AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Foundations/Sources

Medellin v. Texas, 552 U.S. 491 (2008)

José Ernesto Medellín was found guilty of murder and sentenced to death by a trial court at Texas. After the sentence was affirmed by the Texas Court of Criminal Appeals, Medellín sought a writ of habeas corpus on the ground that, contrary to Article 36 of the Vienna Convention on Consular Relations, he had not been informed of his right to have the Mexican embassy notified of his detention. Texas courts rejected this claim on the ground that Medellín had not raised the issue during his trial or appeal. This ruling was consistent with the law of most states which, barring unusual circumstances, require defendants in criminal trials to raise all of their legal and constitutional objections as early as possible. In 2004, however, the International Court of Justice (ICJ) in the Case Concerning Avena and Other Mexican Nationals *ruled that citizens of other countries did not forfeit their rights under the Vienna Convention by failing to make claims at trial or during their direct appeal. The United States, the ICJ concluded, had violated its treaty obligations by not considering whether the failure to notify the Mexican consulate had prejudiced Medellín's defense during this trial. After that decision was handed down, President Bush issued a memorandum, which ordered the states to treat the ICJ decision as binding law. When Texas refused to do so, Medellín petitioned to have the state decision reversed.*

The Supreme Court by a 6–3 vote rejected both of Medellín's claims for relief. Chief Justice Roberts's majority opinion first concluded that the Vienna Convention on Consular Relations was a non-self-executing treaty. As the excerpts below indicate, a non-self-executing treaty is a treaty that does not constitute binding federal law in the absence of congressional legislation. A self-executing treaty, by comparison, becomes binding law the instant the treaty is ratified. A treaty requiring workers to receive a minimum wage, for example, would be self-executing if workers could rely solely on the treaty when suing in federal courts but non-self-executing if a federal law was required for anyone to have a judicially enforceable legal right. The opinion for the Court then concluded that the president could not unilaterally convert a non-self-executing treaty into a self-executing treaty. Whether a treaty was self-executing or non-self-executing, the justices agreed, was for the federal judiciary to determine. Why did Roberts believe the treaty was self-executing? Why did Breyer disagree? Who had the better of the argument? Medellin *pit conservatives (plus Justice Stevens) against liberals. Why was this so? Imagine the Vienna Convention guaranteed a right to bear arms. Would the justices have voted in the same way?*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court

Medellin first contends that the ICJ's judgment in *Case Concerning Avena and Other Mexican Nationals* (2004) constitutes a "binding" obligation on the state and federal courts of the United States. He argues that "by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are already the 'Law of the Land' by which all state and federal courts in this country are 'bound.'" . . . . Accordingly, Medellin argues, *Avena* is a binding federal rule of decision that pre-empts contrary state limitations on successive habeas petitions.

. . .

This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law. The distinction was well explained by Chief Justice Marshall's opinion in *Foster v. Neilson* (1829), . . . which held that a treaty is "equivalent to an act of the

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legislature," and hence self-executing, when it "operates of itself without the aid of any legislative provision." . . . When, in contrast, "[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson* (1888). In sum, while 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." . . .

A treaty is, of course, "primarily a compact between independent nations." . . . It ordinarily "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.". . . . "If these [interests] fail, its infraction becomes the subject of international negotiations and reclamations. . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress." . . . Only "[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment." . . .

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The obligation on the part of signatory nations to comply with ICJ judgments derives . . . from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions. Article 94(1) provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." . . . The Executive Branch contends that the phrase "undertakes to comply" is not "an acknowledgement that an . . . ICJ decision will have immediate legal effect in the courts of U. N. members," but rather "a commitment on the part of U. N. Members to take future action through their political branches to comply with an ICJ decision.". . .

We agree with this construction of Article 94. The Article is not a directive to domestic courts. It does not provide that the United States "shall" or "must" comply with an ICJ decision, nor indicate that the Senate that ratified the U. N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts. Instead, "[t]he words of Article 94 . . . call upon governments to take certain action.". . . In other words, the U. N. Charter reads like "a compact between independent nations" that "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." . . .

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The dissent faults our analysis because it "looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language).". . . Given our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue. That is after all what the Senate looks to in deciding whether to approve the treaty.

. . .

Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. . . . They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. . . . The dissent's understanding of the treaty route, depending on an ad hoc judgment of the judiciary without looking to the treaty language—the very language negotiated by the President and approved by the Senate—cannot readily be ascribed to those same Framers.

The dissent's approach risks the United States' involvement in international agreements. It is hard to believe that the United States would enter into treaties that are sometimes enforceable and sometimes not. Such a treaty would be the equivalent of writing a blank check to the judiciary. Senators could never be quite sure what the treaties on which they were voting meant. Only a judge could say for sure and only at some future date. This uncertainty could hobble the United States' efforts to negotiate and sign international agreements.

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In sum, while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions. . . . [A] contrary conclusion would be

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extraordinary, given that basic rights guaranteed by our own Constitution do not have the effect of displacing state procedural rules. . . . 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."

. . .

Medellin next argues that the ICJ's judgment in *Avena* is binding on state courts by virtue of the President's February 28, 2005 Memorandum. The United States contends that while the *Avena* judgment does not of its own force require domestic courts to set aside ordinary rules of procedural default, that judgment became the law of the land with precisely that effect pursuant to the President's Memorandum and his power "to establish binding rules of decision that preempt contrary state law." . . .

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. . . The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. . . .

The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution, which divides the treaty-making power between the President and the Senate. The Constitution vests the President with the authority to "make" a treaty. . . . If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented "in mak[ing]" the treaty, by ensuring that it contains language plainly providing for domestic enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote, consistent with all other constitutional restraints.

Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "'[t]he power to make the necessary laws is in Congress; the power to execute in the President.'". . . As already noted, the terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto. . . .

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. . . [T]he non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts. The President may comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution. But he may not rely upon a non-self-executing treaty to "establish binding rules of decision that preempt contrary state law." . . .

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We thus turn to the United States' claim that—independent of the United States' treaty obligations—the Memorandum is a valid exercise of the President's foreign affairs authority to resolve claims disputes with foreign nations. . . .

. . .

The President's Memorandum is not supported by a "particularly longstanding practice" of congressional acquiescence . . . , but rather is what the United States itself has described as "unprecedented action" . . . . Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws. . . . The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.

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JUSTICE STEVENS, concurring in judgment

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There is a great deal of wisdom in JUSTICE BREYER's dissent. I agree 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. . . . In the end, however, I am persuaded that the relevant treaties do not authorize this Court to enforce the judgment of the International Court of Justice. . .

. . .

Absent a presumption one way or the other, the best reading of the words "undertakes to comply" is, in my judgment, one that contemplates future action by the political branches. . . .

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Under the express terms of the Supremacy Clause, the United States' obligation to "undertak[e] to comply" with the ICJ's decision falls on each of the States as well as the Federal Government. One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. . . .

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JUSTICE BREYER, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

The Constitution's Supremacy Clause provides that "all Treaties . . . 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." . . . The Clause means that the "courts" must regard "a treaty . . . as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." . . .

. . .

In my view, the President has correctly determined that Congress need not enact additional legislation. The majority places too much weight upon treaty language that says little about the matter. The words "undertak[e] to comply," for example, do not tell us whether an ICJ judgment rendered pursuant to the parties' consent to compulsory ICJ jurisdiction does, or does not, automatically become part of our domestic law. To answer that question we must look instead to our own domestic law, in particular, to the many treaty-related cases interpreting the Supremacy Clause. Those cases, including some written by Justices well aware of the Founders' original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation.

. . .

Supreme Court case law stretching back more than 200 years helps explain what, for present purposes, the Founders meant when they wrote that "all Treaties . . . shall be the supreme Law of the Land." . . . In 1796, for example, the Court decided the case of *Ware v. Hylton* (1796). . . . A British creditor sought payment of an American's Revolutionary War debt. The debtor argued that he had, under Virginia law, repaid the debt by complying with a state statute enacted during the Revolutionary War that required debtors to repay money owed to British creditors into a Virginia state fund. . . . The creditor, however, claimed that this state-sanctioned repayment did not count because a provision of the 1783 Paris Peace Treaty between Britain and the United States said that "'the creditors of either side should meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts, theretofore contracted'"; and that provision, the creditor argued, effectively nullified the state law. . . . The Court, with each Justice writing separately, agreed with the British creditor, held the Virginia statute invalid, and found that the American debtor remained liable for the debt. . . .

The key fact relevant here is that Congress had not enacted a specific statute enforcing the treaty provision at issue. Hence the Court had to decide whether the provision was (to put the matter in present terms) "self-executing." . . .

Justice Iredell pointed out that some Treaty provisions, those, for example, declaring the United States an independent Nation or acknowledging its right to navigate the Mississippi River, were "executed," taking effect automatically upon ratification. . . . Other provisions were "executory," in the sense that they were "to be carried into execution" by each signatory nation "in the manner which the Constitution of that nation prescribes." . . . Before adoption of the U.S. Constitution, all such provisions

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would have taken effect as domestic law only if Congress on the American side, or Parliament on the British side, had written them into domestic law. . . .

But, Justice Iredell adds, after the Constitution's adoption, while further parliamentary . . . action remained necessary in Britain (where the "practice" of the need for an "act of parliament" in respect to "any thing of a legislative nature" had "been constantly observed," . . . further legislative action in respect to the treaty's debt-collection provision was no longer necessary in the United States. . . . The ratification of the Constitution with its Supremacy Clause means that treaty provisions that bind the United States may (and in this instance did) also enter domestic law without further congressional action and automatically bind the States and courts as well. . . .

. . .

The case law provides no simple magic answer to the question whether a particular treaty provision is self-executing. But the case law does make clear that, insofar as today's majority looks for language about "self-execution" in the treaty itself and insofar as it erects "clear statement" presumptions designed to help find an answer, it is misguided. . . .

The many treaty provisions that this Court has found self-executing contain no textual language on the point. . . .

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The case law also suggests practical, context-specific criteria that this Court has previously used to help determine whether, for Supremacy Clause purposes, a treaty provision is self-executing. The provision's text matters very much. . . . But that is not because it contains language that explicitly refers to self-execution. . . . [O]ne should not expect that kind of textual statement. . . . Instead text and history, along with subject matter and related characteristics will help our courts determine whether, as Chief Justice Marshall put it, the treaty provision "addresses itself to the political . . . department[s]" for further action or to "the judicial department" for direct enforcement. . . .

In making this determination, this Court has found the provision's subject matter of particular importance. Does the treaty provision declare peace? Does it promise not to engage in hostilities? If so, it addresses itself to the political branches. . . . Alternatively, does it concern the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery? If so, it may well address itself to the Judiciary. Enforcing such rights and setting their boundaries is the bread-and-butter work of the courts. . . .

. . .

It is difficult to believe that in the exercise of his Article II powers pursuant to a ratified treaty, the President can never take action that would result in setting aside state law. . . .

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Given the Court's comparative lack of expertise in foreign affairs; given the importance of the Nation's foreign relations; given the difficulty of finding the proper constitutional balance among state and federal, executive and legislative, powers in such matters; and given the likely future importance of this Court's efforts to do so, I would very much hesitate before concluding that the Constitution implicitly sets forth broad prohibitions (or permissions) in this area. . . .

I would thus be content to leave the matter in the constitutional shade from which it has emerged. Given my view of this case, I need not answer the question. And I shall not try to do so. That silence, however, cannot be taken as agreement with the majority's . . . conclusion.

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