A PRIMER ON TREATIES AND § 1983 AFTER *MEDELLÍN V. TEXAS*

by
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The majority opinion in Medellín v. Texas *contains a number of statements to the effect that treaties are not equal to federal statutes and that courts should presume that treaties do not create private rights. This Article analyzes the impact of those statements on the ability of plaintiffs to bring actions under 42 U.S.C. § 1983 for the enforcement of treaty rights. Because there has been no comprehensive assessment of whether § 1983 applies to treaties at all, however, the Article first considers the textual, precedential and policy-based arguments on that issue, and it concludes that § 1983 should include treaty-based claims. Turning to* Medellín, *the Article discusses and criticizes the ways in which the decision creates problems for treaty claims, and it argues that treaties and statutes should receive similar treatment under § 1983.*

I. INTRODUCTION

The Supreme Court's decision in *Medellín v. Texas*[1] addresses the status under U.S. law of a decision by the International Court of Justice

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[1] 128 S. Ct. 1346 (2008).

about the meaning and enforcement of Article 36 of the Vienna Convention on Consular Relations.[2] More specifically, *Medellín* first addresses the circumstances under which treaty provisions are self-executing and, therefore, directly enforceable against states under the Supremacy Clause. Second, and, relatedly, the case assesses the power of the President to enforce a treaty against the states. Rather than confront these issues directly, this article considers how *Medellín* intersects with the ability of plaintiffs to enforce treaty rights in actions under 42 U.S.C. § 1983.[3]

My ultimate focus is the extent to which *Medellín*'s analysis of self-execution doctrine will hamper individuals seeking to bring treaty claims under § 1983. Before undertaking that analysis, however, I will first discuss the structure of § 1983 claims in Part II before turning in Part III to the question whether individuals can bring treaty-based § 1983 actions in the first place.[4] Only then, in Part IV, will I consider the impact of *Medellín* on such claims.

With respect to the use of § 1983 to enforce treaties, I conclude that the better argument favors interpreting the statute to include such claims. My conclusions about *Medellín* will therefore not be surprising. The decision not only suggests that treaties are not equal to federal statutes; it also articulates a presumption against finding individual rights in treaties. *Medellín* thus stands against treaty enforcement by individuals.

My analysis will also make plain that *Medellín*'s treatment of treaty rights is roughly consistent with other recent decisions that have limited

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[2] *Medellín* is one of a line of Supreme Court and International Court of Justice cases addressing violations by U.S. states of Article 36. For the history of this litigation, see John T. Parry, Sanchez-Llamas *in Context*, 11 LEWIS & CLARK L. REV. 1 (2007).

[3] I do not take up the issue of potential private actions to enforce treaties against federal officials under the Administrative Procedures Act, 5 U.S.C. § 702 (2006), or against federal or state officials through existing common law or implied rights of action, such as the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Nor do I address whether treaties should be interpreted to create causes of action to enforce individual rights where no common law or statutory cause of action would be available—although my analysis at times overlaps with this issue. For discussions of these and related topics, see David Sloss, *Ex parte* Young *and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103 (2000); David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in* Hamdan *and* Sanchez-Llamas, 45 COLUM. J. TRANSNAT'L L. 20 (2006); Paul B. Stephan, *Private Remedies for Treaty Violations After* Sanchez-Llamas, 11 LEWIS & CLARK L. REV. 65 (2007); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992). I also do not discuss the ability of aliens to bring treaty-based claims under the Alien Tort Statute, 28 U.S.C. § 1350, although such claims would overlap with treaty-based § 1983 claims when a state or local government official is a defendant, as the *Jogi* litigation in the Seventh Circuit makes clear. *See* Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005); Jogi v. Voges, 480 F.3d 822 (7th Cir. 2007).

[4] This issue has received little sustained attention from commentators. For discussions, see Sloss, *Ex Parte* Young, *supra* note 3, at 1142–48; Vázquez, *supra* note 3, at 1146–47; Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 450–51 (1997).

implied rights of action under federal statutes,[5] cabined the *Bivens* doctrine,[6] and narrowed the kinds of federal statutory rights for which § 1983 provides a cause of action.[7] That is to say, although *Medellín* first and foremost hampers the domestic enforcement of public international law, it is also part of an ongoing jurisprudence that seeks to control and limit the ability of individuals to enforce federal rights in a variety of circumstances. Indeed, to the extent *Medellín* limits the ability of criminal defendants and prisoners to use treaty rights to protect against or undo government action, it goes further than the earlier cases that have limited the ability of civil plaintiffs to impose damages liability on officials and local governments.

II. THE STRUCTURE OF § 1983 CLAIMS

The Supreme Court repeatedly has said that 42 U.S.C. § 1983 does not create rights. Instead, it provides a cause of action to obtain damages or equitable relief for violations of rights recognized in some other way.[8] To state a claim, a plaintiff must show that he or she was injured by a "person" acting "under color of" state law, and that the injury harmed "any rights, privileges, or immunities secured by the Constitution and laws."[9] The Supreme Court has held that the statute's use of "person" includes natural persons and local governments as potential defendants but excludes state governments.[10] Although the "color of law" requirement has its complexities, it tracks the contours of the state action doctrine.[11]

That leaves the question whether the plaintiff can state a claim for the violation of a right, privilege, or immunity "secured by the

[5] *See* Alexander v. Sandoval, 532 U.S. 275, 286–89, 293 (2001); *see also* Stephan, *supra* note 3, at 81 (making a similar point about *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)).

[6] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001).

[7] *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 279 (2002); City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 119–20 (2005). Chief Justice Roberts, who authored the majority opinion in *Medellín*, represented the victorious petitioners in *Gonzaga* when he was in private practice.

[8] *See*, *e.g.*, *Gonzaga*, 536 U.S. at 285.

[9] 42 U.S.C. § 1983 (2006).

[10] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978); Quern v. Jordan, 440 U.S. 332, 338 (1979); Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989). "At least insofar as § 1983 is used to enforce Fourteenth Amendment rights (which include civil liberties generally), it could have been construed to abrogate state sovereign immunity." JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 53 (2d ed. 2007) (citing United States v. Georgia, 546 U.S. 151, 158 (2006)); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 447–48, 456 (1976) (holding sovereign immunity can be overridden under § 5 of the Fourteenth Amendment).

[11] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982); United States v. Price, 383 U.S. 787, 794 n.7 (1966). For complications of the state action requirement, see DeShaney v. Winnebago County Dep't Soc. Servs., 489 U.S. 189, 199–200 (1989); Town of Castle Rock v. Gonzales, 545 U.S. 748, 768–69 (2005).

Constitution and laws." Again, while determining a plaintiff's ability to state a claim for violation of a constitutional right is not always easy, the result in most cases is relatively straightforward.[12] The harder issue is what to do with the statute's reference to "laws." The original version of § 1983—enacted as part of the Civil Rights Act of 1871—provided a cause of action only for deprivations of rights "secured by the Constitution."[13] Congress added the phrase "and laws" when it approved the compilation of federal statutes known as the Revised Statutes of 1874.[14] Justices White and Powell exhaustively debated the meaning of that addition in *Chapman v. Houston Welfare Rights Organization*, with Powell arguing that "and laws" was "no more than a shorthand reference to the equal rights legislation enacted by Congress,"[15] and White insisting that "Congress meant what the plain words it used say" with the result that "laws" includes all federal statutory rights.[16]

The Court settled the general debate in *Maine v. Thiboutot*, when it embraced Justice White's position and held that the phrase "and laws" in

[12] Claims for violations of due process rights tend to produce the most difficult issues and have provoked the Court to declare that § 1983 is not "a font of tort law." *See* Paul v. Davis, 424 U.S. 693, 701 (1976).

[13] Civil Rights Act of 1871, § 1, 17 Stat. 13.

[14] *See* Revised Statutes § 1979 (1874). The Supreme Court has held that "the Supremacy Clause, of its own force, does not create rights enforceable under § 1983. . . . '[T]hat clause is not a source of any federal rights'; it '"secure[s]" federal rights by according them priority whenever they come in conflict with state law.'" Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107 (1989) (footnote omitted) (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979)) (alteration in original). Thus, the claimed right at issue—in *Golden State* a right under a federal statute—must derive from something other than its status as supreme federal law. "If the Supremacy Clause itself were understood to secure constitutional rights, the reference to 'and laws' would have been wholly unnecessary. It follows that a Supremacy Clause claim based on a statutory violation is enforceable under § 1983 only when the statute creates 'rights, privileges, or immunities' in the particular plaintiff." *Id.* at 108 n.4. I will not question that result in this Article, and I will assume that the same is true for treaty rights. *Cf. Chapman*, 441 U.S. at 613 ("all federal rights, whether created by treaty, by statute, or by regulation, are 'secured' by the Supremacy Clause"). In other words, *Golden State* establishes that § 1983's reference to the Constitution does not create a cause of action for violations of statutes or treaties by state actors. More is necessary, and the questions then are whether treaty claims fall within the phrase "and laws" and, if so, whether the treaty at issue creates enforceable rights.

[15] 441 U.S. at 624 (Powell, J., concurring). Justice Powell later suggested that advocates of "plain meaning" interpretation must account for the use of "and" rather than "or" to separate "the Constitution" from "laws" in § 1983, because "and" could indicate the interdependence of the two. *See* Maine v. Thiboutot, 448 U.S. 1, 13 n.1 (1980) (Powell, J., dissenting). He also noted that the original version of 28 U.S.C. § 1331 referred to the "Constitution *or* laws," *see id.*, and the same is true of the contemporaneous version of 28 U.S.C. § 2241, *see infra* note 35 and accompanying text. In light of *Thiboutot*'s holding, I will assume that "laws" is not limited to statutes that implement constitutional rights.

[16] *Chapman*, 441 U.S. at 649 (White, J., concurring).

§ 1983 "means what it says" and is not "limited to some subset of laws."[17] A few months later, in *Cuyler v. Adams*, the Court held that § 1983's reference to "laws" also includes "a congressionally sanctioned interstate compact"—in that case, the Interstate Agreement on Detainers.[18]

The Court subsequently made clear, however, that not every federal statute is automatically enforceable through a § 1983 action. As the Court said in *Gonzaga University v. Doe*, "it is only violations of *rights*, not *laws*, which give rise to § 1983 actions."[19] Analogizing to its implied right of action cases, *Gonzaga* held that a federal statute creates individual rights only when "Congress intended to confer individual rights upon a class of beneficiaries. . . . [W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action."[20] The conferral of an individual right must be "unambiguous."[21] That said, "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983."[22] Defendants have a limited ability to rebut this presumption by showing that Congress did not intend for enforcement of that right under § 1983 (for example, the creation of a different and comprehensive enforcement scheme for the right may suffice).[23]

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[17] 448 U.S. at 4. The Court thus appears to have expanded § 1983 beyond its origin as legislation under § 5 of the Fourteenth Amendment, because it encompasses claims under statutes that are not themselves directed at enforcing due process, equal protection, or privileges or immunities guarantees against state actors. Further, while one might attempt to characterize statutory claims as in fact alleging that the violation of statutory rights constitutes unequal treatment under the Fourteenth Amendment, that conclusion would make the "and laws" addition "wholly unnecessary," *Golden State*, 493 U.S. at 108 n.4, and would be in tension with *Thiboutot*'s holding that the word "laws" allows statutory claims under § 1983. Note, however, that in the *Slaughterhouse Cases*, the Court suggested that "rights secured to our citizens by treaties" are privileges within the Fourteenth Amendment's privileges or immunities clause. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 79–80 (1873).

[18] 449 U.S. 433, 442 (1981).

[19] 536 U.S. 273, 283 (2002); *see also* Blessing v. Freestone, 520 U.S. 329, 340 (1999) (holding federal statutory requirement that required state to operate certain programs in compliance with federal law did not create individual rights enforceable through § 1983). *Alexander v. Sandoval*, 532 U.S. 275 (2001), in which the Court denied an implied right of action in terms that presaged *Gonzaga*, is also a key case.

[20] *Gonzaga,* 536 U.S. at 285–86. The Court rejected the argument that a plaintiff has a right under a statute if he or she "falls within the general zone of interest that the statute is intended to protect." *Id.* at 283.

[21] *Id.* at 280.

[22] *Id.* at 284. For discussion and criticism of *Gonzaga*, *see infra* note 164 (collecting citations). Note that *Gonzaga* involved a statute enacted under the Spending Clause. At times the *Gonzaga* Court seemed to limit its discussion to Spending Clause statutes, while at other points it clearly spoke more generally.

[23] *See* Fitzgerald v. Barnstable School Comm., No.07-1125, 2009 WL 128173, *6 (Jan. 21, 2009) (stating § 1983 is not available when it would allow plaintiffs to circumvent statutory requirements "to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit" and would give

This brief summary does not exhaust the questions raised by § 1983 litigation. Plaintiffs seeking to hold a local government liable may not rely on respondeat superior and instead must demonstrate that the government entity is independently liable for the claimed violation.[24] Further, individual defendants almost always raise claims of absolute or qualified immunity from damages liability, and those defenses must be resolved, if possible, at the outset of the litigation.[25] Standing doctrine may limit the available remedies.[26] None of these issues is relevant to the question whether plaintiffs may bring treaty claims under § 1983, although each issue is presumably relevant to the litigation of such claims.[27] Instead, the availability of § 1983 turns on whether it encompasses treaties at all and, if so, how to determine whether the treaty creates individually-enforceable "rights, privileges, or immunities."

III. DOES 42 U.S.C. § 1983 APPLY TO TREATIES?

A. The Text of § 1983 and Analogous Statutes

Thiboutot held that the word "laws" in § 1983 "means what it says."[28] This conclusion does not so easily resolve whether § 1983 extends to treaty claims. Although "laws" could include treaties, nothing in the text of the statute signals that it means anything other than statutes. The Court's decision in *Cuyler* is suggestive, because it holds that "laws" not only mean more than federal statutes but also extend to interstate compacts that require congressional approval.[29] Perhaps treaties

plaintiffs "access to tangible benefits—such as damages, attorneys fees, and costs—that [are] unavailable" under the statute at issue).

[24] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–95 (1978); City of St. Louis v. Praprotnik, 485 U.S. 112, 121–22 (1988).

[25] *See* Mitchell v. Forsyth, 472 U.S. 511 (1985); *see also* Johnson v. Fankell, 520 U.S. 911 (1997) (state courts need not provide immediate appeal).

[26] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101–02, 105 (1983) (holding plaintiff must have standing for each form of relief sought and that claims for injunctions require a likelihood of continuing or future harm).

[27] *See* Jogi v. Voges, 480 F.3d 822, 836 (7th Cir. 2007) (noting statute of limitations and qualified immunity issues would arise in treaty-based § 1983 cases); Gandara v. Bennett, 528 F.3d 823, 838 n.20 (11th Cir. 2008) (Rodgers, J., concurring) ("Of course, in all cases brought against an individual officer under § 1983 for violation of the Convention qualified immunity would provide a defense to suit and in many cases would preclude a finding of liability."); *id.* at 838 n.20 (discussing likely remedies for treaty claims); *see also infra* notes 54–63 and accompanying text (discussing cases that applied qualified immunity analysis to treaty claims).

[28] Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

[29] *See* Cuyler v. Adams, 449 U.S. 433, 442 (1981); *see also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 663 F. Supp. 682, 684–85 (W.D. Wis. 1987), *app. dismissed*, 829 F.2d 601 (7th Cir. 1987) (relying on *Cuyler* to conclude that including treaties in § 1983 is neither frivolous nor insubstantial). Although one can dispute the *Cuyler* Court's reasoning on the specific issue of whether the Interstate Agreement on Detainers qualifies as a compact, and whether Congress actually approved it, *see Cuyler*, 449 U.S. at 451–53 (Rehnquist, J., dissenting), the Court's

approved by the Senate are analogous enough to compacts that *Cuyler* emerges as strong support for including treaties in § 1983. One could seek to distinguish *Cuyler* by asserting that the congressional action that makes an agreement among states into federal law, and therefore enforceable through § 1983 if it creates individual rights, is quite different from interpreting "laws" to include treaties simply because the Senate gave its consent to each treaty, with the result that enforcement of compacts under § 1983 is less problematic than enforcement of treaties. To the extent *Cuyler* is distinguishable, the most natural reading of "the Constitution and laws" could well be that these words do indeed mean what they say, and that treaties are not included in that meaning.

This relatively limited and largely textual analysis need not be the end of the inquiry.[30] In *Thibotout*, the Court also said that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law"—which plainly suggests the Court interpreted "laws" to mean federal statutes.[31] Yet in *Monell v. Department of Social Services*, the Court provided a broader description of § 1983's role, stating that it "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights"[32]—a description that easily encompasses treaty claims. The historical debate between Justices Powell and White in *Chapman* does not provide much insight into the question. Statutes were their battleground, and they had little to say about treaties, although Justice White may have meant to include them in his interpretation of "laws."[33]

Analogies to other statutes provide little insight. One year after the inclusion of "laws" in the Revised Statutes version of § 1983, Congress enacted the predecessor of 28 U.S.C. § 1331, which extended original federal court subject matter jurisdiction to cases "arising under the

larger holding about the effect on compacts for § 1983 purposes of congressional approval remains.

[30] *See Thiboutot*, 448 U.S. at 13–14 (Powell, J., dissenting) (making the same point on the question whether § 1983 includes statutes).

[31] *Id.* at 4; *see also* Owen v. City of Independence, 445 U.S. 622, 649 (1980) (§ 1983 applies to the "Federal Constitution and statutes"); Greenwood v. Peacock, 384 U.S. 808, 829 (1966) (referring to "federal constitutional and statutory rights").

[32] 436 U.S. 658, 700–01 (1978); *see also* Mitchum v. Foster, 407 U.S. 225, 240 n.30 (1972) ("the provision included by the Congress in the Revised Statutes of 1874 was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well.").

[33] In a footnote, White referred to *Baldwin v. Franks*, 120 U.S. 678, 682–83 (1887), which assumed that violations of a treaty would be included within a related criminal statute. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 661–62 n.36 (1979) (White, J., concurring) ("Three years later, the Court concluded that discrimination against Chinese in contravention of a treaty between the United States and China would be within the proscription of [18 U.S.C.] § 241 but for the language in that statute limiting its application to denials of the rights of 'citizens.'"). For discussion of *Baldwin*, *see infra* notes 38–48 and accompanying text.

Constitution or laws of the United States, or treaties."[34] If the 1874 Congress understood the word "laws" to include treaties, why did the 1875 Congress specifically include treaties in addition to laws? But asking the question in this way probably assumes too much. The difference in the two statutes could reflect a substantive decision, but it could also reflect the fact that Congress does not use consistent language when it legislates. For example, 28 U.S.C. § 2241 allows courts to grant the writ of habeas corpus if a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." Like § 1331, it distinguishes between treaties and statutes. When Congress enacted the predecessor of § 2241 in 1867, however, it used two different phrases to refer to the kinds of legal violations that would support a grant of the writ. The statute first refers to violations "of the constitution, or of any treaty or law of the United States," but a different phrase—"constitution or laws," nearly the same phrase used in § 1983—appears three times in the rest of the statute, apparently as a shorthand.[35] Did the 1874 Congress mean to apply that shorthand to the Revised Statutes version of § 1983? If so, why did they depart from the shorthand when they adopted § 1331 a year later? One can speculate, but it seems clear that the differences of language in these statutes are suggestive but not conclusive in either direction.

The Supremacy Clause—which states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land"[36]—also provides less help than one might first assume. The clause distinguishes between a category of laws that includes federal statutes and excludes treaties, but it then groups "treaties" and "laws" together as "supreme Law of the Land." On the one hand, as the Supreme Court explained in *Whitney v. Robertson*, the Supremacy Clause places treaties and federal statutes "on the same footing," and "no superior efficacy is given to either over the other."[37] Treaties *are* laws in that sense. On the other hand, the declaration that treaties have the same legal status as federal statutes does not mean that

[34] Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

[35] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385–86; *cf.* Medellín v. Dretke, 544 U.S. 660, 677–78 (2005) (O'Connor, J., dissenting) (suggesting the word "constitutional" in 28 U.S.C. § 2253(c)(2) may be "shorthand for all of the federal claims traditionally heard in habeas").

[36] U.S. CONST., art. VI, § 2. Note that the Arising Under clause of Article III also refers to "this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." *Id.* art. III, § 2, cl. 1.

[37] 124 U.S. 190, 194 (1888); *see also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (self-executing treaty is "equivalent to an act of the legislature"); *cf.* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389–90 (Max Farrand ed. 1937) (reporting successful motion of Gouverneur Morris to strike the words "enforce treaties" from Congress's power to call out the militia "to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions," because "treaties were to be 'laws'").

every congressional or judicial reference to federal "law" or "laws" includes a reference to treaties by virtue of the Supremacy Clause. The same reasoning that automatically includes treaties in "laws" requires little extension to suggest that the Constitution should also be included in the reference. Yet § 1983 itself refers to the "Constitution and laws," and of course 28 U.S.C. §§ 1331 and 2241 refer to the Constitution, laws, and treaties. Treaties may be laws, but the Supremacy Clause is not a dictionary act.

My point here is simply that the question whether treaty rights are included in the § 1983 cause of action cannot be resolved by assertions about the plain meaning of "laws." Although the word "laws" in § 1983 includes federal statutes, its relationship to treaties is murky. "Laws" could include treaties, and *Cuyler*'s gloss on *Thiboutot* provides some support for that conclusion, but one easily could conclude that textual analysis leans against including treaties. In the end, the interpretive decision requires more than text.

B. Cases on § 1983 and Treaties

In 1887, the Supreme Court faced the question whether violations of treaty rights were included within the scope of three criminal statutes—Revised Statutes §§ 5508, 5519, and 5336—that, like § 1983, also derive from reconstruction-era civil rights legislation.[38] Section 5508 addressed conspiracies to prevent "any citizen" from exercising rights "secured to him by the constitution or laws." Section 5519 covered conspiracies to deprive people of "the equal protection of the laws, or of equal privileges and immunities under the laws," while § 5336 prohibited conspiracies to prevent "the execution of any law of the United States."

In *Baldwin v. Franks*, the Court held that these statutes did not apply to a conspiracy to expel Chinese alien workers from Nicolaus, California, in violation of their rights under a treaty between the United States and China.[39] With respect to § 5519, the Court seemed to assume that the word "laws" in the statute included "rights under the Constitution, laws,

[38] Section 5508 was part of the Civil Rights Act of 1870, 16 Stat. 141, and is now codified as 18 U.S.C. § 241 (2006). Section 5519 was part of § 2 of the Civil Rights Act of 1871, 17 Stat. 13–14. The Supreme Court declared it unconstitutional in *United States v. Harris*, 106 U.S. 629, 644 (1882), and confirmed that conclusion in *Baldwin v. Franks*, 120 U.S. 678, 689–90 (1886). Congress repealed § 5519 in 1909, but its civil analogue survives in 42 U.S.C. § 1985(3) (2000). *See* Griffin v. Breckenridge, 403 U.S. 88, 104–05 (1971). Section 5336 dates to 1861 and was a response to the secession of the southern states, *see* Act of July 31, 1861, ch. 33, 12 Stat. 284. It was reenacted as part of § 2 of the Civil Rights Act of 1871 and is now codified as 18 U.S.C. § 2384 (2006).

[39] For discussion of the case and its background, see Charles J. McClain Jr., *The Chinese Struggle for Civil Rights in 19th-Century America: The Unusual Case of* Baldwin v. Franks, 3 LAW & HIST. REV. 349 (1985).

or treaties,"[40] but it adhered to its holding in *United States v. Harris* that the statute was unconstitutional in its entirety because portions of it were unconstitutional.[41] The Court did not specifically address whether § 5508 included treaty rights, because it held that section applied only to conspiracies against citizens.[42] In dissent, however, Justice Harlan declared, "It is also conceded that, in the meaning of that section [5508], a treaty between this Government and a foreign nation is a 'law' of the United States."[43]

Turning to § 5336, the Court indicated that conspiracies to prevent the execution of treaties would fall within the statute:

> The United States are bound by their treaty with China to exert their power to devise measures to secure the subjects of that government lawfully residing within the territory of the United States against ill treatment, and if in their efforts to carry the treaty into effect they had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the statute would have arisen.[44]

The Court nonetheless held that § 5336 did not apply because the charged offense "was exerted against the Chinese people, and not against the government in its efforts to protect them."[45] Justice Field's dissent agreed that treaties fell within the statute, but for him that was enough to apply the statute to the claimed conspiracy.[46] The treaty was not only the supreme law of the land but was also self-executing—and was thus clearly a "law" within the meaning of the statute—and "a conspiracy to prevent by force their enjoyment [of the treaty rights] is a conspiracy to prevent by force the execution of a law of the United States."[47]

The most useful discussion in the Court's opinions on the meaning of "laws" addresses § 5336, which is the least analogous of the three statutes to § 1983. The most relevant of the statutes—§ 5508, now 18 U.S.C. § 241—received the least discussion. Still, while it is possible to parse the Court's discussion by statutory section, the general tone of all the opinions is clearly that treaties are laws for purposes of these criminal statutes, even if the statutes were ultimately unenforceable for one reason

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[40] *Baldwin*, 120 U.S. at 685. Because it was addressing the rights of aliens, the Court could not have been relying on the statement in the *Slaughterhouse Cases* that the treaty rights of citizens are privileges under the Fourteenth Amendment's privileges or immunities clause. *See* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 79–80 (1873); *supra* note 17.

[41] *See Baldwin*, 120 U.S. at 685–90; *Harris*, 106 U.S. at 643.

[42] *Baldwin*, 120 U.S. at 690–92.

[43] *Id.* at 695 (Harlan, J., dissenting). Justice Field agreed. *See id.* at 706–07 (Field, J., dissenting).

[44] *Id.* at 693–94.

[45] *Id.* at 694.

[46] *Id.* at 704–05 (Field, J., dissenting).

[47] *Id.* at 702–06; *see* Whitney v. Robertson, 124 U.S. 190, 194 (1888) (discussing distinction between treaty provisions that are self-executing and those that are not).

or another. Further, in *Monroe v. Pape*, the Court relied on interpretations of the criminal analogues of § 1983 to determine the scope of the civil action.[48] Assuming *Monroe*'s methodology remains valid, *Baldwin*'s interpretation of similar statutes is at least relevant, and it supports the inclusion of treaty claims within § 1983. But because the majority's statements were not necessary to the disposition of the case and did not focus on § 5508, *Baldwin* is not conclusive.

Recent cases are few in which plaintiffs have relied on § 1983 to bring treaty claims. In *Republic of Paraguay v. Allen*—another case that, like *Medellín*, dealt with Article 36 of the Vienna Convention—the district court held that the Consul General of Paraguay could bring a § 1983 claim for violations of the Convention. The court focused on whether the Consul was a "person" entitled to sue under the statute, and not on whether § 1983 encompassed treaty claims, and it ultimately dismissed the claim on Eleventh Amendment grounds.[49] In affirming the dismissal, the Supreme Court in *Breard v. Greene* also avoided the specific question whether § 1983 encompasses treaty claims, but it seemed to assume that the cause of action would have been available had it not been barred by the Eleventh Amendment.[50]

Most of the remaining decisions involve treaties with Indian tribes. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, the court asked whether § 1983 was available for treaty claims, but only to determine whether such a claim would be "wholly insubstantial or frivolous."[51] The court noted two earlier cases involving Indian tribes in which the courts had avoided deciding the issue, and it concluded that the lack of resolution meant the § 1983 claim was neither insubstantial nor frivolous at the time it was brought. Further, relying on *Maine v. Thiboutot* and *Cuyler v. Adams*—both decided after the complaint was filed—the court determined that "the 'laws' securing rights for § 1983 purposes are not limited to the Constitution and federal statutes, making it a closer question whether § 1983 covers violations of treaty rights"—with the result that the § 1983 claim had "become more substantial."[52]

The other relevant Indian treaty cases are from the Ninth Circuit. The first case, *United States v. Washington*, obliquely referred to the possibility of treaty claims under § 1983 when it observed that the state had not yet violated the intervenor tribes' treaty rights, but if it were to do so, "there would be an actual conflict between state and federal law which might give rise to a § 1983 action."[53] A subsequent decision in the

[48] 365 U.S. 167, 183–87 (1961).

[49] *See* Republic of Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996), *aff'd* 134 F.3d 622 (4th Cir. 1998), *aff'd sub nom.* Breard v. Greene, 523 U.S. 371 (1998).

[50] *See Breard*, 523 U.S. at 377.

[51] 663 F. Supp. 682, 684 (W.D. Wis. 1987) (citing Bell v. Hood, 327 U.S. 678, 682 (1946)), *app. dismissed*, 829 F.2d 601 (7th Cir. 1987).

[52] *Id.* at 685–86.

[53] 813 F.2d 1020, 1023 (9th Cir. 1987).

Washington litigation relied on this analysis to reach the same conclusion that § 1983 was not available under the circumstances of the case.[54]

Hoopa Valley Tribe v. Nevins[55] provided a more confusing analysis. Discussing the tribal right to self-government, the court declared that it "is protected by treaty and federal judicial decisions."[56] The court then considered whether this right was enforceable under § 1983 and held it was not, because it was "best characterized" as a conferral of power on the tribe rather than a protection of rights.[57] At that point, it was unclear if the court was addressing treaty rights, rights stemming from judicial decisions, or both at the same time. Yet the court went on to say:

> The right to tribal self-government also is based on treaty. We previously have held that a suit based on the interpretation of treaty rights to take fish is not cognizable under § 1983. The right to self-government may appear more akin to a § 1983-type civil right than the right to take fish. Nonetheless, both rights are grounded in treaties, as opposed to specific federal statutes or the Constitution.[58]

While the court's analysis is not clear, the most obvious reading of this passage is that treaty rights are outside the scope of § 1983, even though the court did not specifically say so.

Nonetheless, two years later, the court cited *Hoopa Valley* for the proposition that "claims for deprivations of treaty-based rights" are cognizable under § 1983 "under specified circumstances," but it went on to hold that the claimed treaty rights were not clearly established for purposes of qualified immunity.[59] The court also ruled in a separate case—yet another part of the *Washington* litigation—that a tribe was entitled to attorney's fees in "an action to enforce" treaty rights to fishing, as opposed to an action merely "to interpret the treaties or define the rights they conferred."[60] Because the courts were enforcing "well-defined

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[54] *See* United States v. Washington, 873 F.2d 240, 242 (9th Cir. 1989) (relying on the earlier case to hold "the district court's reliance on the applicable treaties as U.S. law securing civil rights is in retrospect incorrect" because "treaty interpretation claims do not give rise to a claim cognizable under § 1983"). Although the court did not say so in these two cases, claims requiring interpretation of a treaty in many instances would not state claims for violation of clearly established law, as required by the qualified immunity doctrine applicable to § 1983 claims. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982); *compare* Romero v. Kitsap County, 931 F.2d 624, 627 n.5 (9th Cir. 1991) (interpretation claim not clearly established), *with* Shoshone-Bannock Tribes v. Fish & Game Comm'n, 42 F.3d 1278, 1286 (9th Cir. 1994) (interpretation claim clearly established).

[55] 881 F.2d 657 (9th Cir. 1989).

[56] *Id.* at 662.

[57] *Id.*

[58] *Id.* at 663 (citing *Washington*, 813 F.2d at 1023).

[59] *Romero*, 931 F.2d at 627 n.5.

[60] United States v. Washington, 935 F.2d 1059, 1061 (9th Cir. 1991).

treaty rights," the claim was cognizable under § 1983 and attorney fees were available under 42 U.S.C. § 1988.[61]

Soon thereafter, the Ninth Circuit again allowed a plaintiff to state a treaty claim under § 1983. The Shoshone-Bannock Tribes sought damages from a state official for violations of fishing rights "secured by the Due Process and Equal Protection Clauses of the United States Constitution and the law of the United States, including the Fort Bridger Treaty, in violation of 42 U.S.C. § 1983."[62] Deciding the issue of qualified immunity, the court ignored the constitutional aspects of the claim and stated:

> The Tribes assert that they have a clearly established treaty right to fish free from state regulations not necessary for public health or the conservation of the species.
>
> The Tribes' right is and was clearly established. For more than twenty years, the Fort Bridger Treaty has been interpreted to reserve to the Tribes the right to fish on unoccupied lands of the United States. It is equally well established that the states may not limit on conservation grounds an Indian Tribe's treaty right to fish except where the limitation is necessary to the preservation of the fish. Any reasonable Idaho Fish and Game official would have known of these long established rights.[63]

None of these cases provides an extensive discussion of why § 1983 does or does not encompass treaty claims, all of them involve treaties with Indian tribes (assuming that could or should make a difference in this context[64]), and there is clearly some tension in the line of cases. But the 1991 *United States v. Washington* decision and *Shoshone-Bannock* seem to resolve that tension in favor of allowing treaty claims under § 1983.

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[61] *Id.*

[62] Shoshone-Bannock Tribes v. Fish & Game Comm'n, 42 F.3d 1278, 1284 (9th Cir. 1994).

[63] *Id.* at 1286 (citations omitted).

[64] *See* United States v. Lara, 541 U.S. 193, 200–01 (2004) (appearing to equate treaties with Indian tribes and treaties with foreign sovereigns); *see also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01[2] (Nell Jessup Newton et al. eds., 2005) (discussing the importance of the treaty power to congressional power to legislate on issues relating to Native Americans). Traditional canons of interpretation for Indian treaties, particularly the canons that "ambiguous expressions must be resolved in favor of the Indian parties concerned" and that "Indian treaties must be liberally construed in favor of the Indians," Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601, 617 (1975); *see also* 1 COHEN'S HANDBOOK, *supra*, at § 2.02 (discussing the various canons), indicate that the question whether a treaty creates rights might be resolved in the affirmative more often under Indian treaties than under other treaties. *See infra* § IV.B. Also worth noting is that none of the Indian treaty cases that I discuss inquired whether the treaty provisions at issue were self-executing. Still, unless the likelihood that a treaty creates rights is itself a reason, there appears to be no basis to treat Indian treaties differently with respect to the prior question whether § 1983 encompasses treaties.

Most recently, however, a sharply divided en banc panel in *Skokomish Indian Tribe v. United States* threw this developing doctrine into confusion. Writing for the majority, Judge Kozinski noted that self-executing treaties "have occasionally been found to provide [implied] rights of action for equitable relief against non-contracting parties [i.e., against state officials]."[65] He refused, however, to imply a tribal right to bring a damages action directly under the treaty.[66] The court then took up the question whether individual members of the tribe could bring treaty-based damages claims under § 1983. The majority equivocated on the issue and ultimately decided there was no cognizable claim:

> [W]hile we have *suggested* that some treaty-based rights might be cognizable on behalf of a tribe's members under section 1983, we have noted that the hallmark for determining the scope of section 1983 coverage is whether the right asserted "is one 'that protects the individual against government intrusion.'" In *Hoopa Valley*, for instance, we held that section 1983 could not be used to enforce a collective right to tribal self-government. . . . Because the Tribe's members seek to vindicate communal, rather than individual rights [fishing rights], they do not have cognizable section 1983 claims.[67]

The majority distinguished *Shoshone-Bannock* by noting that the complaint in that case "alleg[ed] violations of the Due Process and Equal Protection Clauses, as well as treaty rights."[68] The court then insisted that the *Shoshone-Bannock* panel allowed a constitutional claim and "did not consider when a section 1983 claim could be brought to vindicate treaty rights"[69]—although the opinion in that case seems to demonstrate the opposite.

Insisting that "Indian treaties are unique, governed by different canons of construction than those that apply to statutes and other treaties,"[70] Judge Berzon's dissent argued the court should recognize an implied cause of action for damages directly under the treaty.[71] Turning to § 1983, she stressed the need to recognize "nuance in the case law with regard to the rights of Indian tribes and their members."[72] She was "inclined to hold" that the Tribe could bring a § 1983 claim, but she also characterized the claim as arising under "the Takings and Due Process Clauses of the federal Constitution, although the fishing rights assertedly

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[65] Skokomish Indian Tribe v. United States, 410 F.3d 506, 512 (9th Cir. 2005) (amended en banc opinion).

[66] *Id.* at 512–14. The court also held that the tribe was not a proper party to bring a § 1983 damages action. *See id.* at 514–15.

[67] *Id.* at 515–16 (quoting Hoopa Valley Tribe v. Nevins, 881 F.2d 657, 662 (9th Cir. 1989)) (citation omitted).

[68] *Id.* at 516 n.8.

[69] *Id.*

[70] *Id.* at 523 (Berzon, J., dissenting). For the relevance of these canons, see *supra* note 64.

[71] *See id.* at 523–27.

[72] *Id.* at 528.

unconstitutionally taken are traceable to the Treaty."[73] With respect to individual claims, she was less tentative, declaring that "there is no support for the more general proposition that treaty-based rights cannot support a § 1983 cause of action," and she noted that "[i]ndividual Indians have brought a number of § 1983 cases in the district courts to enforce their treaty rights."[74] Although "these opinions do not squarely address whether the individual plaintiffs have stated a cognizable cause of action," she declared, "they do indicate that other courts have found this marriage of treaty rights and § 1983 to be acceptable."[75]

The Ninth Circuit cases thus end up where they began—in uncertainty. Despite the holdings of prior cases, the en banc majority in *Skokomish* said only that § 1983 actions might encompass treaty claims, and it sought to limit the circumstances under which such claims might be available. Although the dissent argued the § 1983 cause of action was presumptively available, that claim also rested on the insistence that Indian treaties are special. Whether or not that should be the case, these cases provide only slight help to either side of the more general debate over enforcing treaties of any kind through § 1983.

The Seventh Circuit's recent decision in *Jogi v. Voges*, by contrast, goes beyond the Supreme Court's apparent assumption in *Breard* and explicitly holds that plaintiffs can use § 1983 to enforce treaty rights.[76] Jogi was arrested and interrogated by police in Illinois; they read him his *Miranda* rights but did not inform him of his right as a citizen of India and under Article 36 of the Vienna Convention to contact the Indian consulate. After his criminal conviction, he filed a pro se claim for damages arising from the Article 36 violation. The United States argued in an amicus brief that § 1983 does not allow treaty claims, but the Seventh Circuit, speaking through Judge Wood, rejected that argument

[73] *Id.* at 529.

[74] *Id.* at 529–30.

[75] *Id.* at 530 (citations omitted). Judge Berzon did not make clear whether her reference to "treaty rights" in this meant claims directly under treaties, or instead—as in the section on the Tribe's § 1983 rights—meant takings and due process claims "traceable to" a treaty right. With respect to the district court cases she cited, Judge Berzon was correct that they "do not squarely address whether the individual plaintiffs have stated a cognizable cause of action under § 1983." *Id.* The § 1983 treaty claims in some of these cases are jumbled together with constitutional claims, and the United States was sometimes an intervening plaintiff, which may have led the courts to deemphasize the § 1983 aspects of the cases. The only noteworthy case in the list for § 1983 purposes is *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, which I discuss at *supra* notes 51–52 and accompanying text.

[76] Jogi v. Voges, 480 F.3d 822 (7th Cir. 2007). In an earlier opinion, the court held it had jurisdiction over Jogi's claim under the Alien Tort Statute, 28 U.S.C. § 1350, and that Jogi had an implied right of action under Article 36 of the Vienna Convention. *See* Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005). After the Supreme Court's decision on the application of procedural default rules to Article 36 claims in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the panel withdrew the earlier opinion and issued a new opinion that relied on 28 U.S.C. § 1331 for jurisdiction and on § 1983 for the cause of action. *Jogi*, 480 F.3d at 824.

for three reasons: first, the court held that the argument of the United States was "in tension with" *Baldwin v. Franks*.[77] Second, the court quoted the Supremacy Clause—but without explaining exactly what its point was in doing so.[78] Third, the court quoted *Monell*, stating that § 1983 "was designed to be a remedy 'against all forms of official violation of federally protected rights.'"[79]

Jogi went on to note that the Vienna Convention is self-executing and to hold that Article 36 confers individual rights under the *Gonzaga* test—as modified by cases suggesting that treaties should be construed liberally in favor of rights.[80] Again applying *Gonzaga*, the court also held these rights were enforceable under § 1983.[81]

Subsequent cases have not been kind to *Jogi*'s holding on the enforceability of Article 36 rights. On the more general question of enforcing treaties through § 1983, however, they have been less hostile. Without citing its Indian treaty cases, the Ninth Circuit stated, "we assume for purposes of this case that a treaty such as this one that is self-executing and thus law, has that status [for purposes of § 1983]."[82] The Second Circuit accepted the availability of § 1983 as an obvious conclusion:

> [A]ssuming arguendo that plaintiff has an individual right under the Convention, his claim for damages pursuant to § 1983 would likely be actionable. Section 1983 would likely provide a cause of action for damages in the case of a treaty violation in the same manner that § 1983 provides a cause of action for remedying a statutory violation.[83]

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[77] *Jogi*, 480 F.3d at 827. The court characterized *Baldwin* as interpreting "the criminal counterpart to what has become § 1983 (now codified at 18 U.S.C. §§ 241–42)." *Id.* As noted above, only one of the three statutes at issue in *Baldwin* was a predecessor to §§ 241–42, and the *Baldwin* majority made no specific statements about the intersection of treaty claims with that statute. *See supra* notes 38–47 and accompanying text. Nonetheless, as I also noted above, all of the opinions in *Baldwin* seem to assume that treaties are laws for purposes of this kind of statute, so the general thrust of the *Jogi* court's argument is accurate.

[78] *See Jogi*, 480 F.3d at 827.

[79] *Id.* (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 700–01 (1978)).

[80] *See id.* at 831–35. The court relied on *United States v. Stuart*, 489 U.S. 353, 368 (1989), and *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924), for the principle of interpreting treaties in favor of rights. *See Jogi*, 480 F.3d at 834.

[81] *See Jogi*, 480 F.3d at 835–36.

[82] Cornejo v. County of San Diego, 504 F.3d 853, 858 n.8 (9th Cir. 2007) (making this statement in the course of holding Article 36 does not confer individually enforceable rights and citing *Baldwin* and *Thiboutot*); *see also id.* at 864–65, 872–73 (Nelson, J., dissenting) (contending treaties are presumptively enforceable under § 1983).

[83] Mora v. New York, 524 F.3d 183, 199 n.23 (2d Cir. 2008) (citation to *Gonzaga* omitted) (making this statement in the course of holding Article 36 does not confer individually enforceable rights). The Eleventh Circuit ignored *Jogi*'s holding about the availability of § 1983 in the course of holding that Article 36 does not create individually enforceable rights. *See* Gandara v. Bennett, 528 F.3d 823 (11th Cir. 2008).

Jogi thus stands alone as the only circuit court decision clearly and explicitly to hold that § 1983 is available for violations of treaty rights in general. No case stands clearly for the opposite result. Prior Supreme Court cases provide some support for the holding, as do some of the Indian treaty cases, and subsequent Article 36 cases either do not dispute the point or suggest approval.

C. Federalism vs. Federal Rights

Jogi's holding that § 1983 encompasses treaty claims rested on three citations. The court's unadorned reference to the Supremacy Clause does little to advance its reasoning.[84] The reference to *Baldwin v. Franks* provides meaningful support, but in *Jogi* it was more an appeal to authority than a reasoned explanation for why treaties are included in § 1983.[85] Only the third citation—to *Monell*'s discussion of the purpose of § 1983[86]—gestures toward the beginning of an explanation for the holding. This Section briefly attempts to outline a more complete assessment of the arguments for and against including treaties in § 1983.

1. The Argument for Excluding Treaties from § 1983

The primary arguments against including treaties in § 1983 derive from federalism concerns. A broad argument might begin with the claim that allowing Congress to subject states or state actors to suits for violation of treaties would in some cases expand rights claims and limit state action beyond what the Constitution requires of the states, and beyond what federal statutes can do. If, for example, the President and the Senate enter into a treaty that obligates the United States to expand individual rights, and if the Necessary and Proper Clause allows Congress to implement the treaty against states or state actors, then federalism restraints suffer a serious blow. This argument receives atmospheric support from the recent state sovereign immunity cases.[87] To the extent

Note, however, that a different Seventh Circuit panel recently sought to bolster *Jogi*'s Article 36 holding, stating "we have always assumed that Article 36 confers individual rights, even in the criminal setting, and we stand by that position today." Osagiede v. United States, 543 F.3d 399, 407 (7th Cir. 2008). The court also noted that "numerous courts had held by 2003 [the relevant time for petitioner's habeas claim] that Article 36 created individual rights, even in the criminal setting. The courts that did *not* hold Article 36 created individual rights almost invariably assumed that Article 36 did confer individual rights." *Id.* at 409 (footnote omitted). The court noted that two court of appeals decisions had held by 2003 that Article 36 does not confer individual rights, *see id.* at 409 n.7, but it did not mention that three more circuits have reached the same conclusion since then. The Seventh Circuit remains the only federal court of appeals to hold to the contrary.

[84] *Jogi*, 480 F.3d at 827.

[85] *Id.*

[86] *Id.*

[87] *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999). Recent cases holding that various federal statutes cannot be enforced against states under § 5 of the Fourteenth Amendment provide some additional assistance in their stress on the limits of

one accepts these claims, courts either should interpret § 1983 not to include treaty claims or at least should reject § 1983 claims in cases that raise this risk.

This argument may have some salience with respect to expanding the direct liability of states,[88] but its application to claims against state actors is more difficult in light of the longstanding acceptance of suits against state actors for damages and injunctive relief. State sovereign immunity, according to the Court, is a fundamental, if non-textual, constitutional principle that protects states from many suits seeking to vindicate federal rights and raises hurdles even for suits that are permissible.[89] Yet plaintiffs still may seek damages against state actors for violations of federal constitutional or statutory rights so long as the suit seeks relief from the defendant as an individual, not as an official, and they can get injunctive relief that is nominally against the defendant official but in many cases functionally binds the state.[90] Reaching a different result for treaty claims against state actors would create a dissonance that threatens to outstrip its purported justification.

Any argument that the Constitution could prevent or limit treaty claims in general stands in tension with the Supreme Court's decision in *Missouri v. Holland*.[91] *Holland* appears to allow Congress to use the Necessary and Proper Clause to enact legislation that implements treaties—and thereby allows the United States to fulfill its international law obligations—even if it could not enact that legislation under its enumerated powers.[92] Thus, the argument for constitutional limits on

congressional power to impose liability on states, *see, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001), although the federalism strength of this line of cases may be waning, *see* Tennessee v. Lane, 541 U.S. 509 (2004). Regardless of which enumerated powers support it, § 1983 avoids Eleventh Amendment problems by subjecting state officials to liability in their individual capacity. *See* Hafer v. Melo, 502 U.S. 21, 29–31 (1991); Scheuer v. Rhodes, 416 U.S. 232, 237–38 (1974).

[88] That is to say, the Court has made clear that the Eleventh Amendment prevents Congress from using its Article I powers to abrogate state sovereign immunity, *see* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996), although Congress can do so under its Fourteenth Amendment § 5 power in appropriate cases, *see* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); City of Boerne v. Flores, 521 U.S. 507 (1997). Although *Missouri v. Holland*, 252 U.S. 416 (1920), allows expansion of congressional power for the purpose of implementing treaties, whether it goes so far as to allow abrogation of state sovereign immunity is at least doubtful.

[89] *See supra* note 87 and accompanying text.

[90] *See Hafer*, 502 U.S. 21 (discussing § 1983); *Scheuer*, 416 U.S. 232 (same); *Ex parte* Young, 209 U.S. 123 (1908) (recognizing implied right of action against state officials for injunction to remedy constitutional violations).

[91] 252 U.S. 416 (1920).

[92] *See id.* at 432; *see also* United States v. Lara, 541 U.S. 193, 201 (2004) (affirming this aspect of *Holland*); Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1644–50 (1999); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 46–49 (1997). For debate on the relationship between federalism and the treaty power, see, for example, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); David

treaty claims probably also requires limiting the treaty power, or at least limiting the ability of the federal government to fulfill and ensure compliance with the obligations it assumes pursuant to that power.[93]

One could respond that *Holland* should be limited to measures reasonably necessary to fulfill international obligations, and that damages claims against states or state actors will rarely rise to that level. Injunction claims cannot be so easily rejected, however, because they are well suited to obtaining compliance. Further, this limitation cannot easily overcome the objection that it would overly restrict federal power to comply with international law and the ability of Congress to choose among reasonable methods of compliance. It may be that the Article 36 cases—*Medellín*, as well as *Sanchez-Llamas v. Oregon*[94] and *Breard v. Greene*[95]—can be read together with the domestic federalism cases to suggest a path of doctrinal development that would limit the scope of *Holland*. Yet the Article 36 cases are more about background rules where Congress has not acted than they are about constitutional limits on the ability of Congress to bind the states. As a result, the combination of these cases adds little or nothing to the analysis.[96]

Separation of powers concerns could also play a role in opponents' arguments.[97] They could claim, for example, that allowing § 1983 treaty

M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Brad D. Roth, *Understanding the "Understanding": Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891 (2001); Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE L. REV. 841 (2001); Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT'L L. 757 (2002).

[93] For one potential limit, see *supra* note 88 and accompanying text.

[94] 548 U.S. 331 (2006).

[95] 523 U.S. 371 (1998).

[96] To the extent these federalism objections rest on the fear that the President and Senate will enter into treaties that trample state interests and that Congress will implement those treaties in obtrusive ways that further degrade those interests, three responses seem apt. First, the Eleventh Amendment likely will prevent some intrusions on state rights and interests. Second, the federal government already has enormous formal and practical power to accomplish such a result despite the Eleventh Amendment and other federalism doctrines. Third, the "political safeguards of federalism" have real power to limit federal intrusion. *See* Garcia v. San Antonio Metro. Transit. Auth., 469 U.S. 528, 550–51 (1985); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). If political safeguards fail in a systematic way, it is difficult to see how legal doctrines such as the one sketched in the text can save the day.

[97] Skeptics of private treaty enforcement point out that courts are not the only available forum, because diplomacy and other international interactions also play a role in resolving treaty-related controversies. *See* Stephan, *supra* note 3, at 81. But that point has little bearing on the use of § 1983 to enforce treaty rights against state actors. The *Medellín* and *Avena* litigation demonstrate the incompleteness of the remedies available through traditional international mechanisms. On the one hand,

claims would give courts too much responsibility for treaty interpretation when that responsibility is more properly concentrated in Congress and the President.[98] This argument could have particular weight because the United States would not be a party to these cases.[99] Even worse—to bring federalism back in (albeit from a different direction)—local governments would sometimes be parties, and states and local governments would effectively be parties in many cases to the extent they take on the task of providing counsel for state actor defendants. State actors and state interests tend to fare well in § 1983 cases—especially on issues such as qualified immunity, which requires a determination whether the defendant states a claim for violation of a clearly established right[100]—which raises the risk that treaties would receive a cramped interpretation that would frustrate federal interests.[101] Further, judicial interpretations of treaties are difficult to change, so that enforcing treaties through § 1983 would be less like statutory interpretation and more like constitutional interpretation.[102]

None of these contentions is strong enough to establish that Congress *cannot* allow treaty claims under § 1983 or some other cause of action. Congress has the power to include treaties in § 1983; the only serious question is whether it already has. On that issue, the arguments I have sketched support a plausible statutory construction argument: states and their agents should not be subjected to suit on federal claims without

state compliance with Article 36 has increased markedly. *See* Mora v. New York, 524 F.3d 183, 197–98 n.22 (2d Cir. 2008); Janet Koven Levit, Sanchez-Llamas v. Oregon*: The Glass is Half Full*, 11 LEWIS & CLARK L. REV. 29, 42–44 (2007). On the other hand, the individuals whose plight gave rise to the litigation obtained nothing, at least in part because U.S. courts were not willing or able to play a role in enforcing the Convention. (Of course, other factors—such as convincing evidence of guilt, procedural default rulings, and uncertainty about appropriate remedies—were also important.).

[98] *Cf.* Woolhandler, *supra* note 92, at 768 (suggesting the early Supreme Court "frequently shied from deciding broad issues of nation-to-nation obligations contrary to the decisions of the political branches . . . .").

[99] *Cf.* John B. Bellinger, III, Jonathan I. Charney Lecture in Int'l Law at Vanderbilt Law Sch., Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches (Apr. 11, 2008), http://law.vanderbilt.edu/vulsplayer.asp?vid=42 (making a similar argument in the context of Alien Tort Statute litigation).

[100] *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[101] Qualified immunity analysis involves two questions: 1) whether the defendant's conduct (as pled in the complaint) violates a right protected by § 1983, and 2) whether the right was clearly established when the defendant acted. District courts have discretion to answer the questions in order or simply to proceed to the second question. *See* Pearson v. Callahan, No. 07-751, 2009 WL 128768, *9–*14 (Jan. 21, 2009) (overruling the requirement of Saucier v. Katz, 533 U.S. 194 (2001), that courts should decides the first question before proceeding to the second). Whether, under *Pearson*, courts would be particularly likely to avoid ruling on the first question in the treaty context is an open issue. The concerns raised in the text could provide a basis for avoiding the issue even more than in other § 1983 cases.

[102] *See* Stephan, *supra* note 3, at 87 n.76.

clear authority, and statutes or doctrines purporting to subject states and their agents to suit should be narrowly, or at least not expansively, construed. Paul Stephan suggests a "background norm of legislative implementation" already exists for treaties,[103] and on this issue opponents could argue that this norm also requires a clear statement. The statutory interpretation argument finds some support in the cases holding that the word "person" in § 1983 does not include states.[104] Under this argument, courts should require a clear statement of intention by Congress, not only with respect to causes of action that could subject states to liability,[105] but also for the liability of state actors.[106] This argument applies with particular force to damages actions.[107] Put briefly, because the word "laws" in § 1983 is ambiguous, courts should hold that it does not include treaties until Congress clearly says so.

As a fall back position, opponents of § 1983 treaty claims could plausibly insist that such suits should be strictly limited. Among other things, they could suggest that allowing treaty claims would further expand the already burdensome amount of § 1983 litigation. To that end, the test for finding enforceable rights in a treaty for purposes of § 1983 ought to be at least as strict as the test for statutory rights established in *Gonzaga University v. Doe*. Indeed, whether or not one agrees with this argument, this is the area in which *Medellín* would likely have the greatest impact on § 1983 litigation.

2. Reasons to Include Treaties in § 1983

The argument for including treaties in § 1983 begins not with the text of the Supremacy Clause but with the policies behind it. The Supremacy Clause was included in the Constitution primarily to address the unwillingness of state courts to enforce federal rights, including treaty rights.[108] Regardless of uncertainties over how the Supremacy

[103] *Id.* at 84.

[104] *See supra* note 10 and accompanying text.

[105] *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985))).

[106] For discussion of the ways in which contemporary treaty claims, such as those likely to be brought under § 1983, differ from treaty claims earlier in the country's history, see Woolhandler, *supra* note 92. *See also* Sloss, *When Do Treaties, supra* note 3, at 53–78 (discussing early cases, but using them to suggest a general transnational model of treaty enforcement, as opposed to a more recent nationalist model); Stephan, *supra* note 3, at 76–78 (suggesting early cases need to be seen in the context of a pre-*Erie* idea that federal courts could wield general common law powers).

[107] *Cf.* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 413–15 (2004) (discussing reasons to distinguish between damages and injunctions in suits against state officials).

[108] For the drafting of the Supremacy Clause, see Vázquez, *supra* note 3, at 1104–08; *see also* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 235–53 (2000). For the problem of state noncompliance with treaties under the Articles of Confederation,

Clause and the treaty power interacted at the separation of powers level, nearly everyone involved in drafting and ratifying the Constitution understood that the Clause was meant to subordinate state law to federal law and to bind state courts to apply federal law—including treaties.[109] In particular, state courts would be bound to apply treaties in cases brought by individuals. That is to say, some treaty provisions would create legal rights that individuals could enforce in court.[110]

This basic understanding that individuals could enforce some treaty rights, particularly against states or state actors, continued through the period in which § 1983 was drafted and revised, even as other treaty issues gave rise to controversy and debate.[111] Thus, the idea that the phrase "and laws" could include treaties rests on more than an easily disputable textual inference; it also reflects a contemporaneous idea that treaty rights were not only federal rights but were also assumed to be enforceable by individuals in some instances. And all of this also provides a context for the Supreme Court's similar assumption in *Baldwin v. Franks*. The apparently unanimous belief of the justices that treaties were included in the phrase "Constitution and laws" as it appeared in Reconstruction criminal statutes that shared similar goals with § 1983 was

see Golove, *supra* note 92, at 1104–32. *Jogi*'s citation to the Supremacy Clause could have been meant as a shorthand for all of this. *See* Jogi v. Voges, 480 F.3d 822, 827 (7th Cir. 2007).

[109] *See* John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT'L L.J. (forthcoming 2009) (distinguishing between the consensus on federalism aspects of treaties and the lack of consensus on separation of powers); Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 PERSP. IN AM. HIST. (N.S.) 233, 236, 264 (1984) (noting foreign relations "was regarded as a problem more of federalism than of the separation of powers" and that "[w]hatever uncertainty might have persisted about the precise allocation of the authority to make treaties, the framers were virtually of one mind when it came to giving treaties the status of law."). The Supreme Court confirmed the federalism consensus early on. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[110] *See* Vázquez, *supra* note 3, at 1101–10. Further, the treaty power was designed in part to accommodate federalism concerns. While the Supremacy Clause ensured the preemptive legal status of treaties over state law, the inclusion of the Senate—whose members were selected by state legislators—ensured that legitimate state concerns and interests about treaties would find a meaningful forum. *See* Solomon Slonim, *Congressional–Executive Agreements*, 14 COLUM. J. TRANSNAT'L L. 434 (1975). Note that the design of the treaty power and the exclusion of the House from making treaties were not only about federalism. *See* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 629 (2004) (noting the importance of secrecy to the decision to exclude the House); Rakove, *supra* note 109, at 246–47 (same).

[111] For example, during congressional debates on the intersections of the treaty power with congressional power, when the Supreme Court endorsed the distinction between self-executing and non-self-executing treaties in *Foster v. Nielson*, 27 U.S. (2 Pet.) 253 (1829), and in the cases that adopted the last in time rule as a corollary to self-execution doctrine, participants took as a given the fact that the Supremacy Clause gave individuals the ability to enforce at least some treaty provisions in judicial proceedings. *See* Parry, *supra* note 109.

neither a sport nor sloppiness. Rather, a better inference is that the justices' common assumption reflected this shared understanding about the importance of treaty rights in the federalism context.[112]

This suggestion about likely assumptions at the time § 1983 was drafted and revised not only bolsters the *Jogi* court's reliance on *Baldwin*. It also provides a basis for linking *Baldwin* to later cases, such as *Monell*—also relied on by the *Jogi* court—in which the Supreme Court stated that § 1983 "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights."[113] By itself, the *Monell* statement has little obvious application to treaties, and the unsupported effort to use it as support for including treaties in § 1983 risks appearing tendentious. Placed alongside a history of assuming that treaties can create enforceable rights, however, including in statutes roughly similar to § 1983, the *Monell* statement gains relevance and force.[114]

A potential problem with relying on a case like *Monell* is that opponents of including treaties in § 1983 could argue it no longer reflects the Supreme Court's approach to the statute. While it is certainly true that in the years since *Monell*, the Court has made it more difficult for plaintiffs to bring successful § 1983 actions, much of that doctrinal development bears only tangentially on the treaty issue. Rulings on such things as immunity and the scope of due process claims may reflect discomfort with the implications and quantity of § 1983 litigation, but they do not limit the basic cause of action itself. Even *Gonzaga University v. Doe*, which limited the kinds of statutory claims that can be brought under § 1983, recognized the statute's force as "a mechanism for enforcing individual rights," including non-constitutional rights.[115]

In fact, including treaties in § 1983 may not depart "from the purposes of § 1983" as significantly as including statutory claims did in the eyes of the *Thiboutot* dissenters.[116] Treaty enforcement was a special concern of the founding generation, and *Baldwin* makes clear that the inclusion of treaties in "laws" is at least within the realm of

[112] Further, the separation of powers concerns that animated debates over the House's interaction with treaties, self-execution doctrine, and the last-in-time rule were (and are) obviated by the fact that the *Baldwin* Court was interpreting federal statutes. The arguments in the text accordingly provide less support for efforts to imply causes of action directly from treaties.

[113] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 700–01 (1978).

[114] It is worth noting that the force of the arguments for and against the use of § 1983 to enforce treaty rights may also depend on one's view of whether rights of action can be derived directly from treaties—an issue I do not address directly, *see supra* note 3, although I am skeptical of such claims for roughly the reasons stated in Stephan, *supra* note 3. Both the *Medellín* majority and Justice Breyer in dissent were also skeptical of implied rights of action arguments. *See Medellín*, 128 S. Ct. 1346, 1357 n.3 (2008); *id.* at 1382 (Breyer, J., dissenting).

[115] 536 U.S. 273, 285 (2002).

[116] *See* Maine v. Thiboutot, 448 U.S. 1, 20 (1980) (Powell, J., dissenting).

reasonableness. From that perspective, including treaties seems at least as reasonable as providing a cause of action for violation of any federal statute that creates rights—as opposed to providing a cause of action for violations of "individual rights defined and enforced by the civil rights legislation of the Reconstruction Era" as well as other "enduring civil rights."[117]

Nor does the inclusion of treaties require overruling or modifying any precedents. No recent court decision rejects the use of § 1983 for treaty claims, and many cases are receptive to the idea. Even the Ninth Circuit cases most hostile to claims under Indian treaties did not hold that § 1983 could never be available. Thus, although prior cases do not provide clear and conclusive support for including treaties in § 1983, they certainly weigh more in favor of it than against it.

Finally, to the extent that allowing treaty claims under § 1983 raises concerns about unduly elevating the status of international law, the text and history of the Supremacy Clause make clear—as I have already discussed—that treaty rights are already federal rights. To the extent this concern is more targeted to concerns about the impact of treaty claims on the volume of § 1983 litigation, the *Jogi* court's comments seem apt.

> [T]here are numerous hurdles that must be overcome before an individual may assert rights in a § 1983 case under a treaty: the treaty must be self-executing; it must contain provisions that provide rights to individuals rather than only to states; and the normal criteria for a § 1983 suit must be satisfied.[118]

The self-execution issue is particularly salient. As I discuss below, *Medellín* tightens the test for finding a treaty self-executing. In addition, human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) would be an obvious source of rights for § 1983 claims, but the Senate has given its advice and consent to the ICCPR and other conventions only with the declaration that they are not self-executing.[119]

These arguments, of course, do not evince a great deal of concern for ongoing federalism concerns, and they are arguably in tension with recent cases that limit or at least stop the expansion of the ability to assert federal rights. They may also too easily assume that enforcement of treaties in damages actions was intended or expected by treaty makers or legislators, or that such enforcement is easily characterized as consistent

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[117] *Id.* at 25, 25 n.15. Examples of such statutes include 42 U.S.C. §§ 1981 & 1982. *Cf.* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) (holding § 1983 provides the cause of action for violations of § 1981 rights by state actors, even though the Court previously had implied a cause of action against private actors for violations of § 1981 rights).

[118] Jogi v. Voges, 480 F.3d 822, 827 (7th Cir. 2007); *see also supra* notes 24–27 and accompanying text.

[119] *See* 138 CONG. REC. S4784 (daily ed. April 2, 1992) (Resolution of Ratification, Int'l. Covenant on Civil and Pol. Rights). Courts have taken this declaration seriously. *See* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1365 n.184 (2007) (citing cases).

with prior practice—when in fact neither assumption is clear. To my mind, however, these responses do not outweigh the arguments in favor of including treaties in § 1983 as a general matter. They do, however, have force when it comes to the other issues that *Jogi* mentioned, particularly the question whether the relevant treaty provision is self-executing and provides rights to individuals. As with other sources of rights for § 1983 claims, there are ample ways to control and limit claims without closing the door entirely.

The decision whether § 1983 includes treaties comes down to a series of background or baseline positions about textual analysis, the scope and importance of federalism doctrine, the purposes and impact of § 1983, and the status of treaties under the Supremacy Clause. I view the textual arguments as inconclusive, but I interpret the precedential, historical, and policy arguments as weighing in favor of including treaties. Before *Medellín*, therefore, I would have argued that although the question is close, courts should hold in favor of including treaty claims in § 1983. Still, I would not have been surprised by decisions going the other way, and I would have been hard pressed to demonstrate clear error in such a result. The questions now are whether *Medellín* bears on this issue and what other impact it has on the litigation of treaty claims under § 1983.

IV. *MEDELLÍN* AND § 1983 CLAIMS TO ENFORCE TREATIES

Medellín did not address § 1983 litigation at all. The case came to the Court as a habeas proceeding in which Medellín—then facing a death sentence for murder[120]—sought enforcement of the International Court of Justice's *Avena* decision, which held that he and several others were entitled to "[r]eview and reconsideration" of their convictions and sentences.[121] The Supreme Court held, first, that *Avena* was not automatically enforceable in U.S. courts because the treaties governing ICJ judgments in Vienna Convention cases were not self-executing, and, second, that the President lacked power to implement a non-self-executing treaty against the states, at least with respect to the specific form of enforcement at issue.[122] The Court's treatment of the first issue has serious implications for the ability of plaintiffs to enforce treaties through § 1983.

[120] Texas executed Medellín on August 5, 2008. *See* James C. McKinley, Jr., *Texas Executes Mexican Despite Objections From Bush and International Court*, N.Y. TIMES, Aug. 6, 2008, at A19; *cf.* Medellín v. Texas, 129 S. Ct. 360 (2008) (denying stay of execution).

[121] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

[122] *See Medellín*, 128 S. Ct. 1346 (2008).

A. Including Treaties in § 1983 After Medellín

Although *Medellín* has no direct bearing on whether § 1983 includes treaties, two aspects of the majority opinion do not bode well for inclusion.

First, the general tone of Chief Justice Roberts's opinion seems hostile to enforcement of treaties in federal court proceedings brought by individuals against state actors, unless Congress has made a "clear statement" in favor of enforcement. For example, the opinion draws a strong distinction between international obligations created by treaties and their domestic legal effect.[123] The opinion also describes self-execution doctrine in a way that makes non-self-execution seem like the default position:

> 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."[124]

Further, courts must ask "whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect."[125] This phrasing comes close to creating a presumption that treaties have a status similar to legislation only if the proponent of that view can prove that the language of the treaty supports such an interpretation.[126]

The context, of course, for this general tone was how to determine whether a treaty is self-executing, not whether an existing cause of action includes treaties. After all, the statute that creates federal habeas corpus jurisdiction in a case like *Medellín*—28 U.S.C. § 2254—explicitly includes treaties. Still, the assumption that treaties should not be enforced without a clear indication from Congress strengthens the textual and federalism arguments against including treaties in § 1983 and weakens the historical

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[123] *See id.* at 1356 ("No one disputes that the *Avena* decision . . . constitutes an *international* law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.").

[124] *Id.* at 1357 (citations omitted) (quoting Head Money Cases, 112 U.S. 580, 598 (1884), and Whitney v. Robertson, 124 U.S. 190, 194 (1888)) (alterations in original).

[125] *Id.* at 1366.

[126] I agree with Curtis Bradley that *Medellín* does not actually adopt a presumption against self-execution. *See* Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 546 (2008). But it comes close.

and policy-based arguments in favor of it. Indeed, if the majority opinion's cursory and selective engagement with the history of self-execution doctrine is a model,[127] then the history of enforcing federal treaty rights against states and state actors also has little weight in deciding whether to enforce treaty rights in federal court.

Second, and as the quotations above already suggest, the majority was reluctant to equate treaties with federal statutes (let alone to find rights in or imply causes of action from them). Non-self-executing treaty provisions, for example, "'are not domestic law'" or "federal law" unless Congress passes implementing legislation[128]—even though treaties, whether or not self-executing, are already federal law once ratified by virtue of the Supremacy Clause. The Court appropriately noted that treaty violations, in general, are "the subject of international negotiations and reclamations," not domestic litigation.[129] But this observation proves little. The Court also noted but gave little weight to the fact that treaties consistently have been the subject of litigation when the provisions of the treaty create or impact individual legal rights as well as national interests.[130]

The *Medellín* majority's loose language notwithstanding, the determination that a treaty provision is not self-executing in the sense of being enforceable in court should not affect its status as federal law, any more than the failure of a federal statute to create private rights lowers its

[127] I discuss some of this history, and *Medellín*'s distance from it, in Parry, *supra* note 109.

[128] *Medellín*, 128 S. Ct. at 1356 (domestic law) (quoting Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)); *id.* at 1357 (federal law); *see also* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 606 n.31 (2008) (noting similar statements by lower courts). The Court may have simply been using "federal law" as shorthand for "federal law enforceable in court," but such a shorthand risks revealing or creating conceptual confusion. Note that this issue also came up in the 1796 House debate over implementing the Jay Treaty, when some Republicans argued that a treaty that overlapped with enumerated congressional powers was not "law of the land" until approved by the House. They ultimately backed away from that view and instead made their stand on the claim that such treaties "must depend, for [their] *execution*" on legislation. *See* Resolution of Apr. 7, 1796, 5 ANNALS OF CONG. 771 (emphasis added); Parry, *supra* note 109.

[129] *Medellín*, 128 S. Ct. at 1357 (quoting Head Money Cases, 112 U.S. 580, 598 (1884)).

[130] Instead, the Court said in a footnote that even when a treaty is self-executing, "the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellín*, 128 S. Ct. at 1357 n.3 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1986)). Whether or not the Court's use of the term "presumption" is correct—it certainly changes the meaning that the quoted phrase would otherwise have, *see infra* note 158 and accompanying text—this generalization has little bearing on whether § 1983 should be available for treaty claims that do create rights. By contrast, it plainly bears on the next issue: how to determine whether a treaty creates enforceable rights.

federal law status. Not all statutory violations support private litigation, although many do, if the statute creates or modifies individual legal rights,[131] but none of this affects the status of the statute as federal law. This similarity between statutes and treaties makes clear that the stakes of recognizing the rough equivalency between the two are not as high as they sometimes appear, because the issue is not equivalence but what follows from the shared status as federal law.[132] The result is not immediate enforcement of every treaty provision in federal court. Rather, as with statutes, the result is the enforcement in particular cases of particular treaty provisions, subject to a variety of gate-keeping doctrines.

Nonetheless, the Court's apparent default position that treaties are not self-executing and its suggestion that non-self-executing treaty provisions are not fully federal law could extend beyond limiting habeas rights and could also frustrate the use of § 1983 to enforce treaties.[133] These aspects of the *Medellín* analysis dovetail with the argument that allowing treaty enforcement under § 1983 would be improper where Congress has not made its intentions clear. The weight of *Medellín*'s analysis is far from being an imperative, however. *Medellín* is plainly distinguishable because it does not address § 1983 or even the more general question of enforcing treaties under existing causes of action that do not explicitly include treaties. More important, because these aspects of the opinion concern the decision whether a treaty provision is self-executing, they have much less bearing on what to do with a treaty or provision once it is found or conceded to be self-executing. Indeed, although *Medellín* loads the self-execution question in favor of non-self-execution, it concedes that at least some self-executing treaty provisions are enforceable through judicial proceedings.[134] And, of course, § 1983

[131] *See* Bradley, *supra* note 126, at 548–50; Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 447 (2000); Stephan, *supra* note 3, at 69–74; Vázquez, *supra* note 3, at 1122–33; Carlos Vázquez, *Less Than Zero?*, 102 AM. J. INT'L L. 563, 568–69 (2008).

[132] *Cf.* Stephan, *supra* note 3, at 86; Vázquez, *supra* note 128, at 627. The fact that a non-self-executing treaty requires a federal statute for implementation is not as important a difference as it might appear, because Congress often has to pass statutes to implement or improve the implementation of particular statutory schemes. Note, too, that prior cases have sometimes been inconsistent on the question of equivalence. In the *Head Money Cases*, the Court said that self-executing treaty provisions are "in the same category as other laws of Congress," such that they may be "a rule of decision" for courts. 112 U.S. at 598–99; *see also* United States v. Rauscher, 119 U.S. 407, 419 (1886) (quoting and applying this portion of the *Head Money Cases*). In *Whitney v. Robertson*, however, the Court stated simply that the Constitution places treaties and federal statutes "on the same footing," and "no superior efficacy is given to either over the other." 124 U.S. 190, 194 (1888).

[133] *Medellín* appears to establish that a non-self-executing treaty cannot create rights enforceable in a federal habeas corpus proceeding. *See* Bradley, *supra* note 126, at 547–48. Compare the earlier suggestion to the contrary in *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218–19 n.22 (3d Cir. 2003).

[134] *See Medellín*, 128 S. Ct. at 1356–57, 1364. The Court's discussion of what it means for a treaty to be self-executing exhibits confusion. In general, the Court

provides a cause of action that allows one kind of judicial enforcement proceeding to go forward.

B. Deciding What Treaty Rights Are Enforceable Through § 1983 After Medellín

Even as the Supreme Court was evaluating the domestic impact of Article 36 in *Breard*, *Sanchez-Llamas*, and *Medellín*, the Courts of Appeals were hearing a series of cases that raised a more pointed issue: Does Article 36 create individual rights that can be enforced on appeal, in federal habeas, or in § 1983 actions?[135] This section discusses the methodologies that the lower courts have used to resolve the Article 36 issue and considers how *Medellín* will affect the effort to determine whether a treaty creates individually enforceable rights.

Before *Medellín*, appellate judges employed a variety of approaches to analyze Article 36 claims. Several judges used a straightforward textual analysis to decide that Article 36 creates an individual right. Thus, Judge Boochever stated, "It strains the English language to interpret 'his rights' in this context to refer to the Consulate's rights," and "the language of the provision is not precatory, but rather mandatory and unequivocal."[136]

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assumed that all self-executing treaty provisions are enforceable in court. But in a footnote, the Court distinguished between self-execution and the creation of private rights. *See id.* at 1357 n.3. But if self-executing treaties are enforceable in court, what does it mean to say that a self-executing treaty may not create private rights? (Perhaps the United States would enforce the treaty against recalcitrant states through judicial proceedings, although the Court did not suggest this.) *See also supra* note 128. In any event, the Court's general equation of self-execution and judicial enforcement may go too far, at least if one recognizes that a treaty provision can be self-executing as a grant of power to the executive branch—something the *Medellín* majority was loath to consider under the circumstances of the case. *Compare Medellín,* 128 S. Ct. at 1367–72 *with* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, reporter's note 5 (stating that "in general" a treaty is self-executing if it "can be readily given effect by executive or judicial bodies"). For discussion of this issue and *Medellín*'s approach to it, *see* Bradley, *supra* note 126, at 549–50; Steve Charnovitz, *Revitalizing the U.S. Compliance Power*, 102 AM. J. INT'L L. 551, 558 (2008); Parry, *supra* note 109; Jordan J. Paust, Medellín, Avena*, The Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301 (2008); Paul Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. 11, 23(2009); Vázquez, *Less Than Zero?*, *supra* note 131, at 566–70; Ingrid Wuerth, Medellín*: The New, New Formalism?*, 13 LEWIS & CLARK L. REV 1, 3–5 (2009); *see also* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 353–59 (2008).

[135] A majority of the Supreme Court consistently has ducked this issue and generally has assumed that Article 36 is self-executing and creates individual rights—and then for various reasons has denied relief. *See* Breard v. Greene, 523 U.S. 371, 375 (1998); Sanchez-Llamas v. Oregon, 548 U.S. 331, 337 (2006); *Medellín*, 128 S. Ct. at 1357 n.4.

[136] United States v. Lombera-Camorlinga, 206 F.3d 882, 889–90 (9th Cir. 2000) (en banc) (Boochever, J., dissenting); *see also id.* at 885 (majority opinion) (suggesting the text "implies that the provision exists for the protection of the foreign national"); United States v. Li, 206 F.3d 56, 72 (1st Cir. 2000) (en banc) (Torruella, C.J., concurring in part and dissenting in part) ("I have some difficulty envisioning how it is possible to frame language that more unequivocally establishes that the protections

By contrast, the First Circuit insisted in *United States v. Li* that the Vienna Convention is "facially ambiguous on the subject of whether [it] create[s] individual rights at all."[137]

Judges who used textual analysis to find a right sometimes also referred to cases such as *United States v. Stuart*[138] and *Asakura v. City of Seattle*,[139] which arguably support a presumption in favor of interpreting treaties to create rights.[140] For example, quoting *Stuart*, Chief Judge Torruella said:

> [A] treaty should generally be construed . . . liberally to give effect to the purpose which animates it and that even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.[141]

The *Jogi* court took a slightly different tack and framed its analysis by reference to *Gonzaga University v. Doe*'s test for when a statute creates individual rights that can be enforced through § 1983: "(1) whether the statute by its terms grants private rights to any identifiable class; and (2) whether the text of the statute is phrased in terms of the persons benefitted."[142] The court then held that the language of Article 36 "satisfies the strict test of clarity that the Supreme Court set forth in *Gonzaga University*."[143] Recognizing that other courts had disagreed, however, the court also relied on *Stuart* and *Asakura*, as well as *Sosa v. Alvarez-Machain*.[144] Soon thereafter, however, the Ninth Circuit relied on

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of Article 36(1)(b) belong to the individual national . . . ."); Gandara v. Bennett, 528 F.3d 823, 835–36 (11th Cir. 2008) (Rodgers. J., concurring) ("To require more specific language in the face of such clarity . . . is unwarranted under ordinary principles of treaty interpretation.").

[137] *Li*, 206 F.3d at 62.

[138] 489 U.S. 353 (1989).

[139] 265 U.S. 332 (1924).

[140] Reliance on *Stuart* in this context is a bit odd. Although the Court made the quoted statement, *infra*, it did so to support its conclusion that a treaty expanded the federal government's power to obtain tax related information about individuals. *Asakura*, by contrast, involved discrimination against an alien in violation of a treaty and is more directly on point.

[141] *Li*, 206 F.3d at 72 (Torruella, C.J., concurring in part and dissenting in part) (quoting *Stuart*, 489 U.S. at 368 (internal quotation marks omitted)); *see also* Jogi v. Voges, 480 F.3d 822, 834 (7th Cir. 2007); *cf. Gandara*, 528 F.3d at 832 n.8 (noting the force of these cases).

[142] *See Jogi*, 480 F.3d at 827–28 (citing Gonzaga University v. Doe, 536 U.S. 273, 283–84 (2002)); *see also id.* at 832.

[143] *Id.* at 833; *see also* Cornejo v. County of San Diego, 504 F.3d 853, 864–65 (9th Cir. 2007) (Nelson, J., dissenting) (arguing for the same conclusion).

[144] *Jogi*, 480 F.3d at 834–836 (citing United States v. Stuart, 489 U.S. 353 (1989); Asakura v. City of Seattle, 265 U.S. 332 (1924); and Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)). The *Jogi* court said that "*Sosa* recognizes that international law in general, and thus treaties in particular, occasionally do [create rights]." *Jogi*, 480 F.3d at 834. In her *Cornejo* dissent, by contrast, Judge Nelson relied only on *Gonzaga* to argue Article 36 creates individual rights. *Cornejo*, 504 F.3d at 863–73.

Gonzaga and ignored the other cases to reach the opposite conclusion in *Cornejo v. County of San Diego*.[145]

Although some courts that have refused to find individual rights in Article 36 have relied on a textual analysis, and some of them apply *Gonzaga*, most of them have relied primarily on a presumption against self-execution or the creation of private rights. According to the First Circuit in *Li*:

> [T]reaties do not generally create rights that are privately enforceable in the federal courts. . . . "[E]ven where a treaty provides certain benefits for nationals of a particular state . . . it is traditionally held that any rights arising from such provisions are, under international law, those of states and . . . [that] individual rights are only derivative through the states."
>
> Even stronger than the presumption against private rights of action under international treaties is the presumption against the creation of rights enforceable by the suppression of evidence or by the dismissal of an indictment.[146]

Note how this passage begins with a description—treaties "do not generally create rights"—but transforms that description into a presumption, so that the claim of a relative lack of rights-creating provisions in treaties ends up meaning that every treaty provision should be construed with a thumb on the scale against creating rights.

The concurring judges in *Li* were even more emphatic. Assuming that the Vienna Convention was ambiguous, they declared:

> Ambiguity brings into play the background presumption in respect to treaties between States—a presumption which holds that they *do not* create rights that private parties may enforce in court. This presumption can certainly be overcome by explicit language that is easy to draft and insert . . . . In addition, rights-granting language occasionally may make sense only on the premise that it confers a right enforceable by a private citizen in the courts of the other country. But apart from these narrow circumstances, the presumption rules.[147]

Other courts have made statements similar to those in the *Li* majority and concurrence.[148] All of these statements rely primarily on

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[145] 504 F.3d at 858–59.

[146] United States v. Li, 206 F.3d 56, 60–61 (1st Cir. 2000) (en banc) (citations omitted) (quoting Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990)).

[147] *Li*, 206 F.3d at 66–67 (citing Goldstar v. United States, 967 F.2d 965, 968 (4th Cir. 1992), and Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring)) (citations omitted). Note that *Goldstar* actually said something quite different: "International treaties are not presumed to create rights that are privately enforceable." *Goldstar*, 967 F.2d at 968. The lack of a presumption in one direction does not establish a presumption the other way.

[148] *See* United States v. Jimenez-Nava, 243 F.3d 192, 195–97 (5th Cir. 2001); United States v. Emuegbunam, 268 F.3d 377, 389–90 (6th Cir. 2001). The Ninth

circuit court opinions for the claim that a presumption exists against individually-enforceable treaty rights, and they do not address the Supreme Court cases—such as *Asakura*—that suggest a more liberal or flexible approach.

A footnote in the *Medellín* majority opinion followed the lead of these courts and stated that even when a treaty is self-executing, "the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'"[149] One might object that the statement is dictum, since it bears not at all on the question before the court. But soon thereafter, in *Mora v. New York*,[150] the Second Circuit relied on that statement to give even greater emphasis than earlier appellate courts had to the idea of a presumption. The court began its Article 36 analysis with a straightforward interpretation of the text, and it noted the relevance of *Gonzaga*.[151] But after construing the text of Article 36 against the creation of rights, the court went on to devote a section of its opinion to the proposition that "the presumption against conferral of individual rights by international treaties requires a clear statement of the treaty drafters' intent."[152] The court began that section by quoting the *Medellín* footnote, and it determined that Article 36 could not overcome that presumption.[153]

Circuit was more circumspect: "While treaties *may* confer enforceable individual rights, most courts accept a 'presumption' against inferring individual rights from international treaties. Whether or not aptly characterized as a 'presumption,' the general rule is that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies." *Cornejo*, 504 F.3d at 858–59 (citations omitted) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1986)).

[149] Medellín v. Texas, 128 S. Ct. 1346, 1357 n.3 (2008) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1986)).

[150] 524 F.3d 183 (2d Cir. 2008).

[151] *Id.* at 195 (appearing in the opinion as the title of section 2); *see also* id. at 202 n.26 (noting the U.S. urged the court to apply a clear statement rule derived from *Gonzaga*).

[152] *Id.* at 200; *see also id.* at 201, 201 n.25 (emphasizing the presumption and stating that "[a]t least nine of the other courts of appeals have applied such a presumption"); *but see id.* at 202 ("Whether we call this expectation [that treaty obligations do not extend to individuals] a 'presumption,' or refer to it as some other rule of construction, or simply treat it as a general guide to treaty interpretation, the result is the same." (footnote omitted)).

[153] *See id.* at 200. Another post-*Medellín* decision—*Gandara v. Bennett*, 528 F.3d 823 (11th Cir. 2008)—relied on a combination of textual analysis and the presumption and avoided explicit reliance on *Medellín*. *See Gandara*, at 829 n.5 (Rodgers, J., concurring) (noting that "[a]lthough *Medellín* . . . dealt with closely related questions, the Court specifically stated that it was not resolving 'whether the Vienna Convention is itself "self-executing" or whether it grants Medellín individually enforceable rights.'" (quoting *Medellín*, 128 S. Ct. at 1357 n.4)).

In sum, the majority view among the circuits, bolstered by the *Medellín* footnote, appears to be that a presumption exists against recognizing individual rights even when a treaty is self-executing. Courts and judges who have looked to cases such as *Asakura* are not only in the minority but are also now inconsistent with the reasoning—albeit dictum—of *Medellín*. Despite its growing weight, however, the no-rights presumption skews the analysis too far against treaty-enforcement. The test for self-execution is whether "the treaty contains stipulations which . . . require no legislation to make them operative"[154]—and making such a finding will be more difficult after *Medellín*. Whether or not a stricter test is a good idea, Chief Justice Marshall made clear in *Foster v. Neilson* that once a court makes a finding of self-execution, such provisions are "to be regarded in courts of justice as equivalent to an act of the legislature" and do not require legislation to become "a rule for the Court."[155] Yet the doctrine emerging from *Medellín* and several of the courts of appeals is that, having overcome what appears to be a near-presumption against self-execution, the person seeking to enforce a treaty must also overcome a presumption against interpreting treaties to create individual rights.[156]

As I noted above, the idea of a presumption against finding rights tends to begin with the descriptive claim that most treaty provisions do not create individual rights. By itself, the frequency of rights-granting provisions has little to do with a presumption,and appellate opinions provide little analysis of the issue. Lower courts have also relied on selective quotation of the *Head Money Cases*[157] and a mischaracterization

[154] *Medellín*, 128 S. Ct. at 1357 (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

[155] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); *see also* Head Money Cases, 112 U.S. 580, 598–99 (1884) (stating "a treaty may also contain provisions which confer certain rights upon" individuals and that "such provisions as these [are] in the same category as other laws of Congress" and may be "a rule of decision" for courts).

[156] *See also* Vázquez, *supra* note 128, at 604-05 (noting many lower courts have begun "requiring a threshold showing of 'judicial enforceability,' beyond what is required for statutory and constitutional provisions" to be enforceable in court, and in addition to the requirement of "self-execution" (footnote omitted)).

[157] Several courts have quoted some or all of the following statement from the *Head Money Cases*: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress." 112 U.S. 580, 598 (1884); *see* United States v. Li, 206 F.3d 56, 60–61 (1st Cir. 2000) (en banc); United States v. Jimenez-Nava, 243 F.3d 192, 195–96 (5th Cir. 2001); United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001); Cornejo v. County of San Diego, 504 F.3d 853, 858 (9th Cir. 2007). But the *Head Money* opinion goes on to state that "a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as

of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW—a mischaracterization in which *Medellín* also indulges.[158] The emerging presumption, in short, rests on distortions that suggest not simply skepticism about treaty claims but a hostility that is unwarranted by, and indeed is in strong tension with, the text, history, and earlier interpretations of the Supremacy Clause. The Court is free to disregard earlier doctrine, but it has failed to provide an explanation for its current attitude.

Earlier in this Article, I discussed potential arguments against including treaty claims in § 1983. I suggested those arguments failed to make the case for complete exclusion but that opponents of treaty-based § 1983 claims could more plausibly argue either for a clear statement from Congress before such claims are enforceable through a particular cause of action, or for a strict test for determining whether a treaty creates individually enforceable rights. Without articulating any specific policy reasons, this seems to be exactly what the lower courts—and apparently now the Supreme Court—have done.

The problem is that this emerging doctrine, although on the surface a plausible response to federalism concerns, turns out to be entirely unnecessary—unless one is simply opposed to treaty claims as a general

between private parties in the courts of the country." 112 U.S. at 598. Further, "when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would a statute." *Id.* at 599. For analysis of the misuse of *Head Money* by lower courts, see Vázquez, *supra* note 128, at 624–28.

Note that the Second Circuit first quoted portions of the entire *Head Money* statement, *see* Mora v. New York, 524 F.3d 183, 192–93 (2d Cir. 2008), but it later relied on the first part of the *Head Money* statement in support of its presumption analysis, as if it had never quoted the entire statement earlier in the opinion, *see id.* at 200–01.

[158] Section 907 of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986) asserts, "A private person having rights against the United States under an international agreement may assert those rights in courts in the United States of appropriate jurisdiction either by way of claim or defense." In a comment, the Restatement also says, "International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies. Whether an international agreement provides a right or requires that a remedy be made available to a private person is a matter of interpretation of the agreement." *Id.*, cmt. a. Thus, the Restatement primarily provides that people may assert treaty rights in U.S. courts. It also observes that most treaties do not create individually enforceable rights, but instead of suggesting a presumption it simply states that whether or not a particular treaty creates rights "is a matter of interpretation." Most courts, however, including the Supreme Court, ignore § 907 entirely and focus only on comment a. And, when addressing comment a, they almost always provide an incomplete quotation and/or mischaracterize the comment by using a lead-in phrase such as "the presumption is." *See Medellín*, 128 S. Ct. at 1357 n.3; *Emuegbunam*, 268 F.3d at 389; *Cornejo*, 504 F.3d at 859; Gandara v. Bennett, 528 F.3d 823, 828 (11th Cir. 2008). *See also* Vázquez, *supra* note 128, at 626–27 n.131 (discussing this issue).

matter. A treaty is equivalent to a federal statute, and it may or may not create individual rights capable of judicial enforcement. But no treaty may be enforced by U.S. courts at the behest of an individual unless it is self-executing or Congress has provided for its implementation.[159] Even without the no-rights presumption, not all self-executing treaties would automatically create rights that would be enforceable in court. To the contrary, a test already exists for determining whether a federal statute creates rights enforceable in a damages action. *Gonzaga University v. Doe* requires courts to determine whether "the text and structure of a statute" "unambiguously" indicate whether "Congress intends to create new individual rights."[160] Further, even if Congress has created a right, it is only presumptively enforceable under § 1983—the existence of an alternate remedial scheme could rebut the presumption.[161]

Thus, under *Gonzaga*, something close to a clear statement rule exists for recognizing statutory rights, with a presumption in favor of enforcing such rights through § 1983. In treaty cases, as *Jogi* illustrates, these two steps easily can follow the initial inquiry into whether the treaty is self-executing. The no-rights presumption, by contrast, would either insert a fourth step into the analysis or would displace the *Gonzaga* analysis altogether. Either result would undermine the purported equality of treaties and statutes, and the resulting inequality would be particularly strange when the treaty is self-executing. The no-rights presumption subordinates treaties that are not only law of the land but, because self-executing, are also meant to operate directly as law. With the presumption in place, treaties will often lack the sharp impact and meaning that derives from actual enforcement. Put differently, treaties would still be laws in name, but they would be shadows of law in form: "[l]aws have little meaning unless they can be enforced."[162]

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[159] For example, in *Hamdan v. Rumsfeld*, the Court applied the standards of common Article 3 of the Geneva Conventions to the Bush administration's military commissions scheme, but it did so because Congress had incorporated those standards into federal statutory law. *See* 548 U.S. 557, 613, 628–31 (2006); *see also id.* at 628 n.58. *Medellín* requires courts to make the self-execution inquiry where there is no statute, when before many courts had simply assumed that a treaty was directly enforceable.

[160] 536 U.S. 273, 283, 285–86 (2002).

[161] *See id.* at 284; *supra* note 23 and accompanying text; *see also* Sloss, *supra* note 107 (detailing ways in which courts allow injunction claims to enforce federal statutes outside § 1983). Admittedly, this factor likely has little weight in the treaty context, although I would not be surprised by the argument that an agreement to submit disputes about a treaty to an international tribunal either indicates that the treaty does not create individually-enforceable rights or that it contemplates an alternate enforcement scheme. *See Gonzaga*, 536 U.S. at 290 (noting that the existence of an enforcement scheme created by Congress "counsel[ed] against our finding a congressional intent to create individually enforceable rights" whether or not it would be a sufficient alternative remedial scheme that would preclude the use of § 1983).

[162] Erwin Chemerinsky, *Limiting Suits to Enforce Federal Laws*, TRIAL, Jan. 1, 2003, at 70, 71.

Gonzaga already ensures that only clear rights-granting provisions can be enforced through § 1983,[163] and it already responds to federalism concerns by creating a fairly high hurdle for finding that a specific provision creates individually-enforceable rights. Still, although *Gonzaga* is one of many recent cases that cut back on the easy enforcement of federal rights by individuals, it stops short of actually articulating a presumption against finding rights. To the extent the Supreme Court's concern in *Medellín* was to ensure that treaty-enforcement by individuals would not be too easy, adding the *Gonzaga* analysis to the self-execution analysis ought to be sufficient. Imposing a different and more difficult standard goes beyond the concerns that drove *Gonzaga*. Further, the fact that the *Medellín* majority sought to accomplish this result without any specific analysis or justification suggests a reflexive suspicion of, or hostility to, treaty claims.[164]

The Supreme Court and the courts of appeals seem to be asking for a statement along the lines of, "This treaty provision confers individual rights that are intended to be enforceable in court." Sometimes treaties come close to this language, but more often they do not—for a good reason. Each country has its own way of enforcing treaty obligations. In

[163] *See also* Vázquez, *supra* note 3, at 1135–41 (arguing under pre-*Gonzaga* law that the test for whether an individual has standing to assert a statutory claim should be sufficient for treaties).

[164] It is possible that *Medellín* meant to adopt roughly the same standard as *Gonzaga*, but if so the Court's loose language and mischaracterization of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES easily lend themselves to the conclusion that the standard is different. Or, if the Court meant the standard to be the same, then it arguably has turned the *Gonzaga* test into a no-rights presumption as well. Of course, it is possible to interpret *Gonzaga* as not merely removing a presumption or shifting the burden of proof but as actually imposing a presumption against the creation of individually-enforceable rights in the first place, *cf. Gonzaga*, 536 U.S. at 291 (Breyer, J., concurring) ("I would not, in effect, predetermine an outcome though the use of a presumption—such as the majority's presumption that a right is conferred only if set forth 'unambiguously' in the statute's 'text and structure.'" (quoting *id.* at 280, 288), but that reading does not accord with the general reception of the case among commentators and lower courts. *See* Sabree v. Richman, 367 F.3d 180, 191 (3d Cir. 2004) (stating *Gonzaga* removed a presumption in favor of recognizing rights but stopping short of saying it imposed a new presumption); Bradford C. Mank, *Suing Under § 1983: The Future After* Gonzaga University v. Doe, 39 HOUS. L. REV. 1417, 1455–56 (2003) (making a similar assessment); David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 521 (2007) (stating *Gonzaga* does not create a presumption); Sarah D. Greenberger, Comment, *Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-Minded Section 1983 Jurisprudence*, 153 U. PA. L. REV. 1011 (2005) (arguing against interpreting *Gonzaga* to create a presumption against rights); Sasha Samberg-Champion, *How to Read* Gonzaga*: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838 (2003) (making a similar argument); *see also* Brian J. Dunne, Comment, *Enforcement of the Medicaid Act Under 42 U.S.C. § 1983 After* Gonzaga University v. Doe*: The "Dispassionate Lens" Examined*, 74 U. CHI. L. REV. 991, 1004 (2007) (lower courts have not read *Gonzaga* as a broad departure from prior law); Sara J. Klein, Note, *Protecting the Rights of Foster Children: Suing Under § 1983 to Enforce Federal Child Welfare Law*, 26 CARDOZO L. REV. 2611, 2641 n.164 (2005) (same).

the U.S., the Supremacy Clause makes a treaty the law of the land as much as a federal statute, and causes of action such as § 1983 are at least potentially available for enforcement of treaty rights. The only remaining question, then, is how to interpret treaties—especially multilateral conventions—that use general language in part to ensure that the obligations imposed by the treaty can interact easily with the legal system of each state party. Against this background, the test set out in *Gonzaga* is enough. It may even be more than enough, because one easily could argue that the nature of such treaties makes their language more likely to be ambiguous than that of statutes, even when the intent is to create rights.

Put differently, self-execution analysis takes care of the issues that are specific to treaties. Once those issues are out of the way and the treaty is recognized as equivalent to a statute, the inquiry into whether it creates rights should be similar to the inquiry for statutes.[165]

V. CONCLUSION

In *Gonzaga*, the Supreme Court removed a presumption in favor of enforcing statutes through § 1983 and replaced it with a requirement of greater clarity. *Medellín*, too, overturns assumptions and presumptions. It shifts the self-execution analysis away from neutrality or a possible presumption in favor of self-execution, toward a presumption in favor of non-self-execution. And, in the face of cases such as *Asakura*, which suggests a willingness to find individual rights in treaties, the Court declared a presumption that even self-executing treaties do not create individually-enforceable rights.

Medellín thus follows the trend in many recent cases of narrowing the scope and enforceability by individuals of federal civil rights—particularly in the federalism context. I have tried to argue that even if it makes sense to include treaty claims in this general trend, then the analysis should be similar to the analysis applied to statutes. Treaties should not be relegated to a worse position, especially when the decision to do so is made in an off-hand and nearly unreasoned manner.

With respect to § 1983 litigation in particular, *Medellín* raises some difficulties for the initial problem of whether the cause of action can include treaty claims, but those difficulties should not be decisive. If § 1983 is to remain a cause of action for the enforcement against state actors of federal rights, then treaty rights ought to be part of the mix, and contrary emanations from *Medellín* should be confined to the

[165] Note as well that *Gonzaga* consciously sought to align the determination of when statutes create rights under § 1983 with that aspect of the analysis for implied statutory rights of action. *See* 536 U.S. at 283–85. If treaty-based § 1983 claims should be addressed under *Gonzaga*, then it seems at least reasonable that the implied right of action analysis it describes, *see id.* at 284, should apply to attempts to sue directly under a treaty.

context of self-execution analysis. The greater problem is the analysis for determining when an enforceable right exists for purposes of § 1983. Plaintiffs with treaty claims will have a harder time surviving that analysis after *Medellín*. Once they establish that the relevant treaty is self-executing, however, their task should at least be no harder than that of plaintiffs who bring statutory claims.