Treaties and the Separation of Powers in the United States: A Reassessment after *Medellin v. Texas*

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I. INTRODUCTION

Recent history has witnessed a marked expansion of the number of international conventions and other legal instruments containing rules intended to benefit private parties. This is true in areas including human rights, family law, judicial cooperation, and economic law. Because individuals generally do not have access to the major dispute settlement bodies of international law, the question of application of international law in domestic courts takes on particular importance.¹

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¹ For a discussion of the doctrines of direct effect and self-execution of treaty provisions in the European Union and the United States, respectively, see Ronald A. Brand,
The recent decision of the U.S. Supreme Court in *Medellín v. Texas*\(^2\) has heightened concern about the ability to apply important international law principles in U.S. courts. It also raises questions about both the allocation of powers among the executive, legislative, and judicial branches of the U.S. government and the relationship between the federal government and the states in determining when and if international law is applicable in U.S. courts.

Chief Justice Roberts's majority opinion in the *Medellín* case includes statements that bring into question long-standing assumptions about the authority of the President and Congress in the treaty-making process. These questions have implications for both public and private international law, including how future international legal instruments should be negotiated in organizations like the Hague Conference on Private International Law, UNCITRAL, and UNIDROIT.\(^3\) If some of the language contained in the *Medellín* opinion is strictly followed in future cases, it may severely restrict the ability of the United States to participate effectively in these institutions. It is thus worth considering both how vital that language is to the specific holding in *Medellín* (i.e., how much it must be considered to be binding on lower courts), and how it might be applied in future cases.

In this paper, I review the *Medellín* decision, consider specific statements contained in Chief Justice Roberts's opinion, and attempt to project the effect of that language on the future application of existing private law and private international-law treaties. Perhaps more significant, however, is the potential impact of the decision on the future negotiation of such instruments. Thus, I also consider the implications for the future relationship between the President and Congress in the treaty-making process. Finally, I consider those aspects of the decision that raise issues of federalism, and I survey the troubling potential for distributive effects of the *Medellín* decision that might erroneously be taken to imply a blocking role for states in international relations that could significantly reduce the influence of the United States both in future

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treaty negotiations and in the development of international law generally.

II. THE MEDELLÍN CASE

A. The Facts and Context

The Medellín case is part of a package of legal decisions involving the application of the Vienna Convention on Consular Relations to citizens of foreign countries accused of crimes in U.S. courts. Article 36(1)(b) of the Vienna Convention includes the following language regarding the rights of such a person:

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.[

In the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), the International Court of Justice ("ICJ") determined that this provision of the Vienna Convention had been violated, and that the United States was obligated "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals," regardless of state procedural rules.

Subsequent to the Avena decision by the ICJ, the U.S. Supreme Court, in Sanchez-Llamas v. Oregon, held that state-default rules prevented such reconsideration when the Convention issues were raised only in state habeas corpus proceedings brought after con-

7. Id. at 72.
8. Id. at 56-57.
viction and direct appeal. In doing so, the Court specifically rejected the rationale of the ICJ that the default by the defendants in raising the Convention claims in the original proceedings was "because of the failure of the American authorities to comply with their obligation under Article 36," and thus, "prevented [U.S. courts] from attaching any legal significance to the fact that foreign governments were kept from assisting their nationals in their defense." The parties in Sanchez-Llamas had not been defendants specifically named in the Avena decision of the ICJ.

An important event, both in terms of the progression of legal matters and in regard to separation of powers, occurred on February 28, 2005, when President George W. Bush issued a Memorandum to the Attorney General, in which he stated:

I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 128 (Mar. 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

10. Sanchez-Llamas, 548 U.S. at 350-51. "The general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review. . . . Like many States, Virginia applies a similar rule in state post-conviction proceedings, and did so here to bar Bustillo's Vienna Convention claim. Normally, in our review of state-court judgments, such rules constitute an adequate and independent state-law ground preventing us from reviewing the federal claim." Id.

The argument that a treaty could trump the procedural default rule had first been raised and rejected in regard to the Vienna Convention in Breard v. Greene, 523 U.S. 371 (1998) (per curiam). The Court there found such a treaty supremacy argument to be "plainly incorrect" for two reasons:

First, we observed, "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." Furthermore, we reasoned that while treaty protections such as Article 36 may constitute supreme federal law, this is "no less true of provisions of the Constitution itself, to which rules of procedural default apply."

Sanchez-Llamas, 548 U.S. at 351-52 (quoting Breard, 523 U.S. at 376).


Thus, the treaty, the ICJ, and the President had all directed states to comply with the requirements of Article 36(1)(b) of the Vienna Convention on Consular Relations.

José Ernesto Medellín, a Mexican national, was convicted of capital murder and sentenced to death in Texas for the 1993 rape and murder of two teenagers. When arrested, he was given his Miranda warnings and then signed a written confession. He was not informed by the arresting officers (or by anyone else) of his Vienna Convention right to notify the Mexican consulate of his detention. He did not raise any claims regarding his Convention rights at trial or on direct appeal in the state court proceedings. Subsequently, as a named party in the Avena case before the ICJ, and in habeas corpus proceedings for post-conviction relief, Medellín did raise the Vienna Convention claims.

When the Medellín case reached the U.S. Supreme Court on writ of certiorari, the Court held that (1) the Avena decision of the ICJ did not create rights directly enforceable in U.S. courts by private individuals that would preempt state procedural limitations on filing habeas corpus petitions, and (2) the President’s Memorandum of February 28, 2005, did not create a legal basis for requiring a Texas state court to review its decision in the Medellín case when to do so would be inconsistent with state procedural default rules. Thus, the Court rejected claims based both on international law represented by the decision of the ICJ and on executive power to implement that international law in the domestic realm. In a detailed opinion, Chief Justice Roberts, writing for the majority, discussed the status in domestic law of both the ICJ judgment and the President’s Memorandum. While the Court determined that neither had status as law that could be asserted by Medellín in U.S. courts, it also made clear that, even if such status was achieved, the resulting federal law rule would not prevail over the criminal procedure default rules of the State of Texas that prevented a defendant from raising such matters only in claims for post-conviction relief.

14. Id.
B. Chief Justice Roberts's Majority Opinion

1. Dualism and the Self-Executing Treaty Doctrine

Early in his majority opinion, Chief Justice Roberts restates the traditional dualist rationale regarding the relationship of international law to the U.S. legal system:

No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—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.\(^\text{15}\)

Thus, a rule of international law otherwise binding on the U.S. government in its conduct with other nations is not *on its own* a rule of law on which private parties may claim either individual rights or state or federal government obligations in courts within the United States. This dualist tradition has been a consistent characteristic of the U.S. legal system throughout our nation’s history.\(^\text{16}\) This part of the *Medellín* opinion presents no surprise.

In order for treaty obligations to create legal rights applicable in U.S. courts in cases involving private parties, it has long been clear that such rights must either be implemented by federal law in accordance with Congress’s Article I powers, or the treaty language being applied must be self-executing, thus resulting in effect through the Supremacy Clause of Article VI.\(^\text{17}\) While the doc-

\(^{15}\) Id. (emphasis in original).


\(^{17}\) See, e.g., *Head Money Cases*, 112 U.S. 580, 598 (1884) (“A treaty is primarily a compact between independent nations . . . . But 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 between private parties in the courts of the country.”); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part by*, United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (“Our constitution declares a treaty to be the law of the land. It is
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trine of self-execution is applied to determine when a treaty provision is applicable as law in disputes involving private parties, it is often construed as a limitation on the ability to assert rights found in treaties to which the United States is a party.

Chief Justice Roberts’s majority opinion in *Medellín* begins by following the long line of prior decisions recognizing that the Supremacy Clause of Article VI of the United States Constitution views treaties as providing the “supreme law of the land,” when the language of the treaty provision in question clearly indicates that it “operates of itself without the aid of any legislative provision.”

He clearly takes the doctrine of self-execution as a restriction on the application of treaty rules in U.S. courts; however: “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.'”

Here, though, Roberts provides confusing language that, at the same time, goes further than any Supreme Court decision in the past by suggesting that there is a step between self-execution and the creation of enforceable legal rights in U.S. courts, and that the only way a treaty can create enforceable legal rights in U.S. courts (i.e., the only way its language may be self-executing) is if the words of the treaty explicitly state that it is self-executing:

Even when treaties are self-executing in the sense that they create federal law, the background presumption is that “[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.” . . . Accordingly, a number of the Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.

This leaves one who has read only Chief Justice Roberts’s *Medellín* opinion to conclude that the only way treaty language consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”.

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20. *Id.* at 1357 n.3 (citations omitted).
might create enforceable legal rights in U.S. courts (i.e., the only
time the Supremacy Clause of the United States Constitution has
any effect in regard to treaties) is when either the language of the
treaty explicitly requires self-execution or implementing legisla-
tion specifically requires such a result. In the extreme, this lan-
guage could be taken to state a presumption that treaties do not
create enforceable domestic rights, and the presumption is over-
come only by explicit language to the contrary in either the im-
plementing legislation or the language of the treaty itself. Such
an extreme should not be assumed as a result of Chief Justice
Roberts's rather confusing discussion of the doctrine of self-
execution.21

While it is true that international agreements "generally do not
create private rights or provide for a private cause of action in
domestic courts,"22 prior decisions have indicated that they do so
when the language demonstrates a clear intent that they do so.23
Those decisions have not required that Congress restate that in-
tent explicitly for each provision in implementing legislation. Nor
have they required that other parties to the agreement explicitly
acknowledge self-executing effect.24

It is important to understand that Medellin had not sought re-
lief directly through the application of Article 36 of the Vienna
Convention on Consular Relations. In fact, Chief Justice Roberts,
in a footnote, "assumes without deciding" that Article 36 is self-
executing, and thus does create "an individually enforceable right
to request that [an individual's] consular officers be notified of
their detention."25 That was not, however, the question before the
Court, because legal counsel for Medellin did not rely on that ar-
gument:

21. See, e.g., Curtis A. Bradley, Intent, Presumptions, and Non-Self-Executing Treaties,
102 Am. J. Int'l. L. 540, 546 (2008) ("It would be over-reading the decision, however, to
conclude that it supports a presumption against self-execution.").
22. Restatement (Third) of Foreign Relations Law of the United States § 907
(1986).
23. Percheman, 32 U.S. at 51.
24. See, e.g., Bradley, supra note 21, at 544-45 ("[S]elf-execution is rarely the subject of
negotiation. . . . If the relevant intent were the collective intent of the parties, treaties
would almost never be self-executing, since, as noted above, there is almost never such a
collective intent."). It is the author's experience in negotiations on behalf of the United
States at the Hague Conference on Private International Law that no nation involved in
the negotiation of a multilateral treaty wants other nations to dictate the manner in which
a treaty will or will not come into effect in the first nation's domestic legal system. Thus,
explicit language of self-execution in a treaty text would be nearly impossible to arrange.
25. Medellin, 128 S.Ct. at 1357 n.4.
The question is whether the *Avena* judgment has binding effect in domestic courts under the Optional Protocol, ICJ Statute, and U.N. Charter. Consequently, it is unnecessary to resolve whether the Vienna Convention is itself "self-executing" or whether it grants Medellín individually enforceable rights.

... As in *Sanchez-Llamas*, ... we thus assume, without deciding, that Article 36 grants foreign nationals "an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification."26

In his concurring opinion, Justice Stevens rejects any suggestion in Chief Justice Roberts's opinion of a presumption against self-execution, and explicitly endorses self-executing status for the Vienna Convention on Consular Relations.27 Justice Breyer, in his dissenting opinion, joined by Justices Souter and Ginsburg, readily accepts the self-executing status of Article 36 of the Vienna Convention.28 Thus, all nine justices either accept or assume that Article 36 of the Vienna Convention is self-executing and the subject of enforceable legal rights. Nevertheless, the analysis of the majority opinion concludes that those rights may not be asserted by Medellín in post-conviction relief proceedings.

26. *Id.* (citations omitted).
27. *Id.* at 1372. (Stevens, J., concurring):
There is a great deal of wisdom in Justice Breyer's dissent. I agree that the text and history of the Supremacy Clause, as well as this Court's treaty-related cases, do not support a presumption against self-execution. See *post*, at 1377-80. I also endorse the proposition that the Vienna Convention on Consular Relations . . . "is itself self-executing and judicially enforceable."

Id.

28. *Id.* at 1385 (Breyer, J., dissenting):
The Optional Protocol here applies to a dispute about the meaning of a Vienna Convention provision that is itself self-executing and judicially enforceable. The Convention provision is about an individual's "rights," namely, his right upon being arrested to be informed of his separate right to contact his nation's consul. See Art. 36(1)(b) . . . . The provision language is precise. The dispute arises at the intersection of an individual right with ordinary rules of criminal procedure; it consequently concerns the kind of matter with which judges are familiar. The provisions contain judicially enforceable standards. See Art. 36(2), *ibid.* (providing for exercise of rights "in conformity with the laws and regulations" of the arresting nation provided that the "laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended.").
2. Choice of Forum Without Commitment to the Result

With the admission of the defendant that the application of Article 36 of the Vienna Convention was not being challenged, attention then turned to the two other relevant treaties. These were the Optional Protocol to the Vienna Convention and the U.N. Charter. The Optional Protocol contains the obligation to submit disputes regarding the Vienna Convention to the ICJ, and Article 94 of the U.N. Charter contains the obligation to abide by any decision of the ICJ to which a Member State is a party. Medellín's argument was that the combination of these two provisions resulted in a binding obligation to carry out the decision of the ICJ in the *Avena* case.

Private parties often agree to submit disputes to a specific forum for settlement, whether that forum be a court or an arbitral tribunal. Choice-of-forum clauses have been hailed by the Supreme Court as providing predictability and facilitating international trade. When private parties include a choice-of-forum clause in their agreements, and even when one party imposes such a clause on another, the U.S. Supreme Court has been quick and comprehensive in respecting that choice and acknowledging the right to recognition and enforcement of the resulting decision.

In *Medellín*, however, Chief Justice Roberts came up with an approach to forum selection that would both surprise and baffle private parties if it were applied to their choice-of-court or arbitration clauses. Choice of forum in the Optional Protocol and U.N. Charter, according to Roberts, means nothing more than a commitment to let a court hear the case, without any obligation to abide by the resulting decision. In Roberts's words: "[S]ubmitting to jurisdiction and agreeing to be bound are two different things. A party could, for example, agree to compulsory nonbinding arbitration. Such an agreement would require the party to appear

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29. *Medellín*, 128 S.Ct. at 1358 ("As a signatory to the Optional Protocol, the United States agreed to submit disputes arising out of the Vienna Convention to the ICJ. The Protocol provides: 'Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice.' Art. I, 21 U.S.T., at 326.").

30. U.N. Charter, art. 94, para. 1 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").


before the arbitral tribunal without obligating the party to treat the tribunal's decision as binding.\textsuperscript{33}

A presumption that any choice-of-court clause or arbitration agreement is non-binding would fly in the face of the Supreme Court's own precedent in the private realm.\textsuperscript{34} Such an approach may be both logical and appropriate when the parties \textit{expressly} agree to non-binding submission to a third party. In private relationships, however, the combination of those two elements is the exception rather than the norm. Even in public matters, it would seem that the same presumption should prevail. The fact that Chief Justice Roberts's approach is both counterintuitive and contra-logical begs the question of why the majority in \textit{Medellín} find it to be easily applied to choice of forum in the public realm. There are, as Roberts suggests, international agreements that specifically set up non-binding arbitral bodies, but those are the exception rather than the rule, and the Court's adoption of that approach as the rule seems to fly in the face of logical expectations of parties to dispute resolution, whether in public or private law matters.

Roberts here agrees with the amicus brief submitted by the U.S. Administration,\textsuperscript{35} determining that because the Optional Protocol only refers to submission of disputes to the ICJ, it does not require compliance with the resulting decision, and that the language of Article 94 of the U.N. Charter sets up a similar result:

\begin{quote}
Article 94(1) provides that "[e]ach Member of the United Nations \textit{undertakes to comply} with the decision of the [ICJ] in any case to which it is a party." . . . The Executive Branch contends that the phrase "undertakes to comply" is not "an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. members," but rather "a commitment on the part of U.N. Members to take future ac-
\end{quote}

\textsuperscript{33} 128 S.Ct. at 1358 (citing the North American Free Trade Agreement, U.S.-Can.-Mex., Art. 2018(1), Dec. 17, 1992, 32 I.L.M. 605, 697 (1993) ("On receipt of the final report of [the arbitral panel requested by a Party to the agreement], the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel").

\textsuperscript{34} See, e.g., \textit{Carnival Cruise Lines, Inc.}, 499 U.S. at 585 (1991) (enforcing choice-of-court clause found in fine print on the back of a cruise ticket sold to a consumer, with clear expectation that any resulting judgment would be enforceable); \textit{Mitsubishi Motors}, 473 U.S. at 614 (enforcing an agreement to arbitrate in Japan, with clear expectation that the resulting award would be enforceable); \textit{Bremen}, 407 U.S. at 1 (enforcing an agreement to litigate in London, with clear expectation that the resulting judgment would be enforceable).

\textsuperscript{35} Brief for United States as \textit{Amici Curiae} in \textit{Medellín I}, O.T.2004, No. 04-5928, p. 34.
tion through their political branches to comply with an ICJ decision."36

The analysis here, if applied to a private agreement, would require not only that there be a clear agreement on the forum to which the dispute is to be sent, but that the parties also explicitly include language that they are to be bound by the decision of that forum. While such an inclusion might be considered to be good belt-and-suspenders drafting by some (and overkill by others), it would likely surprise most commercial parties and their lawyers to require such language before any court judgment or arbitral award could be recognized and enforced. In Roberts's language, however:

Article [94] is not a directive to domestic courts. It does not provide that the United States "shall" or "must" comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts. Instead, "[t]he words of Article 94 . . . call upon governments to take certain action." . . . In other words, the U.N. Charter reads like "a compact between independent nations" that "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."37

It may be that Chief Justice Roberts is right on the result. No provision of the U.N. Charter is likely to be found to be self-executing, and it would be difficult to find any state that has gone so far as to commit to making any ICJ judgment enforceable by private parties in its domestic courts. Nonetheless, it is unlikely that most of those other states would base their decisions in this regard on the theory that they agreed to submit matters to the ICJ but not to be bound by the decision.


Chief Justice Roberts's interpretation of Article 94 of the U.N. Charter is consistent with past interpretations of that provision by

36. Medellín, 128 S.Ct. at 1358 (citations omitted).
It is further justified in *Medellín*, however, by analysis that raises questions about the majority's understanding of the U.N. Charter. Chief Justice Roberts's opinion expands the rationale for this position by tying decisions of the ICJ to resolutions of the U.N. Security Council. In doing so, he focuses on the language of Article 94(2), which authorizes resort to the Security Council if a state does not comply with an ICJ judgment. According to Roberts, if ICJ judgments were automatically enforceable in U.S. courts,

[n]oncompliance with an ICJ judgment through exercise of the Security Council veto—always regarded as an option by the Executive and ratifying Senate during and after consideration of the U.N. Charter, Optional Protocol, and ICJ Statute—would no longer be a viable alternative. There would be nothing to veto. In light of the U.N. Charter's remedial scheme, there is no reason to believe that the President and Senate signed up for such a result. 39

There are two problems with this analysis. First, the United States, through the President, who has been acknowledged by the Supreme Court in prior cases to be the "nation's organ in foreign affairs," had specifically sought to comply with the decision of the ICJ. Moreover, while five (and only five) U.N. Member States, as permanent members of the Security Council, are given veto power over decisions of the Security Council, there is no language in the Charter giving any state a veto over decisions of the ICJ. Article 94(2) of the U.N. Charter provides that a party seeking compliance by another party to an ICJ judgment "may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." But no Security Council procedure is required for the announcement of an ICJ judgment. Reliance on the veto power to conclude that states may be obligated to submit a matter to the ICJ but are not obligated to abide by the resulting decision would necessarily mean that only five states have such privileged status. The mere fact that further political recourse

38. See, e.g., Committee of United States Citizens Living in Nicaragua, 859 F.2d at 929.
may be sought through the Security Council does not reduce the legal effect of a judgment; it merely recognizes the absence of an executive enforcement mechanism at the international state-to-state level.41

Chief Justice Roberts reinforces his argument about Article 94 of the U.N. Charter by stating that “Article 94(2)—the enforcement provision—provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state.”42 While this may be true, it is only so in the context of the distinction made earlier by the Chief Justice: that treaties are always binding on nations, and that the role of treaty provisions as law within the U.S. legal system is a separate matter because we operate under a dualist system. Once such dualism in approach is acknowledged, the question of whether a treaty is binding on the nation is separate from whether it is self-executing in that nation’s courts in disputes involving private parties. Once such separation is present, and once it is acknowledged that the treaties being considered are binding on the international level, the law dealing with what “binding” means for that purpose, while it may be necessary to get to the question of self-execution, is not a part of the self-execution analysis itself.

4. The Supreme Court and the President as Arbiters of International Obligations

It is at this point in Roberts’s opinion that consideration moves from international law to internal separation of powers in the United States through the consideration of President Bush’s Feb-

41. Chief Justice Roberts’s opinion in the earlier Sanchez-Llamas case was much more convincing on this issue: Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts. The ICJ’s decisions have “no binding force except between the parties and in respect of that particular case,” Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 993 (1945) (emphasis added). Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent even as to the ICJ itself; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts. The ICJ’s principal purpose is to arbitrate particular disputes between national governments. Id. at 1055 (ICJ is “the principal judicial organ of the United Nations”). See also Art. 34, id. at 1059 (“Only states [i.e., countries] may be parties in cases before the Court.”).

Sanchez-Llamas, 548 U.S. at 354-55.

Even this analysis, however, is built on ICJ Statute provisions that are limited to state-to-state legal relationships, and does not apply neatly to decisions involving treaties that give rights to private persons.

42. Medellín, 128 S.Ct. at 1359.
February 28, 2005, Memorandum to the Attorney General. Interestingly, Roberts first builds up the deference of the Court to the executive branch before then undercutting that branch’s authority by denying effect to President Bush’s memorandum. He does this by noting that the executive branch “has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law,” and that such an interpretation by the executive branch on behalf of the United States “is entitled to great weight.”

Such “great weight” is not afforded, however, to President Bush’s determination of the need for U.S. states to comply with the Vienna Convention, and the ICJ decision in Avena. When Roberts moves back to discussion of the doctrine of self-executing treaties, the level of deference given to the executive branch becomes rather more limited. Here, he belies some of his earlier comments about the need for either congressional implementing legislation or explicit language of self-execution in a treaty in order to make treaty language applicable in domestic courts as law. He does this by acknowledging that the 1819 treaty found to be non-self-executing in Foster v. Nielson was later found to be self-executing in Percheman, “because ‘the language of the Spanish translation (brought to the Court’s attention for the first time) indicated the parties’ intent to ratify and confirm the land-grant ‘by force of the instrument itself.’” Roberts specifically acknowledges that in Foster, the Court had “distinguish[ed] between self-executing treaties (those ‘equivalent to an act of the legislature’) and non-self-executing treaties (those ‘the legislature must execute’).” This language clearly indicates the availability of self-executing status to clear treaty language without requiring the addition of either the explicit language of self-execution in the treaty or congressional implementing language that seemed to be required earlier in the opinion.

44. Medellin, 128 S.Ct. at 1361 (citations omitted) (indicating that “It is . . . well settled that the United States’ interpretation of a treaty ‘is entitled to great weight.’ The executive branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law.”). Id. at 1361.
45. 27 U.S. at 314.
46. 32 U.S. 51.
47. Medellin, 128 S.Ct. at 1362 (quoting from Percheman, 32 U.S. at 89).
48. Id.
While the amicus brief of the United States had suggested that the presidential memo was authorized by the U.N. Charter and the ICJ Statute, the Court specifically rejected this argument:

The United States maintains that the President’s Memorandum is authorized by the Optional Protocol and the U.N. Charter. . . . That is, because the relevant treaties “create an obligation to comply with Avena,” they “implicitly give the President authority to implement that treaty-based obligation.” . . .

We disagree. The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.49

So the position of the executive branch is entitled to great weight, but a presidential memo is not enough to give effect to a treaty provision that is not otherwise self-executing. What it does take for a treaty provision to be self-executing is now less clear than prior to the Medellín decision, with some of the language of the majority opinion squarely requiring explicit language of self-implementation in a treaty, and other language providing a contrary statement that a treaty provision may be self-executing without specific statement to that effect. What the opinion does make clear is that it is the role of the courts, and the Supreme Court in particular, to decide whether a treaty provision is self-executing:

We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments—that the U.N. Charter, the Optional Protocol, and the ICJ Statute do not do so. And whether the treaties underlying a judgment are self-executing so that the judgment is directly enforceable as domestic law in our courts is, of course, a matter for this Court to decide.50

49. Medellín, 128 S.Ct. at 1368 (citations omitted).
50. Id. at 1364-65.
5. International Law and State Procedural Rules

In the end, the outcome in Medellín did not depend on whether the U.N. Charter, the ICJ Statute, or the Optional Protocol to the Vienna Convention contains self-executing provisions. It depended on the relationship between federal law (whether created by statute or by treaty through the Supremacy Clause) and state rules of criminal procedure. Chief Justice Roberts was careful to state that "we reiterated in Sanchez-Llamas what we held in Breard, that 'absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.'" Thus, even if the provisions of all of the treaties under consideration had been determined to be self-executing, Medellín would not have been entitled to relief. The outcome of the case depended not on whether international law was applicable in U.S. courts (as part of federal law), but on whether state procedural rules trump federal substantive law in state court proceedings. The Court said that they do, in language that is stated clearly by Chief Justice Roberts:

In sum, while the ICJ's judgment in Avena creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions. As we noted in Sanchez-Llamas, a contrary conclusion would be extraordinary, given that basic rights guaranteed by our own Constitution do not have the effect of displacing state procedural rules.

This statement of the outcome seems to conflate the role of the doctrine of self-executing treaty law and the limitation on the application of any federal law in the context of state procedural rules. There would seem to be nothing "extraordinary" about concluding that a treaty creates rules that are self-executing in U.S. courts if, as Roberts states, state procedural rules would still dictate the result in the specific case. The mere fact that state procedural law trumps federal substantive law in certain situations does not in itself mean that no rule of federal substantive law results from a treaty through the Supremacy Clause. Certainly, the suggestion that state procedural law may trump "basic rights guaranteed by our own Constitution" does not mean that those Constitutional rights do not exist. Thus, the construction of Chief Justice Roberts's opinion for the majority in Medellín is rather

51. Id. at 1363 (quoting Sanchez-Llamas, 548 U.S. at 351).
52. Id. at 1367.
peculiar given the Supreme Court's normal practice of deciding cases on narrow grounds if available, and the fact that the case was ultimately decided on the relationship between state procedural statute and federal substantive law. 53

III. THE IMPLICATIONS OF MEDELLÍN FOR THE FUTURE

While Chief Justice Roberts's discussion of the doctrine of self-executing treaties and of the separation of powers in the treaty-making process appears from his own statements to have been no more than dicta in regard to the outcome in Medellín, it is likely to be cited in future cases, and thus compels further consideration of its potential impact. Certainly, it is this aspect of the decision that has received most of the commentary. 54 The opinion raises specific concerns in the areas of separation of powers and federalism, as well as about the future of treaty negotiations for the United States generally. The following discussion focuses, in particular, on the future negotiation and application of treaties in the area of private international law and international private law.

A. Medellín and the Separation of Powers

1. The Role of the Court

The majority opinion in Medellín restates and continues the common-law doctrine that self-executing provisions of a treaty may provide rules of decision in U.S. courts in matters raised by private persons. In doing so, it effectively states this doctrine as one of limitation; only when a treaty provision is self-executing does it provide a rule that can be applied in litigation in U.S. courts. What the Medellín opinion does not do is provide specific guidance for the future application of this doctrine.

The fact that the discussion of the doctrine of self-executing treaties was not necessary to the outcome of the particular case muddies the future application of the analysis provided by Chief Justice Roberts. If it is to be applied, however, it seems to limit the doctrine of self-execution in two ways. It does so by suggesting that there must be an explicit indication of intent, either on the part of the treaty drafters or Congress, that the language of the

53. See, e.g., Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) (broad constitutional questions should be avoided where a case may be decided on narrower, statutory grounds on remand).

54. See Bederman, supra note 4.
treaty provide rights enforceable in U.S. courts. The latter of these presents a political, separation-of-powers issue, but is not theoretically a problem. Congress, in implementing legislation, can make clear its intent that treaty language be considered federal law applicable under the Supremacy Clause in U.S. courts. If this were the end of the analysis, however, it would render the Supremacy Clause reference to treaties virtually meaningless. When there is implementing legislation, it is the federal statute, not the treaty itself, that generally is the applicable source of law.

A requirement that treaty language be explicitly self-executing before it can be applied in U.S. courts would be inconsistent with prior case law and would create an obstacle to treaty drafting that might be impossible to overcome in some circumstances. As Professor Curtis Bradley has stated, “self-execution is rarely the subject of negotiation,” because “there is almost never such a collective intent.”55 Particularly in the areas of private international law and international private law, states have differing methods for the application of treaty rules internally, and there is not likely to be consensus on including language that would dictate the manner in which a treaty will or will not come into effect in every state’s domestic legal system. Other states may not require such language in order for treaties to have the equivalent effect of self-execution in their domestic legal systems. The addition of such language would suggest a change in their legal systems, especially in those states that allow direct effect without such language. It is quite unlikely that our negotiating partners will be receptive to such treaty language simply to create a result that we can otherwise create through federal legislation in the treaty implementation process. Thus, as a practical matter, Chief Justice Roberts’s narrow reading of the doctrine of self-execution could prospectively result in the absence of any future treaties that would be self-executing. Even if the discussion of self-execution was necessary to the holding in Medellín, it seems unwarranted to interpret a long-established doctrine of U.S. constitutional law such that it may be applied only in a manner that limits its effect so much that it would never again be likely to operate for its intended purpose (i.e., to give effect to the “treaty” reference in the Supremacy Clause).

What is clear from Chief Justice Roberts’s opinion is that the majority of the Court considers the doctrine of self-executing trea-

55. Bradley, supra note 21, at 544-45.
ties to be the province of the judicial branch. "[W]hether the treaties underlying a judgment are self-executing so that the judgment is directly enforceable as domestic law in our courts is, of course, a matter for this Court to decide." Thus, while the discussion of the doctrine of self-executing treaties leaves many elements of its application vague, in terms of separation of powers, it is clear that the application of the doctrine is for the judicial branch.

The opinion does, however, provide a recipe by which either Congress or the executive branch may ensure the creation of legal rules applicable to litigation in U.S. courts through engagement in the treaty process. For Congress, the route is through legislation accompanying the advice-and-consent process. For the executive branch, the route is through explicit language in the treaty itself, expressing a clear intent for provisions to be self-executing. Once again, for Congress, the route can be (at least at first glance) a very simple one to follow. For the reasons set forth above, the route for the President brings with it potential for real problems in the treaty negotiation process and would make it more difficult to negotiate any treaty in the future.

The reason the route for Congress seems simple only at first glance is that a requirement that implementation of the treaty occur through federal legislation runs certain risks. If a treaty provision can become law applicable in U.S. courts only through translation into a statute, there is always the risk of creating (through different language no matter how minor the distinction) a rule different from the one intended by the parties to the treaty negotiation. Different language is always subject to different interpretation, and even the same words used in different contexts can be found to create different rules.

B. Medellín and Federal-State Relations

Chief Justice Roberts made clear that all of the treaties being considered in the Medellín case (the U.N. Charter, the IJC Statute, the Vienna Convention, and the Optional Protocol to the Vienna Convention) were binding on the United States under international law. By holding that state procedural rules could prevent

56. Medellín, 128 S.Ct. at 1364-65.
57. This prospect was pointed out by Professor David Stewart of the Georgetown University Law Center in his presentation as part of a panel on developments in private international law at the International Law Weekend sponsored by the American Branch of the International Law Association in New York City on October 17, 2008.
the application of the binding international-law rules created by these treaties, the Court made clear that any one of the 50 states can place the United States in non-compliance with its binding treaty obligations, even when the President has issued a memorandum requiring state compliance. This position, if it is to be followed in other circumstances, will constitute an extraordinary delegation of authority to the states for matters of foreign affairs.

This potential effect of the Medellín decision would have the most significant impact on the long-established rule of Missouri v. Holland—that treaties may be the source of federal law that could not otherwise be established by federal statute because of the Tenth Amendment. It would be possible to interpret the confused approach to the self-execution doctrine in Chief Justice Roberts's opinion in Medellín to conclude that there are likely to be fewer self-executing treaties, and that the law to be applied in courts within the United States is to be found (if at all) in the implementing legislation provided by Congress. If the area of law involved is one that is saved to the states by the Tenth Amendment, then federal legislation is not an acceptable route to uniformity. While the treaty power may be available under Missouri v. Holland, the analysis of Medellín could be applied to make it much more difficult for such "supreme law of the land" to be created.

This result is particularly likely in the areas of private international law and international private law, areas in which the United States is consistently involved in the negotiation of treaties and other international legal instruments at the Hague Conference on Private International Law, UNCITRAL, and UNIDROIT. Treaties such as the United Nations Convention on Contracts for the International Sale of Goods and the Hague Convention on Choice-of-Court Agreements create new rules of commercial law and private international law—areas in which U.S. courts traditionally apply state substantive contract law and state rules on the conflict of laws. These are also areas that cry out for harmonization and unification in order to promote the global trade rela-

58. 252 U.S. 416 (1920).
tions necessary to a 21st-century world. Such treaties will be negotiated and implemented with or without the United States. If the Supreme Court were to be seen as establishing a roadblock to U.S. participation in such treaties, it would be neither good for the country nor consistent with the intent of the framers of the Article VI Supremacy Clause in the United States Constitution.62

The question not answered in the self-execution dicta of Chief Justice Roberts's opinion in Medellín is whether saying that a treaty is not self-executing is the same as saying it is not the "supreme law of the land" under Article VI. Article VI states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."63 It does not say that only self-executing treaties are the supreme law of the land. Can a treaty be the supreme law of the land and not provide rules applicable in U.S. courts? That is a question that must await further cases before the Supreme Court on such matters.

VI. CONCLUSION

Most commentators so far have discussed the Medellín decision in terms of its effect on the application of treaties in U.S. law and the development of the doctrine of self-execution. While that issue accounts for the majority of the opinion, Chief Justice Roberts's own language suggests that this portion of his opinion is only dicta—ultimately unnecessary to the holding in the case. That dicta, however, raises important questions about separation of powers in the U.S. constitutional system. It clearly appropriates to the Court the role of determining what treaties are and are not self-executing. It also allocates to Congress the role of making any treaty rule effective as law through implementing legislation. And it allows the President the authority to negotiate self-executing

62. Professors Daniel Hulsebosch and David Golove of the New York University Law School have done excellent historical research supporting the conclusion that the United States Constitution was created for both internal and external audiences, and that the language of the Constitution reflects important efforts to incorporate respect for international law and to place the United States squarely within the community of nations that demonstrated respect for international law. This research supports an important role for treaties in the Article VI Supremacy Clause. Presentations of Daniel Hulsebosch & David Golove at the International Law Weekend, New York City, October 18, 2008.

63. U.S. CONST. art. VI, § 2. See Bradley, supra note 21, at 550 ("If the Court's decision is interpreted more broadly as holding that non-self-executing treaties do not have any domestic law status, it may be difficult to reconcile with the text of the Supremacy Clause, which states that 'all' treaties made under the authority of the United States are part of the supreme law of the land.").
treaties, if our treaty partners will agree to the rather specific language the Court now seems to require to provide explicit indicia of self-executing intent. In doing so, it clearly would—if applied in its extreme in future cases—limit the traditional role of the executive branch as the organ of foreign relations of our national government by making it much more difficult to negotiate treaties that will provide the supreme law of the land.

A second troubling aspect of the Medellin decision is found in its potential impact on the federal separation of powers between the national and state governments. The explicit holding in the case is that state criminal-procedure rules trump the "law of the land," whether that law comes from a statute, a treaty, or even from the Constitution itself. In the realm of private law and private international law treaties, this has the potential to interject a role for the states in the treaty process that would seem not to have been intended by the framers of the United States Constitution.