. Id. at 165.
300. Id.
301. Id. (emphasis omitted).
302. Id. The Court rejected the notion that similarities between the United States's and other nations' antitrust law minimized potential "interference with the relevant interests of other nations." Id. at 167. In prior cases, the Court already found differences in nations' substantive antitrust law. Id. (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797-99 (1993), as one such case). Moreover, nations "disagree dramatically about appropriate remedies"; other governments worry that providing treble damages under U.S. law will undercut the policies embodied in their domestic antitrust law and discourage foreign firms from cooperating with foreign antitrust authorities to secure amnesty from prosecution. Id. at 167-68.
stantial "justification for [the] interference." A contrary holding would permit a foreign plaintiff to sue a foreign defendant for foreign injury based on foreign anticompetitive conduct as part of a cartel, provided that a separate plaintiff had a claim against a separate member of the cartel for U.S. injury. The Court could not conclude that Congress intended such a result.

Second, the Court found nothing in the text or history of the FTAIA suggesting that Congress intended to significantly expand the application of the Sherman Act to foreign action. Congress did not enact the FTAIA against a clear judicial understanding that the Sherman Act would govern situations like that in *Hoffmann-La Roche*. The language of the FTAIA applies the Sherman Act "to foreign 'conduct' with a certain kind of harmful domestic effect" that produces "'a claim'" (rather than "'the plaintiff's claim' "). Certainly, this language could be read to make foreign conduct actionable even for plaintiffs who experience a foreign rather than the requisite domestic effect. However, such a reading is improbable. And even if it were "the more natural reading," it would be inconsistent with the FTAIA's purpose, as discerned from the Act's history and the principles of prescriptive comity, and should be rejected in favor of a reasonable interpretation consistent with statutory purpose. In short, refusal to apply the Sherman Act in this case was sup-

The Court likewise rejected the suggestion that problems from applying the Sherman Act to cases of independent foreign injury could be addressed through case-by-case abstention (a possibility contemplated by the majority in *Hartford Fire*). Id. at 168–69. Case-by-case determinations would be so complex that procedural costs "could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." Id.

303. Id. at 165.
304. Id. at 166–67.
305. Id.
306. Id. at 169. Eschewing reliance on statutory history (and purpose), Justices Scalia and Thomas concurred because the FTAIA's language "is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories." Id. at 176 (Scalia, J., concurring).
307. Id. at 169–73 (majority opinion).
309. Id. at 173–74.
310. See id. at 174 (rejecting such a reading as "not convincing").
311. Id.
ported by the history and purpose of the FTAIA312 and principles of prescriptive comity.313

*Hartford Fire* and *Hoffmann-La Roche*, together with *Morrison* and *Bowman*, produce an extraterritoriality analysis that turns on congressional intent. That intent is informed both by the presumption against extraterritoriality314—little discussed between the two principal cases given precedent for the extraterritorial reach of U.S. antitrust law—and the *Charming Betsy* canon. The *Charming Betsy* canon focuses on the reasonableness of extraterritorial application when the regulated conduct or person has ties to another state. Other evidence of congressional intent, including text, history, and purpose, may confirm or overcome the conclusion supported by the two presumptions.315

VI. COMPARATIVE ANALYSIS OF THE CONSTITUTION, STATUTES, AND TREATIES IN THEIR AREAS OF SECONDARY APPLICATION

*Boumediene, Hartford Fire, Hoffmann-La Roche,* and *Medellín* provide current data on how the Supreme Court treats the Constitution, statutes, and treaties in their areas of secondary application. A comparison of this judicial treatment reveals that statutes fare the worst.

A. Even Under a Broad Notion of Non-Self-Execution, Treaties Fare Better Than Statutes

Doctrinally, the Constitution, statutes, and treaties receive similar treatment from at least one perspective—the considerations governing

312. While the Court lists statutory purpose as a separate consideration, "the FTAIA's basic intent" was discerned from its history and principles of comity. Id. Consequently, one might read *Hoffmann-La Roche* to suggest that the *Charming Betsy* canon may prevail over the most natural reading of statutory text at least where the statute's history supports a less obvious but nonetheless reasonable alternative reading. See id. (noting "respondents' linguistic arguments might show that respondents' reading is the more natural reading" but "considerations . . . of comity and history . . . make clear that the respondents' reading is not consistent with the FTAIA's basic intent").

313. Id. at 174–75. These considerations could not be overcome by the empirically suspect policy claim that applying the Sherman Act would increase deterrence and "help protect Americans against foreign-caused anticompetitive injury." Id. at 174.


315. See *Dodge*, supra note 126, at 123 ("[S]ince *Aramco*, both the Supreme Court and the lower courts have looked to 'all available evidence' in determining whether the presumption [against extraterritoriality] has been rebutted," (footnote omitted) (quoting *Sale* v. *Haitian Ctrs. Council*, Inc., 509 U.S. 155, 177 (1993))).
the application of all three sources in their areas of secondary application substantially overlap.\textsuperscript{316} Lawmaker intent figures in the analysis for each source of law. Moreover, in all three contexts, practical consequences play a role. For example, whether statutes reasonably apply extraterritorially depends in part on how application of a statute will affect "justified expectations" and whether application will conflict with another state's law.\textsuperscript{317} Whether the Constitution limits actions abroad turns in part on whether application of those limits presents practical difficulties in light of the circumstances in which application must occur.\textsuperscript{318} The practical consequences of classifying a treaty as self-executing—such as the threat of unassailable ICJ judgments that would preempt U.S. law—bear on whether treaties are judicially enforceable without implementation.\textsuperscript{319}

The effect on foreign relations likewise plays a role in analyzing the secondary application of each source. The various factors that determine reasonableness—such as the interest of another state in legislating and the possibility of conflict with another state's regulation—all bear on the foreign relations effects of applying U.S. law extraterritorially.\textsuperscript{320} Indeed, the possibility of offending other states dominates the assessment of whether extraterritorial application of a statute is reasonable.\textsuperscript{321} Foreign relations considerations guide the enforceability of treaties and the Constitution as well. In \textit{Medellin}, the threat that United States treaty-making might be hampered (potentially affecting relations with other states) led the Court to reject a dominant role for the judiciary in deciding when

\textsuperscript{316} Empirically, by contrast, one might intuit that treaties are enforced domestically more than the Constitution is extraterritorially. That intuition, of course, may result from the fact that there are many more treaties governing the United States' international relations than there are constitutional provisions that might restrain the United States abroad. Similarly, when differences in the numbers of treaties and statutes are accounted for, it is conceivable that treaties receive greater domestic enforcement than statutes receive extraterritorial enforcement. Why? Perhaps lawmakers typically act consistent with the presumption against extraterritoriality; they generally legislate only for U.S. territory. See supra note 138 (identifying cases and commentators asserting Congress's domestic focus). And yet it might be said that treaty-makers generally intend to create international obligations rather than domestic law (despite the absence of a formal judicial presumption to that effect). The Supremacy Clause allows those obligations to become domestically enforceable federal law. But the Supremacy Clause also allows statutes to become domestically enforceable law as to extraterritorial activity. More limited extraterritorial enforcement of statutes would dilute the suggestion that classifying treaties as non-self-executing results in discrimination against treaties.


\textsuperscript{318} See supra text accompanying notes 161–194 (detailing role of practical considerations in constitutional extraterritoriality).

\textsuperscript{319} See supra text accompanying notes 220–223 (describing \textit{Medellin}'s consideration of practical consequences in self-execution analysis).

\textsuperscript{320} See Restatement (Third) of the Foreign Relations Law of the United States § 403(2) (listing factors relevant to reasonableness of exercise of prescriptive jurisdiction).

\textsuperscript{321} See id. (same).
treaties are self-executing.\textsuperscript{322} In \textit{Boumediene}, the fact that exercise of habeas jurisdiction would not offend Cuba, given plenary U.S. control at Guantanamo, supported extension of the habeas right.\textsuperscript{323} Deference to the Executive may also influence the application of at least treaties and the Constitution as courts try to respect the Executive's role in foreign affairs and/or military matters.\textsuperscript{324} In short, while there is not complete identity of factors\textsuperscript{325} in deciding the effect of the Constitution, statutes, and treaties in their areas of secondary application, common themes appear. From this perspective, one might conclude that the Constitution, statutes, and treaties receive similar treatment in their secondary roles.

When one looks closer, however, it appears that statutes fare worse than the Constitution and treaties. While the intent of the relevant lawmakers surfaces in each source's secondary realm, the analysis of intent, and particularly the relation of intent to functional considerations, differs with each source of law, leading to differing levels of judicial discretion to enforce the law in its area of secondary application. As this Part explains, in the constitutional context original intent may be shunted in favor of a functional analysis of extraterritoriality. A standalone functional analysis provides the judiciary significant discretion to fix (and, in historical perspective, extend) the extraterritorial reach of constitutional limitations. In the treaty context, by contrast, functional considerations mix with evidence of actual intent in a search for U.S. treatymaker intent regarding self-execution. The focus on intent as well as the functional considerations invoked—grounded as they are in a vision of political branch supremacy in both foreign affairs and lawmaking—tend to limit judicial discretion to enforce treaties as domestic law. Even that limited discretion appears relatively broad in the statutory context where the Court has rejected a more free-floating functional approach to congressional intent. With regard to statutes, congressional in-

\textsuperscript{322} See supra text accompanying note 216 (discussing how court-centered approach to self-execution could impair United States' ability to enter treaties).

\textsuperscript{323} See supra text accompanying note 183 (noting absence of risk of offending Cuba or other sovereign by extending habeas to Guantanamo).

\textsuperscript{324} See supra text accompanying notes 192–194, 217–218 (noting role of deference to Executive in constitutional extraterritoriality and treaty self-execution).

\textsuperscript{325} For example, the existence of alternative remedial options affects treaty self-execution and constitutional and statutory extraterritoriality, but arguably in divergent ways. On the one hand, if constitutional protections are secured through other means (for example, the process for classifying prisoners as enemy combatants) the need to extend constitutional protections diminishes. If a treaty contemplates alternative means of enforcement, the likelihood that a treaty is self-executing similarly wanes. On the other hand, whether other states regulate conduct bears on whether extraterritorial application of U.S. statutes is reasonable. The mere existence of foreign regulation is not determinative, however. If other states regulate the conduct in the same way as the United States, application of U.S. law may be reasonable because it would not raise foreign relations problems to the same extent as application of a conflicting U.S. law. If U.S. law conflicts, the foreign state's law would not provide a fully fungible alternative, but the conflict might suggest that application of U.S. law is nonetheless unreasonable.
tent is bounded by presumptions against extraterritoriality and violation of international norms of prescriptive jurisdiction. Functional considerations influence whether these presumptions are overcome, but the existence of the presumptions cabins the role of functional considerations in discerning extraterritorial intent and the judiciary's opportunity to apply statutes abroad. As a result, the doctrinal constraints on statutes in their area of secondary application are more severe than on treaties or the Constitution.

1. Judicial Treatment of the Constitution. — As noted above, lawmaker intent appears as a consideration in determining the secondary role of each source of law. In Boumediene, the Court attempted to identify the original intent behind constitutional habeas; only when that attempt failed did the Court conduct its functional analysis. On these facts, one might conclude that the Court assigns a dominant role to original intent in constitutional extraterritoriality. That role, however, may be more formal than real.

The majority could have grounded its decision in original intent, perhaps supplemented by functional considerations. The majority's conclusion that the evidence of original intent was indefinite may have been sincere, but it may also have been an attempt to shunt the confines of original intent and allow the Court to reach its own conclusion on the scope of constitutional habeas informed by a multi-factored, functional analysis. Even in the face of originalist uncertainty, the Court made statements to suggest that it would not always be bound by original intent. The Court characterized legal commentary and settled precedent from 1789 as potentially "instructive" in its analysis. Relatedly, the Court left open the possibility (as it had before) that the scope of constitutional habeas has expanded since ratification, rendering precedents from 1789, 466 (2004),] to support [the majority's] conclusion about the [statutory] reach of habeas corpus." Id. at 2300 n.4; cf. Burnett, Convenient Constitution, supra note 37, at 1032–33 (arguing Court could have found "Suspension Clause applies in Guantánamo" based solely on its conclusions that "United States exercises de facto sovereignty over Guantánamo; the Suspension Clause itself does not contain geographical limitation and constitutional wartime powers must be read in light of the right to habeas; the history of extraterritorial extension of the writ is inconclusive but there is evidence that it applied extraterritorially"); Stephen I. Vladeck, Foreign Affairs Originalism in Youngstown's Shadow, 53 St. Louis U. L.J. 29, 30 (2008) (arguing functionalism, rather than originalism, is "the methodological framework at the heart of the Supreme Court's contemporary separation-of-powers jurisprudence").

326. Justice Scalia, for example, perceived original understanding as alone sufficient to resolve the constitutional reach of habeas. Boumediene v. Bush, 128 S. Ct. 2229, 2303–07 (2008) (Scalia, J., dissenting). Justice Scalia criticized the majority for rejecting in Boumediene's constitutional context "the historical evidence cited in Rasul [v. Bush, 542 U.S. 466 (2004),] to support [the majority's] conclusion about the [statutory] reach of habeas corpus." Id. at 2300 n.4; cf. Burnett, Convenient Constitution, supra note 37, at 1032–33 (arguing Court could have found "Suspension Clause applies in Guantánamo" based solely on its conclusions that "United States exercises de facto sovereignty over Guantánamo; the Suspension Clause itself does not contain geographical limitation and constitutional wartime powers must be read in light of the right to habeas; the history of extraterritorial extension of the writ is inconclusive but there is evidence that it applied extraterritorially"); Stephen I. Vladeck, Foreign Affairs Originalism in Youngstown's Shadow, 53 St. Louis U. L.J. 29, 30 (2008) (arguing functionalism, rather than originalism, is "the methodological framework at the heart of the Supreme Court's contemporary separation-of-powers jurisprudence").
the beginning point of analysis. Moreover, when the Court turned to its functional analysis it made no attempt to cast the analysis as an exercise in constructive intent. Nor did it attempt, in any significant way, to bolster its functional analysis with evidence of original intent. Its discussion of precedents that engaged in functional analyses suggests that the functional test may be the primary means for determining constitutional reach rather than a secondary approach to be taken only in the face of an indiscernible original intent.

Unbound by original intent, the functional analysis gives the Court significant discretion to determine the reach of constitutional limitations. In (at least recent) historical context where the judiciary generally has given the Constitution limited extraterritorial scope, the discretion tends to expand the Constitution's foreign role. Relatedly, the

328. Id. at 2248. But cf. id. at 2247 ("The separation-of-powers doctrine, and the history that influenced its design, . . . must inform the reach and purpose of the Suspension Clause."); id. at 2248 ("The broad historical narrative of the writ and its function is central to our analysis . . . .").

329. The Court merely states that the government’s de jure sovereignty argument finds “scant support” in “the history of common-law habeas corpus” and is “inconsistent with [the Court’s] precedents and contrary to fundamental separation-of-powers principles.” Id. at 2253.

330. See, e.g., id. at 2303 (Scalia, J., dissenting) (arguing "the Court’s ultimate, unexpressed goal [in adopting a functional analysis] is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world" since “[t]he ‘functional’ test . . . is so inherently subjective that it clears a wide path for the Court to traverse in the years to come"); id. at 2279 (Roberts, C.J., dissenting) ("One cannot help but think, after surveying the modest practical results of the majority’s ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants."); Burnett, Convenient Constitution, supra note 37, at 978 (criticizing Boumediene’s functional test—which Professor Burnett calls the “impracticable and anomalous” test—for giving “excessive leeway to courts”); see also Neuman, Strangers, supra note 109, at 8, 93 (arguing practical balancing approach to constitutional extraterritoriality—which he terms “global due process” approach—“contemplate[s] an extraordinary degree of both judicial discretion and deference to the choices of the political branches”); Burnett, Convenient Constitution, supra note 37, at 1003–19, 1042–43 (arguing functional analysis gives courts “nearly unbounded discretion in selecting the factors relevant to a determination of what constitutional guarantees apply when and where”).

331. See Raustiala, supra note 127, at 218 (noting Boumediene “was the first time that the Supreme Court itself had held that a constitutional right applied to an alien held outside the United States” and agreeing with Justice Scalia’s prediction that “the functional/practical test . . . would, in time, likely be applied to other constitutional protections as well”); id. at 245 (noting Boumediene’s functional analysis “at least suggests that in other places subject to extensive and stable American control, though not American sovereignty, aliens may also fall within the Constitution’s reach”); cf. Neuman, Strangers, supra note 137, at 93 (noting practical balancing approach to constitutional extraterritoriality holds “out the possibility of more widespread constitutional protection than had previously been afforded but at the cost of diluting its content"); id. at 116 (describing functional approach as “half a loaf” for those advocating broader reach for constitutional rights and casting his proposed mutuality approach, under which constitutional limits attach when United States subjects an individual to its law, as “the full loaf”).
discretion ensures a prominent role for the judiciary in fixing the Constitution's reach. The *Boumediene* Court made that fact explicit in rejecting the government's formalist approach to the reach of habeas in

Professor Burnett does not perceive *Boumediene* as expanding judicial discretion to extend constitutional rights abroad. According to Professor Burnett, the conventional account has been that "by the end of the nineteenth century the Supreme Court's jurisprudence had established that the Constitution applied to the United States' nonstate territories, and at the dawn of the twentieth century, the *Insular Cases* "held that most of the Constitution does not 'follow the flag' outside the United States." Burnett, Convenient Constitution, supra note 37, at 982, 984; see also Burnett, *United States*, supra note 157, at 800–01 (discussing "standard account of *Insular Cases*" and their break with nineteenth-century precedent). As a result, *Boumediene*'s invocation of the *Insular Cases* to conclude that constitutional protections extend to Guantanamo came as a surprise. Burnett, Convenient Constitution, supra note 37, at 982–84. But cf. Raustiala, supra note 127, at 146 (asserting *Reid v. Covert*, 354 U.S. 1 (1957), transformed *Insular Cases* from precedents for strict territoriality into support for Constitution with worldwide reach). Professor Burnett argues that *Boumediene*'s reliance on the *Insular Cases* is not so surprising, however, since the nineteenth-century case law was less clear than the conventional account let on, and the *Insular Cases* concluded, as *Boumediene* correctly noted, that the Constitution applies of its own force in unincorporated territories. Burnett, Convenient Constitution, supra note 37, at 983–95; Burnett, *United States*, supra note 157, at 804, 815–16, 819, 824–34; see also supra note 157 (discussing application of Constitution in territories). Nonetheless, the *Insular Cases* recognized significant restrictions on the extraterritorial effect of the Constitution. See Raustiala, supra note 127, at 233 ("The principle that some constitutional rights could be denied within American borders made it easier to maintain that no constitutional rights applied outside those borders."); Burnett, Convenient Constitution, supra note 37, at 985–84, 992–93 ("The *Insular Cases* undoubtedly created a new type of second-class territory—the unincorporated territory—... [b]ut when it comes to the applicability of constitutional provisions, the line between [unincorporated territory] and the places comprising the 'United States' turns out... to be far blurrier than the standard account of the *Insular Cases* suggests."). After *Reid v. Covert*, there were scattered efforts by lower courts to expand the reach of constitutional rights, but the Supreme Court arrested that expansion in *Verdugo-Urquidez*. Raustiala, supra note 127, at 164–77, 184–86, 189, 204, 210, 234–35, 242–43. *Boumediene*'s functional analysis has relaxed the restrictions on constitutional extraterritoriality (particularly when viewed in light of the conventional understanding of the *Insular Cases*), providing the judiciary greater discretion to extend the Constitution's reach. But cf. id. at 235 (arguing *Boumediene* decision is consistent with the *Insular Cases* "for the right to contest detention has long been seen as the sort of fundamental right that exists even in American colonies"). Nonetheless, Professor Burnett criticizes the functional test for providing courts too much discretion "to hold constitutional guarantees inapplicable in places outside the 'United States.'" Burnett, Convenient Constitution, supra note 37, at 978; see also Neuman, *Strangers*, supra note 137, at 103, 114–16 ("The global due process [i.e., functional] approach embodies judicial discretion to reject, after deferential inquiry, the applicability of constitutional rights to government action abroad in situations where [the rights] meet "a low threshold of 'impracticability.'"). Her perspective derives, at least in part, from the normative, as opposed to purely historical, position that the Constitution should apply broadly beyond U.S. borders, even if the nature of its enforcement must vary with the circumstances. See Burnett, Convenient Constitution, supra note 37, at 979 (endorsing *Boumediene*'s conclusion "that the Constitution does not stop where de jure sovereignty ends" as correct both normatively and as matter "of constitutional text and structure, history and... precedent[ ]"); id. at 981–82 (arguing "functional considerations should not ordinarily resolve the question of whether a constitutional provision applies" but rather "should be relevant to the question of how a provision... may be enforced").
part on separation of powers grounds, arguing that the government's formal, de jure sovereignty limitation on habeas would allow the President and Congress "to switch the Constitution on or off at will" in "a striking anomaly in our tripartite system of government." Likewise, while the Court recognized the need for deference to the Executive with regard to the procedural and substantive standards governing detention of possible terrorists, the Court emphasized the need for judicial review of detention as well.

*Boumediene* thus introduces a significant level of judicial discretion into the Constitution's foreign affairs role. The political branches do not control the Constitution's extraterritorial reach by statute or treaty. The Court fixes that reach and does so in light of functional considerations that elide the restraints of more categorical approaches based on such things as formal sovereignty. The result is that constitutional limitations are likely to extend further than they have in recent history.

2. **Judicial Treatment of Treaties.** — The intent of the lawmakers appears to play a larger role in identifying the domestic effect of treaties. The *Medellín* Court relied, in small part, on express evidence of the treatymakers' intent regarding self-execution. This reliance may have resulted from the availability of evidence directly on point, in which case the difference between *Medellín* and *Boumediene* may not be in their commitment to intent, but rather in the scope of evidence available to identify intent.

However, *Medellín* attempted to tether its analysis to intent—even when invoking functional considerations—in a way that *Boumediene* did not. Like *Boumediene*, *Medellín* focused on functional considerations, such as the practical consequences of treating ICJ judgments as judicially unassailable federal law. In *Medellín*, however, the functional considerations mix with, rather than arise separate from, consideration of the treatymakers' intent.

Some might argue that *Boumediene* only defines the extraterritorial reach of the Constitution as to aliens located outside the United States' formal sovereignty. Cf. *Raustiala*, supra note 127, at 243 ("*Boumediene* underscored the unique attributes of Guantanamo, and hence its impact beyond that unusual location is uncertain."). Even if this were the case, *Boumediene* expands the potential reach of the Constitution in these areas. However, *Boumediene* extracted its functional approach from cases—such as *Reid v. Covert*, which addressed the constitutional rights of American citizens abroad—that dealt with the Constitution's reach more generally. And *Boumediene* identified citizenship as one factor to consider in determining the Constitution's reach. As a result, it would appear that *Boumediene*'s functional approach may control constitutional extraterritoriality questions in all situations arising outside formal sovereign boundaries.

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333. Id. at 2276–77.
334. Some might argue that *Boumediene* only defines the extraterritorial reach of the Constitution as to aliens located outside the United States' formal sovereignty. Cf. *Raustiala*, supra note 127, at 243 ("*Boumediene* underscored the unique attributes of Guantanamo, and hence its impact beyond that unusual location is uncertain."). Even if this were the case, *Boumediene* expands the potential reach of the Constitution in these areas. However, *Boumediene* extracted its functional approach from cases—such as *Reid v. Covert*, which addressed the constitutional rights of American citizens abroad—that dealt with the Constitution's reach more generally. And *Boumediene* identified citizenship as one factor to consider in determining the Constitution's reach. *Boumediene*, 128 S. Ct. at 2259. As a result, it would appear that *Boumediene*'s functional approach may control constitutional extraterritoriality questions in all situations arising outside formal sovereign boundaries.
337. See supra Part V.B (describing *Medellín*'s reliance on "functional considerations in constructing treatymaker intent").
erations led to a conclusion consistent with the evidence of the


treatymakers’ intent. But the Court seems to treat both evidence of the

Executive’s and Senate’s understanding during the advice and consent

process and the functional considerations as evidence of actual intent.

Indeed, in the final sentence of its self-execution analysis, the Court

states: “Nothing in the text, background, negotiating and drafting his-

tory, or practice among signatory nations suggests that the President or

Senate intended the improbable result of giving the judgments of an in-

ternational tribunal a higher status than that enjoyed by ‘many of our

most fundamental constitutional protections.’”

In light of the coupling of evidence of actual intent with functional

considerations, the intent identified is arguably more constructive than

actual. As a result, the attempt to tie functional considerations to intent

may be little different than the Boumediene Court’s shunting of original

intent. Yet the Medellín Court acknowledges some need to ground its de-

cision in the authority of the lawmakers. Consequently, Medellín arguably

manifests at least a marginally greater commitment to lawmaker inten-

t than does Boumediene. This commitment restrains the judiciary in
classifying treaties as enforceable domestic law.

The functional considerations that inform the self-execution analysis
also constrain—rather than expand, as in Boumediene—judicial

enforcement of treaties. The functional considerations in Medellín reflect a sepa-

ration of powers vision in which the political branches take the lead in
foreign affairs and lawmaking. To illustrate, suppose that a treaty im-
pioned a broad obligation such as the duty to provide due process. A
court could certainly fill such an obligation with content as courts do in
applying the Constitution. However, the Medellín Court presumed that
if treaty obligations are not specifically defined, Congress did not intend
judicial enforcement absent congressional implementation. The polit-

cal branches generally should fill vague treaty obligations with content.
The obligation to “undertake[] to comply” with ICJ judgments was such
an obligation. It did not suggest an immediate obligation to judicially

enforce judgments but a range of steps that might be taken to implement

(2006)).

339. See supra Part V.B (noting Medellín’s focus on treatymaker intent).

340. Moore, Medellín and the ATS, supra note 6, at 491, 500-03. I describe these
functional considerations as separation-of-powers-based presumptions. To the extent that
this description is accurate, one might argue that the considerations are more structural
than functional. In partial response, these categories meld, at least to the extent that the
separation of powers presumptions rest on judgments about the relative competencies of
the branches of the federal government.

341. Moore, Law(makers) of the Land, supra note 29, at 42.

342. See id. (noting “presumption . . . that treatymakers do not intend to grant”
authority to “courts to give content to vague standards”).

343. See Medellín, 552 U.S. at 508 (concluding “undertakes to comply” language “is
not a directive to domestic courts”).
ICJ decisions. Under Medellín's separation of powers perspective, the political branches should elect those steps. Although this line of thinking limits judicial enforcement of treaties, many critics of non-self-execution agree that treaty obligations may be non-self-executing if they are vague. The Court's other separation of powers judgments are more controversial.

First, the Court considered whether other parties to the relevant treaties made ICJ judgments immediately enforceable in their domestic courts. The absence of persuasive evidence that other states adopted this practice supported a finding of non-self-execution on the implicit presumption that the political branches may, but the judiciary should not, assume unilateral obligations on behalf of the United States.

Second, the judiciary should be reluctant to classify a treaty as self-executing if the practical consequences of doing so "give pause." Treating commitments toward the ICJ as self-executing threatened the possibility of unassailable ICJ judgments that preempt state and federal law and void criminal convictions and sentences. The Court presumed that express election of such consequences should be left to the political branches, notwithstanding the fact that the political branches arguably chose those consequences in accepting the relevant treaty obligations.

Third, the Court should be sensitive to the effect of self-execution on political branch discretion and U.S. foreign relations. Justice Breyer's

344. Id. at 508–09 & n.5.
345. See supra Part I (discussing circumstances under which even critics of non-self-execution agree that treaties are non-self-executing).
346. See supra Part I (discussing circumstances under which even critics of non-self-execution agree that treaties are non-self-executing).
348. See Moore, Law(makers) of the Land, supra note 29, at 45 ("[S]ince no other signatory treats ICJ judgments as binding in domestic courts, the Court presumed that the U.S. treatymakers did not assume a greater obligation . . . ."); Moore, Medellín and the ATS, supra note 6, at 502 ("Because other nations had not assumed . . . an obligation [to enforce ICJ judgments in domestic courts], the Court concluded that it should not assume a unilateral obligation to that effect on behalf of the United States.").
349. Medellín, 552 U.S. at 517.
350. Id. at 517–18.
351. See id. at 518 (noting if "Congress is unlikely to authorize automatic judicial enforceability of [politically sensitive] ICJ judgments, . . . the lesson to draw from that insight is hardly that the judiciary should decide which judgments are politically sensitive" (citation and internal quotation marks omitted) (quoting id. at 560 (Breyer, J., dissenting))).
352. See Sloss, Self-Execution Debate, supra note 17 (arguing that allowing judiciary to enforce ICJ's Avena judgment should not be troubling because political branches in accepting relevant treaty obligations "decided that the United States [would] comply with ICJ decisions" (emphasis omitted)).
353. See Moore, Medellín and the ATS, supra note 6, at 501–02 ("[T]he [Medellín] Court's concern for both the foreign affairs [dominance and] discretion of the political
case-by-case, multivariate approach to self-execution would label a treaty self-executing in some contexts and not in others based on a judicial determination and would hamper the United States's ability to enter treaties with other countries.  

Branding the relevant treaty obligations self-executing would also remove the option of deciding whether and how to comply with ICJ judgments. Perhaps that result would not be troubling in certain circumstances. However, international law and the U.S. treaty makers contemplated the possibility of both noncompliance and U.S. veto of any Security Council attempts at enforcement, and the judiciary, under Medellín's separation of powers, should not limit that discretion.

Fourth and relatedly, the relevant treaties established international means of enforcing treaty obligations relative to the ICJ. The Court presumed in such circumstances that the treaty makers would not expect the treaty to be self-executing, obviating—at least in some situations—the need for the contemplated international enforcement.

As noted, each of these considerations reflects a separation of powers in which the judiciary takes second seat in lawmaking and foreign affairs. The considerations fall short of establishing a formal presumption of non-self-execution. Together, however, they limit judicial opportunity to classify a treaty as self-executing and immediately enforceable as do-

354. Medellín, 552 U.S. at 515.
355. Id. at 507–11.
356. See id. at 511 (rejecting elimination of “the option of noncompliance” through transfer of compliance decisions to judiciary).
357. Id. at 507–11.
358. Id.
359. See id. at 533 (Stevens, J., concurring) (agreeing with Justice Breyer’s dissent “that the text and history of the Supremacy Clause, as well as this Court’s treaty-related cases, do not support a presumption against self-execution”); Bradley, Treaty Duality, supra note 6, at 171–72 (“Medellín need not be read as . . . requiring a presumption against self-execution. . . . If the Court was suggesting any presumption . . . it was probably just a presumption against giving direct effect to ICJ judgments.” (emphasis omitted)); Young, supra note 11, at 118 (noting some cite Medellín for presumption against self-execution but concluding such reading “rather drastically overreads” Medellín); cf. Carlos Manual Vázquez, Agora: Less Than Zero?, 102 Am. J. Int’l L. 563, 571–72 (2008) (arguing Medellín should be read as presuming self-execution). But cf. Hollis, supra note 27, at 413 (“The Court’s approach ruled out any presumption of self-execution, and in searching for affirmative evidence of intent, may imply a presumption against self-execution.”); Parry, Rewriting, supra note 52, at 69 (“[T]he Court’s actual reasoning strongly hints at a presumption against self-execution (even if it stops short of actually proclaiming one) . . . .”); Edward T. Swaine, Putting Missouri v. Holland on the Map, 73 Mo. L. Rev. 1007, 1018 n.57 (2008) (“[Medellín] created what arguably amounts to a presumption against self-execution.”); Vázquez, Safeguard of Nationalism, supra note 6, at 1618 (“[T]he self-execution test applied by the majority appears to presume that a treaty is not self-executing unless there is affirmative evidence that the parties intended that the treaty have domestic legal force.”); Rosenkranz, supra note 30 (inquiring whether Medellín Court implicitly presumed non-self-execution).
mestic law.\textsuperscript{360} That result, though arguably inconsistent with \textit{Boumediene}'s expansion of judicial authority, was not accidental. In responding to Justice Breyer's proposed analysis, the Court emphasized the impropriety of expanding the judiciary's foreign affairs and lawmaking power through self-execution analysis.\textsuperscript{361}

3. \textit{Judicial Treatment of Statutes}. — Restrictions on judicial discretion to classify treaties as self-executing, however, are not as severe as those on the extraterritorial application of statutes. The ultimate determinant of statutory extraterritoriality is congressional intent. The Court recognizes, for example, that Congress can apply a statute beyond the boundaries imposed by international law.\textsuperscript{362} At the same time, as noted, the Court enlists two canons of interpretation that presume that Congress did not intend to legislate extraterritorially\textsuperscript{363} and did not intend to exceed the limits of international law.\textsuperscript{364} Application of each canon can involve functional considerations. In \textit{Bowman}, for example, the Court found the presumption against extraterritoriality overcome given the nature of the activity Congress sought to prohibit—conduct easily and as likely commit-

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360. See Moore, \textit{Medellin} and the ATS, supra note 6, at 491 (“[\textit{Medellin’s}] self-execution analysis includes considerations that will likely lead lower courts to classify treaties as non-self-executing more frequently.”).

361. See \textit{Medellin}, 552 U.S. at 514–16 (“To read a treaty [as Justice Breyer would] so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law” and “could hobble the United States’ efforts to negotiate and sign international agreements”); Moore, \textit{Medellin} and the ATS, supra note 6, at 501 (“The Constitution’s assignment of the power to create treaties . . . to the political branches excludes the role Justice Breyer assigns to the judiciary.”).

362. See United States v. Bowman, 260 U.S. 94, 97–98 (1922) (noting statute’s territorial reach is “a question of statutory construction” and “\textit{when not specifically defined,} depends upon the purpose of Congress as evinced by the description and nature of the crime and upon” limitations imposed by international law (emphasis added)); Restatement (Third) of the Foreign Relations Law of the United States §§ 402 cmt. i, 403 cmt. g (1987) (explaining extraterritorial statutes are valid and binding on agencies and courts when Congress clearly intends to apply statutes beyond limits of international law); Born & Rutledge, supra note 127, at 576, 578–79, 585, 613–14 (“Congress has the power to enact legislation that violates international law.”). But cf. id. at 576, 583–84 (“A few courts have held that contemporary jurisdictional limits of international law are coextensive with constitutional limits on federal legislative jurisdiction.”); id. at 579, 582–83 (recognizing “the Due Process Clause might preclude extension of federal law to conduct abroad that has only \textit{de minimis} contact with or effect upon the United States or its nationals,” while acknowledging “no reported federal court decision has held an extraterritorial application of substantive U.S. law unconstitutional”).


364. See Born & Rutledge, supra note 127, at 576–77, 617 (noting judicial use of presumption against extraterritoriality and \textit{Charming Betsy} canon in fixing extraterritorial reach of statutes); Bradley, \textit{Charming Betsy}, supra note 142, at 489–90 (same).
ted abroad as at home—and the practical consequences of preventing the statute from reaching the extraterritorial conduct.\textsuperscript{365}

Functional considerations inform application of the Charming Betsy canon as well. In determining whether a particular extraterritorial application is consistent with international law, courts should first identify one of five grounds, discussed above, for exercising prescriptive jurisdiction.\textsuperscript{366} Some of these grounds parallel the functional considerations in Boumediene: whether the regulated person or activity is within the state’s territory, whether the person regulated or harmed is a national of the regulating government, and whether regulation is necessary to a state’s core interests, including security interests.\textsuperscript{367}

Functional considerations likewise guide the reasonableness analysis that ensues when a state has a basis to exercise prescriptive jurisdiction but that exercise targets “a person or activity having connections with another state.”\textsuperscript{368} Reasonableness may turn on such things as whether there is a territorial link between the action or actor regulated and the regulating state, the effect of the regulation on justified expectations, “the extent to which another state may have an interest in regulating the activity,” and “the likelihood of conflict with regulation by another state.”\textsuperscript{369} These considerations focus on the effect of extraterritorial application of a statute on another sovereign’s authority.\textsuperscript{370} Many of these factors track Boumediene’s consideration of such things as the link of the government activity regulated (i.e., apprehension and detention) to U.S. territory and the link between the detainees and the United States.

The considerations in the statutory context, however, are critically different. In Boumediene, functional considerations supported judicial discretion to extend the Constitution’s protections extraterritorially. In Medellín, functional considerations informed treatymaker intent. In the statutory context, the Court expressly rejected “excessive reliance on functional considerations and reconstructed congressional intent” in fixing extraterritoriality.\textsuperscript{371} Functional considerations in the statutory context are not permissive guidelines for the courts to decide “what Congress

\textsuperscript{365}. See supra text accompanying notes 263–271 (discussing Bowman); cf. Rasul v. Bush, 542 U.S. 466, 480 (2004) (classifying Guantanamo as within United States’ territorial jurisdiction and not subject to presumption against extraterritoriality given United States’ “complete jurisdiction and control” (internal quotation marks omitted)).

\textsuperscript{366}. See supra text accompanying notes 276–283 (listing Restatement grounds on which states may exercise prescriptive jurisdiction).

\textsuperscript{367}. Restatement (Third) of the Foreign Relations Law of the United States § 402 & cmt. f.

\textsuperscript{368}. Id. § 403(1).

\textsuperscript{369}. Id. § 403(2).

\textsuperscript{370}. See F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (indicating rule that “Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations” reflects customary international law’s reasonableness requirement).

\textsuperscript{371}. Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869, 2891 (2010) (Stevens, J., concurring in the judgment); see also id. at 2877–81 (majority opinion) (rejecting lower
would have wanted."\textsuperscript{372} Instead, functional considerations inform whether the presumptions against extraterritoriality and violation of international law are overcome. These presumptions restrain both Congress and the courts from applying statutes extraterritorially. As the Supreme Court has illustrated, most recently in \textit{Morrison}, the presumptions sometimes will hold, obstructing extraterritorial application of statutes.\textsuperscript{373} And in all cases, the presumptions will restrict judicial discretion in statutes' area of secondary application.\textsuperscript{374}

In sum, the roles of lawmaker intent, functional considerations, and ultimately judicial discretion differ significantly in the Constitution's, statutes', and treaties' areas of secondary application. In some cases, original intent might control the extraterritorial reach of the Constitution. At least when original intent is indeterminate, however, a functional analysis ensues. The functional analysis provides the judiciary greater discretion to extend constitutional limitations in foreign relations. With treaties, the analysis also focuses on intent, but functional considerations combine with evidence of actual intent to form a sort of hybrid intent. These separation of powers-inspired considerations tend toward non-self-execution, but do not erect a formal presumption against self-execution. As a result, courts retain limited but still significant discretion to enforce treaties as domestic law. The functional considerations bearing on the extraterritorial reach of statutes, by contrast, inform presumptions that Congress did not intend to regulate extraterritorially or in excess of international law. These presumptions limit judicial discretion to apply statutes extraterritorially.

The result is that the hurdles the Constitution and treaties face prior to judicial enforcement in their secondary areas are flatter than the hurdles statutes must overcome before being applied extraterritorially, notwithstanding the inclusion of all three sources in the Supremacy Clause. The doctrine of non-self-execution results in favorable treatment of treaties vis-à-vis statutes. With regard to the Constitution, at least where intent is unclear, the extraterritorial analysis provides the judiciary greater space to extend the Constitution's reach. Where all admit the court's departure from presumption against extraterritoriality toward constructive congressional intent informed by functional considerations).

372. Id. at 2881.

373. Id. at 2883; see EEOC v. Arabian Am. Oil Co. (\textit{Aramco}), 499 U.S. 244, 246–47, 259 (1991) (concluding Title VII did not "appl[y] extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad"), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. § 2000e(f) (2006)). As noted, the constraint imposed by the presumption against extraterritoriality is moderated by the fact that a statute that does not overcome the presumption may nonetheless reach multinational conduct as a result of domestic aspects of that conduct. See supra text accompanying note 260 (discussing \textit{Morrison}).

374. See Bradley, \textit{Charming Betsy}, supra note 142, at 490 ("[A]t least in the context of customary international law, the \textit{Charming Betsy} canon has been used primarily as a braking mechanism . . . to restrain the scope of federal enactments.").
Constitution merits superior treatment at least in the event of conflict, perhaps this greater opportunity to apply the Constitution in its area of secondary application is not particularly troubling. Moreover, in practice, treaties may actually receive greater enforcement in their secondary arena than does the Constitution. Practical consequences influence the application of both treaties and the Constitution; it is at least conceivable that practical difficulties will deter extraterritorial application of the Constitution more than domestic enforcement of treaties.\(^{375}\)

Despite claims that a broad doctrine of non-self-execution discriminates against treaties and thus violates a constitutional requirement of equivalent treatment, comparison of judicial treatment of the Constitution, statutes, and treaties in their areas of secondary application reveals that even a broad notion of non-self-execution does not discriminate against treaties (at least as compared to statutes).

B. Implications for Other Debates

The comparison also has important implications for two related debates regarding the domestic status of treaties. The first concerns the considerations \emph{Medellín} credited in identifying whether a treaty is self-executing. As discussed above, \emph{Medellín} invoked a variety of functional considerations that reflect separation of powers-based judgments.\(^ {376}\) For example, the Court considered the practical consequences of treating ICJ judgments as binding federal law. Those consequences, which included the possibility that the ICJ might overturn state convictions and sentences, were too troubling to be effected by the judiciary without further direction from the political branches. Similarly, classifying ICJ judgments as judicially-enforceable federal law would prevent the Executive from deciding not to comply with ICJ judgments and vetoing any attempt at enforcement in the Security Council, thereby undermining the Executive’s primary role in foreign affairs.

As briefly noted, these considerations are controversial. Some argue that they are inconsistent with the Supremacy Clause.\(^ {377}\) To the extent these considerations reflect respect for political branch primacy in lawmaking and foreign affairs, they may not be troubling. On the other hand, the considerations might go too far. It is one thing to consider evidence of the treatymakers’ intent in deciding whether a treaty is self-executing. The treatymakers are authorized to decide whether a treaty


\(^{376}\) See supra Part VI.A.2 (discussing “functional considerations in \emph{Medellín} [that] reflect a separation of powers vision in which the political branches take the lead role in foreign affairs and lawmaker\textsuperscript{\textregistered}”).

\(^{377}\) See, e.g., Sloss, Non-Self-Executing, supra note 13, at 10, 28–31 (identifying conditions under which treaties may be non-self-executing without endorsing various \emph{Medellín} considerations).
should have the full effect that the Supremacy Clause allows. It is another thing to construct treatymaker intent by reference to separation of powers-inspired functional considerations. Nonetheless, comparison of judicial treatment of the three Supremacy Clause sources supports reliance on these considerations. In comparative perspective, reliance on functional considerations (and, indeed, on particular considerations such as foreign relations effects) appears unexceptional. Functional considerations inform, and in the absence of clear original intent may control, the secondary application of the Constitution. They likewise guide the extraterritorial reach of statutes. Comparative analysis in each source’s area of secondary application, at least at the macro level, tips the scale in favor of the functional considerations endorsed in Medellín.

The comparative analysis introduced in this Essay also informs the debate over a presumption for or against self-execution. Relying on the Supremacy Clause, many scholars have endorsed a presumption of self-execution. The Restatement supports that position. Prior to Medellín, however, lower courts appear to have employed a presumption against self-execution. That position garnered some scholarly support

378. See Moore, Law(makers) of the Land, supra note 29, at 33–47 (developing constitutional, precedential, and comparative arguments for treatymakers’ authority to create less than Constitution permits). Compare Ted Cruz, Medellín v. Texas: Part I: Self-Execution, The Federalist Society Online Debate Series (Mar. 28, 2008), at http://www.fed-soc.org/debates/dbid.17/default.asp (on file with the Columbia Law Review) (relying on precedent, history, and treatment of statutes to conclude Constitution permits non-self-execution), and Rosenkranz, supra note 30 (asserting both treaties and congressional enactments are supreme federal law “to the extent that they purport to be” (emphasis omitted)), with Sloss, Self-Execution Debate, supra note 17 (asserting Supremacy Clause “cannot mean that the treaty makers have the power to decide that some treaties shall not be federal law”).

379. See, e.g., Henkin, supra note 13, at 201 (supporting self-execution presumption); Paust, Self-Executing, supra note 41, at 775 (same); Vázquez, Four Doctrines, supra note 60, at 700–10 (same); Vázquez, Laughing at Treaties, supra note 13, at 2154 n.3, 2175 (same); Vázquez, Treaties as Law of the Land, supra note 13, at 602 (same). But cf. Bradley, Treaty Duality, supra note 6, at 148 (noting “if there is no inherent conflict between non-self-execution and the Supremacy Clause” argument for presumption of self-execution “loses force”).

380. Restatement (Third) of the Foreign Relations Law of the United States § 111 reporter’s note 5 (1987) (“[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts.”).

381. See, e.g., Bradley, Treaty Duality, supra note 6, at 136 & n.15, 163 (“[L]ower courts in the post-World War II period have come close to presuming against self-execution, at least for multilateral treaties and other treaties not covered by prior lines of precedent.”); Jack L. Goldsmith, The New Formalism in United States Foreign Relations Law, 70 U. Colo. L. Rev. 1395, 1429 & n.126 (1999) (“In recent years courts . . . have instead opted for a more rule-like approach . . . that presumes that a treaty is non-self-executing.”).
as well.\textsuperscript{382} While \textit{Medellín} approved a presumption that treaties do not create private rights of action, \textit{Medellín} did not expressly endorse a presumption for or against self-execution.\textsuperscript{383} At the same time, the functional considerations the Court adopted and the separation of powers judgments that inform them increase the likelihood of a treaty being classified as non-self-executing.\textsuperscript{384} Indeed, some find in \textit{Medellín} an implicit adoption of a presumption against self-execution.\textsuperscript{385} Without endorsing that reading of \textit{Medellín} or the constitutionality of a presumption against self-execution, comparison of the judicial treatment of the supreme sources of law in their secondary arenas provides support for such a presumption. A presumption against treaty self-execution would parallel the presumptions that statutes do not apply extraterritorially and do not exceed international law.

\textbf{CONCLUSION}

The domestic status of treaties has generated longstanding debate. Scholars resist arguments in favor of non-self-execution that are based on treaties' unique duality and instead urge Supremacy Clause-mandated equivalent treatment of treaties. By acknowledging the dual nature of the Constitution and statutes and comparing judicial treatment of the three sources of supreme federal law in their areas of secondary application, this Essay accommodates critics' concern for the exclusive focus on treaty duality and demonstrates that even a broad doctrine of non-self-execution results in better treatment for treaties than exists at least for statutes. The comparison thus supports, contrary to the prevailing scholarly position, a broad formulation of non-self-execution, such as that endorsed in \textit{Medellín}. The comparison likewise suggests the propriety of the functional considerations employed in \textit{Medellín} and lends support for a presumption against self-execution.

\textsuperscript{382} See Yoo, Globalism, supra note 24, at 2093 ("At the very least, courts should obey the presumption that when the text of a treaty is silent, courts ought to assume that it is non-self-executing."); Yoo, Public Lawmaking, supra note 34, at 2219–20, 2255 (proposing "‘hard’ rule" that treaties in areas of Congress's legislative powers cannot be self-executing and second-best "‘soft’ rule . . . requiring the treatymakers to issue a clear statement if they want a treaty to be self-executing").

\textsuperscript{383} \textit{Medellín} v. Texas, 552 U.S. 491, 506 n.3 (2008); see Moore, Law(makers) of the Land, supra note 29, at 46 ("[\textit{Medellín}] did not expressly adopt a presumption against self-execution . . . ."); supra note 359 and accompanying text (asserting \textit{Medellín} did not establish formal presumption of non-self-execution).

\textsuperscript{384} Moore, \textit{Medellín} and the ATS, supra note 6, at 491; Moore, Law(makers) of the Land, supra note 29, at 46.

\textsuperscript{385} See supra note 359 (discussing whether \textit{Medellín} created presumption against self-execution).