



DO

U.S. COURTS

DISCRIMINATE

AGAINST TREATIES?

EQUIVALENCE, DUALITY,

AND NON-SELF-EXECUTION*

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Article II of the Constitution authorizes the President, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹ The Supremacy Clause declares that, like the Constitution and statutes, “all” treaties “shall be the supreme Law of the Land.”² Despite use of the word “all,” some treaties are not automatically enforceable in U.S. courts. The Supreme Court held in



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1829, in the landmark case of *Foster v. Neilson*, that only self-executing treaties immediately provide rules of decision.³ 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*,⁴ 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.⁵

One of the ways in which scholars challenge non-self-execution is by asserting that it violates a constitutional principle of equivalence.⁶ As discussed below, various arguments countering the equivalence thesis have been offered to date. I offer a new response. This response turns on the recognition that all three sources of supreme federal law have a dual nature. Treaties are primarily international agreements and secondarily domestic law. The Constitution and statutes, by contrast, primarily function as domestic law but also play a role in international relations, particularly when they apply extraterritorially. Comparing judicial treatment of all three sources along their secondary axis reveals that treaties receive not just equivalent treatment but better treatment than at least statutes even under a broad notion of non-self-execution. This novel comparison thus lends support to the doctrine of non-self-execution.

I The Equivalence Thesis and Counterarguments

As noted, some scholars have opposed broad classification of treaties as non-self-executing on the grounds that it violates a constitutional requirement of equivalent treatment. The Supremacy Clause designates the Constitution, statutes, and treaties as supreme federal law.⁷ In doing so, the argument goes, the Supremacy Clause requires equivalent treatment of all three sources.

Defenders of non-self-execution have responded, in effect, with three principal arguments. First, scholars have argued that non-self-execution does not result in differential treatment. Just as treaty makers 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.⁸ For example, statutes may “expressly eschew preemption of state law, . . . authorize states to opt out of federal requirements, . . . and . . . not impose binding obligations.”⁹ Similarly, 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.”¹⁰

Second, scholars have argued based on constitutional text, history, purpose, and precedent that the Constitution does not require equivalence. They note, for example, that the Supremacy Clause fails to address the relation of all three sources of federal law.¹¹ Thus, the Constitution is superior to laws and treaties notwithstanding the fact that the Supremacy Clause lumps all three sources together. 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.¹² The Supremacy Clause explicitly binds state judges to the Constitution, laws, and treaties in the face of inconsistent state constitutional and statutory law.¹³ This provision requires judges to follow the dictates of the federal Constitution, treaties, and laws, but it does not say that these sources must dictate preemption of state law.

The Supremacy Clause's 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 in response to a history of state treaty violations.¹⁴ To the extent that non-self-execution turns, for example, on treaty maker intent, it appears consistent with the purpose behind inclusion in a way that similar treatment of the Constitution and statutes might not.

Third, scholars argue that treaties' dual nature justifies differential treatment. Treaties not only function as domestic law,

they also play a role in foreign relations.¹⁵ Indeed, they are primarily instruments of foreign affairs and secondarily domestic law. A treaty cannot exist without consent from a foreign sovereign. The inclusion of treaties in Article II, rather than Article I, highlights the international nature of treaties. Article II addresses executive power and does not speak expressly of legislative authority.¹⁶ The dual view of treaties has also been confirmed by the Supreme Court as recently as *Medellín*.¹⁷ Treaties' dual nature as instruments of foreign affairs and domestic law produces a variety of differences between statutes and treaties. For example, treaties often use broad terminology to extract consent from global diversity.¹⁸ 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.”¹⁹ These differences, the argument goes, justify differential treatment and, in particular, less judicial enforcement of treaties than is afforded statutes.²⁰

II An Expanded Duality

The dual nature of treaties, upon which this final argument relies, has been widely acknowledged and is not particularly controversial.²¹ The controversy results from reliance on treaty duality to undercut the equivalence thesis and support non-self-execution.²²

This article accommodates concern for the exclusive reliance on treaty duality, at least partially, by taking treaty duality only as a starting point. The article 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. 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 impact even when applied to U.S. nationals. Statutes of this type might include the federal death penalty, which generates opposition from abolitionist countries.²³ Other statutes have an even more direct impact: namely,

statutes that specifically target foreign nationals—such as immigration laws²⁴—or that authorize or command foreign actions by U.S. officials.²⁵ 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.²⁶ 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.²⁷ The extraterritorial expansion of U.S. law has, unsurprisingly, been met with opposition from foreign states.²⁸

With regard to the Constitution, a similar spectrum exists. Constitutional limitations on domestic regulation of domestic conduct, such as limitations on regulation

III 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.³⁵ 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 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

Constitution, statutes, and treaties in their areas of secondary application is a matter of domestic law.⁴⁰

IV Treatment of the Constitution, Statutes, and Treaties in Their Areas of Secondary Application

The comparison is also timely as the Supreme Court has recently issued relevant opinions for each source of law. The Court's most recent foray into the extraterritorial⁴¹ application of the Constitution occurred in *Boumediene v. Bush*,⁴² in which the Court concluded that aliens detained as enemy combatants at Guantánamo Bay "have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause."⁴³ In *Medellín v. Texas*, the Supreme Court

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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 "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"²⁹ insofar as such a prohibition would contravene constitutional (and statutory) free speech protections.³⁰ The scope of government actors' constitutional authority both to make decisions related to foreign affairs³¹ and to take actions outside U.S. territory³² also bears heavily on foreign relations. The scope of constitutional protections available to aliens likewise affects our relations with others.³³ Numerous foreign and international officials, for instance, filed amicus briefs in support of the Guantánamo detainees in *Boumediene v. Bush*.³⁴ 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.

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,³⁶ neither Congress in enacting statutes³⁷ nor the Constitution³⁸ 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.³⁹ 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

handed down its most important decision on the domestic status of treaties in roughly 200 years, and perhaps ever.⁴⁴ 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.⁴⁵ Endorsing a broad notion of non-self-execution,⁴⁶ the Court concluded that the relevant treaty obligations were not self-executing.⁴⁷ And, while there has long been uncertainty regarding how to ascertain the extraterritorial reach of statutes, with 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*⁴⁸ and *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,⁴⁹ both of which addressed application of U.S. antitrust law beyond U.S. borders.

A comparison of the judicial treatment afforded the Constitution, statutes, and treaties in their area of secondary application in *Boumediene*, *Hartford Fire*,

Hoffmann-La Roche, and *Medellín* reveals that statutes fare the worst. While the intent of the relevant lawmakers surfaces in the treatment of each source, the analysis of intent, and particularly the relation of intent to functional considerations, differs with each, leading to differing levels of judicial discretion to enforce the law in its area of secondary application.

1. *Judicial Treatment of the Constitution.* 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.⁵⁰ The

dence of original intent.⁵³ 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.⁵⁴ 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.⁵⁵ Relatedly, the 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 partially on separation of powers grounds, arguing that the government's formal, de jure sov-

in identifying the domestic effect of treaties. The *Medellín* Court relied, in small part, on express evidence of the treaty-makers' intent regarding self-execution.⁵⁸ 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.⁵⁹ In *Medellín*, however, the functional considerations mix with, rather than arise separate from, consideration of the treaty-makers' intent.⁶⁰ Perhaps this was because the functional considerations

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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 to allow the Court to reach its own conclusion on the scope of constitutional habeas informed by a multifactored, 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.⁵¹ 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 the beginning point of analysis.⁵² 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 evi-

reignty 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."⁵⁶ 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.⁵⁷

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.

2. *Judicial Treatment of Treaties.* The intent of the lawmakers appears to play a larger role

led to a conclusion consistent with the evidence of the treaty-makers' 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 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.'"⁶¹

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 decision in the authority of the lawmakers. Consequently, *Medellín* arguably manifests at least a marginally greater commitment to lawmaker intent 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 separation of powers vision in which the political branches take the lead in foreign affairs and lawmaking.⁶² To illustrate, suppose that a treaty imposed 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 enforcing the Constitution.⁶³ However, the *Medellín* Court presumed that if treaty obligations are not specifically defined, Congress did not intend judicial enforcement absent congressional implementation.⁶⁴ The political branches generally should fill vague treaty obligations with content. The obligation to “undertake[] to comply with” ICJ judgments was such an obligation.⁶⁵ It did not suggest an immediate obligation to judicially enforce judgments but a range of steps that might be taken to implement ICJ decisions.⁶⁶ 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.⁶⁷ The Court’s other separation of powers judgments are more controversial.⁶⁸

First, the Court considered whether other parties to the relevant treaties made ICJ judgments immediately enforceable in their domestic courts.⁶⁹ 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.⁷⁰

Second, the judiciary should be reluctant to classify a treaty as self-executing if

the practical consequences of doing so “give pause.”⁷¹ 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.⁷² The Court presumed that express election of such consequences should be left to the political branches,⁷³ notwithstanding the fact that the political branches arguably chose those consequences in accepting the relevant treaty obligations.⁷⁴

Third, the Court should be sensitive to the effect of self-execution on political branch discretion and U.S. foreign relations.⁷⁵ Justice Breyer’s dissenting, 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’ ability to enter treaties with other countries.⁷⁶ Branding the relevant treaty obligations self-executing would also remove the option of deciding whether and how to comply with ICJ judgments.⁷⁷ 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.⁷⁸

Fourth and relatedly, the relevant treaties established international means of enforcing treaty obligations relative to the ICJ.⁷⁹ 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.⁸⁰

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.⁸¹ Together, however, they limit judicial opportunity to classify a treaty as self-executing and immediately enforceable as domestic law.⁸² That result, though arguably inconsistent with *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.⁸³

3. 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.⁸⁴ At the same time, the Court enlists two canons of interpretation to fix statutes’ extraterritorial reach: the presumption against extraterritoriality, which assumes that Congress legislates only for U.S. territory, and the *Charming Betsy* canon, which seeks a statutory interpretation that is consistent with international law.⁸⁵

Application of each canon can involve functional considerations. In *United States v. 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 committed abroad as at home—and the practical consequences of preventing the statute from reaching the extraterritorial conduct.⁸⁶ 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 recognized in international law for exercising prescriptive jurisdiction.⁸⁷ Some of these grounds parallel 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.⁸⁸

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."⁸⁹ 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."⁹⁰ These considerations focus on the effect of extraterritorial application of a statute on another sovereign's authority.⁹¹ 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 *Medellin*, functional considerations informed treaty-maker intent. In the statutory context, the Court has expressly rejected "excessive reliance on functional considerations and reconstructed congressional intent" in fixing extraterritoriality.⁹² Functional considerations in the statutory context are not permissive guidelines for the courts to decide "what Congress would have wanted."⁹³ 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 *Morrison v. National Australia Bank Ltd.*, the presumptions sometimes will

hold, obstructing extraterritorial application of statutes.⁹⁴ And in all cases, the presumptions will restrict judicial discretion in statutes' area of secondary application.⁹⁵

In short, 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.

CONCLUSION

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. The expanded duality and new comparative axis discussed above thus support a broader view of non-self-execution than has been endorsed by most foreign relations law scholars.

NOTES

*This article consists largely of excerpts from an essay that originally appeared in 110 Colum. L. Rev. 2228 (2010).

1 U.S. Const. art. II, § 2, cl. 2.

2 *Id.* art. VI, cl. 2.

3 27 U.S. (2 Pet.) 253, 314–15 (1829), abrogated by *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

4 552 U.S. 491 (2008).

5 See Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 Sup. Ct. Rev. 131, 132 [hereinafter Bradley, *Treaty Duality*]; David H. Moore, Medellín, *the Alien Tort Statute, and the Domestic Status of International Law*, 50 Va. J. Int'l L. 485, 486, 490–91 (2010) [hereinafter Moore, Medellín and the ATS]; Carlos Manuel Vazquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 Notre Dame L. Rev. 1601, 1611–12, 1618–20 (2008) [hereinafter Vazquez, *Safeguard of Nationalism*].

6 See Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599, 611–28 (2008) [hereinafter Vazquez, *Treaties as Law of the Land*]; Tim Wu, *Treaties' Domains*, 93 Va. L. Rev. 571, 577–78 (2007).

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

8 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; see also Ernest A. Young, *Treaties as "Part of Our Law"*, 88 Tex. L. Rev. 91, 95, 113, 125–28, 137, 140 (2009) (explaining that statutes can be non-self-executing in the same manner as treaties).

9 Moore, *Law (Makers) of the Land*, *supra* note 8, at 34 (footnotes omitted); see also, e.g., Bradley, *Treaty Duality*, *supra* note 5, at 141 & n.42; Young, *supra* note 8, at 126–27; 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 non-preemptive and aspirational statutes). But see David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1, 42 (2002) (arguing that under Supremacy Clause, statutes may disclaim field preemption but not conflict preemption); Vazquez, *Safeguard of Nationalism*, *supra* note 5, at 1620–21 (disputing analogy between nonbinding resolutions and non-self-executing treaties).

10 Moore, *Law (Makers) of the Land*, *supra* note 8, at 34; see Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 Colum. L. Rev. 973, 977 (2009) (noting not all Bill of Rights guarantees have been applied to the states via Fourteenth Amendment).

- 11 See, e.g., John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 Colum. L. Rev. 2218, 2249–51 (1999) [hereinafter Yoo, *Public Lawmaking*].
- 12 See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 446 (2000); Moore, *Law (Makers) of the Land*, *supra* note 8, at 34–35.
- 13 U.S. Const. art. VI, cl. 2.
- 14 See, e.g., Bradley, *Treaty Duality*, *supra* note 5, at 144–47; Vasan Kesavan, *The Three Tiers of Federal Law*, 100 Nw. U. L. Rev. 1479, 1512 (2006); Moore, *Law (Makers) of the Land*, *supra* note 8, at 33.
- 15 See, e.g., Bradley, *Treaty Duality*, *supra* note 5, at 133, 182.
- 16 See U.S. Const. art. II, § 2; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 1966 (1999) [hereinafter Yoo, *Globalism*]; Yoo, *Public Lawmaking*, *supra* note 11, at 2234. *But cf.* Kesavan, *supra* note 14, at 1508–12.
- 17 *Medellin v. Texas*, 552 U.S. 491, 505 (2008).
- 18 See Bradley, *Treaty Duality*, *supra* note 5, at 158.
- 19 *Id.* at 157–58.
- 20 See *id.* at 132–33, 157, 182.
- 21 See, e.g., *Medellin*, 552 U.S. at 504–05; Kesavan, *supra* note 14, at 1512; Yoo, *Globalism*, *supra* note 16, at 1958.
- 22 Compare Vazquez, *Treaties as Law of the Land*, *supra* note 6, at 605–06, with Bradley, *Treaty Duality*, *supra* note 5, at 157–60.
- 23 Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591–99 (2006).
- 24 See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 605–06 (1889); Calderon to Congress: Pass Immigration Reform, CBS News (May 20, 2010), at <http://www.cbsnews.com/stories/2010/05/20/world/main6502952.shtml>.
- 25 See, e.g., 22 U.S.C. §§ 6441–42, 6445, 6450, 7814 (2006).
- 26 See, e.g., Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 Va. J. Int'l L. 505, 556 (1997).
- 27 Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 Minn. L. Rev. 815, 846–49 (2009).
- 28 *Id.* at 857–58, 864–65.
- 29 International Covenant on Civil and Political Rights art. 20(2), Dec. 19, 1966, S. Exec. Doc. E, 95–2 (1978), 999 U.N.T.S. 171.
- 30 See 138 Cong. Rec. 8070 (1992).
- 31 See, e.g., *Medellin v. Texas*, 552 U.S. 491, 524 (2008).
- 32 See Kal Raustiala, *Does the Constitution Follow the Flag?* 36–38 (2009).
- 33 See, e.g., Brief of Amicus Curiae Alcan Alumínio do Brasil, S.A. in Support of Petitioner, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1986) (No. 85-693), 1986 WL 727580, at *11–*12 (arguing if United States does not provide sufficient constitutional protections against exercise of personal jurisdiction over foreign nationals, other countries might assert broad jurisdiction over U.S. nationals).
- 34 See, e.g., 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.
- 35 See, e.g., Vazquez, *Treaties as Law of the Land*, *supra* note 6, at 611, 613.
- 36 See Restatement (Third) of the Foreign Relations Law of the United States §§ 402–04 (1987).
- 37 See, e.g., *id.* §§ 402 cmt. i, 403 cmt. g.
- 38 See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575–78 (2004).
- 39 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; Letter of Submittal from the Department of State to the President, Vienna Convention on the Law of Treaties, *supra*.
- 40 See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2244–62 (2008); *Medellin v. Texas*, 552 U.S. 491, 504, 519 (2008); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).
- 41 *But cf. Rasul v. Bush*, 542 U.S. 466, 480 (2004) (treating Guantánamo 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)]).
- 42 128 S. Ct. 2229 (2008).
- 43 *Id.* at 2240.
- 44 See Bradley, *Treaty Duality*, *supra* note 5, at 132.
- 45 *Medellin*, 552 U.S. at 504–05.
- 46 Moore, *Medellin and the ATS*, *supra* note 5, at 490–91.
- 47 See *Medellin*, 552 U.S. at 506, 513–14, 518.
- 48 509 U.S. 764 (1993).
- 49 542 U.S. 155 (2004).
- 50 See *Boumediene v. Bush*, 128 S. Ct. 2229, 2303–07 (2008) (Scalia, J., dissenting); *cf.* Burnett, *supra* note 10, at 1032–33.
- 51 *Boumediene*, 128 S. Ct. at 2244 (majority opinion).
- 52 *Id.* at 2248.
- 53 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.
- 54 See, e.g., *id.* at 2303 (Scalia, J., dissenting); *id.* at 2279 (Roberts, C.J., dissenting); Burnett, *supra* note 10, at 978.
- 55 See Raustiala, *supra* note 32, at 218, 243.
- 56 *Boumediene*, 128 S. Ct. at 2259 (majority opinion).
- 57 *Id.* at 2276–77.
- 58 *Medellin v. Texas*, 552 U.S. 491, 510 (2008).
- 59 *Id.* at 517–18.
- 60 See, e.g., Moore, *Law(makers) of the Land*, *supra* note 8, at 45.
- 61 *Medellin*, 552 U.S. at 523 (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 [2006]).
- 62 Moore, *Medellin and the ATS*, *supra* note 5, at 491, 500–03.
- 63 Moore, *Law (Makers) of the Land*, *supra* note 8, at 42.
- 64 See *id.*
- 65 See *Medellin*, 552 U.S. at 508.
- 66 *Id.* at 508–09 & n.5.
- 67 See, e.g., Carlos Manuel Vazquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154, 2179–80 (1999).
- 68 See Moore, *Law (Makers) of the Land*, *supra* note 8, at 46.
- 69 *Medellin*, 552 U.S. at 516–17.
- 70 See Moore, *Law(makers) of the Land*, *supra* note 8, at 45; Moore, *Medellin and the ATS*, *supra* note 5, at 502.
- 71 *Medellin*, 552 U.S. at 517.
- 72 *Id.* at 517–18.
- 73 See *id.* at 518.
- 74 See David Sloss, *Medellin 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>.
- 75 See Moore, *Medellin and the ATS*, *supra* note 5, at 501–02.
- 76 *Medellin*, 552 U.S. at 515.
- 77 *Id.* at 507–11.
- 78 See *id.* at 511.
- 79 *Id.* at 507–11.
- 80 *Id.*
- 81 See, e.g., *id.* at 533 (Stevens, J., concurring); Bradley, *Treaty Duality*, *supra* note 5, at 171–72.
- 82 See Moore, *Medellin and the ATS*, *supra* note 5, at 491.
- 83 See *Medellin*, 552 U.S. at 514–16 (majority opinion).
- 84 See *United States v. Bowman*, 260 U.S. 94, 97–98 (1922).
- 85 See, e.g., Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts*, 576–77, 617 (4th ed. 2007).
- 86 See *Bowman*, 260 U.S. at 97–102.
- 87 See Restatement (Third) of the Foreign Relations Law of the United States §§ 402, 404.
- 88 *Id.* § 402 & cmt. f.
- 89 *Id.* § 403(1).
- 90 *Id.* § 403(2).
- 91 See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).
- 92 *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).
- 93 *Id.* at 2881.
- 94 *Id.* at 2883.
- 95 See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 490 (1998).

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