# OPEN DOORS

*by*
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*This Article focuses on two issues left open by* Medellín v. Texas. *First, do the courts of the United States have an obligation to accord comity to judgments of international tribunals such as the International Court of Justice? Second, is it possible to construe a treaty as delegating lawmaking authority to the Executive Branch, and if so, what are the criteria for determining that a delegation is intended? The Article argues that the comity doctrine rests on principles of reciprocity and discrimination, and that such principles generally are inapplicable to a treaty-based international tribunal. The Article further argues that the* Medellín *majority failed to address the delegation issue, and that strong arguments exist for inferring delegations from particular treaty provisions. In particular, it is plausible to infer, from a treaty commitment to submit a matter to binding dispute settlement by an international tribunal, a limited delegation to the Executive of discretionary authority to take necessary steps to bring the United States into compliance with the tribunal's judgment.*



## I. INTRODUCTION

*Medellín* closes some doors but leaves others open.[1] For Medellín himself, the legal system no longer has any answers. As for debatable legal issues that the case settled, one no longer can argue that, as a matter of current U.S. law, a judgment of the International Court of Justice (ICJ) provides a binding rule of decision directly enforceable in a U.S. court. More broadly, one cannot claim that the Supreme Court accepts a presumption in favor of judicial enforcement of treaty provisions, much less that the Supremacy Clause mandates such a

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[1] Throughout I refer to *Medellín v. Texas*, 128 S. Ct. 1346 (2008), simply as *Medellín*, even though the Supreme Court did produce an earlier decision in the same litigation, *Medellín v. Dretke*, 544 U.S. 660 (2005).

presumption.[2] But more remains unresolved than settled. Of the many questions raised but not answered by the *Medellín* decision, I want to focus on two. First, the issue of enforcing an ICJ judgment in domestic litigation is a particular application of a general problem: What legal effect should domestic courts attach to the lawmaking acts of international organizations? Second, under what circumstances and to what extent might a court interpret a treaty as authorizing the President to exercise certain lawmaking powers?

Both of these questions involve delegations. In the first case, the issue is whether a treaty or statute has delegated to an international body the authority of the several organs of the United States to make domestically enforceable law. In the second case, the issue is whether a treaty or statute has delegated to the President some part of the lawmaking authority of Congress. Although both questions have constitutional dimensions, I will ignore those issues and concentrate on a more technical problem: Under what circumstances should a U.S. court regard itself as bound to apply rules of decisions resulting from such a delegation?

As the debates that swirl around *Medellín* reflect conceptual confusion (as well as sharp disagreements about process and values), I want to be as clear as I can about a term that is common to both of these questions. By "lawmaking," I mean the promulgation of a rule that can bind certain actors. By "bind," I do not necessarily mean judicial enforcement, although one kind of lawmaking involves the creation of a rule of decision that a court may invoke in a case properly before it. With respect to rules generated by international organizations, the question is precisely whether domestic courts should regard those rules as providing a rule of decision. With respect to delegations to the President, the question is whether rules promulgated by the Executive might be regarded as providing a rule of decision that a court might invoke in a case otherwise properly before it. I will not take up subsidiary questions such as whether a rule might provide a basis for federal court jurisdiction or a cause of action and who might have standing to invoke such a rule, even though these issues are significant in their own right.[3]

My answers are limited but clear enough. As to the question of international delegations, I demonstrate that one argument frequently raised in favor of giving effect to decisions of foreign tribunals—the doctrine of comity—is inapplicable to international bodies such as the ICJ. Scholars who have argued for interjudicial cooperation with

[2] On this point the Court has disregarded the arguments of eminent scholars. For a critique of *Medellín*'s approach to this issue by one of those scholars, see Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

[3] For discussion of these subsidiary issues in the context of the Vienna Convention on Consular Relations, see Paul B. Stephan, *Private Remedies for Treaty Violations After* Sanchez-Llamas, 11 LEWIS & CLARK L. REV. 65, 67–69 (2007).

international bodies (as distinguished from the courts of a foreign nation) fail to understand the doctrine's premises and purpose. As to the question of delegations to the Executive, I argue that the *Medellín* majority is profoundly confused as to what this process entails and consequently fails to provide useful guidance as to when courts might give effect to Executive lawmaking regarding international relations.

## II. INTERNATIONAL TRIBUNALS AND THE COMITY CONCEPT

The United States has joined many treaties that mandate or contemplate lawmaking by an international body.[4] Some of this lawmaking capacity takes the form of dispute resolution (as with the ICJ), while other actions look to the production of laws of general application (what might be seen as a legislative function), or licensing or equivalent approvals (what might be seen as an executive function). In some instances Congress has enacted a statute specifying the domestic legal consequences of the international action, but in many cases it has not. In a few instances Congress has declared that the actions of certain international bodies shall not have any domestic legal effect.[5]

[4] For a fuller discussion, see Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, LAW & CONTEMP. PROBS., Winter 2008, at 1; Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707 (2007); Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 Cal. L. Rev. 1693 (2008); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71 (2008); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2006); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004).

[5] For more than twenty years, legislation approving U.S. trade agreements have contained variations on the proviso that "No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect." Examples include the United States–Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, § 5(a), 99 Stat. 82, 83 (codified at 19 U.S.C. § 2112 note (2006)); North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 102(a)(1), 107 Stat. 2057, 2062 (1993) (codified at 19 U.S.C. § 3312(a)(1) (2006)); Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(a)(1), 108 Stat. 4809, 4815 (1994) (codified at 19 U.S.C. § 3512(a)(1) (2006)); United States–Chile Free Trade Implementation Act, Pub. L. No. 108-77, § 102(a)(1), 117 Stat. 909, 911 (2003) (codified at 19 U.S.C. § 3805 note (2006)); United States–Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, § 102(a)(1), 117 Stat. 948, 950 (2003) (codified at 19 U.S.C. § 3805 note (2006)); United States–Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, § 102(a)(1), 118 Stat. 919, 921 (2004) (codified at 19 U.S.C. § 3805 note (2006)); United States–Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-302, § 102(a)(1), 118 Stat. 1103, 1104-05 (2004) (codified at 19 U.S.C. § 3805 note (2006)); Dominican Republic–Central America–United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, § 102(a)(1), 119 Stat. 462, 464 (2005) (codified at 19 U.S.C. § 4012(a)(1) (2006)); United States–Bahrain Free Trade Agreement Implementation Act, Pub. L. No. 109-169, § 102(a)(1), 119 Stat. 3581, 3583 (2006) (codified at 19 U.S.C. § 3805

As a theoretical matter, the delegation of all forms of lawmaking to international bodies raises profound issues about the future of the nation state, the survival of liberal institutions, and the crisis of democratic legitimacy. But as a practical matter, we have yet to encounter a pure delegation by the United States of legislative or executive power to an international organization. In contrast to Europe, where the executive and legislative products of the European Community take direct effect in national law, Congress traditionally has looked to the executive branch to act as a kind of filter. [6] Congress, on occasion, has authorized the Executive to implement legislative or executive actions by international bodies, but I am unaware of any instance where it has mandated such implementation. Thus, these issues collapse into questions about the scope of legislative delegations to the domestic executive. And when the executive branch does incorporate these actions into its lawmaking, the residual domestic law question is the scope of the Executive's authority to do so.[7]

With dispute resolution the situation is different. As *Medellín* illustrates, international bodies exercising a judicial function produce decisions that litigants then seek to invoke in domestic lawsuits. These bodies vary in jurisdiction, composition and procedures. But because they decide cases in accordance with published reasons, a domestic lawyer working in a common-law tradition finds it hard to resist the idea that their decisions constitute a kind of law.

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note (2006)); United States–Oman Free Trade Agreement Implementation Act**,** Pub. L. No. 109-283, § 102(a)(1), 120 Stat. 1191, 1193 (2006) (codified at 19 U.S.C. § 3805 note (2006)); United States–Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, § 102(a)(1), 121 Stat. 1455, 1457 (2007) (codified at 19 U.S.C. § 3805 note (2006)). Similarly, legislation implementing U.S. adherence to the Berne Copyright Convention provided that "Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto." Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 4, 102 Stat. 2853, 2855 (1988) (codified at 17 U.S.C. § 104(c) (2006)). In addition, Section 5(a) of the Military Commissions Act of 2006 provides: "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories." Furthermore, Section 6(a)(2) of that statute provides: "No foreig[n] or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441 [criminalizing certain violations of the Geneva Conventions]." Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 5(a), 6(a)(2), 120 Stat. 2600, 2631–32 (codified at 18 U.S.C. § 2441 note).

[6] On the direct effect of Community law in national legal systems, see J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413–14 (1991).

[7] *E.g.*, Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 926–27 (D.C. Cir. 2008); Natural Res. Def. Council v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006).

We can find both statutes that implement treaty obligations to recognize certain judgments by non-U.S. dispute settlement bodies, and treaties that do not have such accompanying legislation.[8] Parallel to this, there exists a longstanding common-law tradition of recognizing and enforcing certain foreign judicial judgments as "a matter of comity."[9] Accordingly, we need to consider two plausible inferences. Should we conclude that, absent a statute on point or unambiguous treaty language, the decisions of international tribunals should, as a general matter, be regarded as having no domestic legal consequences? Or should we draw an analogy between foreign courts and international tribunals and conclude that the decisions of international tribunals demand recognition by domestic judges consistent with the principle of comity?[10]

For the *Medellín* majority, this issue simply was absent from the case. Two years earlier the Court had determined that the ICJ's interpretation of the Vienna Convention on Consular Affairs rested on serious errors and misperceptions concerning the U.S. legal system.[11] This conclusion, the Court argued, precluded the possibility of embracing the ICJ's interpretation in *Medellín* itself. Medellín's lawyers did not argue the ICJ decision applied as a matter of comity, but rather that U.S. treaties required domestic judicial enforcement of the ICJ decision even if it rested on faulty legal reasoning. Six members of the Court rejected this argument. Neither the majority decision nor the dissent discusses the comity doctrine.

In spite of *Medellín*'s silence on this point, the comity question remains relevant. In a later case, a litigant still might claim a judgment of an international tribunal in its favor should enjoy enforcement by a United States court as a matter of comity, even when Congress has not adopted a statute addressing the issue. We thus still must unpack this claim and explore its implications.

Put aside for a moment the concern that the comity doctrine supposedly lacks substantial content and largely functions as a pretext for

[8] The statutes that obligate enforcement of awards include 22 U.S.C. § 1650a (2006) (authorizing courts to enforce arbitral awards by international tribunals made pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States) and 9 U.S.C. §§ 201–207 (2006) (authorizing courts to enforce arbitral awards by international tribunals pursuant to the Convention on Recognition and Enforcement of Foreign Arbitral Awards). *See also* 28 U.S.C. § 2414 (2006) (providing mechanism for the payment of judgments against the United States issued by foreign courts or tribunals).

[9] Hilton v. Guyot, 159 U.S. 113, 188, 202 (1895).

[10] For the fullest statement of the argument that international courts should receive comity from domestic courts on the same terms as do foreign courts, see Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998). *See also* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2006).

[11] Sanchez-Llamas v. Oregon, 548 U.S. 331, 357 (2006).

free-ranging judicial discretion.[12] Taken on its own terms, comity rests on a core premise and an uncontroversial corollary. The premise is that dynamic reciprocity characterizes interstate relations. The corollary is that courts can act as agents of states and thus, to a limited extent, conduct interstate relations through their judicial acts. Two seminal Supreme Court decisions illustrate these points. In *The Schooner Exchange v. M'Faddon*, Chief Justice Marshall argued:

> The jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent sovereign power.
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> . . . .
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> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.
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> . . . .
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> Without doubt, the sovereign of the place is capable of destroying this implication. . . . But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.[13]

Accordingly, the Court embraced the doctrine of sovereign immunity, secure in the belief that doing so would improve international relations and that Congress and the Executive would want it to take this step.[14]

*The Nereide*, a nearly contemporaneous Marshall opinion, elaborates on the significance of reciprocity, but also illuminates the limits of the judiciary's capacity to exercise this function on behalf of the sovereign:

> [T]he Court is decidedly of [the] opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. It is for the consideration of the government not of its Courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all.

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[12] *See generally* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991); Michael D. Ramsey, *Escaping "International Comity"*, 83 IOWA L. REV. 893 (1998).

[13] The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 136–37, 146 (1812).

[14] To be clear, the Court in *M'Faddon* did not refer to comity as such. But Chief Justice Marshall rested his argument on general principles because of an absence of applicable statutory or treaty authority, and these general principles illuminate comity.

> It is not for its Courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics. [15]

Accordingly, the Court refused to deviate from the general rule that goods owned by a neutral but found on an enemy vessel were not subject to condemnation, even though it appeared that the owner's sovereign would have followed the opposite rule.[16]

Together, these cases indicate judicial recognition of both the importance of reciprocity and the respective institutional competences of the judiciary and the political branches in advancing this end. *M'Faddon* teaches that a court will apply a rule that has emerged out of a general pattern of reciprocal international behavior and where refusal to apply that rule would signal a defection from that pattern. *The Nereide* complements this lesson with the admonition that a court cannot take it upon itself to retaliate against other states that have themselves defected from such a pattern.

The contemporary doctrine remains true to these principles. It in turn implies several features about the relationship between domestic and foreign law. As I will show, none of these features, on close examination, exists when an international body generates law.[17]

*Reciprocity.* The idea of comity, thought to have emerged as part of the Westphalian architecture that launched modern Europe, requires reciprocal recognition of laws. The concept rests on principles of contract: A sovereign can agree to do something it is not bound to do in return for an equivalent action by a peer. The reciprocity may be implicit, but it always is present.

It is important, at the risk of returning to basics, to remember why reciprocity is so fundamental in international relations. For the most part the international system lacks independent third parties that can enforce rules against states that break them. Without rules, cooperation becomes more difficult. Reciprocity offers one way around this problem. States can reward cooperation and punish opportunism, changing the incentives states face and inducing greater cooperation than might otherwise take place. What the comity doctrine does is give courts a role in the process

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[15] The Nereide, 13 U.S. (9 Cranch) 388, 422–23 (1815).

[16] Again, the case did not invoke the doctrine of comity as such. But, as with *M'Faddon*, Marshall's opinion articulates the underlying principles that inform the doctrine.

[17] The arguments made here represent an extension of and elaboration on portions of two amicus curiae briefs I authored and submitted to the Supreme Court. Brief of Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as *Amici Curiae* in Support of Respondents, at 16–22, Sanchez-Llamas v. Oregon and Bustillo v. Johnson, 548 U.S. 331 (2006) (Nos. 04–10566 and 05–51); Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as *Amici Curiae* in Support of Respondent, at 20–21, Medellín v. Dretke, 128 S. Ct. 1346 (2008) (No. 04–5928)

by allowing them to act as representatives of their sovereign, but only to the extent that they can behave reciprocally.

*Nonrecognition*. Reciprocity requires the capacity to reject the act of a foreign lawmaker that does not make the requisite concession. In *Hilton v. Guyot*, the leading case on comity, the Court refused to give effect to a French judgment for money damages because France as a general rule did not recognize U.S. judgments as conclusive on the merits of a dispute.[18] Comity, in other words, is a two-way street: A state can give effect to a foreign legal act or not depending on the behavior of the lawmaker that promulgated that act.

*Dynamic interaction*. Reciprocity is dynamic. The parties interact, either adhering to the cooperative norm or not. A state will retaliate against an uncooperative state by withdrawing its cooperation. It will reward a cooperating state with its continued cooperation. A party can shift between a cooperative and an uncooperative posture depending on the actions of the other party. *The Nereide* underscores the difficulty that courts have in carrying out dynamic interactions.

*Discrimination*. Because comity conditions a state's behavior on the actions of the lawmaking state, it presupposes that similar laws generated by different states may produce different outcomes. A judgment issued by a court in a cooperative state will be respected, but a comparable judgment originating from an uncooperative state will not. A domestic court seeking to invoke the comity doctrine can use the reciprocity principle to pick and choose between those foreign judgments it will enforce and those it will not.[19]

None of these attributes characterizes the relationship between a domestic court and an international organization. International organizations come into being through, and only through, treaties. And treaties limit, when they do not rule out entirely, reciprocity and dynamic interaction between a party and the organization they create.

First, a treaty functions as a stabilizing mechanism, not a dynamic interaction. It memorializes a specified set of understandings of the parties and seeks, by some mechanism, to project those understandings into the future. In doing so, it limits the discretion of parties to react to future uncooperative behavior.[20]

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[18] 159 U.S. 113, 210 (1895).

[19] *Compare In re* Maxwell Commc'n Corp., 93 F.3d 1036, 1054–55 (2d Cir. 1996) (rewarding cooperative British court with comity for its rule on preferences in bankruptcy), *with* Drexel Burnham Lambert Group, Inc. v. Galadari, 777 F.2d 877, 881 (2d Cir. 1985) (declining to accord comity to Dubai bankruptcy proceeding). For an early analysis of one particular legal doctrine—the act of state doctrine—that emphasizes the inclination of courts to distinguish between liberal and illiberal regimes, see Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

[20] To be sure, customary international law admits some discretion on the part of treaty parties to sanction other parties for a failure to honor treaty obligations and allows some selective nonapplication of treaty norms to such parties. *See, e.g.*, Vienna

Second, international law has not worked out effective mechanisms to deal with uncooperative international organizations. In the case of international dispute settlement bodies, a state affected by a lawless or unfounded decision has few alternatives. It may argue that the body acted *ultra vires*, either by exceeding its terms of reference or violating relevant procedural rules (including, one assumes, the acceptance of corrupt inducements to reach a result). It may refuse to comply with the decision, putting itself in the position of violating an international law obligation but perhaps not suffering adverse consequences other than a reputational loss. It may withdraw from the treaty on which the body's jurisdiction rests, although that action will have no retroactive effect.[21] But it may not contest the decision as unfounded, discriminatory, or malicious, absent proof of misconduct by the body's members.

In a few instances, the threat of withdrawal from a treaty might suffice to deter an international organization from capricious or malicious behavior. If the organization is the creature of a bilateral treaty, for example, suspension or denunciation of the treaty might bring its operations to a halt.[22] But most international organizations derive their authority from multilateral treaties, reducing the ability of any one party (even a "hyperpower") to retaliate effectively against misbehavior.

The composition of the international dispute resolution bodies reinforces the lack of flexibility, and therefore the inability to act reciprocally. A national court, to varying degrees, remains subject to its national political authorities. Constitutional litigation aside, a legislature can change the applicable rule in response to reciprocal pressures. More subtly, political actors can influence domestic judicial bodies directly through reconstituting membership, or indirectly through rhetoric and reputational sanctions. International dispute settlement bodies, by contrast, almost always comprise persons from multiple states. This feature makes it difficult, if not impossible, for political actors in any one state to exert influence on the body. Of course, this freedom from national influence is often seen as the genius of international dispute resolution.[23] But it is inconsistent with the capacity to act reciprocally.

Convention on the Law of Treaties, art. 60, May 23, 1969, 1155 U.N.T.S. 331; John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881 (1999). But this discretion to retaliate is far more limited than would exist in the absence of a treaty.

[21] The United States twice has renounced prior treaty obligations to accept the jurisdiction of the International Court of Justice. In the first instance, the ICJ refused to give effect to the renunciation as to a case over which it already had exercised jurisdiction. Military and Paramilitary Activities (Nicar. v. U. S.), 1986 I.C.J. 14, 28–29. In the second, no one has yet challenged the effectiveness of the denunciation of the Optional Protocol to the Vienna Convention on Consular Relations with respect to future disputes. *See* Medellín v. Texas, 128 S. Ct. 1346, 1354 (2008).

[22] *Cf.* Comegys v. Vasse, 26 U.S. (1 Pet.) 193, 211 (1828) (dispute resolution tribunal established by 1819 bilateral treaty between United States and Spain).

[23] For a dissenting argument that states over time eschew tribunals whose members cannot be sanctioned for surprising or undesirable decisions, see Eric A.

And without reciprocity, the fundamental premise for claims of comity disappears.

Not only do states lack the capacity to respond reciprocally to the behavior of international dispute settlement bodies, but these bodies also find it hard to respond reciprocally to state behavior. To be sure, an international organization with significant executive powers—the International Monetary Fund comes to mind—does have considerable ability to reward and punish states in line with its objectives.[24] A dispute resolution body, in contrast, typically has a mandate to assess a dispute by reference to preexisting criteria. It will, of course, have reason to reward states that live up to such criteria and to impose costs on those that do not. But the preexisting criteria do not normally include the extent of a state's cooperation with, or hostility to, the body itself, as distinguished from the legal regime that the body implements.

Reflect, for example, on the history of the Vienna Convention disputes involving the United States in the International Court of Justice. For a decade now, the United States has failed to comply with ICJ orders in the most absolute and irrevocable way, namely, by executing persons that the ICJ has ordered to be kept alive.[25] Perhaps the judges have become irritated with this behavior, and perhaps this irritation explains the supposedly unjustifiable conclusions reached by the court in the *Avena* case.[26] But the opinions of the court express no such irritation, and most observers would regard any such expression as damaging to the court. The deepest principles of legality call on dispute resolution bodies not to discriminate among the parties except as legal norms and rules require. It might be naive to insist that dispute resolution bodies have no capacity to act reciprocally with particular parties that appear before it, but such capacity as exists is heavily constrained by well grounded norms of appropriate judicial behavior.

In sum, whatever else may justify the willingness of U.S. judges to enforce the decisions of international dispute settlement bodies, comity cannot do the job. States, including the United States, and dispute settlement bodies cannot relate to each reciprocally, or at least not much. Rather, each side is bound by legal commitments that structure and

Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005). For a rejoinder defending the conventional view, see Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005). For the dissenters' response, see Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957 (2005).

[24] *See* Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 718–19 (1996–97).

[25] *Medellín*, 129 S. Ct. at 360; Fed. Republic of Germany v. United States, 526 U.S. 111 (1999); Breard v. Greene, 523 U.S. 371 (1998).

[26] For the argument that *Avena,* Avena and Other Mexican Nationals, (Mex. v. U.S.) 2004 I.C.J. 12 (Mar. 31), manifests a remarkable and unjustifiable ignorance of, or indifference to, the normal workings of the U.S. legal system, see Sanchez-Llamas v. Oregon, 548 U.S. 331, 351–57 (2006).

constrain their relationship with each other. The United States must comply with its treaty obligations regarding the body, unless it has a legitimate ground for retroactive suspension or termination of those obligations. Dissatisfaction with a body's behavior is not, in and of itself, such a ground. And an international dispute settlement body must apply the law even if it favors an uncooperative state or disfavors a cooperative one.

What then remains of arguments for enforcing the decisions of international dispute settlement bodies in domestic law? Two occur to me, neither of which I find satisfactory. In an earlier article, I discussed what one might call the "safety in numbers" argument. One could argue, and proponents of international judicial comity appear to believe, that persons charged with the responsibility of judging, whether in national judiciaries or international organizations, can bolster their collective position, and hence the efficacy of the rule-of-law concept they presumably embody, through acts of mutual support.[27]

The argument assumes that the dominant, or at least a significant, quality of all judges, domestic and international, is a recognizable commitment to rule-of-law values. This assumption strikes me as insupportably strong, especially as applied to international organs that operate in the context of international disputes. I offer as one striking counterexample: the Iran-U.S. Claims Tribunal, a body that has decided hundreds of cases since its creation by the Algiers Accords.[28] Its panels always comprise one U.S. national, one Iranian, and one person from a third country, except when all nine members (again one-third each) sit. I am unaware of any instance where an Iranian member of the tribunal voted in favor of a contested U.S. claim. Many factors might explain this voting pattern, but it seems to preclude a commitment to the disinterested application of objective rules.

Alternatively, one might argue that there is something about the culture of judging, the commitment to disinterested elaboration and application of legal principle, that is self-reinforcing. Not all judges may participate in this culture—see my reference to the Iran-U.S. Claims Tribunal above—but the culture nonetheless exists and has value. Promotion of the culture involves mutual support, although it also will require distinguishing between positive and negative instances of judging.[29]

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[27] I discuss and criticize this argument in Paul B. Stephan, *Process Values, International Law, and Justice*, 23 SOC. PHIL. & POL'Y 131, 147–48 (2006).

[28] *See generally* CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1998).

[29] *See, e.g.*, Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, LAW & CONTEMP. PROBS., Winter 2008, at 37 (discussing logic of appropriateness as applied to international judges); Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33 (2008) (discussing appropriateness as a quality manifested by international judges).

This argument has at least two difficulties. First, it smuggles in, without serious critical analysis, criteria for distinguishing appropriate from inappropriate judicial behavior. Is appropriateness simply a social phenomenon based on popularity, or are normative assessments doing some work here? I suspect that the latter more accurately describes what at least some scholars do. Second, it abandons hierarchy, including that specified by legal instruments such as treaties, in favor of a fluid, if not formless, appraisal of judicial work. As an aesthetic exercise, this is unexceptional. As, however, a way of determining when certain official acts have substantial, real-world consequences—indeed, as *Medellín* demonstrates, even life-or-death consequences—it is troubling.

Most to the point, these arguments have nothing to do with comity. They do not focus on the virtues of reciprocity, but rather a compelling need for respect. They do not claim that we should accord legal effect to the decisions of international tribunals because of the benefits of cooperating with these tribunals, but rather because of a felt need to instill the tribunals with authority.

I will not debate here the merits of authoritarian arguments for obeying international tribunals.[30] It suffices to note that the problem of cooperation among courts of different nations, and the doctrine that defines that cooperation, is significantly different from the issue of implementing the decisions of international tribunals into the domestic legal order. The analogy between foreign courts and international courts, which some scholars advance uncritically, is misleading. As we continue to wrestle with the potential of international tribunals to generate domestically binding rules of decision, we should stop using any and all arguments based on interjudicial reciprocity.

## III. DELEGATIONS TO THE EXECUTIVE

The word "comity" did figure in the *Medellín* case, but rather oddly. President Bush, in the winter of 2005, issued his famously enigmatic statement calling on the Texas courts to give Medellín the hearing that the ICJ had demanded "in accordance with general principles of comity."[31] The failure of the President to state more clearly the legal basis for his statement immediately bred confusion: One member of the Texas Court of Criminal Appeals inferred that President Bush, like President

[30] One difficulty with an authoritarian argument is its obvious inconsistency with the intimation in the majority opinion in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006), that assigning binding and unreviewable force to an international tribunal's interpretation of a domestically enforceable treaty would raise constitutional problems. For the additional argument that the law-declaring, as opposed to dispute-settlement, function of international tribunals leaves much to be desired, see Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 DUKE J. COMP. & INT'L L. 477 (2008).

[31] Memorandum of President George W. Bush to the Attorney General (Feb. 28, 2005), *available at* http://brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf.

Clinton before him, had not purported to bind the state courts but only to make a request.[32]

The *Medellín* majority did assume that President Bush meant to provide a rule of decision that would bind the Texas judiciary, but dismissed the government's argument that he had the authority to do so. For the most part the majority's argument turned on its conclusion that neither the UN Charter nor the Optional Protocol to the Vienna Convention was self-executing: "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."[33] Non-self-execution, in other words, means a treaty completely lacks any domestic legal effect. Given this premise, the conclusion that a non-self-executing treaty provides no authority for any action by the Executive follows ineluctably.

The problem is with the premise. At other points in the majority's opinion, non-self-execution has a different, more limited meaning: Such a treaty does not itself create privately enforceable rights.[34] The distinction is critical. While judicial enforcement at the behest of a private person is the kind of consequence that preoccupies most lawyers, it is not the only way that a law can have effect. A law, for example, might give a government official the power, but not the duty, to undertake an action with concrete consequences to individuals. And if a law can have this kind effect, so too can a treaty.

At one point the majority tried to provide a clear definition of self-execution: "What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification."[35] But what does "automatic" mean? And "effect"? The opinion then states that whether a non-self-executing treaty has domestic legal effect depends on the need for enactment of implementing legislation.[36] Does this mean that a treaty does not have an automatic effect if, and only if, it requires implementing legislation? And by effect, does the majority mean judicial enforcement?

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[32] *Ex parte* Medellín, 223 S.W.3d 315, 358–60 (Tex. Ct. Crim. App. 2006) (Cochran, J., concurring). I had earlier suggested the possibility of this argument in an article published shortly after the first *Medellín* decision. Paul B. Stephan, *U.S. Judges and International Courts*, 100 AM. SOC'Y INT'L L. PROC. 238, 240 (2006).

[33] Medellín v. Texas, 128 S. Ct. 1346, 1368 (2008).

[34] *Id.* at 1357 n.3. For a discussion of the different understandings of non-self-execution that the majority weaves into its opinion, apparently without appreciation of the distinction between no judicial enforcement and no domestic legal force, see Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540 (2008).

[35] *Medellín*, 128 S. Ct. at 1356 n.2.

[36] *Id.*

A difficulty with this formulation is that it seems to regard domestic lawmaking as fitting within one of only two categories: an enactment that immediately creates judicially enforceable private rights (putting aside the separate issues of standing and whether the rights can be enforced through a private right of action) and an enactment that has no legal effect pending the later adoption of implementing legislation.[37] But there exists a third possibility: An enactment can have no immediate effect but can authorize the Executive, without any further legislation, to adopt rules that do have direct domestic effect. Such an enactment's domestic legal effect, in other words, is not automatic, but rather depends on subsequent implementing action by the Executive.

The most famous example of a statute that operates in this fashion is the one at the heart of *United States v. Curtiss-Wright Export Corp.*[38] Congress authorized the President to declare the sale of arms to certain countries illegal and adopted criminal sanctions for violations of such declarations. The statute had no automatic legal effect, but rather enabled the President to take steps that, without further legislation, had direct legal consequences, namely criminal punishment. The Supreme Court upheld this mechanism against a constitutional challenge.

To be sure, *Curtiss-Wright* involved a statute rather than a treaty. I cannot conceive, however, why in principle a treaty cannot delegate lawmaking authority to the Executive in the same fashion as a statutory delegation. Indeed, treaties commonly anticipate implementation through governmental, rather than legislative, action. Among the earliest of U.S. treaties, for example, was the Jay Treaty authorizing the governments of the United States and Great Britain to form a commission to settle outstanding property disputes.[39]

Consider, as a modern instance, Article 2001(1) of the North American Free Trade Agreement (NAFTA).[40] This provision authorizes a committee comprising representatives of the three governments to adopt binding interpretations of the Treaty's provisions. These interpretations in turn affect the rights under the Treaty that private investors enjoy. In particular, they determine the extent of legal protection given to investors against government actions that harm their economic interests.[41] As a matter of U.S. law, the Executive does not need to seek further legislative authority to participate in such interpretations. Moreover, pursuant to statute, any awards made by investment dispute

[37] An example of the latter is the adoption of a budget, which has no consequence absent a subsequent appropriation.

[38] 299 U.S. 304 (1936).

[39] Treaty of Amity, Commerce, and Navigation, Gr. Brit.–U.S., Nov. 19, 1794, 8 Stat. 116.

[40] North American Free Trade Agreement, U.S.–Can.–Mex., art. 2001(1), Dec. 17, 1992, 32 I.L.M. 605, 693 (1993).

[41] *Id.* art. 1131(2), at 645.

tribunals under that Treaty, including those resulting from an interpretation under Article 2001(1), have direct legal effect.[42]

One might respond that, as a matter of U.S. law, NAFTA has legal effect only as a result of implementing legislation.[43] As a result, the Treaty's delegation of interpretative authority to the trinational committee has consequence only because Congress, in approving NAFTA, implicitly approved the delegation as well. But nothing in the implementing legislation referred specifically to this delegation. Although some have questioned the constitutionality of the decision of the United States to adopt the Treaty through a congressional enactment, rather than by procuring a supermajority consent from the Senate, no one has suggested that the legitimacy of any authority delegated to the Executive by the Treaty should turn on this point.[44]

Assume that there is no constitutional impediment to the United States adopting a treaty that authorizes the Executive to take action, either alone or in conjunction with a foreign government, that will produce rules of decision that will bind domestic judges. If so, the *Medellín* majority's argument that neither the UN Charter nor the Optional Protocol provides any authority to the President is seriously incomplete. Either treaty, or perhaps both operating in conjunction, might have no automatic domestic effect but still provide a basis for later actions by the Executive that could be legally consequential. The label "non-self-executing" simply doesn't do the work that the majority asserts that it does.

The harder question is what it takes for a treaty to effect a delegation of domestically effective lawmaking authority to the Executive. Should it suffice for the treaty to create a structural inference of a delegation based on the purposes of the treaty and the kinds of functions normally exercised by the Executive? Or should the treaty contain an express delegation along the lines of NAFTA and the statute at issue in *Curtiss-Wright*? More generally, should the courts apply the same interpretative standard when inferring that a treaty has created privately enforceable rights and delegates lawmaking authority to the Executive, or instead approach these issues differently?

Because the *Medellín* majority did not identify this issue, the opinion provides no real help in divining answers to these questions. The Solicitor General's brief argued that two treaties and a statute together gave the President the authority to bind the Texas courts.[45] First, the UN

[42] Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. No. 889-532, 80 Stat. 344 (codified at 22 U.S.C. §§ 1650, 1650a (2006)).

[43] North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 101(a), 107 Stat. 2057, 2061 (1993) (codified at 19 U.S.C. § 3312(a)(1) (2006)).

[44] On the constitutionality of NAFTA's approval, see Made in the USA Found. v. United States, 242 F.3d 1300 (11th Cir. 2001), *cert. denied*, 534 U.S. 1039 (2001).

[45] Medellín v. Texas, 128 S. Ct. 1346, 1367–71 (2008).

Charter obligates the United States to enforce judgments of the ICJ.[46] Second, the Optional Protocol obligated the United States to respect ICJ jurisdiction over disputes arising under the Vienna Convention on Consular Relations.[47] Third, through the UN Participation Act, Congress authorized the President to conduct relations with the United Nations.[48] The two treaties obligate the United States to submit to the jurisdiction of the ICJ and to respect its orders; the statute confers on the President the authority to participate in the functions of the United Nations, including its judicial arm. Together, the United States argued, these instruments confer on the President discretionary authority to take such steps as he believes are necessary to bring the United States into compliance with ICJ orders.[49]

The Court thought it sufficient to observe that neither of these treaties was self-executing and that the UN Participation Act did not give the President a unilateral authority to make domestic law.[50] But the first part of this argument reflects the Court's confusion about what self-execution means. These treaties did not create any rules of decision that a private person might invoke in a domestic court, but it does not follow that they did not anticipate and, by inference, authorize Executive lawmaking. If this inference is permissible, then the UN Participation Act simply embellishes the point by indicating the endorsement by both Houses of Congress, and not simply a supermajority of the Senate, of the power authorized.

How plausible is the inference in this case? A treaty that submits the United States to binding dispute settlement, under conditions where compliance with the resulting decision is acknowledged to be obligatory, raises the question of how compliance will come about. Such a treaty clearly bestows some authority on the Executive, which has the responsibility of managing U.S. participation in the proceeding. The Executive has discretion to dispute jurisdiction, repudiate the treaty creating jurisdiction, choose which arguments to make and, perhaps equally important, which not to make, all in accordance with the UN

[46] United Nations Charter, art. 94(1), 59 Stat. 1051, T.S. No. 993 (1945).

[47] Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

[48] United Nations Participation Act of 1945, Pub. L. No. 264, § 2(e), 59 Stat. 619, 620 (codified at 22 U.S.C. §§ 287, 287a (2006)).

[49] For an earlier and abbreviated version of this argument, see Carlos Manuel Vázquez, Breard *and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 689 (1998). For a restatement in the wake of *Medellín*, see Carlos Manuel Vázquez, *Less Than Zero?*, 102 AM. J. INT'L L. 563 (2008). It is not clear whether Professor Vázquez understands the Executive's authority to implement orders of the International Court of Justice as discretionary or obligatory. As the argument in the text makes clear, a conventional delegation analysis supports the existence of discretionary authority only.

[50] *Medellín*, 128 S. Ct at 1367–71.

Participation Act.[51] Inferring the existence of a capacity to settle a dispute with which an international tribunal is seized from an express authority to bring and defend claims in that tribunal does not seem all that great a stretch.

Also relevant is the line of cases regarding the President's lawmaking authority with respect to international disputes. These cases all involve sole executive agreements (that is to say, international compacts into which the Executive entered without statutory authorization and did not submit to the Senate for its consent) that settled disputes over business injuries arising from foreign political upheavals.[52] All upheld the authority of the Executive to agree to settlements that displace the rules of contract, property, and tort otherwise applicable under state law without prior or subsequent congressional approval.

The *Medellín* majority confined these cases to their facts, arguing that the power to encroach on state rules of private law is quite different from the authority to interfere with state criminal proceedings.[53] As to inherent executive authority, this is undoubtedly true. But this is the right answer to the wrong question. While a finding of inherent lawmaking authority would have been sufficient to justify the President's memorandum, it was not necessary. Even in the absence of inherent executive authority, the dispute resolution cases remain relevant as a lens for interpreting the two treaties that the Executive signed and ratified, and that the Senate approved.

What the majority overlooked is that the Executive function of international dispute settlement illuminates the background understanding of the Senate when it gave its consent to ratification of the UN Charter and the Optional Protocol, and of the full Congress when it adopted the UN Participation Act. These instruments bound the United States to participate in a formalized dispute resolution process. The longstanding tradition of Executive authority to settle claims points to a further expectation as to how the United States would implement the resolution reached by the process. It is a defensible, and perhaps irresistible, inference from the acceptance of ICJ jurisdiction that the Senate and Congress delegated to the Executive the authority to take whatever steps the President deemed appropriate to comply with ICJ orders.

What would such a delegation entail? First, it would provide fairly clear standards, subject to judicial review, setting the limits to this authority. The President could not, for example, use the ICJ order requiring further review of tainted convictions as a pretext for

[51] The Court acknowledged that the UN Participation Act provided express statutory authority to litigate in the ICJ, but declined to infer from this a further capacity to bring about compliance with ICJ orders. *Medellín*, 128 S. Ct. at 1371.

[52] Dames & Moore v. Regan, 453 U.S. 654, 660, 675 (1981); United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324 (1937).

[53] 128 S. Ct. at 1371.

commuting a death sentence. Second, it would confer a power, but not a duty, on the President. In cases where the President believed that compliance with an ICJ order would harm the interests of the United States, even taking into account the reputational cost of disregarding an international law obligation, no person could challenge this decision in court.[54]

As a functional matter, such a delegation not only embraces the long historical record of Executive authority to manage international dispute resolution, but also recognizes the significance of reciprocity in international relations and the unique capacity of the Executive to bargain internationally. A burgeoning political science literature emphasizes the importance of reciprocal interaction among states as a basis for stable international cooperation.[55] The capacity to interact reciprocally requires discretion, the authority to discriminate, and an ability to act quickly and decisively. Of the three branches of our government, only the Executive fully possesses these qualities.[56]

This functional argument, some might object, proves too much. That international dispute settlement is important, and that the Executive is uniquely positioned to promote this process, does not mean that all international agreements should induce an inference that the instrument authorizes the President to implement binding settlements regarding their interpretation. Treaties extend over a vast area of policies and interests, and any one might provoke a dispute. With the rise of multilateral treaties, the potential for disagreements over interpretation has grown proportionally with the number of parties to the instruments. A free-floating Executive authority to make law on any subject related to a treaty-based interpretive dispute would represent an unprecedented, and unacceptable, extension of Executive lawmaking power.[57]

By contrast, an inference limited to express commitments, found in treaties or congressional enactments, to submit matters to binding

[54] Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) (rejecting judicial challenge to Executive refusal to comply with ICJ order).

[55] The seminal texts are ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) and Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281 (1956). For a recent review of the literature and its applicability to international law, see ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 111–17 (2006).

[56] For judicial recognition of the significance of the Executive's capacity to behave reciprocally in international relations, see, for example, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431–32 (1964); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111–12 (1948); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936).

[57] One should note, however, that the Court's rather Delphic opinion in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), indicates no obvious limits on the Executive's authority to displace state law as part of international dispute resolution. If nothing else, *Medellín* represents a welcome step back from that much criticized decision. *Cf.* Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1 (2003).

dispute resolution would not present the problem of open-ended discretionary authority. The inference would apply only where the responsible organ of Congress has embraced dispute resolution and not taken any action to limit the scope of Executive authorization.[58] It would complement the exercise of a dispute-settlement function that Congress long has supported even when it has not expressly approved . It would not extend past the authority to implement the orders of a previously approved international tribunal and would leave the Executive free to do less (but not more) than the tribunal ordered.

A final objection to the inference argument is that it extends Executive authority past the boundaries recognized in earlier cases. As noted above, the *Medellín* majority characterized its earlier decisions upholding Executive displacement of state law as limited to the settlement of civil claims between U.S. citizens and foreigners. It contrasted the power asserted in the instant case as "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."[59] Disregarding the law governing a state's criminal justice process is, it appears, far more intrusive than overturning its rules of tort, contract, and property.

By framing the issue as one of the scope of inherent Article II power, rather than as a matter of treaty interpretation informed by past practice, the Court overlooked a relevant longstanding practice of Executive intrusion into states' criminal proceedings. As a matter of treaty interpretation augmented by statutory enactment, the Executive traditionally has exercised unreviewable authority to determine whether persons held by a state pursuant to criminal charges may be handed over to a foreign state.[60] This power, exercised by the Secretary of State, has as its preconditions a demand by a requesting state and a finding by a judicial body (at present a federal judge or magistrate) that the foreign charges come under an extradition treaty and that there exists a proper evidentiary basis for them. When these conditions have been met, the Executive has complete discretion to terminate the state criminal proceedings or not.[61]

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[58] In the case of trade agreements, for example, the U.S. implementing legislation limits the Executive's authority to the seeking of injunctive relief against state and local governments that bring the United States out of compliance with the agreement. *E.g.*, Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b)(2)(A), 108 Stat. 4809, 4817 (1994) (codified at 19 U.S.C. § 3512(b)(2)(A) (2006)).

[59] Medellín v. Texas, 128 S. Ct. 1346, 1372 (2008).

[60] Terlinden v. Ames, 184 U.S. 270 (1902); United States v. Rauscher, 119 U.S. 407 (1886). The extradition treaties are numerous. The statutory authority currently resides in 18 U.S.C. § 3184 (2006), which is the latest version of legislation that has been on the books for more than two centuries.

[61] For decisions upholding this Executive power against separation-of-powers attacks, see, for example, Cornejo-Barreto v. Siefert, 379 F.3d 1075 (9th Cir. 2004), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004); DeSilva v. DiLeonardi, 125 F.3d 1110

I do not mean to suggest that this tradition suggests the existence of inherent constitutional authority on the part of the Executive to control extradition. The Executive's authority is shared with the judiciary, which must certify that the statutory conditions have been met, and in any event rests on a statute.[62] What this authority does illuminate is a well established capacity of the Executive to intervene in state criminal proceedings upon the satisfaction of certain preconditions. If an extradition treaty can be understood to authorize the Executive to terminate a state criminal proceeding, is it that great a leap to interpret a treaty submitting specific controversies to binding dispute settlement as authorizing the Executive to extend a state criminal proceeding? The more general point is that, when international relations and treaties intersect, there indeed exists a longstanding practice of Executive interference with state criminal proceedings "that reaches deep into the heart of the State's police powers."[63]

On balance, the case is strong for an inference that a treaty submitting the United States to binding international dispute settlement also authorizes the Executive to do what it regards as necessary to implement the resulting settlement.[64] Any further resistance must rest on categorical objections to any inference at all. One could argue, for instance, that delegations of lawmaking authority to the Executive must be express. Certainly the delegations that underlie *Curtiss-Wright* and the Executive's extradition power are clear and unambiguous. And both these examples demonstrate that Congress has the capacity to make such delegations when it wishes to do so.

But a categorical argument against inferential interpretation of treaties that commit the United States to third-party dispute settlement has at least two difficulties. First, it is inconsistent with general principles of statutory interpretation, in particular the *Chevron* doctrine. Second, it ignores an important difference between treaties and statutes.

As a general matter the U.S. courts have regarded legislative allocations of responsibility to agencies of the Executive as including an implicit authority to promulgate binding interpretations of that legislation. The practice is old, but the leading modern case is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[65] That decision makes

(7th Cir. 1997); Lo Duca v. United States, 93 F.3d 1100 (2d Cir. 1996), *cert. denied*, 519 U.S. 1007 (1996).

[62] For the historic background to this arrangement, see Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

[63] *Medellín*, 128 S. Ct. at 1372.

[64] I am putting to one side the argument that later legislation adopted by Congress impliedly cancelled this implicit delegation. An *Amicus* brief raised this issue in *Medellín*, but the Court did not address it. *See Amicus Curiae* Brief of Constitutional and International Law Scholars in Support of Respondent State of Texas, at 14–17, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06–984).

[65] 467 U.S. 837 (1984).

an explicit link between administrative authority and Executive lawmaking.

In the case of the UN Charter and the Optional Protocol, there exists, through the UN Participation Act, a clear statutory allocation of administrative authority to the Executive. *Chevron* suggests that courts should give substantial deference to the President's interpretation of the Charter and the Protocol as containing an implicit delegation of discretion to implement ICJ judgments.[66] Moreover, the more frequently the Executive asserts this authority, the stronger will be the case for *Chevron* deference to this position.[67] More generally, the possibility of extending the *Chevron* doctrine to treaties undercuts a categorical position against any inferences of delegation of Executive lawmaking authority.

The categorical argument also fails to confront one aspect of treaties that differs from statutes. Treaties by their nature address matters of common interest to the parties. Because the domestic legal orders of states vary widely, treaties normally do not specify the means by which a state integrates its international obligation with its domestic law. Many states, for example, are required by their constitutional law to give no domestic effect to a treaty.[68] Such states depend entirely on domestic enactments for treaty implementation. Accordingly, treaties typically are incomplete inasmuch as they do not attempt to address differences in domestic law approaches to compliance and enforcement. Statutes, by contrast, are presumed to be comprehensive, including issues of implementation. The silence of a treaty on issues of domestic impact, then, results from a different structure of lawmaking than does silence in a statute and gives rise to a different inference about the lawmaker's intent.

It does not follow, of course, that the failure of a treaty to preclude domestic enforcement permits an inference authorizing all forms of domestic implementation, including private enforcement through judicial proceedings. *Sanchez-Llamas* quite properly confirmed the longstanding U.S. resistance to such a position.[69] But the structural nature of treaties does undermine the argument that no inferences about modes of domestic implementation are possible and, in particular, the

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[66] *Cf.* F. Hoffman-LaRoche Ltd. v. Empagran S. A., 542 U.S. 155 (2004) (applying the Department of Justice's interpretation of the Foreign Trade Antitrust Improvements Act as reasonable, even if not the most obvious reading of the statute). For a fuller discussion of the relevance of the *Chevron* doctrine to foreign relations law, see Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 536–37 (1998).

[67] The *Medellín* majority noted that the Executive's assertion of authority was "unprecedented," 128 S. Ct. at 1372, while *Chevron* gives greater weight to longstanding interpretive positions.

[68] *See, e.g.*, Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326, 347 (Can.).

[69] *See* Stephan, *supra* note 3.

position that treaties should not be read as giving the Executive any discretion as to their implementation.

## IV. CONCLUSION

For the last three decades, debates in the United States about the domestic effect of international law have turned largely on the question of internationalism. Should the United States have mechanisms that make it easy to convert an international obligation into a domestically enforceable legal obligation, or should it be hard? If international cooperation is a good thing, and if greater enforcement induces greater cooperation, then the normative case for easy-to-implement domestic effect seems strong.[70] People adhering to this perspective see themselves as internationalists and seek to stigmatize their adversaries as "sovereigntists."[71]

What *Medellín* reminds us is that this dichotomy is false. In any discussion of domestic law there exists a constitutional dimension. One cannot talk about lawmaking without considering the respective roles of the three lawmaking branches. This dimension does not involve a debate over individual rights versus governmental power, but rather competing visions of how the constitutional separation of powers should function.[72]

A failure to understand the role of separation-of-powers issues can lead to confused or incomplete analysis of particular questions. For the *Medellín* majority and many of the self-described internationalist advocate-scholars alike, the only constitutional question raised by domestic implementation is the choice between judicial improvisation and enforcement, on the one hand, and legislative control, on the other. What this debate has largely ignored is the role of the Executive in controlling domestic implementation of international law.

Executive implementation of international law makes many uncomfortable. On the one hand, recognition and bolstering of this authority does make international law easier to implement and therefore might seem more "internationalist." But one of the dirty secrets that international lawyers wish to elide is that much of international law is contested, unclear, ambiguous, and therefore up for grabs. In a constitutional system where political leadership of the Executive is

[70] An underappreciated flaw in the argument described in text is the assumption that enforcement necessarily means judicial enforcement at the behest of private persons, otherwise known as formal enforcement. A powerful case exists, however, for the position that formal enforcement of legal obligations can undercut informal enforcement, and that in many instances informal enforcement is superior. *See generally* SCOTT & STEPHAN, *supra* note 55.

[71] *E.g.*, Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000, at 12.

[72] Accordingly, Curtis Bradley has proposed that the "sovereigntist" terminology be abandoned and that the term "constitutionalist" be used instead. Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59 (2006).

significant and change is frequent, embracing Executive implementational authority means opening the door to changing on a regular basis much (although by no means all) of the content of that part of international law that has domestic effect. Moreover, at a policy level, one can cite missteps and blunders by the Executive as evidence that international law is too important to be left in the hands of anyone other than the judiciary.[73]

Reasonable people can disagree about the risks associated with Executive lawmaking authority. What seems indisputable, however, is that some portions of international law reflect the contingent and problematic environment in which international relations take place. This environment calls out for an ability to respond to changing circumstances informed by an array of sources not reproducible within the framework of a public adversary system. To abandon Executive lawmaking in favor of either judicial rule or an insistence on express legislative authority impedes, rather than promotes, international cooperation and, in important ways, the progressive development of international law.

[73] *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004). The problem with this argument is the Supreme Court's evident intuition that many matters are too important to be left in anyone's hands but its own.