INTERNATIONAL LAW AT HOME: ENFORCING TREATIES IN U.S. COURTS

Oona A. Hathaway, Sabria McElroy, Sara Aronchick Solow[1]

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[1] Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School; Associate, Covington & Burling; and J.D. Yale Law School (2011), respectively. We thank Kristen Eichensehr, Teresa Miguel, and Deborah Sestito for outstanding editorial and research assistance. We thank Scott Anderson, Rebecca Crootof, Brian Finucane, Jeffrey Kahn, Cameron Kistler, and Helen O'Reilly for their outstanding assistance in this project.

There is a deep puzzle at the heart of international law. It is "law" binding on the United States,[2] and yet it is not always enforceable in the courts. One of the great challenges for scholars, judges, and practitioners alike has been to make some sense of this puzzle—some might call it a paradox—and to figure out when international law can be used in U.S. courts and when it cannot.

The Supremacy Clause in the U.S. Constitution would seem to solve this puzzle. It says, after all, that "Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land."[3] Yet early in the country's history, the Supreme Court distinguished between treaties "equivalent to an act of the legislature"—and therefore enforceable in the courts—and those "the legislature should execute"—meaning they could not be enforced in the courts until implemented by Congress and the President.[4] Thus began a cottage industry devoted to determining when international law was enforceable in the courts and when not.

Just when scholars had more or less come to a settled understanding of the status of international law in the courts—or at least agreed to disagree—the Supreme Court entered the fray. Beginning in the 1990s, foreign nationals convicted of capital offenses and sentenced to the death penalty had begun challenging their convictions on the grounds that the arresting authorities had violated the Vienna Convention on Consular Relations[5] (which the United States had ratified) by failing to inform them that they had the right to contact their consulates.[6] U.S. courts refused to provide the relief the foreign nationals sought, and two of the cases eventually made their way to the International Court of Justice.[7] That Court twice held that the United States had breached its obligations to its treaty partners by failing to notify the consulates of foreign nationals upon

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[2] Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

[3] U.S. CONST. Art. VI cl. 2.

[4] Foster v. Neilson, 2 Pet. 253 (1829), *overruled on other grounds,* United States v. Percheman, 7 Pet. 51 (1833).

[5] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261.

[6] The first of these—presented to the Supreme Court in the context of a last-minute request for a stay of execution and a writ of certiorari—resulted in a *per curiam* decision in that Court refusing to review the case on its merits. Breard v. Greene, 523 U.S. 371 (1998). The petitioner was therefore executed.

[7] The United States had ratified the Optional Protocol to the Convention, which provided that "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, Apr. 24, 1963, 21 UST 325, 596 UNTS 487.

their arrest.[8] In the second of these two cases,[9] the Court held that the United States had violated the Vienna Convention on Consular Relations by failing to inform fifty-one Mexican nationals of their rights under the Convention upon their arrest.[10] The Court declared that the United States was obligated to provide the fifty-one individuals—including the named petitioner Jose Ernesto Medellin—"review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention."[11]

Medellin returned to the U.S. courts to enforce the holding, seeking habeas relief and the review and reconsideration called for by the International Court of Justice. The Texas courts refused—in part on the grounds that the International Court's decision was not directly enforceable in domestic courts. The U.S. Supreme Court surprised many observers by agreeing. In *Medellin v. Texas*,[12] the Supreme Court reasoned that the treaties granting jurisdiction to the International Court were "non-self-executing" and thus not enforceable unless implemented into law by Congress. They were, in other words, among those treaties "the legislature should execute."[13] Congress, of course, had not done so—probably because nearly everyone had long assumed the treaties at issue were legally binding and therefore implementing legislation was unnecessary.

The most significant aspect of the decision, however, was a footnote in which the Supreme Court endorsed a "background presumption" against finding that treaties confer private rights or private rights of action, even when they are self-executing.[14] This represented a significant shift away from the way that courts had historically interpreted treaties. Indeed, it effectively reversed what had during most of the country's history been a background presumption *in favor* of finding treaties to confer private rights of action whenever they conferred private rights. The decision thus served to highlight, and heighten, uncertainty surrounding the enforcement of treaties in the U.S. courts.

This Article examines the status of treaties in U.S. courts—and how the international legal commitments expressed in our treaties "come home"—in three interlocking steps. First, it seeks in Part I to provide an account of the legal and historical context of *Medellin*—examining both the case law that led up to the decision and ways in which the lower courts have begun to respond to it. Even before the Supreme Court's 2008 decision, much had changed in the way the

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[8] LaGrand (Ger. v. U.S.), (Int'l Ct. Justice June 27, 2001), 40 ILM 1069 (2001).
[9] In the first case, the petitioner had been executed by the time the merits decision was handed down. *Id*. Thus no further proceedings occurred
[10] *Avena and Other Mexican Nationals* (Mes. V. U.S.), 2004 I.C.J. 12 (Mar. 31).
[11] *Id.*
[12] Medellín v. Texas, 128 S. Ct. 1346 (2008).
[13] *Id.*
[14] *Id.* at 1357 n. 3.

courts enforced treaties created under Article II of the U.S. Constitution.[15] During the first hundred and seventy years of U.S. history, courts generally applied a strong presumption that treaties could be used by private litigants to press their claims. That all began to change just after WWII, as international treaties—and international human rights treaties in particular—proliferated. Still, the old presumptions remained in place for certain categories of treaties. Understanding this transformation enables one to gain a deeper appreciation of the impact *Medellin* is already having, and will likely have in the future, on the enforcement of international law in U.S. courts.

Second, the Article aims in Part II to place direct enforcement of international law through private rights of action into broader context in a second way—by looking at *all* the ways in which international law can be enforced in U.S. courts. This discussion is important because if *Medellin* raises the barriers to direct enforcement, methods of indirect enforcement are increasingly necessary to ensure that international law can continue to come home. Part II shows that treaties are enforced in U.S. courts in several ways—through what we term "indirect enforcement," "defensive enforcement," and "interpretive enforcement" methods. These other ways of enforcing international commitments in U.S. courts are often ignored in the scholarly literature about judicial enforcement of international law. Many treat one or the other in isolation, but no one considers them as a whole. As a result, the literature has failed to provide a complete picture of how international law is enforced in U.S. courts. In doing so, the narrow focus has caused advocates and critics of international law alike to place too much emphasis on the use of international law as a cause of action for private litigants—and thus to magnify the likely effect of the Supreme Court's recent decision on the enforcement of international law in U.S. courts.

Finally, in Part III, this Article considers steps that can be taken to increase the likelihood that treaties will continue to be enforced directly, even in a post-*Medellin* world. We offer three proposals for how different branches of the federal government can strengthen the enforcement of international law. First, Congress could pass legislation providing for the judicial enforcement of certain subsets of Article II treaties. Second, the President and Senate could adopt a Clear Statement Rule for treaty ratification– a practice through which the President submits treaties to the Senate for ratification with clear statements about whether

[15] Under Article II, the President is authorizes to "make" treaties with the advice and consent of two-thirds of the Senate. U.S. Const. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."). This Article focuses exclusively on Article II treaties. When it uses the term "international law," it is referring only to such treaties. For more on executive agreements, see Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L. J. 1236 (2009).

they are self-executing, and through which the clear statement becomes part of the treaty's formal text. Third, the executive branch could pursue direct enforcement of treaty obligations itself. Where treaties are clear that private litigants lack rights of action, the U.S. government could bring affirmative lawsuits against state and municipal agencies that refuse to comply with treaties, to enjoin those entities from activities that place the United States in violation of its international obligations.

Our proposals each offer a path toward more effective enforcement of Article II treaties in U.S. courts. They are only valuable, of course, if it is in the United States' interest to abide by the international legal commitments it makes.[16] We recognize that there is an ongoing debate in academic circles on this proposition.[17] Although proving the proposition that it is in the United States' interest to abide by its international law commitments is not a goal of this Article, we note at least two reasons to believe it is true. First, when treaties provide reciprocal benefits, the United States clearly gains from the enforcement of the agreements by other parties to the treaty. Indeed, for the 4.5 million Americans who live overseas and the 60 million who traveled abroad each year[18]—not to mention the U.S. businesses whose billions of dollars in investments are protected

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[16] *See generally* ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984) (arguing that strong international institutions and international laws promote states' individualistic objectives through facilitating cooperation); Andrew T. Guzman, *A Consent-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1834, 1869 (2002) (arguing states should (and do) obey international legal commitments, such as treaty-commitments, because "[a] country that develops a reputation for compliance with international obligations signals to other countries that it is cooperative. This allows the state to enjoy long-term relationships with other cooperative states, provides a greater ability to make binding promises, and reduces the perceived need for monitoring and verification"); Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.-Dec. 2000 (critiquing the "New Sovereigntists" for failing to appreciate the benefits to states in general and the United States in particular of complying with international legal obligations).

[17] For work arguing against treating international legal obligations as binding and enforceable, see, e.g., Eric Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1916 (2003) ("[W]at I have said should be enough to cast doubt on the notion that states have a moral obligation to obey international law."); Curtis A. Bradley, International Delegations, the Structural Constitution, and Non-Self Execution, 55 STAN. L. REV. 1557, 1589-91 (2003) (arguing treaties should have diminished status domestically, until they are implemented by Congress, given "delegation" and democratic legitimacy concerns); John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 26-27 (2000) (arguing treaties are not legally binding and the United States should be able to ignore its treaty obligations to promote its sovereign interests); Austen L. Parrish, *Reclaiming International Law from Extra-Territoriality*, 93 MINN. L. REV. 815, 822-28 (2009) (describing how "Sovereigntists" are skeptical of international law and particularly of multilateral treaties, because such provisions undermine state sovereignty).

[18] *Hearing on S.11994 Before Sen. Comm. on the Judiciary*, July 27, 2011, at 1 (statement of Under Secretary Patrick F. Kennedy).

by a variety of international treaties—the ability to enforce treaty-based rights abroad is essential.[19] But other countries are less likely to observe their treaty obligations if the United States fails to live up to its side of the bargain. A private right of action is often the best way to guarantee this compliance, for the federal judiciary is in a unique position to press the political branches to honor the country's international commitments.[20] Second, regardless of the value one may place on any given international agreement—or the benefit that the United States receives from that particular treaty—the United States has a broader and deeper interest in demonstrating its capacity to abide by the commitments it makes. Until the United States chooses to end an international legal commitment (which it ordinarily can do by simply providing notice to this effect), it is obligated to comply with the agreement as a matter of international law.[21] Failure to comply with such obligations makes the United States a law-violator potentially subject to sanctions and—likely most harmful of all—an unreliable treaty partner.[22] For these reasons, even those who dislike or disapprove of particular international agreements should wish to see the United States live up to the commitments that it has made.

I. THE HISTORY OF INTERNATIONAL LAW AT HOME

To understand modern jurisprudence on the enforcement of international law in U.S. courts, it is important to disentangle the meaning of "self-executing treaties," "private rights," and "private rights of action." A *self-executing treaty* is a treaty that creates a domestic legal obligation in the absence of implementing legislation.[23] A *private right* is a right that accrues to an individual.[24] A *private*

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[19] *See, e.g., id.* at 2-6 (explaining the importance of the rights to consular notification and access, protected by the Vienna Convention on Consular Relations, for the thousands of Americans in foreign custody); *c.f.* Medellin v. Texas, 555 U.S. 491, 524 (2008) (recognizing that the United States had "plainly compelling" interests in complying with its obligations under the Vienna Convention on Consular Relgations, such as "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law").

[20] *See* William M. Carter, *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 359-80 (2010) (contending that federal courts should use their mandamus power to compel the U.S. government to comply with its human rights treaty obligations, even for non-self-executing treaties, because those treaties are still binding federal law under the Supremacy Clause).

[21] Indeed, the most fundamental proposition of international law is *pacta sunt servanda*—agreements must be kept.

[22] For more on this, see Oona A. Hathaway & Scott S. Shapiro, *Outcasting: The Enforcement of Domestic and International Law*, YALE L. J. (forthcoming 2012)

[23] As the Court put it in *Medellin*, a treaty that is self-executing has "automatic domestic effect as federal law upon ratification." Medellín v. Texas, 128 S. Ct. 1346, 1356 n.2 (2008).

right of action[25] allows a private party to seek a remedy from a court for the violation of a private right provided by a treaty.[26]

Treaties that may be enforced in court by private litigants are often referred to as "self-executing" treaties. This is technically accurate, though it leads many to the incorrect assumption that treaties that are "self-executing" and those that create "private rights of action" are always one and the same. In fact, they are not. As the Restatement (Third) puts it, "[W]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."[27]

Although all treaties that create private rights of action are self-executing, not all self-executing treaties necessarily create private rights or private rights of action. For example, a treaty providing for military cooperation between two countries would likely create no private right, while a treaty involving contractual or property rights likely would. A treaty providing for the protection for civilians during times of armed conflict would confer new, private rights on such persons, but that treaty could only be enforced in federal court if there is a *private right of action* to bring lawsuits in federal court for violations of the treaty.[28]

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[24] For example, a property right, such as that provided by the treaty at issue in *Chirac v. Chirac's Lessee*, 15 U.S. (2 Wheat.) 259, 271 (1817).

[25] The phrase "private cause of action" and "private right of action" will be used interchangeably throughout this memorandum.

[26] For more on the distinction between private rights and private rights of action, see *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 489-491 (2008) (holding that even though the Treaty of Amity between the U.S. and Iran is self-executing, creates a property right, and provides for a remedy, there is no implied private right of action). *See also* 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, 101-102 (2006) (noting that courts have found treaties to be judicially enforceable on behalf of private parties even when the treaty did not create an express private right of action).

[27] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987).

[28] For example, U.S. courts have held that the Geneva Conventions create private rights, but no private right of action. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring) (noting that the Geneva Conventions are not self-executing and do not provide a private right of action); Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005) (concluding that the Geneva Conventions created private rights but not private rights of action); *see* Derek Jinks & David Sloss, Is the President Bound by the Geneva Conventions, 90 CORNELL L. REV. 97, 126-29 (2004) (noting that U.S. courts have uniformly held that the Geneva Conventions do not provide a private right of action); Geneva Convention Relative to the Protection of Civilian Persons in time of War art. 5, 75 U.N.T.S. 287, Oct. 21, 1950 (referring to the "full rights and privileges of a protected person under the present Convention"). A recent bilateral investment treaty provides another example. As the Senate Report on the treaty put it: "The resolution of advice and consent contains a statement reflecting the committee's understanding of the extent to which this Treaty will be self-executing. This provides that Articles 3–10 of the Treaty are self-executing and do not confer private rights of action enforceable in

Supreme Court jurisprudence prior to the mid-twentieth century, however, made no distinction between self-execution, private rights, and private rights of action. During this period, if a treaty dealt with the rights of private parties, it was generally treated as self-executing and the source of a private right of action.[29] This presumption began to erode in the second half of the twentieth century. A number of lower courts looked for express language stating that a treaty was self-executing or contemplated a private right of action for individuals, rejecting the presumption of the previous century-and-a-half. This was partially a reaction to the emergence of large numbers of human rights treaties—and concerns that these treaties could create private rights of action that would be pursued in U.S. courts. The new approach was endorsed in dicta by a majority of the Supreme Court in *Medellín*.[30] In a footnote, the Court explained that, "Even when treaties are self-executing in the sense that they create federal law, the background presumption is that 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."[31] Subsequent rulings by a number of lower courts have relied upon the *Medellín* dicta as a basis for rejecting implied treaty-based causes of action—thus, effectively flipping the presumption in favor of self-execution and a private right of action that prevailed for a century-and-a-half to a presumption against. We trace this evolution below.

A. Founding to World War II

For most of the history of the country, the Supreme Court treated the issues of self-execution, private rights, and private rights of action as essentially indistinguishable. Between 1790 and 1947, there were at least twenty-two cases in which the Supreme Court found a treaty self-executing on the basis that a private right was secured by the treaty.[32] In each case, the Court held not only that the treaty was self-executing, but also that it created a private right of action. The

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United States courts." Investment Treaty with Rwanda, Exec. Rept. 112-2, 112th Congress, 1st Sess. (Aug. 30, 2011), available at http://foreign.senate.gov/reports/.

[29] *See* David L. Sloss et al., The U.S. Supreme Court and International Law: Continuity and Change 5 (2010) (unpublished manuscript on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664773 ("The Supreme Court's approach to treaties shows substantial continuity until the middle of the twentieth century, with substantial change after World War II. . . . Throughout the nineteenth and early twentieth centuries, the Court routinely applied treaties to preempt state law. It also played an active role enforcing treaty rights on behalf of individuals, even against the federal government.").

[30] Justice Stevens filed a concurring opinion. Justice Breyer wrote a dissent that was joined by Justice Ginsburg and Justice Souter.

[31] Medellín v. Texas, 128 S.Ct. 1346, 1357 n.3 (2008) (internal citations omitted).

[32] These cases are cited in Justice Breyer's Appendix to *Medellín*. Medellín v. Texas, 128 S.Ct 1346, 1379-80 app. A (2008) (Breyer, J., dissenting).

treaties where the Court inferred this right to private enforcement of a treaty right fell into four areas: (1) contract matters; (2) property and inheritance law matters; (3) the right to challenge the legality of detention through a writ of habeas corpus; and (4) rights to carry on a trade.

The reasoning of the Court throughout this period followed a consistent pattern: *if* the treaty created a private right—a property right, inheritance right, contract right, or habeas corpus right—*then* the treaty was "self-executing," and there was *necessarily* a private right of action enabling individuals to enforce the right in the courts. The Court reasoned that treaties conferring rights on private individuals did not "addres[s] [themselves] to the legislature"[33] and therefore did not require congressional action to have effect. Rather, these treaties spoke to the judiciary, whose role it was to enforce individual rights under the treaties.

The Court's approach during this era is exemplified by the seminal cases of *Ware v. Hylton*,[34] *Foster v. Neilson*,[35] and *United States v. Percheman*.[36] In *Ware*, the Court held that the Treaty of Peace, signed between the United States and Great Britain in 1783, enabled a British creditor to recover a debt owed to him by an American.[37] The Court reasoned that because the Peace Treaty between the United States and Britain created a private right for British creditors, the treaty automatically gave rise to an implied private right of action. The treaty aimed to protect the contractual rights of British creditors and the Court regarded judicial enforcement of that right as the necessary means to that end.[38] Thus, once it found that the treaty created a private right, the Court inferred that the treaty must give rise to a private right of action allowing the enforcement of that private right in U.S. courts.

Just over three decades later, in *Foster v. Neilson*, the Supreme Court famously elaborated what we now know as the self-execution doctrine. The case presented the question whether the plaintiff had property rights in a plot of land in Florida.[39] The plaintiff traced his right in the land to a transfer of ownership rights from Spain in 1804. At issue was whether Spain had the power to transfer ownership rights. It had, after all, ceded sovereignty over some portion of the territory to France in the Treaty of San Ildefonso in 1800 (exactly what land was covered by that treaty was central to the dispute in the case). France in turn had ceded sovereignty to the United States in the Treaty of Paris in 1803. In resolving the case, Chief Justice Marshall distinguished between treaties

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[33] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).
[34] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
[35] 27 U.S. 253.
[36] United States v. Percheman, 32 U.S. (7 Pet.) 51(1833).
[37] *Ware*, 3 U.S. (3 Dall.) at 199.
[38] *Id.* at 238-39 ("If a British subject . . . prosecuted his just right, it could only be in a court of justice.").
[39] 27 U.S. (2 Pet.) 253 (1829).

"equivalent to an act of the legislature" and those "the legislature should execute."[40] The treaty at issue in this case, he concluded, fell into the latter category, because the treaty itself contemplated future legislative action to put the land transfer into effect.[41]

This case may seem in tension with the presumption during this period in favor of self-execution of treaties that create private rights, but in fact it is not. In *Foster*, the question at issue was whether the treaty purported to create or preserve any personal property rights, not whether private rights created or protected by the treaty could thereafter be enforced. The Court read the treaty to require additional legislative action before property rights could vest—in other words, the treaty on its own terms was not a source of any private rights. Given that there was no private property right to enforce, there was certainly no private right of action that could be located in the treaty.

This reading finds support in the subsequent case, *United States v. Percheman*, which overruled *Foster*.[42] There, the Court revisited its holding that the treaty at the heart of the contested property rights claims in Florida required legislative action to create private rights.[43] Contrary to its holding in *Foster*, the Court held that under customary international law and general canons of treaty interpretation, the cession treaty should be read to have preserved the preexisting property rights of Florida's inhabitants.[44] The Court explained that in *Foster*, it had not been presented with the Spanish version of the treaty. After reading the Spanish version, the Court was convinced that the English version must be interpreted as self-executing to accord with the Spanish version.[45] Having now found that the treaty of cession did, in fact, preserve private property rights, the Court concluded that the treaty obligation to protect those rights was self-executing and that an individual could bring an action under the treaty.[46]

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[40] *Id.* at 314.

[41] Carlos Vazquez has explained that "the modern reader of *Foster* is left to infer that the Court concluded the Article 8 contemplated implementing legislation because the treaty employed action verbs ("ratify" and "confirm") in the future tense." Carlos Vazquez, Foster v. Neilson *and* United States v. Percheman: *Judicial Enforcement of Treaties*, *in* INTERNATIONAL LAW STORIES 168 (John E. Noyes et al. eds., 2007).

[42] 32 U.S. (7 Pet.) 51(1833).

[43] *Id*.

[44] The treaty stated that, "[a]ll the grants of land made before the 24th of January 1818, by his Catholic Majesty, or his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands." *Id.* at 88.

[45] *Id.* at 65 (citations omitted).

[46] *Id*. The Supreme Court expressly drew a similar distinction in *Fok Young Yo v. U.S*., 185 U.S. 296 (1902). It explained that the treaty of 1880, which declared that the government could "'regulate, limit, or suspend'" the immigration of Chinese laborers into the United States "did not refer to the privilege of transit, and, as it was not self-executing, the act of May 6, 1882, was passed to carry the stipulation into effect." *Id*. at 303. By contrast, it explained, "the provision of

The presumption in favor of finding treaties self-executing when a treaty created a private right was consistently applied by the courts throughout the period of the Founding through the early 20th century. What is striking when we examine these cases more closely is that they give rise to an interesting pattern. As we show below, all of the cases involved treaties that created one of four types of private rights: contractual, property and inheritance, detention and habeas corpus, and the right to carry on a trade. It is noteworthy that these rights are traditional common law rights. This suggests that one likely reason that courts were quick to infer that treaty-created private rights could be enforced through private rights of action in U.S. courts is that the private rights were ones that had always been treated as judicially enforceable under the English common law. If that is true, then it would help to explain why the courts were less willing to apply the same strong presumption of self-execution to new treaties that emerged in the mid-20th century that created very different kinds of private rights claims. The rest of this Section is devoted to examining the treaties of this period according to the four types of private rights they created, setting the stage for an examination of the evolution in the case law as the country entered the modern era.

1. Contract

In four cases during the two decades following the Founding, the Supreme Court held that the Treaty of Peace between the U.S. and Great Britain, signed after the Revolutionary War in 1783, created private contractual rights directly enforceable in U.S. courts.[47] The Treaty of Peace stated: "It is agreed, that creditors on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted."[48] No mention of rights of action or self-execution appeared in the text of the treaty. Nonetheless, when several states passed statutes expressly limiting the rights of British creditors to recover debts owed to them, the Supreme Court gave relief to British creditors under the Treaty. Time and again, the Court held that the Treaty of Peace of 1783 was the "supreme law of the land"; that it took precedence over

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this treaty applicable here, in recognizing the privilege of transit and providing that it should continue, proceeded on the ground of its existence and continuance under governmental regulations, and no act of Congress was required." *Id*.

[47] Hopkirk v. Bell, 7 U.S. (3 Cranch) 454, 456-57 (1806) ("This was a *bona fide* debt, contracted before the treaty-and the act of limitations is a legal impediment . . .[T]he treaty says that the creditor shall meet with no legal impediment; and the constitution of the United States declares the treaty to be the *supreme* law of the land. The act of limitations, therefore, must yield to the treaty."); Hannay v. Eve, 7 U.S. (3 Cranch) 242, 248-49 (1806); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 238 (1796) ("If a British subject . . . prosecuted his just right [under the Treaty], it could only be in a court of justice . . ."); Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 2-3 (1794).

[48] *Ware*, 3 U.S. at 204.

contrary state statutes; that it created a contract right for British creditors; and, finally, that the contract right was enforceable in U.S. courts by private litigants.

2. Property and Inheritance

In eight cases between 1789 and 1840, the Supreme Court held that a treaty created a private property or inheritance right that was directly enforceable in U.S. courts.[49] In *Chirac v. Chirac's Lessee*, decided in 1817, for example, the Court held that the 1778 Treaty of Amity between the United States and France created a private right for Frenchmen to hold and sell land in the United States. Accordingly, the Court allowed a Frenchman's heirs to invoke the treaty in a U.S. court to stop the deceased's estate from escheating to the government.[50] Two years later in *Orr v. Hodgson*, the Supreme Court reached a similar holding with respect to the Treaty of Peace between the United States and Britain, signed in 1783.[51] In *Orr*, the Court held that the U.S.-Britain Treaty had created by its "express terms" a private right for British residents to acquire and pass on property by descent, and thus right was directly enforceable in court.[52]

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[49] Chirac v. Chirac's Lessee, 15 U.S. (2 Wheat.) 259, 271 (1817); Orr v. Hodgson, 17 U.S. (4 Wheat.) 453 (1819); De Geofroy v. Riggs, 133 U.S. 272-73, 299 (1890) (holding that the U.S.-France Treaty of 1853 created a private right for French residents in the U.S. to pass on property and for the heirs to claim that property and that these rights were enforceable in state court); Hauenstein v. Lynham, 100 U.S. 483, 486, 490 (1879) (holding that the U.S.-Swiss Confederation Treaty of 1850 created a private right of Swiss residents to "withdraw and export the proceeds of [their] land… without difficulty" if those persons were domiciled in a state that did not allow foreigners to take property "by descent or inheritance," and that it is was the U.S. court's "duty to give it full effect"); United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (holding that the U.S.-Spanish treaty of cession for the state of Florida preserved the property rights of Florida's inhabitants and made those rights enforceable by private rights of action); United States v. Arredondo, 31 U.S. (6 Pet.) 691 (1832) (also holding that the U.S.-Spanish treaty of cession preserved property rights of inhabitants of Florida); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that the U.S.-Britain Treaty of Amity, Commerce and Navigation of 1794 created private rights for a British Lord in the United States to devise his land); United States v. Schooner Peggy, 5 U.S. 103, 110 (1801) (holding that the U.S.-French Treaty of 1801 created a private right of action and stating that "[w]here a treaty is the law of the land and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress.").

[50] *Chirac*, 15 U.S. at 271 ("[W]e are all of opinion that the treaty between the United States and France, ratified in 1778, enabled the subjects of France to hold lands in the United States. That treaty [also] declared that . . . 'They may, by testament, donation, or otherwise, dispose of their goods . . . and their heirs, subjects of the said United States, whether residing in France or elsewhere, may succeed them *ab intestat* . . . .").

[51] *Orr*, 17 U.S. at 453.

[52] *Id.* at 463("H]er title was completely confirmed, free from the taint of alienage; and *that by the express terms of the treaty, it might lawfully pass to her heirs*.") (emphasis added).

Although the treaties at issue in *Orr*, *Chirac*, and the other six cases decided by the Court in this period expressly created private property or inheritance rights, none explicitly created private rights of action to enforce those rights in the courts of the United States. In each case, the Court inferred the rights of action once it found that the treaties were meant to create the private rights.

3. Detention and Habeas Corpus

Three cases decided by the Supreme Court during the 1880s held that a treaty endowed persons with a private right either to be released from detention or to file for habeas corpus review, when detained by authorities. In the 1884 case of *Chew Heong v. United States*,[53] the Supreme Court assumed that a treaty between the United States and China created a private right of action to bring a habeas petition in U.S. courts, absent explicit language to that effect in the treaty.[54] In *United States v. Rauscher*, two years later, the Supreme Court held that a bilateral extradition treaty between the United States and Britain created a private right to be released from detention in one's own country, when a detainee had been extradited and was detained for a crime *not* specified in the extradition treaty.[55] The *Rauscher* case is interesting because it involved several steps of inferential reasoning by the Court – even the Court's locating of a private right of the detainee to be free of charges for those crimes not specified in the extradition treaty was an expansive reading.[56] Finally, in *Mail v. Keeper of the Common Jail*, decided in 1887, the Supreme Court held that a bilateral treaty between the United States and Belgium, also created a private right to be free of detention in the

[53] 112 U.S 536 (1884).

[54] A Chinese laborer was detained near San Francisco and filed a habeas corpus petition in federal court alleging that his detention violated Article II of the 1880 U.S.-China Treaty Concerning Immigration. The treaty provided that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will…." Despite the lack of any provision in the treaty granting Chinese laborers access to the courts of the United States, the Supreme Court granted Chew Heong's habeas petition and held that he was "entitled to enter and remain in the United States." *Id.* at 560.

[55] 119 U.S. 407 (1886).

[56] *Rauscher*, 119 U.S. at 419 ("[A] treaty may . . . 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. . . . And, 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 to a statute.'")

United States for crimes not covered by the treaty,[57] as well as a private right of action in U.S. courts demanding release.[58]

4. Right to "Carry on Trade"

In *Asakura v. City of Seattle*, decided in 1924, the Supreme Court considered whether a Seattle city ordinance prohibiting non-citizens from obtaining a business license violated a treaty between the United States and Japan.[59] The Treaty of Amity between the United States and Japan provided that "[t]he citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade."[60] The plaintiff, relying on the treaty, sued to enjoin the enforcement of the Seattle ordinance.[61] Without addressing the question directly, the Court inferred a private right of action from the text of the treaty. The Court noted that the treaty was one of many treaties meant to provide for "the protection of the citizens of one country, residing in the territory of another." It then concluded that the treaty "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."[62] The Court enjoined the enforcement of the ordinance against the plaintiff.[63]

B. World War II to *Medellin*

In the period following World War II, both the Supreme Court's approach and the approach of the lower federal courts towards the enforcement of treaties in U.S. courts was less consistent than it had been in the prior century-and-a-half.[64] The courts continued to regard treaties benefitting private parties as self-

[57] 120 U.S. 1 (1887).
[58] The Court stated that the treaty was "the supreme law of the United States," and that since the treaty gave "the consul of Belgium exclusive jurisdiction over the offense which it [was] alleged ha[d] been committed," there was no reason defendant could "not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States." *Id.* at 17.
[59] 265 U.S. 322 (1924).
[60] *Id*. at 322.
[61] *Id.* at 340.
[62] *Id.* at 341.
[63] *Id.* at 343.
[64] *Cf.* Sloss, *supra* note 29 at 8 ("[A]s late as 1945 the Court's approach to treaties remained generally consistent with its approach over the previous 150 years. After the Second World War, however, the Court's application of treaties as judicially enforceable law changed substantially.

executing and capable of being enforced by those parties through lawsuits. But they began taking a more skeptical approach toward treaties regulating relationships between sovereign states, as well as toward treaties regulating the relationship between the state and the individual. This shift, we shall see, may be traced at least in part to a backlash against the emerging human rights revolution and the threat some feared it posed to racial segregation and Jim Crow.

1. The Presumption in Favor of Enforcement Weakens

The Supreme Court—which has exercised control over its own docket through certiorari jurisdiction since the 1920s—did not choose to address many cases involving the enforcement of international treaties during the post-World War II period. In those it did accept, it began to develop a less consistent approach to treaty enforcement, in U.S. courts, than it had applied in the previous 150 years. It continued to treat a number of treaties—particularly those affecting economic or commercial relations between individuals and those addressing transnational liability or litigation—as self executing and capable of direct enforcement in U.S. courts. It reached such judgments in cases involving aircraft liability treaties,[65] a multilateral convention concerning ship-owners' liability,[66] a treaty governing international discovery rules,[67] and several bilateral treaties setting forth protections for investors and inheritors.[68] Yet the Court adopted a

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The Court continued vigorously to apply treaties regulating relationships among private parties. But in contrast to earlier periods, the Court "declined to use treaties as an instrument to justify judicial supervision of the political branches in the exercise of their public functions.").

[65] *E.g.* Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243 (1984) ("[T]he Convention is a self-executing treaty. Though the Convention permits individual signatories to convert liability limits into national currencies by legislation or otherwise, no domestic legislation is required to give the Convention the force of law in the United States."). For similar cases assuming aircraft liability treaties to be self-executing, see Olympic Airways v. Husain, 540 U. S. 644, 649, 657 (2004); Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U. S. 155, 161–163, 176 (1999); and Zicherman v. Korean Air Lines Co., 516 U. S. 217, 221, 231 (1996).

[66] United States v. Warren, 3 40 U.S. 523 (1951) (holding that Article 2 of The Shipowners' Liability Convention was self executing).

[67] Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U. S. 522, 524, 533 (1987) (international discovery rules).

[68] *E.g.* Klovorat v. Oregon, 366 U.S. 187 (1961) (concerning an 1881 treaty between United States and Serbia that regulated the property rights of citizens of each country); Clark v. Allen, 331 U. S. 503, 507 (1947) (concerning the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany and the testamentary disposition of realty and personalty). *See also* Sumitomo Shoji America, Inc. v. Avagliano, 457 U. S. 176, 181, 189–190 (1982) (assuming in dicta that a Friendship, Navigation and Commerce treaty between the United States and Japan is self-executing and confers private rights of action for parties whose rights under the treaty are violated).

newly skeptical posture in cases involving other types of treaties. The Court was hesitant to declare the treaty provided a private right of action in cases that turned on the new International Convention on Civil and Political Rights,[69] an extradition treaty with human rights implications,[70] and treaties regulating the maritime industry on the high seas.[71]

The Supreme Court did not offer the lower courts a consistent standard by which to judge which treaties should be treated as self-executing and giving rise to a private right of action and which should not. Left without clear guidance, the lower federal courts developed a bifurcated approach to treaty enforcement that reflected and amplified the Supreme Court's.[72] Like the Supreme Court, lower courts continued to infer a private right of action in cases that involved economic or commercial relations.[73] Yet the lower courts began taking a more skeptical approach toward treaties regulating relationships between sovereign States (such as international dispute settlement and international use of force) and those

[69] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (holding that ICCPR is not self executing and does not confer private cause of action; "Although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.").

[70] United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that a US-Mexico extradition treaty did not confer the private right not to be abducted to stand trial for a crime not specified).

[71] Argentine Republic v. Amerada Hess Shipping Co., 488 U.S. 428, 442 (1989) ("Respondents point to the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention. These conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts.").

[72] Previous work has noted the shifting presumption at the lower court level. Sloss, *supra* note 26, at 106-10 (finding that beginning in around the 1960s, many lower courts created a novel assumption that treaties do not confer private rights of action). But to date, no other work has detected the differential treatment of private law and public law rights at the lower court level that we emphasize here.

[73] BP Oil Intern., Ltd. v. Empresa Estatal Petoleos de Ecuador, 332 F.3d 333 (5th Cir. 2003) (concerning the Convention for International Sale of Goods and holding that treaty "creates a private right of action in federal court"); Delchi Carrier v. Rotorex Corp., 71 F.3d 1024, 1027-28 (2d Cir.1995) (concerning the Convention for the International Sale of Goods); Choi v. Kim, 50 F.3d 244 (3rd Cir. 1995) (concerning the Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea); Vagenas v. Continental Gin Co., 988 F.2d 104, 106 (11th Cir. 1993) (concerning the Treaty of Friendship, Commerce and Navigation between the United States and Greece); Irish Nat. Ins. Co., Ltd. v. Aer Lingus Teoranta, 739 F.2d 90 (2d Cir. 1984) (concerning the Treaty of Friendship, Commerce and Navigation between the United States and Ireland); People of Saipan, By and Through Guerrero v. U.S. Dept. of Interior, 502 F.2d 90, 97-98 (9th Cir. 1974) (concerning the Trusteeship Agreement for the Former Japanese Mandated Islands); Board of County Com'rs of Dade County, Fla. v. Aerolineas Peruanasa, S.A., 307 F.2d 802 (5th Cir. 1962) (concerning the Convention on International Civil Aviation).

regulating the relationship between the state and individual (most notably the emerging body of human rights treaties and international criminal law regimes).[74] In those cases, the courts began to look for more explicit language in the treaty signaling the intent of the U.S. political branches and the other state parties to create an agreement that would now authorize private suits in U.S. courts.

Focusing on treaty cases in the federal courts of appeals in particular, during the post-World War II period, we find that courts grounded their conclusions that the treaty provided no private right of action in one of two prior findings: (1) the treaty was not judicially enforceable because it was not self-executing;[75] and (2) regardless of whether the treaty was self-executing, it was not intended to benefit private individuals and therefore could not give rise to a private right of action.[76]

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[74] *See supra* notes 75 & 76.

[75] United States v. Casaran Rivas, 311 Fed. Appx. 269, 272 (11 Cir. 2009) ("[A]ny argument that the indictment violated the refugee Convention and CAT Treaty is without merit, as the Refuge Convention and CAT Treaty are not self-executing, or subject to relevant legislation, and, therefore, do not confer upon aliens a private right of action to allege a violation of their terms."); Guaylupo-Moya v. Gonzales, 423 F.3d 121 (2d Cir. 2005) ("This declaration [that the ICCPR is not self-executing] means that the provisions of the ICCPR do not create a private right of action or separate form of relief enforceable in United States courts."); Flores v. S. Peru Copper Corp., 343 F.3d 140, 163 n. 35 (2d Cir.2003) (explaining that the ICCPR does not create a private right of action because the Senate declared that it is not self-executing); Igartua De La Rosa v. United States, 32 F.3d 8, 10 n. 1 (1st Cir.1994) (per curiam) (same), cert. denied, 514 U.S. 1049 (1995); Goldstar (Panama) S.A. v. United States., 967 F.2d 965 (4th Cir. 1992) ("In sum, we hold that the Hague Convention is not self-executing and, therefore, does not, by itself, create a private right of action for its breach."); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373-74 (7th Cir. 1985) ("The provisions of the United Nations Charter on which plaintiff relies are Articles 55 and 56. We have found no case holding that the U.N. Charter is self-executing nor has plaintiff provided us with one. . . . Articles 55 and 56 do not create rights enforceable by private litigants in American courts."); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C.Cir.1984) (Bork, J., concurring) (equating the issues of self-execution and private rights of actions and stating that the treaties which plaintiffs sought to enforce were not self-executing), cert. denied, 470 U.S. 1003 (1985).

[76] United States v. Rommy, 506 F.3d 108, 129-30 (2d Cir. 2007) (concerning a Mutual Legal Assistance Treaty between the Netherlands and holding that the petitioner "cannot demonstrate that the treaty creates any judicially enforceable individual right that could be implicated by the government's conduct here"); In re Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d 85,115-16 (D.D.C. 2007) (concerning the Geneva Convention Relative to the Protection of Civilian Persons in time of War; "None of the provisions of Geneva Convention IV contain any [] express or implied language indicating that persons have individual "rights" that may be enforced under the treaty. . . . [t]he provisions of Geneva Convention IV state general obligations with regard to the treatment of protected persons that are imposed on signatory States."); United States v. Jimenez-Nava, 243 F.3d 192, 197 (5th Cir. 2001) (concerning the VCCR; "A strong argument has been made that . . . the Vienna Convention is not ambiguous as to whether it creates private rights. [cites *Li*] . . . In any event . . . even if the treaty is ambiguous, the presumption against implying private rights comes into play. . . . [and] the U.S. State Department has consistently

Let us offer a couple of examples to illustrate. First, *Vagenas v. Continental Gin Co.*[77] exemplifies the post-War approach to treaties dealing with private law obligations, in which the old presumptions about private rights and private action still governed. In *Vagenas*, the Eleventh Circuit considered whether to permit Greek creditors to enforce a Greek court judgment against an American debtor, pursuant to a Friendship, Commerce, and Navigation (FCN) Treaty between Greece and the United States.[78] FCNs are a common category of bilateral treaty that states enter in order to foster trade and investment. The FCN between Greece and the United States at issue in *Vagenas* had mandated that U.S. courts treat Greek litigants in a nondiscriminatory manner "with respect to access to the courts of justice."[79] In resolving the case, the Eleventh Circuit held the FCN not only granted Greek citizens private rights, but rights that were directly enforceable. Namely, the FCN endowed Green citizens with rights of equal treatment in U.S. courts– and this meant they could avail themselves of the statute of limitations provided for in Greek courts, just as a U.S. citizen would have when seeking to enforce a sister state court judgment.[80]

In *Reffet*, the Second Circuit considered a claim brought under a tax treaty between the United States and the United Kingdom that exempted English insurers from federal excise taxes on insurance premiums.[81] The plaintiff in the

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taken the position that the Vienna Convention does not establish rights of individuals, but only state-to-state rights and obligations."); Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988) ("Article 94 of the U.N. Charter simply does not confer rights on private individuals. Treaty clauses must confer such rights in order for individuals to assert a claim "arising under" them.") ; United States. v. Mann, 829 F.2d 849, 852-53 (9th Cir. 1987) (concerning the Single Convention on Narcotic Drugs; "The treaty and letter agreement do not appear to create any individual right in Mann. The letter agreement merely recognizes the ability of signatory states to request records from financial institutions in other signatory states."); United States v. Conroy, 589 F.2d 1258, 1268 (5th Cir. 1979) (concerning the Geneva Convention on the Territorial Sea and the Contiguous Zone and holding that "redress for improper seizure in foreign waters is not due to the owner or crew of the vessel involved, but to the foreign government whose territoriality has been infringed by the action."); Dreyfus v. Von Flick, 534 F.2d 24 (2d Cir. 1976) (concerning the Hague Convention, Kellogg-Brian Pact & Treaty of Versailles and holding that none "conferred any private rights with regard to such property which were enforceable in American courts"); Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) (concerning a U.N. Security Council resolution; "[W]e find that the provisions here in issue were not addressed to the judicial branch of our government. They do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.").

[77] 988 F.2d 104 (11th Cir. 1993).

[78] Today these matters are generally addressed through bilateral investment treaties or trade agreements, though more than 30 such agreements remain in force between the United States and partner countries.

[79] 988 F.2d at 106.

[80] *Id.*

[81] 861 F.2d at 21.

case claimed that the tax treaty exempted it from the federal excise taxes and therefore the taxes charged should be reimbursed. The court agreed that the treaty eliminated the tax, but not on the plaintiff in the case: "[T]he Treaty was designed expressly to eliminate the tax on insurance premiums paid to foreign insurers"[82] and thereby eliminate "double taxation."[83] The Court never questioned whether the treaty was enforceable by private actors. It instead held that the treaty, by its own terms, did not apply to the plaintiff—a U.S. company not intended to be benefitted by the tax provision in the treaty.[84] **[AEs: We could cut this second example, if you want to trim length.]**

By contrast, in cases involving treaties governing relationships between sovereign states, the courts were less willing than they had once been to find that the treaty created a private right or a private right of action. In *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, for example, the Ninth Circuit considered whether Article 94 of the U.N. Charter—which provides that members of the United States "undertak[e] to comply with the decision of the International Court of Justice in any case to which it is a party"—endowed U.S. citizens with the ability to bring a lawsuit enjoining the American government's funding of the Contras in Nicaragua. The Ninth Circuit concluded that it did not: Article 94 did not create a private right of action in U.S. courts, because the treaty did not create rights at all. This conclusion was grounded in a close reading of Article 94's text, as well as consideration of the Charter's purpose.[85]

The lower courts also turned a newly skeptical eye on treaties regulating the relationship between the state and individual. In several cases, the courts found that human rights treaties were not self-executing, due to an express reservation by the United States stating they would not be directly enforced.[86]

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[82] *Id*. at 21.
[83] *Id*. at 20.
[84] *Id*. at 23.
[85] *Id.* As in most federal appeals court cases involving treaty claims during the period, the court engaged in a fine-grained and detailed analysis of the treaties at issue. It did not invoke a presumption against the treaty's enforceability that the plaintiff had to overcome. Instead, it considered whether a treaty created a private right and was self-executing—and thus produced a private right of action—by embarking on a multi-factor analysis of the treaty's text, history, and context. This method of analysis was captured by the Restatement of Foreign Relations Law published in 1988. RESTATEMENT, *supra* note 27, §111(4) cmt. h & rep. n. 4.
[86] Renkel v. United States, 456 F.3d 640 (6th Cir. 2006) ("Renkel argues that the Government violated her rights under the Convention . . . Those Articles [of the Convention Against Torture (CAT)] are not, however, expressly self-executing."); Saint Fort v. Ashcroft, 329 F.3d 191 (1st Cir. 2003) ("Saint Fort's claims do not rest solely on a treaty that is not self-executing; they rest on the CAT through the FARRA and the regulations"); Guaylupo-Moya v. Gonzales, 423 F.3d 121 (2d Cir. 2005) (**"**[T]he ICCPR, came with attached RUDs *declaring that the ICCPR is not self-executing. This declaration means that the provisions of the ICCPR do not create a private right of action* or separate form of relief enforceable in United States courts.") (emphasis added).

Moreover, this critical assessment extended even to a variety of treaties that did not contain such express reservations. In *In re Iraq and Afghanistan Detainees Litigation*,[87] for example, the D.C. District Court considered whether to enforce the Geneva Convention Relative to the Protection of Civilian Persons in time of War.[88] The court concluded that "[n]one of the provisions of Geneva Convention IV contain any [] express or implied language indicating that persons have individual 'rights' that may be enforced under the treaty."[89] That was true despite the fact that the treaty was expressly meant—by its very title, no less—to provide protections for civilian persons in time of war.

Similarly, in *Goldstar (Panama) S.A. v. U.S.*,[90] the Fourth Circuit considered a claim that the 1907 Hague Convention Respecting the Law and Customs of War on Land imposed a duty on the United States to provide protection for the residents of an occupied territory. The plaintiffs noted that Article 3 provides that "[t]he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war."[91] Despite this language expressly creating an individual "right," the Court concluded that the treaty "does not explicitly provide for a privately enforceable cause of action."[92] As a result, it was "not self-executing and, therefore, does not, by itself, create a private right of action for its breach."[93]

2. The Bricker Backlash

In the post-WWII period, the courts increasingly turned a skeptical eye on treaties regulating relations between sovereign states and between states and individuals, largely abandoning the presumption in favor of enforcement that they had used so routinely in earlier years. At the same time, they continued to apply the earlier presumption to treaties involving economic or commercial relations between states and those expressly addressing transnational liability or litigation. Why this shift? It can be traced at least in part to changes in the nature of the treaties creating individual rights during this period and the response to that shift among the political branches and the public. The human rights revolution and the very public backlash against it provoked increased scrutiny of treaties that might

[87] 479 F. Supp. 2d 85,115-16 (D.D.C. 2007).
[88] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[89] *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 116.
[90] 967 F.2d 965 (4th Cir. 1992).
[91] Brief for the Appellee, Goldstar (Panama), S.A., et al. v. United States at 9, 967 F.2d 965 (4th Cir. 1985) (No. 91-2229), 1991 WL 11246240.
[92] *Goldstar*, 967 F.2d at 968.
[93] *Id*. (emphasis added).

provide a mechanism by which individuals could challenge government policies. This, in turn, led to greater wariness among the courts to find that such treaties created private rights enforceable in U.S. courts.

As we have seen, in the period from the Founding through the mid-20th century, the majority of U.S. treaties that created private rights were private law treaties, often bilateral, primarily concerning contract and property rights. These treaties created private rights that built on existing common law rights that courts already regularly enforced. In the period following World War II, however, the treaties to which the U.S. was a party and those being litigated in U.S. courts increasingly concerned human rights and public law issues. Though public law treaties, these agreements potentially gave rise to a swell of private claims. The United States ratified the U.N. Charter in 1945,[94] Article 92 of which established the International Court of Justice;[95] it signed the Genocide Convention in 1948[96]; it signed and ratified the four Geneva Conventions by 1955[97]; it ratified the Vienna Convention on Consular Relations in 1963[98]; and it joined many other human rights treaties through the Cold War period.[99]

Courts were less familiar with these treaties—they were of a wholly different nature than common law treaties—and were in part for this reason more wary of inferring private rights of action. Even more important than their novelty, however, was the nature of the individual rights they created and the political context these new treaties entered. American Bar Association President Frank Holman illustrated the irrational fears these treaties provoked when he asserted (incorrectly) that if a white person driving through Harlem were to accidentally run over a black child, the driver could be extradited to an international tribunal or

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

[95] Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (1945). In 1946, the U.S. declared that it recognized the compulsory jurisdiction of the ICJ over various matters, *see* United States Declaration of Aug. 14, 1946, 61 Stat. 1218, 1 U.N.T.S. 9, but it withdrew from general ICJ jurisdiction in 1985, following the Nicaragua case. *See* U.S. Department of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, October 7, 1985, *cited in* Medellín v. Texas, 555 U.S. 491, 500 (2008).

[96] Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

[97] *E.g.* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 88, art. 53.

[98] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261

[99] *See, e.g.*, International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, signed by the U.S. on October 5, 1977, although not ratified until 1992. *See also* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1035 U.N.T.S. 167, 13 I.L.M. 41, *entered into force* Feb. 20, 1977, signed by the U.S. in 1973 and ratified in 1976.

foreign court on charges of genocide.[100] Holman's views were extreme but influential. John Foster Dulles was later quoted as cautioning against the "trend toward trying to use the treatymaking power to effect internal social changes."[101] During the debate over the amendment, Time Magazine speculated that the "the fight arose" because of such concerns. It cited, in particular, the U.N. Charter, which required that states respect rights "without distinction as to race," and what it said was the Genocide Convention's definition of genocide to include "'causing . . . mental harm' to members of a 'national, ethnical, racial or religious group.'"[102]

The emergence of numbers human rights treaties during the post-War period thus generated a backlash, particularly among those who feared the human rights treaties might be used to challenge Jim Crow laws in the South. This backlash led to the proposal of what came to be known as the "Bricker Amendment" in the 1950s, a series of constitutional amendments proposed in the Senate with the goal of effectively reversing the Supremacy Clause—not just for human rights treaties but for all treaties. In the end, the Amendment was defeated by a single vote.[103]

It is often said that judges read the newspapers, and this was no exception. Though the Bricker Amendment failed, the courts got the message. The controversy surrounding the debate over international law and the new and growing body of treaty law—including human rights treaties—underscored the political backlash in the United States against treaties that could lead to challenges to domestic laws, norms and institutions through private lawsuits. Courts thus began scrutinizing such claims with greater caution—and growing skepticism. This initial shift in the courts' approach was later codified in the Second and Third Restatements of Foreign Relations Law in 1965 and 1988. The Second Restatement did not expressly address private rights of action, but stated that a treaty "has immediate domestic effect as the supreme law of the land under

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[100] DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP 13 (1988).

[101] *The Bricker Amendment: A Cure Worse than the Disease?*, TIME, July 13, 1953, at 20.

[102] *Id.* Several prominent black intellectuals and leaders also saw the promise of human rights agreements for forwarding the civil right struggle in the United States. WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (1951); CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-55 (2003).

[103] *See* Hathaway, *supra* note 15.

…only if it is self-executing."[104] The Third Restatement went further and provided 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."[105] These Restatements reflected a growing tendency in the federal courts to insist on express evidence in the treaty or its legislative history that it was intended to be enforceable in domestic courts.

Still, even in the years leading up to *Medellin*, federal courts' growing reluctance to employ a presumption in *favor* of private rights of action had not resulted in a consistent and uniform presumption *against* them. Rather, the lower courts generally looked to the text and the history of the ratification process to determine whether a treaty was meant to be self-executing and to give rise to a private right and a private right of action. Moreover, lower courts tended to maintain the presumption in favor of private rights of action for bilateral treaties and for treaties protecting private, common-law rights.[106] It was these last two threads of the earlier framework that *Medellin* would cut.

C. After *Medellin*

Although it had long been assumed that the treaties granting jurisdiction to the International Court of Justice constituted binding federal law in the United States, the Supreme Court held in *Medellín* that the treaties were non-self-executing. Thus, Medellin could not rely on them to enforce the *Avena* judgment requiring review and reconsideration of his sentence. In the course of its decision, the Supreme Court endorsed what it characterized as a "background presumption"

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[104] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 141 cmt. a (1965). David Sloss implies that after the publication of section 141 in the Second Restatement, courts were also more likely to find that treaties were not self-executing. According to Sloss, the Second Restatement provided doctrinal support for the notion that "[T]reaty makers have an affirmative power to decide that a ratified treaty will not be converted into primary domestic law, even though there are no constitutional impediments to automatic conversion." Sloss argues the "Constitution does not give the treaty makers a power to shape primary domestic law directly" and the Restatement doctrine is therefore flawed because "it is founded upon an erroneous assumption about the treaty makers' constitutional powers." *See* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 15 (2002); *see also* David Sloss, *Schizophrenic Treaty Law*, 43 TEX. INT'L L.J. 15, 19 (2007).

[105] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907 cmt. a (1988).

[106] *See supra* note 73.

against finding that treaties confer private causes of action.[107] In what has become influential dicta, the Court stated, "Even when treaties are self-executing in the sense that they create federal law, the background presumption is that 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."[108] This statement by the *Medellin* Court appears to suggest that the presumption against finding a private rights of action had previously been universally applied, which, as we have seen, is not the case. Despite its inaccuracy and status as dicta, the blanket statement by the *Medellin* Court has led to a significant shift in U.S. courts' approach to Article II treaties. No longer is the presumption against private rights of action applied exclusively to public law treaties. Instead, as we shall show, it is being treated by the lower courts as universal. After *Medellin*, the courts have begun applying the opposite presumption of that used by the courts during most of the country's history. Instead of presuming that treaties that create private rights necessarily create private rights of action, courts now generally presume that they do not, regardless of the type of treaty.

This will likely come as a surprise to many. Immediately after *Medellin* was decided by the Supreme Court, the leading scholars in the field mused that the decision *did not* support a strong presumption against finding private rights of action in treaties, and that it would not significantly influence the interpretation of treaties going forward.[109] In 2009, the American Bar Association and the American Society of International Law adopted a joint taskforce report that concluded that *Medellin*'s "self-execution analysis may affect a limited class of treaties of a very substantial number," and it was too early to tell.[110] Yet today, two and a half years after *Medellin*, it appears that these prognoses were too timid. It is now abundantly clear that *Medellin* has begun to make a difference in the interpretation of treaties in two key respects that we detail below. If the legal enforceability of Article II treaties is in the country's best interests—as we believe it is[111]—these trends in treaty interpretation resulting from *Medellin* are troubling, and they call for the types policy proposals that we outline in Part III below.

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[107] *Id*. at 1356-57, 1366, 1369.

[108] Medellín v. Texas, 128 S.Ct. 1346, 1357 n.3 (2008) (internal citations omitted).

[109] *E.g.*, Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 540-41 (2008) ("[S]ome commentators may claim that the decision supports a strong presumption *against* self-execution, and that as a result many treaties that would formerly have been treated as self-executing will now be treated as non-self-executing. A careful reading of the decision suggests that this is not a fair construction.").

[110] ABA/ ASIL Joint Task Force on Treaties in U.S. Law, Report 1 (March 16, 2009), http://www.asil.org/files/TreatiesTaskForceReport.pdf.

[111] *See supra* notes 18-22 and accompanying text.

1. A Presumption Against *Private Rights of Action*

Medellin has changed the nature of U.S. courts' self-execution and private rights analysis, leading them to increasingly adopt a strong presumption that treaties are not self-executing and do not give rise to private rights. This shift is evident in the lower federal courts' decisions in the two-and-a-half years since the Supreme Court's decision.

Consider, for example, the Second and Eleventh Circuits' decisions in *Mora v. New York*[112] and *Gandara v. Bennett*.[113] Both *Mora* and *Gandara* concerned whether plaintiffs could be awarded damages under 42 U.S.C. § 1983 for state officials' violations of their rights under the Vienna Convention on Consular Relations (VCCR). The plaintiffs in each case claimed that after being arrested for various criminal offenses in New York and Georgia, respectively, state law enforcement officials had failed to inform them of their rights to consular notification and access under the VCCR and as a result, the plaintiffs had inadequate counsel and were sentenced to unfair periods of incarceration. Neither plaintiff sought to sue under the VCCR directly, but rather claimed that §1983 provided them with a private right of action.

Both the *Mora* and *Gandara* Courts refused to let the cases proceed, holding that even if §1983 supplied a private cause of action, the VCCR did not give rise to individual rights in the first place. In *Mora*, the Second Circuit oriented its entire analysis around the principles articulated in dicta in *Medellin*'s footnote 3. It explained that "international agreements, even those directly benefiting private persons, generally do not create private rights"[114] and that "'treaties do not create privately enforceable rights in the absence of express language to the contrary.'"[115] Therefore the court could not enforce the treaty-based claim.[116] The *Gandara* panel, like the *Mora* Court, oriented its majority opinion around "the general rule [] that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights,'"

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[112] 524 F.3d 183 (2d Cir. 2008).
[113] 528 F.3d 823 (11th Cir. 2008).
[114] *Mora*, 524 F.3d at 200 (quoting *Medellin*, 128 S. Ct. at 1357 n.3).
[115] *Id.* at 201 (quoting *Medellin*, 128 S. Ct. at 1357 n.3).
[116] Two years later, relying on its decision in *Mora* and the Supreme Court's decision in *Medellin*, the Second Circuit quickly concluded that, as a matter of first impression, the International Telecommunications Regulations (ITRs) did not give rise to a private right of action. *Katel Ltd. Liability Co. v. AT&T Corp*., 607 F.3d 60, 67-68 (2d Cir. 2010), The ITRs "have treaty status" and were promulgated by a United Nations agency responsible for international communications issues in order to provide for the settlement of disputes by Member States of the agency. The United States is one of the 191 member states of the agency. *Id.* at 67. While the ITRs do not protect private rights, the Second Court's decision is noteworthy in that it reiterated the rule that treaties do not create a private right of action absent express language to the contrary.

although it cited to the Restatement rather than to *Medellin* for this point.[117] In her concurring opinion, Judge Rogers noted that lower court decisions to date "have assumed or held that the Convention is self-executing with little or no analysis of the treaty's text"; but under *Medellin*, "the approach to be taken in analyzing international agreements . . . [is that] for a treaty to be self-executing[,] such status must be obvious from the treaty's terms."[118] Other circuits have reached similar conclusions, suggesting that these two cases are indicative of the ways in which the *Medellin* presumption is being extended to make it more difficult to locate private rights in treaties.

In another recent case, *Toor v. Holder*,[119] a D.C. district court similarly extended *Medellin*'s presumption against inferring private rights of action to the Council of Europe Convention on the Transfer of Sentenced Persons.[120] The Convention sets forth protocols concerning the transfer of prisoners, and it specifies that "[a] person sentenced in a Party . . . may express his interest to the sentencing State . . . in being transferred under this Convention."[121] In *Toor*, a Canadian citizen serving a sentence in U.S. federal prison brought suit against the Attorney General, claiming that the DOJ had prevented him from applying to transfer to a Canadian prison as he was authorized to do under the Convention. The district court resolved the case in one fell swoop by adopting the *Medellin* presumption against self-execution. It stated that "'international agreements . . . generally do not create private rights or provide for a private cause of action in domestic courts,"[122] and concluded that "[s]ince the Convention has no express language to rebut a presumption against a private right of action, plaintiff lacks standing to sue under the treaty or its implementing statute."[123] The new *Medellin*-inspired presumption against self-execution thus appears to have been decisive.

2. An End to the Carve-Out for Private Law

Medellin has also led lower courts to apply the presumption against enforcement universally, apparently eliminating the carve-out for private law treaties that persisted through the post-War period up until *Medellin*. This can be

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[117] *Gandara*, 528 F.3d at 828 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §907 cmt. a (1987)).
[118] *Id.*
[119] 717 F. Supp. 2d 100 (D.D.C. 2010).
[120] Council of Europe Convention on the Transfer of Sentenced Persons, March 21, 1983, 22 I.L.M. 530.
[121] *Id.* art. 2(2).
[122] *Toor*, 717 F.Supp.2d at 107 (citing *Medellin*).
[123] *Id.*

seen in particular in several cases decided by the D.C. and Third Circuits between 2008 and 2010.

The case of *McKesson Corp. v. Islamic Republic of Iran* in the D.C. Circuit is particularly instructive because it spans the period before and after *Medellin* and thus offers an unusual opportunity to witness the impact of the decision on lower courts' decisionmaking.[124] A group of U.S. corporations, collectively called "McKesson," and the Overseas Private Investment Corporation (OPIC), a federal agency that helps American businesses invest abroad, brought a complaint in the district court of Washington, D.C. against Iran. They alleged that Iran had illegally expropriated McKesson's interest in an Iranian dairy company following the Iranian Revolution of 1979, and that this nationalization violated McKesson's rights under the U.S.-Iran Treaty of Amity, which .[125] The Treaty provided that "[p]roperty of nationals and companies of either High Contracting Party" shall "receive the most constant protection and security within the territories of the other High Contracting Party" and that such property shall not be "taken without the prompt payment of just compensation."[126]

In 2001, the D.C. Circuit held that the Treaty of Amity created a private right of action for American corporations in U.S. courts. It concluded that "[t]he treaty of Amity . . . explicitly creates property rights for foreign nationals" of both countries, and therefore it "contemplates judicial enforcement of those rights" in both American and Iranian courts."[127] Having found private rights, it inferred a private right of action to enforce those rights, thereby reflecting the common approach to bilateral treaties—particularly Friendship, Commerce, and Navigation treaties—prior to *Medellin*.[128]

On a petition for writ of certioriari to the Supreme Court, however, the newly elected Bush Administration argued that the entire action should be dismissed, because the Treaty of Amity did not confer a private right of action on McKesson Corporation.[129] The Supreme Court rejected the petition for certiorari,

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[124] 539 F.3d 485 (D.C. Cir. 2008).

[125] Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, art. IV, cl. 2, 8 U.S.T. 899, 903.

[126] *Id.* art. IV.

[127] McKesson Corp. v. Islamic Republic of Iran, 271 F.3d 1101, 1107-08 (D.C. Cir. 2001).

[128] Recall that even as courts in the post-World War II period were increasingly reluctant to find private rights of action in treaties, *see supra* Section I.B, they had continued to presume that private rights created in bilateral treaties, particularly in "Friendship, Commerce and Navigation" treaties, were enforceable. *See, e.g.*, Clark v. Allen, 331 U.S. 503, 508 (1947) (holding that the Treaty of Friendship, Commerce, and Consular Rights between United States and Germany was enforceable in U.S. court). The court may also have been persuaded by the fact that the United States "actively supported McKesson's right to assert its expropriation claim against Iran" in the U.S. court system. Brief for McKesson Corp., McKesson Corp. v. Islamic Republic of Iran, No. 07-7113. (D.C. Cir. Mar. 21, 2008).

[129] *Id*. at 488.

but the D.C. Circuit directed the district court to reconsider the case in light of the government's position.[130] The district court rejected the argument, Iran appealed, and the suit landed before the D.C. Circuit again in 2008. The sole question at issue was whether the Treaty of Amity created a private right of action that would allow enforcement of the treaty by a private party in U.S. courts.

While the case was pending, the Supreme Court issued its decision in *Medellin*. The D.C. Circuit subsequently abandoned its 2001 position and, drawing heavily from *Medellin* and reversing its earlier position, concluded that the Treaty of Amity did *not* create a private right of action for any party as a matter of U.S. law.[131] Although the panel acknowledged that the "Treaty of Amity, like other treaties of its kind, is self-executing,"[132] it held that according to *Medellín*'s footnote three (which, as noted earlier, is dicta), "'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.'"[133] The D.C. Circuit "[found] nothing in the Treaty of Amity that overcomes this presumption." While the Treaty of Amity did "benefit McKesson," in establishing that monetary compensation should be provided to parties like McKesson if its property was taken,[134] the Treaty did not specify *how* compensation should be provided.[135] In other words, the treaty created a right but not a remedy, and its "silence on this [latter] point makes all the difference."[136]

The D.C. Circuit's reluctance to infer a private right of action in the Treaty of Amity with Iran, despite its 2001 decision to the contrary, suggests that *Medellin* is, indeed, changing judicial practice. The *McKesson* Court explained that its decision was consistent with "traditional assumptions about how treaties operate"[137]; but actually, the *McKesson* decision was *not* consistent with "traditional assumptions" about such treaties, nor even with earlier assumptions

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[130] McKesson HBOC, Inc. v. Islamic Republic of Iran, 320 F.3d 280, 281 (D.C.Cir. 2003) (instructing the district court "to reexamine [the private right of action] issue in light of the representation of the United States that it does not interpret the Treaty of Amity to create such a cause of action").

[131] McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008)

[132] *Id.* at 489.

[133] *Id.* (quoting *Medellín*, 128 S.Ct. at 1357 n.3).

[134] *Id*.

[135] *Id*.

[136] *Id*. Although the court cited *Medellín* for the presumption against treaties creating private rights of action, the case most relevant to its decision was *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 442 (1989) (holding that a treaty that "only set[s] forth substantive rules of conduct and state[s] that compensation shall be paid for certain wrongs ... do[es] not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts.") (citations omitted).

[137] *Id.* at 491.

about the *particular* treaty in the case. Given that the United States is currently a party to Friendship, Commerce, and Navigation treaties with 32 states,[138] an extension of the *McKesson* line of reasoning to those long-standing bilateral treaties is likely to make a material difference to the status of international law in U.S. courts.[139]

Medellin's presumption against private rights of action has spread to other agreements that expressly create private rights. In *Gross v. German Foundation Industrial Initiative*,[140] the Third Circuit declined to find a private right of action in an executive agreement exclusively concerned with private law rights. The agreement between the United States and Germany agreed to shield German firms from Nazi-era litigation in U.S. courts and to quash 60 pending Holocaust cases. In exchange, the German Industrial Initiative would make available DM 5 billion for victims of corporate wrongdoing during the Nazi reign. Under the agreement, the majority of pending Holocaust-related cases were dismissed. However, the Initiative had trouble raising funds and took 18 months to meet its obligation of paying out the promised money to Holocaust victims. In 2007, the victim-beneficiaries therefore brought suit in federal court, seeking interest payments from the Initiative in the form of damages for breach of contract. The Third Circuit dismissed the suit, holding that the Joint Statement evinced a "strong intent" on the part of the signatories to not create private rights of action."[141] This proposition, the Third Circuit held, found support in the *Medellín* decision's footnote three, and its "'background presumption [] 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."[142]

The Third Circuit's extension of the *Medellin* presumption to the Joint Statement in *Gross* is notable because it runs directly against the long tradition in

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[138] List of Friendship, Commerce, and Navigation Treaties available at http://www.gattiassociates.com/CM/PracticalInformation/PracticalInformation746.asp.

[139] The United States also a party to Bilateral Investment Treaties (BITs) with 40 countries. *See* List of Bilateral Investment Treaties available at http://tcc.export.gov/Trade_Agreements/Bilateral_InvestmentTreaties/index.asp. However, because BITs typically provide for the arbitration of disputes before bodies such as the International Center for Settlement of Investment Disputes (ICSID), *Medellin* will have less bearing on the enforcement of BITs. Even *Medellin* itself noted that its holding was unlikely to affect BITs, given that the United States has passed implementing legislation which gives decisions by the ICSID tribunal the status of "final judgments." *Medellin*, 522 U.S. at 521. Interestingly, *McKesson* is still being litigated in the D.C. district court, but now under Iranian law. Under Iran's legal regime, "treaties have the force of law." Accordingly, all parties conceded in 2009 that McKesson Corporation had a cause of action under the Treaty of Amity as a matter of Iranian law. McKesson Corp. v. Islamic Republic of Iran, WL 4780677 (2010).

[140] 549 F.3d 605 (3rd Cir. 2008).

[141] *Id.* at 612.

[142] *Id*. at 615 (internal quotations omitted) (citing *Medellín*, 128 S.Ct. at 1357 n.3).

U.S. courts of presuming that treaties that concern private, common-law type rights—such as property, inheritance, and contract rights—also create private causes of action. In the period from the Founding through World War II, the Supreme Court routinely assumed that treaties of such a nature were enforceable in U.S. courts.[143] In the years leading up to *Medellin*, lower federal courts continued to maintain that posture[144] – for instance, these courts continued to infer that treaties like the Convention on the International Sale of Goods, which governs contracts for the sale of goods between private entities in different countries, generated private rights of action.[145] If *Gross* signifies a new way forward and an extension of *Medellin*'s presumption to treaties concerning private entities and their common law rights, it could raise questions about the enforceability of numerous treaties to which the United States is a party.[146]

Medellin has already had led to changes in the approach that courts have taken to direct enforcement of international law in at least four circuits. The recent decisions by the D.C. Circuit and the Third Circuit are most profound, because they demonstrate an extension of *Medellin*'s presumption against private rights of action for treaties that were previously understood to be self-executing. If this trend continues—and is not addressed by the Supreme Court—it will likely be substantially more difficult for private parties to directly enforce treaty obligations in U.S. courts. The emergence among the lower courts applying *Medellin* of a new double requirement of clear language that specifies that treaties are self-executing *and* that they are intended to benefit private individuals will make courts more reluctant to enforce the United States' international legal obligations under Article II treaties.

II. HOW INTERNATIONAL LAW COMES HOME

Many will read our findings on the trend in the case law after *Medellin* as sounding a death knell for the enforcement of Article II treaties in U.S. courts. After all, it is commonly assumed that if an international treaty cannot be used as a source of a private right of action, then it cannot be enforced in a U.S. court at

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[143] *See supra* Section I.A.

[144] *See supra* note 73 and accompanying text.

[145] *E.g.*, BP Oil Intern., Ltd. v. Empresa Estatal Petoleos de Ecuador, 332 F.3d 333 (5th Cir. 2003) (holding that the Convention on the Sale of Goods gives rise to private rights of action).

[146] *Cf.* ABA/ASIL Report, *supra* note 110, at 8 (noting that "there have been quite a few other provisions in treaties affecting private commercial law that [historically have been] enforced without the need for implementing legislation," such as the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of October 5, 1961, 527 U.N.T.S. 198, the Protocol on Powers of Attorney Which Are To Be Utilized Abroad of February 17, 1940, 56 Stat. 1376, 161 U.N.T.S. 229; and the Protocol on Juridical Personality of Foreign Companies of June 25, 1936, 55 Stat. 1201, TS 973, 161 UNTS 217).

all. That common assumption, however, misses a significant part of the picture of international law enforcement in U.S. courts. In fact, treaties are regularly enforced in U.S. courts even when there is no private right of action. Understanding this bigger picture is essential to understanding the true impact of the courts' shifting position on the enforcement of treaties through private rights of action.

International treaties are enforced by courts in three circumstances in which the treaty itself does *not* give rise to a private right of action. First, treaties may create a right that can then be enforced through legislation that makes the right actionable. We call this "indirect enforcement." Second, a treaty may be invoked defensively by a private party who has been prosecuted or sued under a statute that is inconsistent with a treaty provision. We call this "defensive enforcement." Third, courts may look to treaties when interpreting statutes and, more controversially, constitutional provisions. We call this "interpretive enforcement." We refrain from engaging in evaluative comparisons among these methods because the enforcement of treaties through indirect, defensive, and interpretive means is not an interchangeable choice. Rather, whether a given method of treaty enforcement will be available to a litigant or to a judge will depend on the particular treaty at issue, and the context in which an individual's claim has arisen. We therefore examine each of these methods below in depth, in order to provide a comprehensive, unified discussion of U.S. treaty enforcement that has until now been missing.

A. Indirect Enforcement

Treaties are commonly used by U.S. courts to vindicate the private rights of litigants even when the treaty does not provide for the direct enforcement of a private right. Specifically, treaty-rights are commonly enforced indirectly through various statutory vehicles. The most common and obvious of these statutory vehicles is the implementing legislation enacted precisely to give force and effect to a particular treaty obligation. Less well-known is the enforcement of treaties through Section 1983, and habeas corpus proceedings.[147] We discuss each of these in brief.

[147] The Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2006), might be thought to be another mechanism for indirect enforcement of a treaty. On closer inspection, however, it turns out to be redundant with a private right of action and is therefore not addressed separately here. In *Sosa v. Alvarez-Machain*, 542 U.S. at 712, 718, the Supreme Court concluded that the Act does not provide a cause of action; that must originate elsewhere. Thus, a treaty would have to be self-executing in order to be enforceable under ATCA. *See* Lopez v. Wallace, 325 Fed. Appx. 782, 784 (11th Cir. 2009) (holding that plaintiffs "may not use § 1350 to create an individual cause of action under the VCCR where . . . [the Eleventh Circuit has] found there to be none."); Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 738 (9th Cir. 2008) (rejecting treaty-based ATCA cause

1. Implementing Legislation

Congress has the authority to implement treaties through legislation.[148] In so doing, it may also choose to create private rights of action that allow individual plaintiffs to sue to enforce international legal obligations. Indeed, the Supreme Court has asserted that "the decision to create a private right of action is one better left to legislative judgment in the majority of cases."[149]

Several treaties are currently enforced through legislatively created private rights of action. Consider, for example, the U.N. Convention Against Torture,[150] which is enforced in part through the Torture Victim Protection Act's establishment of civil liability for individuals who commit torture;[151] the Hague Convention on International Child Abduction,[152] which was implemented through the International Child Abduction Remedies Act providing for a cause of action for individuals seeking to assert their parental rights in court;[153] and the Chemical

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of action because the Rome Statute was not a self-executing treaty); Gandara v. Bennett, 528 F.3d 823, 832-34, 839 (11th Cir. 2008) (Rodgers, J., concurring) (noting that treaties cannot be subject to judicial enforcement unless they are self-executing and create private rights). This reading is supported by *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007), where the court decided to "expressly refrain from deciding whether the failure of the police officers here to inform Jogi of the right to consular notification provided by Article 36 of the Vienna Convention was the kind of "*tort ... in violation of a treaty" that [ATCA] covers*. It is enough, for present purposes, that jurisdiction under § 1331 is secure." 480 F.3d at 826 (emphasis added) (internal citations omitted). Of course courts may discuss non-self-executing treaties in ATCA cases in determining whether a customary international law norm that might be pursued under ATCA exists, s*ee Sosa*, 542 U.S. at 734-36, but in such cases it is the customary norm, not the treaty obligation per se, that that the courts enforce.

[148] Indeed, there continues to be a debate as to whether Congress has a *duty* to implement treaties that have passed through advice and consent proceedings or whether Congress may pursue its own independent evaluation before approving appropriations and other implementing measures. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 204-206 (2d ed. 1996). The Supreme Court has held that Congress may act beyond the scope of its enumerated powers in Article I when passing legislation that is "necessary and proper" to enforce a treaty. *See* Missouri v. Holland, 252 U.S. 416, 432-435 (1920).

[149] Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

[150] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/46 (1984).

[151] Torture Victim Protection Act of 1991 § 2(a), 28 U.S.C. § 1350 note (2006) ("An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual.").

[152] Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 (1980).

[153] 42 U.S.C. § 11603(b) (2006).

Weapons Convention Implementation Act of 1998,[154] which, as its title makes clear, implements the U.S. obligations under the Chemical Weapons Convention. These are only a few examples of the many treaties that are enforced in U.S. courts pursuant to implementing legislation passed for this express purpose.

2. Section 1983

In recent years, plaintiffs have sought to recover damages under Section 1983[155] for violations of their right to consular notification under Article 36 of the Vienna Convention on Consular Relations.[156] Courts have employed a different approach in determining whether a treaty may be enforced in these cases than in cases where plaintiffs seek to enforce treaties directly. Rather than require that the treaty be self-executing and give rise to a private right of action, courts require that the treaty be *self-executing* and confer *individual rights*. When a treaty satisfies these two requirements, the individual right supplied by the treaty is presumptively enforceable under Section 1983. In other words, Section 1983 serves as a statutory mechanism that supplies the relevant cause of action.

To date, several circuit courts have considered whether a foreign national who is not informed of his right to consular notification under Article 36 of the Vienna Convention on Consular Rights may bring a private right of action for damages under Section 1983. The Seventh Circuit is the only court to hold that a treaty, in this case the Convention, meets both of these requirements in the absence of implementing legislation. In *Jogi v. Voges*,[157] the Seventh Circuit decided that an individual may sue for damages under Section 1983 when he or she is not informed of his right to consular notification. The Seventh Circuit began its analysis by concluding that the phrase "and laws" in Section 1983 should be read to include treaties.[158] It noted that "[o]nly a small subset of treaties

[154] Chemical Weapons Convention Implementation Act of 1998, P.L. 105-277, Oct. 21, 1998, 112 Stat. 2681-856.

[155] In relevant part, 42 U.S.C. § 1983 (2006) provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[156] This Subsection focuses exclusively on circuit court decisions.

[157] 480 F.3d 822 (7th Cir. 2007).

[158] The Seventh Circuit decided to withdraw its earlier opinion in this case, *see* Jogi v. Voges, 425 F.3d 367 (2005), and substitute it with the one described here. The court noted that since the first opinion was decided, the Supreme Court had spoken on the subject of the VCCR in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), and had addressed the relationship between the exclusionary rule and 42 U.S.C. § 1983. Based on these developments, the court decided to re-issue the opinion on narrower grounds. *See Jogi*, 480 F.3d at 824.

. . . would even be candidates for such a lawsuit."[159] An individual seeking to proceed under Section 1983 for a violation of his rights under a treaty must show two things: (1) that a personal right can be inferred from the treaty, in this case Article 36 of Convention, and (2) that he is entitled to a private remedy.[160] The court concluded that although most parts of the Convention address only state-to-state relations, language in the treaty providing that authorities "*shall* inform the person concerned without delay *of his rights* under this subparagraph"[161] unambiguously refers to the existence of individual rights. Noting that the Supreme Court had held that "[o]nce a plaintiff demonstrates that a statute confers a right, the right is presumptively enforceable by § 1983,"[162] the Seventh Circuit concluded that Jogi was entitled to pursue his claim under Section 1983.

At the moment, the Seventh Circuit stands alone. The Second, Ninth, and Eleventh Circuits have each concluded that a foreign national may not bring an action for damages under Section 1983 based on a state's alleged breach of the Vienna Convention on Consular Relations,[163] and the Fifth and Sixth Circuits have held that the Convention does not create judicially enforceable rights at all.[164] The Eleventh and Ninth Circuits in *Gandara* and *Cornejo* agreed with the Seventh Circuit that the Convention is a self-executing treaty, in that it "has the force of domestic law without the need for implementing legislation by Congress."[165] However, the Eleventh Circuit reasoned that for "any treaty to be susceptible to judicial enforcement it must both confer individual rights and be self-executing."[166] Article 36, in its view, does not confer individual rights. In *Mora*,[167] the Second Circuit—drawing on *Medellin* and representations by the Executive Department—similarly concluded that the rights outlined in the Convention belonged to state parties and not private individuals.[168]

But even though the Seventh Circuit stands alone in holding that actions for damages under the Vienna Convention *specifically* can be brought through the Section 1983 vehicle, the reasoning of the other circuits in the Vienna Convention cases shows that for treaties aside from the Vienna Convention, Section 1983

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[159] *Id.* at 827.
[160] *Id.*
[161] *Id.* at 833 (citing the Article 36 of the VCCR).
[162] *Id.* at 835 (citing *Gonzaga*, 536 U.S. at 284).
[163] *E.g.* Gandara v. Bennett, 528 F.3d 823 (11th Cir. 2008); Mora v. New York, 524 F.3d 183 (2d Cir. 2008); Cornejo v. County of San Diego, 504 F.3d 853 (9th Cir. 2007).
[164] The Fifth and Sixth Circuit precedents on the matter involved criminal proceedings. United States v. Emuegbunam, 268 F.3d 377, 391-92 (6th Cir. 2001); United States v. Jimenez-Nava, 243 F.3d 192, 197-98 (5th Cir. 2001).
[165] *Gandara*, 528 F.3d at 828; *see also Cornejo*, 504 F.3d at 856.
[166] *Id.* at 828 (quoting *Cornejo*, 504 F.3d at 856).
[167] Mora v. New York, 524 F.3d 183, 193 n.16 (2d Cir. 2008).
[168] *Id.* at 188, 194.

could be a more fruitful instrument for getting into court. The Ninth and Second Circuits, in *Cornejo* and *Mora* respectively, both agreed with the Seventh Circuit that whether a treaty confers a private right is a distinct question from whether it entitles an individual to a specific remedy, i.e., a private right of action. As long as a treaty meets the first test, it need not meet the second in order for a private party to raise a treaty-based claim in a Section 1983 lawsuit. In *Cornejo*, the Ninth Circuit concluded that the Vienna Convention did not confer private rights at all, and so Section 1983 could not provide a relevant cause of action.[169] In *Mora*, the Second Circuit held that if plaintiff had been shown to enjoy an individual right under the Vienna Convention, his claim for "damages pursuant to §1983 would likely be actionable."[170]

In sum, there appears to be widespread agreement among the circuits that in damages claims based on treaty violations, at least where the underlying treaty protects private rights, Section 1983 presumptively provides a private right of action that can be used to enforce those rights in court.

3. Habeas Corpus

The federal habeas statute provides that habeas relief is available for violations of a treaty. It provides that writs of habeas corpus may be granted to a prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States."[171] While the majority of modern day habeas petitioners alleging treaty violations have been unsuccessful, courts have demonstrated a willingness to consider the merits of claims regarding treaty violations in habeas petitions.[172]

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[169] 504 F.3d at 858-59.

[170] *Id.* at 199 n. 23.

[171] 28 U.S.C. § 2241(c)(3) (2006). Most federal prisoners file habeas petitions under 28 U.S.C §2255 after they have exhausted their direct appeals. If the remedy provided by §2255 is "inadequate or ineffective to test the legality of [a prisoner's] detention," prisoners may petition for traditional writs of habeas corpus pursuant to 28 U.S.C. §2241. Section 2241, unlike §2255, expressly includes violation of "treaties of the United States" as a basis for challenging custody. However, "the grounds for relief under § 2255 are the equivalent of those under general federal habeas corpus statutes that refer to 'the Constitution or laws or treaties of the United States.'" *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003) (citing Davis v. United States, 417 U.S. 333, 344 (1974)). Thus, this Section assumes that treaty violations can be alleged under either §2241 or § 2255.

[172] The Supreme Court has limited the availability of relief for treaty violations through its application of state default rules. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) (applying procedural bar rule to claims asserted by habeas petitioner even though doing so would prevent compliance with the decision of the International Court of Justice); Breard v. Greene, 523 U.S. 371 (1998) (per curiam) (applying Virginia's procedural default doctrine to a VCCR claim on habeas review). Moreover, the Antiterrorism and Effective Death Penalty Act of 1996

Thus far, the courts that have addressed the issue have required that the treaty be self-executing in order to serve as a basis for habeas relief,[173] and they have rejected petitions in cases where the treaties relied upon by petitioners are non-self-executing.[174] Since habeas corpus constitutes a separate statutory mechanism for treaty enforcement, the analysis is similar to that in the Section 1983 context. That is, if the treaty is self-executing and confers private rights, the habeas corpus statutory provisions confer the relevant private right of action, even if the treaty itself does not.[175] Although most courts have not focused explicitly on private rights or private rights of action in the habeas context, there is some support for the proposition that a habeas petition obviates the need for an independent treaty-specific private right of action. [176]

Courts have, for example, allowed petitioners to allege violations of extradition treaties in habeas petitions. In *United States v. Rauscher*,[177] the Supreme Court established the principle, known as the rule of specialty, that an extradited defendant has an individually enforceable right not to be prosecuted for any offense other than that for which the surrendering country agreed to extradite.[178] Thus, an individual may seek relief under an extradition treaty in one of two ways. First, a defendant may invoke the extradition treaty defensively in

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("AEDPA") limits a federal court's review of a state court's decision regarding a habeas petition. For a writ to issue under the AEDPA, a federal court must find that the state court's decision was either contrary to or an objectively unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2006).

[173] *See, e.g.*, Bannerman v. Snyder, 325 F.3d 722, 724 (6th Cir. 2003) (reasoning that "the reference to 'treaties of the United States' in § 2241 cannot be construed as an implementation of non-self-executing provisions of treaties so as to render them judicially enforceable under § 2241 when they are not enforceable under § 2255"); Wang v. Ashcroft, 320 F.3d 130, 140 (2d Cir. 2003) ("Unless a treaty is self-executing . . . it does not, in and of itself, create individual rights that can rise to habeas relief."). Often, however, the court will find that implementing legislation makes it unnecessary to decide whether the treaty, on its own, could be enforced via habeas. *See, e.g.*, Ogbudimkpa v. Ashcroft, 342 F.3d 207, 218 n. 22 (3d Cir. 2003) ("We similarly find it unnecessary to consider the proposition that *habeas corpus* claims may be based on violations of treaties regardless whether the treaty is non-self-executing or self-executing.").

[174] *See, e.g.*, Wesson v. U.S. Penitentiary Beaumont, 305 F.3d 343 (5th Cir. 2002) (ICCPR); Garza v. Lappin, 253 F.3d 918 (7th Cir. 2001) (Statute of the Inter-American Commission on Human Rights).

[175] Stephen Vladeck has argued that "after *St. Cyr*, courts are on far shakier ground in barring the use of habeas to litigate claims under non-self-executing treaties." Stephen I. Vladeck, *Non-Self-Executing Treaties and the Suspension Clause After* St. Cyr. 113 YALE L. J. 2007, 2008 (2004).

[176] *See, e.g.*, *Hamdan v. Rumsfeld* 415 F.3d 33, 40 (D.C. Cir. 2005) ("The availability of habeas may obviate a petitioner's need to rely on a private right of action . . .") (citing Wang v. Ashcroft, 320 F.3d 130, 140-41 & n. 16 (2d Cir.2003)).

[177] United States v. Rauscher, 119 U.S. 407, 419 (1886) ("[C]ourts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of [the extradition] treaty.").

[178] *Id*. at 419.

criminal proceedings against him, as did the defendant in *Rauscher*.[179] Second, provided that all other remedies have been exhausted and that there are no procedural bars, a prisoner may file a habeas petition alleging that his detention or sentence violates the terms of the relevant extradition treaty. This is not a mere theoretical possibility. Petitioners have, indeed, used the habeas petition to argue that their convictions violated extradition treaties in cases involving the rule of specialty announced in *Raushcer*,[180] forcible kidnapping,[181] and the imposition of a life sentence.[182]

Although most such claims have been unsuccessful, courts have accepted that petitioners may use a habeas petition to enforce their rights under an extradition treaty. In *Benitez v. Garcia*, for instance, a Ninth Circuit panel held that a sentence violated the terms of an extradition treaty and granted the petitioner's habeas request.[183] Benitez, a Mexican citizen that had fled to Venezuela, was extradited to the United States pursuant to an extradition treaty with Venezuela and sentenced to fifteen years to life for murder by a California trial court. He petitioned for a writ of habeas corpus, arguing that his sentence violated an extradition decree from the Supreme Court of Venezuela when it had approved the extradition. That decree stated that Benitez could not receive the death penalty or be sentenced to more than 30 years if convicted.[184] In 2006, the Ninth Circuit granted Benitez's habeas petition, finding that the extradition treaty was clearly established federal law and that it limited the punishment that Benitez could receive to that specified as part of his extradition under the treaty.[185] A year later, however, the court withdrew the opinion and substituted it with one denying the petition.[186] In this subsequent opinion, it reasoned that because the decree of the Venezuelan Supreme Court was unilaterally imposed and not negotiated, Benitez's sentence did not violate the extradition treaty.[187]

Beyond extradition treaties, federal courts have allowed plaintiffs to use habeas corpus to bring suits based on violations of other treaties. For instance, the Seventh Circuit recently vacated a district court's dismissal of a habeas petition

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[179] *See* Part II.B, *infra*, for a discussion of the defensive use of treaties.
[180] Gallo-Chamorro v. United States, 233 F.3d 1298, 1305 (11th Cir. 2000).
[181] Kasi v. Angelone, 300 F.3d 487, 492 (4th Cir. 2002).
[182] Benitez v. Garcia, 495 F.3d 640 (9th Cir. 2007).
[183] Benitez v. Garcia, 449 F.3d 971, 972 (9th Cir. 2006), *superseded by* 495 F.3d 640 (9th Cir. 2007).
[184] *Id.* at 973.
[185] *Id.* at 977. The case was governed by the standards set forth under AEDPA. *See supra*, note 147.
[186] The Court offered no explanation for the substitution in its *per curiam* opinion. *Benitez*, 495 F.3d 640.
[187] *Benitez*, 495 F.3d at 645.

alleging a violation of Article 36 of the VCCR in *Osagiede v. United States*.[188] Osagiede, a Nigerian alien, was arrested for heroin distribution and was not informed of his right to contact his consulate under Article 36 of the VCCR. At trial, he was convicted. Subsequently, Osagiede filed a *pro se* habeas motion to vacate his sentence on the grounds that his counsel was ineffective for failing to seek a remedy at trial for the Article 36 violation. The Seventh Circuit held that Osagiede was entitled "to an evidentiary hearing to determine whether he [was] prejudiced by the failure to invoke the Convention."[189] In support of its holding, the court stated that, contrary to the government's claim, "a reasonable Illinois lawyer would have known that this Court has never held that Article 36 did not create individual rights; instead, we have always assumed that it did."[190] Because the Seventh Circuit assumed that the VCCR was self-executing and that it conferred private rights on individuals, it held that the petitioner should be able to use habeas to make a VCCR-based claim.[191]

Plaintiffs have also sought to use habeas petitions to allege that their rights under the Geneva Conventions were violated when they were held as enemy combatants.[192] It remains unsettled whether this sort of action is possible, because the federal courts are still in disagreement over whether the Geneva Conventions are self-executing. In *Hamdi v. Rumsfeld*, the Fourth Circuit rejected the plaintiff's attempt to bring a Geneva Conventions claim via habeas petition, concluding that the treaty was not self-executing.[193] In *Hamdan*, the D.C. Circuit similarly concluded that the Geneva Conventions were not enforceable courting federal court.[194] The Supreme Court has yet to issue a decision on the matter. In *Hamdan*, the Court ultimately ruled in favor of the plaintiff on the merits and found that President had violated Article 3 of the Geneva Conventions,[195] but found it unnecessary to decide whether the Geneva Conventions were self-

[188] 543 F.3d 399 (7th Cir. 2008). Unlike *Medellín v. Texas*, 128 S.Ct 1346 (2008), *Osagiede* did not involve the application of state procedural default rules or an attempt to enforce a judgment of the ICJ.
[189] *Id.* at 412-13.
[190] *Id.* at 409-10.
[191] The court noted its earlier decision in *Jogi*, 480 F.3d 822 (7th Cir. 2007). For discussion of *Jogi*, see *supra* Part I.B.3, which postdated the action at issue in the case. In *Jogi*, the Seventh Circuit held that § 1983 provided the relevant private right of action. In *Osagiede*, the court appears to assume that the habeas petition serves the same function.
[192] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[193] Hamdi v. Rumsfeld, 316 F.3d 450, 468-69 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004). The Supreme Court did not reach this issue on appeal.
[194] Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir 2005), *rev'd*, 548 U.S. 557 (2006).
[195] *Hamdan*, 548 U.S. at 630.

executing in order to reach that holding.[196] If the Court were to conclude that the Conventions were self-executting, habeas might become a far more effective method of treaty enforcement.

Enforcement of the Geneva Conventions through habeas appeared to have been obviated for some time by section 5 of the Military Commissions Act of 2006 (MCA),[197] which provided that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding . . . as a source of rights in any court of the United States or its States or Territories."[198] The constitutionality of this provision remains a topic of ongoing dispute.[199] However, the Military Commissions Act of 2009[200] amended this provision to state that "[n]o alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a *private right of action*."[201] Under the amended law, enforcement of the Conventions through habeas remains a possibility, because the habeas corpus statutory provisions can provide the relevant right of action.

B. Defensive Enforcement

Up until this point, we have been discussing offensive enforcement of treaties by private individuals. As we have shown, Section 1983 and the habeas statutes may supply the relevant right of action for claims brought under treaties that otherwise confer private rights. Now, we turn to the defensive enforcement of treaties. A treaty may also be invoked defensively by a private party if a private individual is prosecuted or sued under a statute that is inconsistent with a treaty provision. The defensive enforcement of treaties can be found in two types

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[196] *Id.* at 627-28. *See generally* Carlos Vazquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 73-76 (2007). Section 948b(g) of the Military Commission Act of 2006, 10 U.S.C. §§ 948a-950w (2006), provides that "no alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."

[197] Military Commissions Act of 2006, §5(a), Pub. L. 109-366, 120 Stat. 2600, 2631.

[198] Vazquez, *supra* note 196, at 87. *See also* Noriega v. Pastrana, 564 F.3d 1290, 1295-96 (11th Cir. 2009) ("We find it unnecessary to resolve the question of whether the Geneva Conventions are self-executing, because it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty."). Vazquez disagrees with this interpretation in part because the MCA does not purport to bar the domestic effect of the Geneva Conventions in all forums. Vazquez, *supra* note 196, at 88.

[199] *See* International Law Experts Brief, Kiyemba v. Obama, at 18. Noriega v. Geroge Pastrana, 559 U.S. __ (2010) (dissent from denial of certiorari).

[200] Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2190.

[201] 10 U.S.C. §948e (2009) (emphasis added).

of cases. In the first, a private party seeks to use the treaty to defend against a claim by the United States government. In the second, a private party seeks to use the treaty to defend against a claim by another private party under state or federal law.

Defensive enforcement is generally permitted even for treaties that do not provide private rights of action or even confer private rights. That is because the individual enforcing the treaty is already in court and a cause of action exists independently of the treaty.[202] While few courts have addressed the difference between defensive and offenses uses of treaties expressly,[203] case law is consistent with this understanding that a treaty may be enforced defensively even when there is no private right of action.[204]

The Supreme Court first considered an individual's attempt to invoke a treaty to bar a prosecution in 1886. In *United States v. Rauscher*,[205] the Court concluded that the provisions of an extradition treaty, permitting prosecution for certain enumerated crimes on which the extradition request was based, could serve as a defense to the government's attempt to prosecute a defendant for another crime not specified in the extradition treaty.[206] Although Rauscher was extradited to the United States upon a charge of murder, the indictment substituted a charge of cruel and unusual punishment for the murder charge. The Court held that he could not be prosecuted for this alternative charge not specified

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[202] Other commentators have noted that a treaty may be enforced defensively by a private party even if the treaty does not contain a private right of action. *See, e.g.*, Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143-44 (1992) ("A right of action is not necessary to invoke a treaty as a defense."); Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts--Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401, 1448-63 (1996) ("a defendant being prosecuted or sued under a state or prior federal law that is inconsistent with a treaty is entitled to invoke the treaty in court to nullify the state or federal law without having to show that the treaty confers a private right of action").

[203] The Southern District of New York briefly explored the distinction in *Indemnity Insurance Co. of North America v. Pan American Airways*. 58 F. Supp. 338, 339-40 (S.D.N.Y. 1944).

[204] Whether it must be self-executing or not is a matter of some dispute. Some commentators have suggested that a treaty may be enforced defensively by a private party even if it is not self-executing, though it is not yet a matter of consensus. David Sloss argues that non-self-execution declarations of the Race Convention, the ICCPR, and the Torture Convention were adopted to clarify that the treaty makers intended for the human rights treaties not to create a private right of action in U.S. courts for certain treaty rights, rather than to bar judicial remedies altogether. David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1111-23 (2000).

[205] 119 U.S. 407 (1886).

[206] *Id.* at 422. The *Rauscher* Court discussed domestic legislation bolstering its conclusion that an extradited party could not be tried for any offense other than that charged in the extradition proceedings. However, the Court did not seem to view the statutes as necessary to reach its decision.

in the treaty. During its analysis, the Court did not consider whether the treaty created individual rights and indeed the extradition treaty at issue focused primarily on the rights and obligations of nations regarding extradition.[207]

Several decades later, during the Prohibition-era, the Court held that a treaty that limits the jurisdiction of the United States could be invoked in a defensive posture by an individual to challenge the trial court's jurisdiction in a federal prosecution. In *Cook v. United States*,[208] the government seized a British vessel eleven and one half miles from the U.S. coast that was discovered carrying unmanifested liquor. The seizure was made pursuant to Section 581 of the Tariff Act of 1922 which permitted officers of the Coast Guard to stop and board any vessel at any place within twelve miles of the United States coast to examine the manifest and to inspect and search the merchandise.[209] Subsequently, the shipmaster, Cook, was fined for the failure to include the liquor in the manifest. Although the seizure was lawful under the terms of the Tariff Act, it occurred beyond the territorial limits permitted under a 1924 treaty between the United States and Britain. Cook raised the treaty to challenge the trial court's jurisdiction, arguing that it had modified the Tariff Act of 1922.

The Court had previously held that a court's power to try a defendant is not ordinarily affected by the manner in which the defendant is brought to trial.[210] However, the Court distinguished this doctrine, known as the *Ker-Frisbie* rule, stating that "[t]he objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made," but that, "[o]ur government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws."[211] This conclusion had been suggested by the Court in *Ford v. United States*, decided a few years prior to *Cook* and concerning the same treaty.[212] Although the convictions of the defendants in *Ford* were affirmed because they had not timely raised the jurisdictional defense, the Court stated that a seizure in violation of a treaty presented questions distinct from the *Ker-Frisbie*

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[207] In this respect, the defendant's attempt to invoke a treaty-based defense is similar to Medellín's attempt to enforce Article 94(1) of the United Nations Charter in U.S. courts. Indeed, the *Medellín* dissent cited the case as having involved a treaty provision similar to Article 94 of the U.N. Charter that the Court has found to be self-executing. *Medellín*, 128 S. Ct. at 5, 1385 (Breyer, J., dissenting).

[208] 288 U.S. 102 (1933).

[209] *Id.* at 107.

[210] *See* Frisbie v. Collins, 342 U.S. 519 (1952). The Court applied the *Ker-Frisbie* doctrine in *United States v. Alvarez-Machin*, 504 U.S. 655 (1992).

[211] *Cook*, 288 U.S. at 122.

[212] 273 U.S. 593, 605-06 (1927).

doctrine. As in *Rauscher*, the treaty in *Cook* and *Ford* did not concern the rights of individuals, but rather the obligations of the state parties.[213]

Both *Rauscher* and *Cook* were decided in the pre-World War II era, but the doctrines established in these cases continue to be treated as good law.[214] Thus, these cases may be read to support the proposition that a treaty may be enforced defensively by an individual who is prosecuted by the government, even if the treaty does not give rise to private rights or create a private right of action.[215]

Neither case addressed the question of whether a non-self-executing treaty may be invoked by an individual in a defensive posture. Both treaties at issue in the cases were found to be self-executing and therefore the issue was not presented. The *Cook* Court stated that the treaty between the United States and Britain was self-executing and therefore superseded the terms of an inconsistent federal statute.[216] While the *Rauscher* Court did not use the term "self-executing," it did engage in an analysis of whether the extradition treaty under consideration was directly enforceable in U.S. courts.[217]

The Fifth Circuit has also recognized defensive enforcement of a treaty, but has apparently limited this mode of enforcement to self-executing treaties—at least where the treaties limit the jurisdiction of domestic courts. In *United States v. Postal*, decided in 1979, two individuals were arrested aboard a foreign vessel that was seized beyond the twelve-mile limit in violation of the Convention on the High Seas. Marijuana was discovered on board and the two individuals were convicted of conspiring to import marijuana into the United States.[218] The defendants raised the violation of the Convention as a jurisdictional defense to

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[213] Article I provided that, "The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low-water mark constitute proper limits of territorial waters." *Cook*, 288 U.S. at 110.

[214] *See* Part II.A.3, *supra*, for a discussion of *Rauscher* and the doctrine of specialty.

[215] Several other Supreme Court cases have considered defensive uses of treaties. In *Kolovrat v. Oregon*, a case decided after World War II, the Court held that an FCN treaty that provided reciprocal rights of inheritance to citizens of the United States and Yugoslavia could serve as a defense to a state's action for escheatment to obtain the land of an intestate decedent whose only next of kin lived in Yugoslavia. The Court never discussed nor considered whether the treaty in *Kolovrat* created private rights. 366 U.S. 187 (1961). In some cases, the Court has rejected a treaty defense on its merits. *See, e.g.*, *Patsone v. Pennsylvania*, 232 U.S. 138 (1914); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982). Notably, the majority in *Medellín* cited *Kolovrat* and *Sumitomo Shoji America, Inc.* as examples of Friendship, Navigation, and Commerce treaties that the Court has found to be self-executing based on the language of the treaties. 128 S. Ct. 1346, 1365-66 (2008). *Patsone*, which involved a treaty granting reciprocal rights to citizens of Italy and the United States, would fall into the same category. 232 U.S. 138, 145-46.

[216] *Cook*, 288 U.S. at 119.

[217] 119 U.S. 407, 410-11, 429-30 (1886).

[218] 589 F.2d 862 (5th Cir. 1979).

their prosecution. The Court read *Ford* and *Cook* "to stand for the proposition that self-executing treaties may act to deprive the United States, and hence its courts, of jurisdiction over property and individuals that would otherwise be subject to that jurisdiction."[219] It explained, however, that "treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature self-executing."[220] Because the Court found that the Convention on the High Seas was not self-executing, it held that the defendants could not rely upon it "as a defense to the court's jurisdiction."[221] The Fifth Circuit's discussion regarding self-execution was limited to treaties that limit the jurisdiction of U.S. courts. The reasoning, however, could be applied more broadly to the defensive enforcement of treaties as a whole.

The Supreme Court has also recognized a treaty-based defense in a private lawsuit. In *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, the Supreme Court considered whether an airline could enforce a treaty defensively when sued by a private individual under state law. The plaintiff, a passenger, had been subjected to an intrusive security search before boarding an El Al Israel Airlines flight from New York to Tel Aviv and subsequently sued El Al Israel Airlines for damages, asserting a state-law personal injury claim.[222] The Court held that Article 17 of the Warsaw Convention precluded a passenger from maintaining an action for damages under state law when the passenger's claim did not satisfy the conditions for liability under the Convention.[223] Although previously the Court had held that the Convention gives rise to a private right of action for individual passengers,[224] its decision to permit the Warsaw Convention to limit the conditions of liability under state law did not turn on an interpretation of the individual rights of airlines under the treaty. Rather, the opinion focused on the drafting history and purpose of the Warsaw Convention.[225] It permitted the Convention to serve as a defense in the same manner as a federal law.

Similarly, in the context of private lawsuits, the Second Circuit's recent decision in *Brzak v. United Nations*[226] is in accordance with *Postal* and *El Al Israel Airlines*. In *Brzak*, two United Nations High Commission for Refugees (UNHCR) employees sued the United Nations and three former United Nations

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[219] *Id.* at 875.
[220] *Id.*
[221] *Id.* at 884.
[222] 525 U.S. 155, 160 (1999).
[223] *Id.* at 176.
[224] *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984).
[225] The Court reasoned that "[r]ecourse to local law . . . would undermine the uniform regulation of international air carrier liability that the Warsaw Convention was designed to foster." *El Al Israel Airlines*, 525 U.S. 155, 161 (1999).
[226] 597 F.3d 107 (2d. Cir. 2010).

officials, alleging sex discrimination and retaliation in violation of federal law, as well as various state common law torts. The defendants raised the Convention on Privileges and Immunities of the United Nations (CPIUN) as a defense, a treaty that the United States has ratified that extends immunity from suit to the United Nations and diplomatic envoys. The Court stated that whether the CPIUN applied to bar the suit turned on whether it was self-executing.[227] Relying primarily on the negotiation and ratification history, the court concluded that the CPIUN was self-executing and thus enforceable in court. In reaching this conclusion, the Court did not find it necessary to determine whether the treaty conferred private rights.

C. Interpretive Enforcement

Courts often look to treaties when interpreting statutes and, more controversially, constitutional provisions. In *Murray v. Schooner Charming Betsy*, Chief Justice Marshall wrote for the Court: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."[228] This principle, now known as the *Charming Betsy* canon, animates the Restatement (Third) of Foreign Relations Law, which states: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[229] We call this principle interpretive enforcement.

Like other interpretive canons, interpretive enforcement is a device for resolving ambiguity.[230] It uses the international legal commitments of the United States to fill interpretive gaps and resolve uncertainty that would otherwise exist in statutory provisions. The canon does not encourage courts to turn a blind eye to

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[227] *Id.* at 111.

[228] 6 U.S. (2 Cranch) 64, 118 (1804). This concept was first described three years earlier. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801) ("[T]he laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law.").

[229] RESTATEMENT, *supra* note 27, at § 114. *See* also Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 909 n.75 (2005). "[R]eferences to this canon of statutory construction often equate Marshall's reference to the law of nations with international law."

[230] There are a wide range of similar substantive interpretive canons in U.S. law. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 884 (4th ed. 2007). An excellent discussion of the *Charming Betsy* canon appears in Rebecca Crootof, *Judicious Influence: How Non-Self-Executing Treaties Affect Domestic Decisions*, YALE LAW JOURNAL (forthcoming 2010).

the evidence. Far from it. If there is clear evidence that the statute was intended to permit a violation of international law—such as statutory text or legislative history—then the canon is inapplicable.[231]

Using interpretive enforcement, courts may enforce international law by interpreting a statute so as not to conflict with an earlier treaty or other international agreement—whether self-executing or not.[232] In *Trans World Airlines, Inc. v. Franklin Mink Corp*, for example, the Court refused to interpret the Par Value Modification Act in a way that would render an Article II treaty unenforceable in the United States. It explained, "There is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."[233] The Court concluded: "Legislative silence is not sufficient to abrogate a treaty."[234]

Similarly, in *McColluch v. Sociedad Nacional de Marieneros de Honduras*, the Supreme Court engaged in interpretive enforcement when it found that the U.S. National Labor Relations Board did not have jurisdiction over labor disputes on vessels flying a foreign flag. In arriving at that conclusion, the Court expressly quoted the *Charming Betsy* admonition against construing an act of Congress to violate the law of nations "'if any other possible construction remains'"[235] It concluded: "[F]or us to sanction the exercise of local sovereignty . . . in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.'"[236] Since it was unable, "to find any such clear expression," it held that jurisdiction did not extend to the ship, consistent with the Treaty of Friendship.

Interpretive enforcement occurs, as well, in cases that do not expressly reference the *Charming Betsy* canon. For example, in *Cook v. United States*, the Court held that the re-enactment of prior statutes that were in conflict with an intervening treaty did not reflect a congressional purpose to supersede the international agreement.[237] The Court reasoned that "[a] treaty will not be deemed

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[231] If the statute cannot fairly be construed in such a way, it renders the conflicting sections of the treaty unenforceable under domestic law. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 376 (1998); Reid v. Covert, 354 U.S. 1, 18 (1957); RESTATEMENT, *supra* note 27, at 115(1)(a).

[232] *See* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); United States v. Georgescu, 723 F. Supp. 912, 921 (E.D.N.Y. 1989); United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988); Cook v. United States, 288 U.S. 102, 120 (1933); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); McColluch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963).

[233] 466 U.S. 243, 252 (1984) (quoting Cook v. United States, 288 U.S. 102, 120 (1933)).

[234] Id. (citing Weinberger v. Rossi, 456 U.S. 25, 32 (1982)).

[235] 372 U.S. 21 (quoting Charming Betsy, 2 Cranch 64 (1804)).

[236] *Id.* at 21-22 (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1058)) (citations omitted).

[237] 288 U.S. 102 (1933).

to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."[238]

Interpretive enforcement may extend to non-self-executing treaties, as well as self-executing ones. As scholar and former State Department counselor Sarah Cleveland has put it, non-self-executing treaties "can be the basis for . . . the construing of a statute to comport with the United States's international obligations."[239] This view is reflected in a recent case, *Khan v. Holder*.[240] In that case, Anjam Parvez Khan's application for asylum in the United States was denied by an immigration judge because he had engaged in terrorist activity, which was grounds for dismissal under the Immigration and Nationality Act (INA). Among other things, Khan argued that the 1967 United Nations Protocol Relating to the Status of Refugees "compel[led] a narrower definition of 'terrorist activity'" than that provided in the statute.[241] After noting that the Protocol was not self-executing and thus did not carry the force of law,[242] the Ninth Circuit stated that the Protocol still could influence the interpretation of a statute:

> Under *Charming Betsy*, we should interpret the INA in such a way as to avoid any conflict with the Protocol, if possible. Khan's argument that the terrorism bar violates the obligations of the United States in the Protocol fails because the Protocol does not conflict with the INA's definition of "terrorist activity."[243]

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[238] *Id.* at 120. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (stating that there is "a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action" and finding that a domestic law did not repeal a self-executing treaty); Clark v. Allen, 331 U.S. 503, 509-10 (1947) (holding that the national policy, as expressed by the Trading with the Enemy Act, as amended, was not incompatible with the treaty-granted rights of inheritance granted to German aliens and that treaty provisions were not necessarily invalidated by the outbreak of war); Liberato v. Royer, 270 U.S. 535, 538 (1926) (holding that the Workman's Compensation Act was not in conflict with a treaty with Italy); Chew Heong v. United States, 112 U.S. 536, 539-40 (1884) (holding that later immigration law did not have an effect on the treaty right of resident Chinese aliens to reenter the country); United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491, 496 (1883) ("The laws of congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language.").

[239] Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 118 (2006) (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

[240] No. 07-72586, 2009 WL 2871222, 9 (9th Cir. Sept. 9, 2009).

[241] *Id.* at *7.

[242] *Id.* at *8.

[243] *Id.* at *9.

This reading is consistent with the interpretive enforcement paradigm—it avoids placing the United States into violation of its international legal commitments unless the political branches make clear their intention to do so.

More controversially, courts may engage in interpretive enforcement of international law when interpreting the Constitution. There is a long-raging debate over the proper use of international law in constitutional interpretation that we do not wish to replay. We only note here that the debate thus far has relatively little to do with the interpretive enforcement of U.S. legal commitments that we discuss here. Proponents and critics alike have pointed to *Roper v. Simmons* as the exemplar case in the debate.[244] That case, however, did not involve interpretive enforcement of international law. There was no international legal commitment of the United States under discussion in the case.[245] Several international conventions were cited, but only to demonstrate "the overwhelming weight of international opinion against the juvenile death penalty"[246] The Court was thus looking to international practice—including foreign law, foreign practice and treaties not ratified by the United States—for insight on difficult questions, much in the way it might use an academic book or article for similar guidance. It was not, however, engaging in interpretive *enforcement*, which can only occur where there is a U.S. treaty commitment to enforce. And that requires a directly relevant treaty duly approved by the political branches. It further requires no contrary constitutional text or other clear evidence that the relevant constitutional provision is best read to permit or require a violation of the U.S.'s international legal obligations under the relevant ratified treaty.

III. HOW TO STRENGTHEN INTERNATIONAL LAW AT HOME

[244] 543 U.S. 551 (2005). Other cases that arguably take a similar approach include *Atkins v. Virgina*, 536 U.S. 304, 316 n.21 (2002) ("within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelming disapproved") (citing Brief of Amicus Curiae the European Union in Support of Petitioner at 4); *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988) (plurality) (citing two treaties prohibiting juvenile death penalty that the United States had signed but not ratified and a third that the U.S. had ratified but that applied only in times of armed conflict and therefore was not directly relevant to the facts of the case); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (considering treaties as evidence of "evolving standards of decency that mark the progress of a maturing society").

[245] The majority opinion included a brief discussion of the International Covenant on Civil and Political Rights, but not in the mode of interpretive enforcement. To the contrary: The Court was simply refuting a claim that the 1992 U.S. reservation to Article 6(5) of the Covenant could be read to support petitioner's claim that there was no consensus against capital punishment for juveniles in 2005. *Id*. at 567. The Court also cited several conventions that the United States had not ratified to demonstrate an international consensus against the juvenile death penalty. *Id*. at 576.

[246] *Id*. at 577.

The courts of the United States are today less willing than at any previous time in history to directly enforce the Article II treaty obligations of the United States through a private right of action. The decline of such enforcement began in the post-World II era, but reached its peak only recently as lower courts have begun treating the *Medellin* Court's statement of a "background presumption" against finding that treaties create private rights as universal. The gap left by the decline in direct enforcement has been filled in part by indirect enforcement, defensive enforcement, and interpretive enforcement. Yet there is more that can be done to ensure that once the United States makes an international legal commitment, it is able to honor that obligation.

Here we offer three proposals to ensure that the United States' Article II treaty commitments may be more effectively enforced in U.S. courts.[247] First, Congress could pass legislation that provides for the judicial enforcement of Article II treaties. Alternatively, the President and Congress could make individual international treaty obligations through the ordinary legislative process rather than through Article II. Second, the executive branch could adopt a clear statement rule, which the Legal Advisor's Office of the State Department would apply to newly concluded treaties. Finally, the Executive Branch could enforce international treaty obligations by seeking injunctions against state and municipal agencies violating those obligations in cases where the United States risks being placed in violation of a national treaty obligation.[248]

A. Legislative Enactment

[247] A fourth possible method not discussed here is for the President to negotiate and sign a sole executive agreement expressly stating that the treaty may be enforced through private rights of action in domestic courts. Such agreements would be permissible, however, only when the treaty from which the President derives his authority expressly grants the President such authority. Cong. Research Serv., Treaties and Other International Agreements: The Role of the United States Senate, S. Prt. No. 106-71, at 86 (2d Sess. 2001), *available at* http://www.au.af.mil/au/awc/awcgate/congress/treaties_senate_role.pdf ("Numerous agreements pursuant to treaties have been concluded by the Executive, particularly of an administrative nature, to implement in detail generally worded treaty obligations.") [hereinafter CRS Treaties Report]; RESTATEMENT, *supra* note 27, § 115 cmt. c; *see id.* at § 303 cmt f (asserting that "an executive agreement pursuant to a treaty derives its authority from that treaty and has the same effect as the treaty to supersede an earlier inconsistent federal statute (or an earlier United States agreement) in United State law"); HENKIN, *supra* note 148, at 219 n. **("In such cases it is assumed that the Senate's consent to the treaty implies consent to supplementary agreements."). Yet even within this narrow scope, the precise legal status of such agreements remains in doubt.

[248] We focus here on proposals for improving the enforcement of Article II treaties. An alternative approach would be to conclude the agreements as ex post Congressional-Executive Agreements, as argued extensively in Hathaway, *supra* note 15.

It has long been clear that Congress can render a non-self executing treaty enforceable by passing implementing legislation. We propose that Congress harness this widely-accepted and uncontroversial rule by passing legislation declaring certain *classes* or *categories* of treaties self-executing and enforceable through private rights of action. For example, the statute might reference all private commercial law treaties, providing that they are heretofore to be deemed self-executing in U.S. through the use of a cause of action provided in the statute. As a variant of this approach, Congress could also use the "indirect enforcement" model described in Section II.A, enabling classes of treaties to be enforced through a new private right of action added to an existing statute. For example, Congress might amend the habeas corpus statutes to clarify that they provide a right of action for rights guaranteed by the Geneva Conventions.

We are by no means the first to advocate that Congress pass implementing legislation to resuscitate treaties that might otherwise be unenforceable in U.S. courts. The American Bar Association and American Society of International Law Joint Task Force on Treaties in U.S. Law,[249] for instance, have proposed a statutory mechanism to remedy situations in which there "is an imminent risk of breach" of a treaty because it has been deemed non-self-executing.[250] The Task Force was responding to the uncertainties created by the Supreme Court's decision in *Medellin*, and it sought to address the range of situations that "may occur in which obligations contained in a treaty . . . cannot be implemented domestically under existing legislation."[251] It proposed legislation that would "authorize the President to propose implementation measures that would have the effect of binding federal law."[252] The statute would also require Congress to consider the president's implementation proposals on an expedited basis, so that the problem could be cured quickly.[253]

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[249] ABA/ ASIL Joint Task Force on Treaties in U.S. Law, Report 1 (March 16, 2009), *available at* http://www.asil.org/files/TreatiesTaskForceReport.pdf.

[250] *Id*. at 15.

[251] *Id*. at 14. Throughout this paper, we have contended that these uncertainties existed prior to the *Medellin* decision.

[252] *Id.*

[253] The Task Force summarizes its legislative proposal as follows:

> [T]he proposed legislation sets up a mechanism under which the President could propose measures to implement a particular treaty obligation. Under the first alternative, there would be a waiting period before the measures become effective. During that period the Congress could overturn the measures by a joint resolution of disapproval, which would be considered under expedited procedures. Under the second alternative, the measures would not become effective unless a joint resolution of approval is enacted — i.e., the equivalent of new implementing legislation—but expedited procedures would be triggered for consideration of such legislation. This would, in effect, allow for the enactment of situation-specific implementing legislation on an expedited basis.

Congress is currently considering a bill that would render a more limited legislative fix to the enforcement problems surrounding the Vienna Convention on Consular Relations. The Consular Notification Compliance Act is pending, as of this writing, in the Senate Judiciary Committee.[254] The Act would ensure that rights to consular notice and access, protected by the Vienna Convention on Consular Relations, are enforceable in U.S. courts in two ways. First, there would be a retrospective remedy for all defendants who, as of the time of the bill's passage, had been sentenced to death by a U.S. court but had not received timely notice of his or her consular rights.[255] Under Section 4(a), individuals "convicted and sentenced to death by any Federal or State court" before the date of enactment of the bill would have 1 year to file a habeas petition, requesting judicial review of their capital sentences. If the court were to find that the defendant's consular rights had in fact been the VCCR in future cases, through filing motions during the early stages of their criminal trials claiming that their consular rights had been denied.[256] This proposed Act is a powerful example of Congress' capacity to create a legislative solution to allow the enforcement of treaties that might otherwise be unenforceable. The bill's retrospective provision would bring the United States into compliance with the International Court's decision in *Avena* by granting defendants collateral reviews to determine whether the denial of consular rights was prejudicial, the very remedy for which the *Avena* Court had called.[257] Meanwhile, the bill's prospective provision would authorize a "defensive"

Id. at 15. The Joint Task Force provides a draft of the statutory language in Appendix B of the Report. *Id*. at App. B 1.

[254] S. 1194 (June 14, 2011).

[255] *Id.* §4(a).

[256] *Id.* §4(b) (providing that any individual who is "arrested, detained, or held for trial on a charge that would expose the individual to a capital sentence . . . may raise a claim of a violation of Article 36(a)(b) or (c) of the Vienna Convention . . . before the court with jurisdiction over the charge" and that if the court finds that the VCCR has been violated, it "shall postpone any proceedings to the extent the court determines necessary to allow for adequate opportunity for consular access").

[257] *See Hearing on S.11994 Before Sen. Comm. on the Judiciary*, July 27, 2011, at 5-6 (statement of Deputy Assistant Attorney General Bruce C. Swartz). It is worth noting that the Act is already gaining attention in the courtroom. Humberto Leal Garcia, a Mexican national who had been denied his rights to consular notice and access as guaranteed by the Vienna Convention and was then sentenced to death for murder by a Texas court. After the International Court of Justice's decision in *Avena*, Leal petitioned the Supreme Court (with the United States government filing an amicus brief in his favor) arguing that his execution would amount to a breach of the United States' obligations under international law. Leal also argued that the Court should use its "All Writs" power to stay his execution until the fate of the Consular Notification Compliance Act was decided. The Court denied the petition on July 7, 2011. Garcia v. Texas, 564 U.S. _ (2011).

enforcement technique for Vienna Convention-based rights[258] similar to those described in Section II.B.

Our proposal builds on—and thus differs from—both the Joint Task Force proposal and the Consular Notification Compliance Act. First, we encourage the passage of statutes that address entire classes of treaties, rather than just a single treaty. While the Consular Notification Compliance Act demonstrates a Congressional effort to preserve the Vienna Convention's enforceability in U.S. courts and give effect to the International Court of Justice's judgment in *Avena*, the statute we have in mind could be more broad-reaching; it might, for example, declare that all bilateral investment treaties will be enforceable in domestic courts. Second, unlike the Joint Task force bill, our proposed legislation would not be crafted to address situations in which a risk of treaty breaches is imminent. The Task Force aims to addresses problems with treaty compliance as they arise, proposing that Congress create a new, expedited review procedure that would be triggered at the president's discretion. We agree with the Task Force that it is not practical to prospectively analyze all treaties to determine which provisions are non-self-executing and whether implementing legislation exists to execute these agreements, and then address these treaties individually. However Congress could prospectively address the judicial enforceability of certain classes of treaties or individual treaties of particular significance. This would have the advantage of providing greater certainty to parties—both state parties to the treaties and private actors affected by the agreement—that are otherwise uncertain about whether they may rely on the United States to meet the obligations.[259]

It is worth noting that our proposal and the Joint Task Force proposal are not mutually exclusive. Our broad-based proactive statutory approach could work in conjunction with the emergency statutory mechanism proposed by the ABA/ASIL Task Force. The Task Force proposal is primarily aimed at unforeseen situations in which there is an imminent risk of breach of an individual treaty. Our proposal, however, is best suited for classes of treaties that can be identified and prospectively addressed to avoid breach in advance.

One area that might be a focus of the breed of legislation we propose here is private commercial international law—particularly treaties of friendship, commerce, and navigation (sometimes concluded as treaties of "amity"). The recent shift against a presumption of self-execution has the potential to bring

[258] *Id.* at 6-7 (noting that the bill "shall not be construed to create any additional remedy other than possible postponement" of one's criminal trial "to allow an opportunity for consular notification and assistance").

[259] Our prospective approach would also avoid any possible legislative veto problem that might face a mechanism for ex post expedited bicameral review through a joint resolution of approval or disapproval. *INS v. Chadha*, 462 U.S. 919 (1983).

about serious consequences for these treaties—and therefore for the country's international commercial relations. Even during the post-World War II era, courts held that these private commercial law treaties created judicially enforceable private rights of action.[260] Recently, however, the D.C. Circuit threw this understanding into doubt when it held that the 1957 Treaty of Amity between the United States and Iran did not give rise to a private right of action.[261] This decision stands in stark contrast to earlier decisions considering the judicial enforceability of this and similar treaties,[262] and in the process upset settled expectations that such treaties would give rise to private rights of action. By passing a statute reaffirming the previously settled expectation that individual rights enumerated in friendship, commerce, and navigation treaties give rise to private rights of action in U.S. federal district courts, Congress could remove the cloud of uncertainty that now hangs over these treaties—many of which date to more than 100 years ago and form the backbone of longstanding commercial relationships.

Extradition treaties are another example of a class of treaties that should be targeted by our proposed statutory mechanism. Often relying on the Supreme Court's decision in *United States v. Rauscher*,[263] courts have assumed that extradition create private rights that may be enforced defensively, as in *Rauscher*, or in habeas petitions.[264] The Supreme Court explicitly held in *Rauscher* that "courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of [the extradition] treaty,"[265] and that decision has never been overturned. However, *Medellin* footnote 3 calls this conclusion into question. *Medellin* announced not only a presumption against

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[260] *See, e.g.*, Asakura v. City of Seattle, 265 U.S. 322 (1924) (holding that the Treaty of Amity between the United States and Japan "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts"). *See, e.g.*, Choi v. Kim, 50 F.3d 244 (3rd Cir. 1995) (holding that the FCN Treaty between Korea and the U.S. was enforceable in U.S. courts); Vagenas v. Continental Gin Co. 988 F.2d 104, 106 (11th Cir. 1993) (holding that the FCN Treaty between Greece and the U.S. was enforceable in U.S. courts).

[261] McKesson Corp v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008). For a discussion of the McKesson decision, see Part II.C.I, *supra*.

[262] *See supra* note 260; American Intern. Group, Inc. v. Islamic Republic of Iran, 493 F.Supp. 522, 525 (D.C.D. 1980). ("Plaintiffs can assert their rights to recover damages in this Court for violations of the Treaty and international law. First, the right of individuals and companies to enforce a private right of action in a United States court under the property protection provisions of a treaty of friendship, commerce, and navigation has consistently been upheld. . . . Second, since Article IV, paragraph 2 of the Treaty is self-executing, plaintiffs have a right of action before this Court.").

[263] For our discussion of courts' approaches to the enforcement of extradition treaties in habeas petitioner, see Part II.A.4.a, *supra*.

[264] *See, e.g.*, Gallo-Chamorro v. United States, 233 F.3d 1298, 1305 (11th Cir. 2000).

[265] *Rauscher*, 119 U.S. at 419.

finding that treaties give rise to private rights of action but also a presumption against finding that treaties create private rights.[266] While extradition treaties affect the rights of individual, they are not typically phrased to refer to individual rights. Rather, they refer to the relationship of the contracting parties – the states.[267] In this respect, an individual's attempt to invoke an extradition treaty in a habeas petition is similar to Medellin's attempt to enforce Article 94(1) of the United Nations Charter in U.S. courts. Indeed, the dissent in *Medellin* cited *Rauscher* as an example of a treaty provision similar to Article 94 of the U.N. Charter that the Court has found to be self-executing.[268] Given the risk of uncertainty and confusion in this area of law, a statute clarifying private rights arising under extradition treaties would be well advised.

This first proposal is primarily backward-looking. It aims to provide a practical, efficient, and politically-feasible solution to the uncertainty created by the Court's decision in *Medellin* for existing treaties. It is aimed, in particular, at treaties that have been assumed by parties and courts to be enforceable but which may not, in fact, be enforced by the courts post-*Medellin*. We now turn to a proposal that is primarily forward-looking. It offers the political branches a mechanism for preventing uncertainty about future enforcement of a treaty at the time of its creation.

B. Clear Statement Rule

In *Medellin*, the Supreme Court concluded that a treaty was not directly enforceable in court unless the treaty contains "explicit textual expression about self-execution."[269] Read in its most favorable light, the intuition behind this requirement is obvious: If the intention to make a treaty self executing is not clear from the text of the agreement, how does the court know that the political branches intended to adopt a self-executing treaty? We argue here, however, that the text is one guide to the intentions of the political branches, but it is not the only one. A clear statement by the President and the Senate indicating that they intend the agreement to be self-executing should be regarded as equally compelling evidence that the treaty was intended to be—and should be enforced by the courts as—the Supreme Law of the Land. We call this the Clear Statement Rule.

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[266] For explanation of the distinction, see Part II.A.3, *supra*.

[267] *See, e.g.*, Extradition Treaty Between the United States and Argentina [CITATION], which "follows closely the form and content of extradition treaties recently concluded by the United States." Letter of Submittal from the United States State Department to the President of the United States (July 9, 1997), *available at* http://www.oea.org/juridico/mla/en/traites/en_traites-ext-usa-arg.pdf.

[268] Medellin, 552 U.S. at 556.

[269] Medellin, 128 S.Ct. at 1361

In an ideal world, when a treaty is intended to be directly enforceable in U.S. courts, the treaty would include explicit language to that effect. This is possible in the context of bilateral treaties, for the United States has only a single other party with which it must negotiate the text.[270] But in the context of multilateral treaties with numerous signatory parties, including "explicit textual expression about self-execution" may be an impossible task. As scholars have observed and as Justice Breyer noted in his dissent in *Medellin*, every country has its own internal laws for how treaties become law domestically. It is for that reason that the conventional practice – at least for multilateral treaties – has been to *not* specify matters of self-execution in the text of the legal instrument itself.[271]

The Clear Statement Rule offers an alternative approach. Under the new Rule, when the President submits an Article II treaty to the Senate for its advice and consent, he will include a statement indicating whether the treaty is understood to be self-executing and judicially enforceable or not. If the treaty is declared to be non-self-executing, the statement will indicate how the treaty will be enforced instead. The Clear Statement would be embedded in a formal "Understanding" or "Declaration" that would be part of the treaty package approved by the Senate. Including such a statement would ensure that the Senate and President have a shared understanding of the terms of the agreement, and it would also provide clear notice to U.S. treaty partners.[272]

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[270] *E.g.* Treaty with United Kingdom Concerning Defense Trade Cooperation pmbl. 9, U.S.-U.K., June 21-26, 2007, *reprinted in* TREATY DOC NO. 110-7 (2007) ("*Understanding* that the provisions of this Treaty are self-executing in the United States . . . ."); Treaty with Australia Concerning Defense Trade Cooperation pmbl. 8, U.S.-Austl., Sept. 5, 2009, *reprinted in* TREATY DOC NO. 110-10, at 1-11 (2007) (same). However, even though these two bilateral treaties included statements of self-execution in their preambles, the Senate ended up conditioning ratification on declarations that the treatise were *not* self-executing. *See* Duncan Hollis, *A Head-Spinning Self-Execution Story*, OPINIO JURIS (Nov. 11, 2010), http://opiniojuris.org/2010/11/11/a-head-spinning-self-execution-story/. The outcome – treaties with a statement of self-execution in the text, coupled with declarations of non-self-execution attached by the Senate – creates a confusing landscape regarding the treaty's enforcement. While some scholars contend the Senate's intent should govern, *id.*, others might disagree. The whole episode suggests the wiser course of action might be for parties to avoid making statements about self-execution within a treaty's text altogether, and allow each treaty partner to include statements about self-execution or non-self-execution in their ratification documents. Our Clear Statement Rule would help facilitate the latter type of practice.

[271] *See* Curtis Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 543-544 (2008); Carlos M. Vasquez, *Treaties as Law of the Land: The Supremacy Clause and Judicial Enforcement*, 122 Harv. L. Rev. 599, 679-680 (2008). For Justice Breyer's endorsement of this position, see *Medellin*, 128 S.Ct. at 1381-82 (Breyer, J. dissenting).

[272] Such a practice seems to already be emerging. For example, a tax convention with Hungary on which the Senate Committee on Foreign Relations voted to recommend the Senate give its advice and consent included a declaration—highlighted and reaffirmed in the Senate Report—that the Convention "is self-executing, as is the case generally with income tax treaties." Tax Convention

Our proposed Clear Statement Rule builds on, but modifies, decades-long practices that many U.S. presidents have adopted when negotiating treaties. In 1977, President Carter submitted four human rights treaties to the Senate for its advice and consent, attaching proposed "Declarations" that announced those treaties to be non-self-executing.[273] The Senate granted its advice and consent to the treaties with the Declarations attached. Whatever the merits of the substantive decision to render the agreements non-self-executing, the addition of the Declarations had the virtue of eliminating any ambiguity regarding the enforceability of the treaties in U.S. courts. Thereafter, this became common practice for human rights treaties. Between 1977 and 2008, the Senate gave its advice and consent to numerous human rights treaties with declarations of non-self-execution appended.[274] Moreover, the President and Senate adopted this process for some non-human rights treaties as well.[275] Except for one well-known decision in the D.C. Circuit in the 1950s,[276] no federal appeals court has ever questioned the validity of a Declaration of non-self-execution.[277]

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with Hungary, Exec. Rept. 112-4, 112th Congress, 1st Sess. (Aug. 30, 2011), at 4-5, available at http://foreign.senate.gov/reports/.

[273] Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. DOC. NOS. C, D, E, F, 95-2, at VI, XVIII (1978) (stating that treaties were not self-executing).

[274] 1 MULTILATERAL TREATIES DEPOSITION WITH THE SECRETARY-GENERAL 179, 190, U.N. Doc. ST/LEG/SER.E/25, U.N. Sales No. E.07.V.3 (2007) (showing that the Senate added a declaration of non-self execution to the ICCPR in 1992); id. at 302 -305(same for the Convention Against Torture in 1994); id. at 138 (same for the International Convention on the Elimination of All Forms of Racial Discrimination in 1994); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 415–16, 419–22 (2000) (arguing that all human rights treaties since the 1970s have had such declarations). *But see* Rights of the Child treaty, EXEC. REP. NO. 107-4, at 16–18 (2002) (ratified by the Senate with no declaration regarding self-execution).

[275] 1 MULTILATERAL TREATIES DEPOSITION WITH THE SECRETARY-GENERAL, *supra* note 274, at 236, 240 (U.N. Convention Against Corruption); *see also* Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 137 ("Before *Medellín*, the Senate had utilized these formal non-self-execution declarations in connection with a few treaties outside the human rights area as well, but such declarations were uncommon.").

[276] Power Auth. of N.Y. v. Fed. Power Comm'n, 247 F.2d 538, 543–44 (D.C. Cir. 1957) (holding that the "Niagara Reservation" which was attached by the Senate to a U.S.-Canada treaty and declared the treaty to be non-self-executing, was a legal nullity because it was "purely domestic"; the court concluded that the treaty power only authorized the President and Senate to ratify mutual obligations with foreign parties, not to condition the domestic effects of those international agreements through declarations).

[277] *E.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004) (assuming in dictum that a declaration of non-self-execution attached to the ICCPR was legally valid); Auguste v. Ridge, 395 F.3d 123, 132, 140-42 (3d Cir. 2005) (assuming that the declaration of non-self-execution attached to the Convention Against torture was legally valid in U.S. courts); Vasquez, *supra* note 271, at 674 ("To date, the lower courts have enforced declarations of non-self-execution without

Declarations of self-execution (as opposed to non-self-execution) are admittedly a newer phenomenon. The President and Senate have begun to attach such declarations to treaties in the wake of *Medellin*,[278] but their legal validity has yet to be rigorously assessed by scholars and tested in court. Carlos Vasquez has documented that in 2008, over a dozen treaties were ratified with affirmative Declarations of self-execution,[279] and some Declarations even made the important but subtle distinction between self-execution and judicially enforceable rights.[280]

The question remains, however, whether such statements are constitutional. The constitutional concern focuses on a small slice of treaties. It focuses in particular on situations in which a declaration of self-execution would enhance the domestic effect of treaties beyond that required by the treaty, turning an agreement that is by its own terms non-self-executing into a self-executing

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pausing to consider their validity."). There is an active scholarly debate about the validity of such declarations and reservations. *See, e.g.*, Vasquez, *supra* note 271, at 683 (2009) (arguing that "U.S. treatymakers have the power to "unilaterally" limit the domestic judicial enforceability of the treaties they conclude" through reservations and declarations of non-self-execution, but only as a function of the "reservations" practice at the international level under the Vienna Convention); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV L. REV. 1867, 1929 (2005) (arguing that in certain instances, when "the treaty power overlaps with Congress's enumerated powers," "the greater power to make self-executing treaties includes the lesser power to leave the implementation of a treaty to Congress"); Bradley & Goldsmith, *supra* note 274, at 415–16, 419–22 (arguing that the Senate and President have a broad constitutional power to limit the domestic effect of treaties as a part of the Treaty Clause power); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK J. INT'L L. 277 (1995); Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GW J. INT'L L. & ECON. 49, 64 (1997); HENKIN, *supra* note 148, at 202 (arguing that the practice of non-self-execution declarations "is 'anti-Constitutional' in spirit and highly problematic as a matter of law").

[278] *See, e.g.*, Tax Convention with Hungary, Exec. Rept., *supra* note 272, at 5 ("The committee has included one declaration in the recommended resolution of advice and consent. The declaration states that the Convention is self-executing, as is the case generally with income tax treaties."). *See also* Bradley, *supra* note 275, at 139 (noting that since *Medellin*, "the Senate has for the first time been attaching *self-execution* as well as non-self- execution declarations to its advice and consent to some treaties").

[279] Vasquez, *supra* note 271, at 670. Early examples of this new practice can be found at 154 Cong. Rec. S9328–S9332 (daily ed. Sept. 23, 2008) (senatorial advice and consent for mutual legal assistance, extradition, and tax treaties, containing a declaration for each one stating that, "This Treaty is self-executing."); S. EXEC. REP. No. 110-17, at 7 (2008); S. EXEC. REP. No. 110-16, at 8 (2008); S. EXEC. REP. No. 110-15, at 10 (2008); S. EXEC. REP. No. 110-14, at 6 (2008); S. EXEC. REP. No. 110-13, at 11–21 (2008); S. EXEC. REP. NO. 110-12, at 10–20 (2008)).

[280] *See, e.g.*, S. EXEC. REP. No. 110-22, at 14 (2008) ("With the exception of Articles 7 and 8, this Protocol is self-executing. This Protocol does not confer private rights enforceable in United States courts.").

agreement.[281] This would be problematic for two chief reasons. First, it would permit the federal government to use the Treaty Clause power to make domestically enforceable law beyond the bounds of the enumerated powers *without* the full agreement of a foreign government to those terms. In effect, then, it might be seen as an effort to expand the Treaty Clause power of the federal government vis-à-vis the state governments, effectively giving the federal government greater scope to legislate than is constitutionally permissible.[282] Second, such a declaration of self-execution could represent an effort by the Senate and President to usurp the power to make federal law without the participation of the House of Representatives. True, the Constitution grants them the power to make treaties without the House, but it does so for reasons specifically connected to the process of making international agreements. And that power is limited in scope by the necessity of gaining a commitment on the part of another state.[283] If a unilateral statement of self-execution effectively expands the commitment made in the agreement, the argument goes, it expands the federal legal commitment beyond that contemplated in the Constitution.[284]

These arguments are not to be dismissed lightly. But it is important to recognize their scope. The objections apply only to statements that effectively *expand* the legal commitment beyond that contemplated in the international agreement. There is no evidence that the declarations of self-execution have been used in this manner. Similarly, our Clear Statement Rule is intended not to expand the legal obligations beyond those in the agreement but to clearly state that the agreement is understood by the President and Senate to be judicially enforceable. In effect, where there is a Clear Statement, it operates to flip back the presumption in favor of self-execution. If the text of the treaty unambiguously intends action by the political branches before enforcement—for example, if the treaty expressly requires states to implement the agreement through legislative action—then a Clear Statement that the non-self-executing terms of the treaty are self-executing would not be appropriate (though implementing legislation to make these terms enforceable would be). If, however, the text leaves room for doubt—

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[281] Carlos Vazquez provides a thoughtful analysis of this issue. Vasquez, *supra* note 271, at 685-94 (arguing, *inter alia*, that if *Medellin* is read to establish a default rule that treaties are not self-executing, then "the declarations would . . . purport to "make" federal law"; and the declarations would be unconstitutional under the separation-of-powers principles, because "the President and Senate do not have the power to make federal law by themselves.").

[282] *See Missouri v. Holland*, 252 U.S. 416 (1920).

[283] For more on the origins of the Treaty Clause, see Hathaway, *supra* note 15.

[284] *See* Vázquez, *supra* note 271, at 687-88. *But see* Bradley, *supra* note275, at 149 & 154 (arguing "recent *self-execution* declarations attached by the Senate" should be deemed constitutionally valid because the intent of the U.S. treaty-makers, not the collective intent of the treaty parties, should govern).

if, for example, it provides that states shall "undertake to comply,"[285] then a Clear Statement that the treaty is self-executing should be treated with deference by the courts.

As an alternative to our Clear Statement Rule, the President could also submit a treaty to the Senate with a weaker statement about the treaty's self-executing nature. Rather than be part of the treaty package to which the Senate grants its advice and consent, this statement would—along with any congressional response—become part of the treaty's legislative history, to which a court could refer in seeking to understand the intent of the political branches. Such an approach would be less ideal than the Clear Statement Rule, but it would offer another avenue for the president to clarify his expectations about a treaty's enforceability early on.

There has been a lengthy scholarly debate over whether presidential signing statements should be considered part of a statute's legislative history.[286] Some scholars argue in favor of looking to presidential signing statements when interpreting statutes, given that the President plays a key role in the legislative process under the Presentment Clause and that he is therefore part of a statute's "enacting coalition."[287] Critics, meanwhile, regard presidential signing statements as an unlawful expansion of the President's veto power from the right to say "yes"

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[285] This is the treaty language at issue in *Medellin*. Some might argue that this language unambiguously requires the political branches to act, but even the majority opinion in the case found it necessary to go beyond the text. Although the Court found that the treaty was not self-executing, it did so by applying a presumption against self-execution. Under our proposal, if there was a Clear Statement of self-execution, then the presumption would be flipped, and the ambiguity resolved in favor of self-execution, rather than against it.

[286] In 2006, the American Bar Association issued a report declaring that President Bush's use of signing statements was threatening the rule of law. *See* Am. Bar Ass'n Task Force on Presidential Signing Statements & the Separation of Powers Doctrine (2006), http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf. By 2007, President Bush had in fact issued 118 signing statements challenging some provision of a law he had signed. *See id*. Senator Arlen Specter responded with a bill that would have prevented courts from looking to presidential signing statements when interpreting statutes. The Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. §4 (2006). Despite the controversy, lower courts have occasionally looked to such statements. *See* United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989) (deferring to a presidential signing statement on the grounds that "the Executive Branch participated in the negotiation of the compromise legislation"); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 376 (7th Cir. 1985) (looking to President's signing statement in interpreting the Helsinki Accords).

[287] *See* Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att'y Gen., Office of Legal Counsel, to The Litigation Strategy Working Group 1 (Feb. 5, 1986) http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf; *see also* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 Const. Comment. 307,348 (2006).

or "no" to the right to determine the substantive content of statutes.[288] The critiques, however valid in the context of ordinary legislation, have less force in the context of treaty ratification. The President has a special role in negotiating treaties that is distinct from his role in the Article I process. For treaties, it is the President who drafts the document's text and consults with foreign parties, and it is arguably the president who best understands the intentions of treaty partners.[289] In part for this reason, federal courts regularly give substantial deference to the executive branch's interpretation of treaties.[290] In *Kolovrat v. Oregon*, for instance, the Supreme Court looked to "diplomatic notes exchanged between the responsible agencies of the United States and of Yugoslavia" both before and after the treaty was signed, as well as "instructions issued by our State Department" for carrying out the treaty, to conclude that "the 1881 Treaty, now and always, has been construed as providing for inheritance by both countries' nationals . . ."[291] According to one scholar, the Supreme Court deferred to the executive branch's interpretation of a treaty in "the vast majority" of the cases he surveyed, except for when the government's view was "unreasonable" or called for an unconstitutional result.[292] Moreover, if the presidential statement is made to the Senate prior to its advice and consent, that would blunt concerns that the president is seeking an end-run around the Senate.[293]

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[288] *E.g.* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 Harv. J. on Legis. 363, 367 (1987).

[289] *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1527 n. 313 (arguing that deference to presidential signing statements for treaties – but not statutes- could be justified); Adrian Vermuele, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 122 (2000) (arguing that presidential statements do have a "prominent role" in treaty interpretation, but that this is because "the president's role in treaty formation differs importantly from his role in the legislative process . . . ."); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 717 n.80 (1991) ("A distinction should also be made between statutes and treaties. The President's power to negotiate treaties might give him an interpretive power that he lacks in the context of legislation.").

[290] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (1987) ("Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States, but will give great weight to an interpretation made by the Executive Branch.").

[291] 366 U.S. 187, 194-195 (1961); *see also* Nielsen v. Johnson, 279 U.S. 47 (1929) ("The history of article 7 and references to its provisions in displomatic exchanges between the United States and Denmark [both before and after ratification] leave little doubt that its purpose was both to relieve the citizens of each country from onerous taxes upon their property within the other and to enable them to dispose of such property. . .").

[292] David J. Bederman, Rev*ivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 961-62 (1994);

[293] This lies in contrast to the executive memorandum at issue in *Medellin v. Texas*, in which President Bush declared the ICJ's decision in *Avena* was to be binding on state courts well after the Senate had ratified the treaty. In fact, the Court's analysis rested on the fact that it deemed the memorandum to be an ex post effort to substantively change the terms of the treaty by presidential

Accordingly, presidents could transmit signing statements to the Senate alongside treaties, and hope that through incorporation into the treaty's legislative histories, those statements are persuasive with courts in the future. Nonetheless, such unilateral statements by the President are likely to be less effective and persuasive than is a formal Understanding or Declaration, voted upon by the Senate in the course of the treaty approval process.

Proponents of international law might be concerned that the Clear Statement Rule we propose here will render already-ratified treaties more insecure. If, after all, Clear Statements need to appear at the time of the Senate's advice and consent, and if earlier treaties do not include such statements, then courts may misconstrue the silence in earlier treaties as meaningful. This can be avoided in part by careful wording. For example, a recent Senate report explained that, "The declaration states that the Convention is self-executing, as is the case generally with income tax treaties."[294] This declaration thus serves to both make clear the intended effect of the treaty at hand and the general nature of tax treaties in general.

We also believe that the concern that a new practice of Clear Statements will undermine earlier treaties that do not possess such Clear Statements gives judges less credit than they deserve. Prior to *Medellin*, statements of self-execution were not used in many cases because they were considered unnecessary. Post-*Medellin*, the landscape has changed. If the State Department adopts a Clear Statement Rule—and with it a considered practice of including clear information regarding whether the treaty is self-executing or not at the time of the Senate's advice and consent, courts will be able to recognize that the absence of such statements in earlier treaties does not necessarily mean that those treaties were intended to be non-self executing. The State Department could even further protect against such concerns by issuing an express statement of this new practice—or revising the relevant regulations. In short, the Clear Statement Rule offers a way of addressing ambiguity about the judicial enforceability of treaties going forward, but should have little or no impact on treaties already ratified.

C. Public Right of Action

The Executive branch has the authority to enforce international treaty obligations by seeking an injunction against state and municipal agencies violating those obligations. We will call this a "Public Right of Action," as opposed to a private right of action.

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fiat. *Id.* at 525 ("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.").

[294] Tax Convention with Hungary Exec. Rept., *supra* note 272,

The doctrine upon which the Public Right of Action is based arose in a line of cases from the turn of the century that allowed the federal government to sue in equity to enforce its sovereign rights and obligations.[295] The cases culminated in the Supreme Court's 1895 decision in *In re Debs*,[296] in which the federal government sought to protect interstate commerce by requesting an injunction prohibiting railroad workers from striking. The Court found sufficient justification for the injunction on the merits, but it concluded that seeking equitable decrees was an appropriate means for the federal government to "enforce in any part of the land the full and free exercise of all national powers."[297] The Court reasoned:

> Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other . . . The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.[298]

In subsequent years, courts have applied this reasoning to allow the federal government standing to bring lawsuits against public and private actors where the federal government seeks to use the suits to promote the national welfare—by, for example, enforcing civil rights laws and preventing interference with interstate commerce.[299]

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[295] *See* RICHARD FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 811-20 (4th ed, 1996); *see also* United States v. American Bell Tel Co., 128 U.S. 315, 367 (1888) (allowing the Attorney General to sue in equity for the revocation of certain fraudulently obtained patents); United States v. San Jacinto Tin Co., 125 U.S. 273 (1888).

[296] 158 U.S. 564 (1895).

[297] *Id*. at 584

[298] *Id*. at 584. This principle had previously been stated by the court in *United States v. American Bell Tel Co*., 128 U.S. 315, 367 (1888) (concluding that the government did not need to have a "direct pecuniary interest" in a case, but may sue "to protect the public from the monopoly of the patent which was procured by fraud").

[299] *See, e.g*., United States v. Republic Steel Corp., 362 U.S. 482, 492 (1960) (allowing suit by the United States to enjoin respondent companies from depositing industrial solids in the Calumet River without obtaining requisite permit); United States v. California, 332 U.S. 19, 26-27 (1947) (allowing suit by the United States to determine ownership and rights over submerged land); United States v. City of Jackson, 318 F.2d 1, 11-16 (5th Cir. 1963), *reh. denied*, 320 F.2d 870 (1963) (per curiam) (granting injunctive relief to the United States to prevent racial segregation); United States v. U. S. Klans, Knights of Ku Klux Klan, Inc., 194 F.Supp. 897, 902 (M.D. Ala.

The obvious question, of course, is whether the violation of a treaty obligation is the kind of national harm that entitles the federal government to bring an action for injunctive relief against a state or local government. The Supreme Court has suggested that it is, though only in dicta. In *Sanitary District of Chicago v. United States*, the federal government successfully enjoined an Illinois state agency from diverting water from Lake Michigan. Justice Holmes wrote for a unanimous Court that the United States had "a standing in this suit . . . *to carry out treaty obligations to a foreign power* bordering upon some of the Lakes concerned."[300]Although the case was resolved on statutory and constitutional grounds, the Court's endorsement of a public right of action on the basis of treaty violations was clear.[301]

Despite the breadth of Justice Holmes's assertion in *Sanitary District*, the Supreme Court has not directly revisited the issue of whether the United States can sue state and local governments to enjoin them from violating treaty obligations.[302] Several lower courts have addressed the issue, however. The earliest and most direct affirmation of a Public Right of Action to enforce a treaty came from the Eastern District of New York in its 1971 holding in *United States v. City of Glen Cove*.[303] There, the court held the federal government could enjoin a city from taxing Soviet assets that were protected by a treaty. Relying upon *Sanitary District*, the district court held "the United States may sue to prevent state action which would violate a treaty obligation of the United States."[304] It explained, "[t]he conduct of foreign relations would be hampered and embarrassed if the United States Government were powerless to require units of

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1961) (granting preliminary injunction in favor of the United Stated, enjoining defendants from interfering with the travel of passengers in interstate commerce).

[300] 266 U.S. 405, 425-26 (1925) (internal citations omitted) (emphasis added).[301] *See id.* at 426-32.

[301] *See id.* at 426-32.

[302] A year after *Sanitary District*, the Supreme Court held the United States has "the right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations." *United States v. Minnesota*, 270 U.S. 181, 194-95 (1926). Thus, the Court upheld an injunction issued at the request of the Attorney General, enjoining Minnesota state officials from depriving Native Americans of land rights given to them in prior agreements with the federal government. *Id.* The Court, however, was not clear whether the "obligations" owed by the federal government to the Native Americans stem from the international agreements or from the unique fiduciary relationship the Court ascribes to the federal government with regard to Native American groups. *See id.* at 193-196, 207-12; *see also* HENKIN, *supra* note 148, at 484 n.128 (2d ed. 1996). Since *Minnesota*, the closest the Court has come to revisiting the matter was Justice Breyer's dissenting opinion in *Medellin*, in which Breyer cited *Sanitary District* for the proposition the Court "has also made clear that the Executive has inherent power to bring a lawsuit to carry out treaty obligations." *See, e.g.*, Medellín v. Texas, 128 S. Ct. 1346, 1390-91 (2008) (Breyer, J., dissenting) (citing *Sanitary District*, 266 U.S. at 425-426). The majority opinion neither agreed nor disagreed with Justice Breyer's statement.

[303] 322 F. Supp. 149 (E.D.N.Y.1971), *aff'd per curiam*, 450 F.2d 884 (2d Cir. 1971).

[304] *Id.* at 152.

local government to comply with treaty obligations, and if a treaty could be enforced only by the foreign government making itself a party to litigation before state or federal courts."[305]

Several courts have agreed with the holding in *Glen Cove*. In *United States v. County of Arlington*, for example, the Fourth Circuit held "[t]he United States can sue to enforce its policies and laws, even when it has no pecuniary interest in the controversy. This principle has been invoked to enable the United States to honor its treaty obligations to a foreign state."[306] More recently, in *Mora v. New York*, the Second Circuit noted that the federal government's ability to "sue state and local governments to ensure compliance" was one of the reasons international treaty obligations have not been entirely "deprive[d] . . . of force" by the lack of a private right of action.[307] Courts have also cited *Sanitary District* in opinions allowing the federal government to intervene in various suits, in order to preserve the nation's treaty obligations. For instance, in *Tachiona v. United States*, the Second Circuit held the Department of Justice had standing to intervene and appeal a district court ruling that potentially placed the United States in violation of the U.N. Convention on Privileges and Immunities.[308] Similarly, in *Bennett v. Islamic Republic of Iran*, a D.C. district court held the United States could move to quash writs of attachment issued against Iran in a private suit, given the government's interest in honoring U.S. obligations under the Algiers Accord and the Vienna Convention on Diplomatic Relations.[309] Both cases cited *Sanitary District.*

There are also recent signs that the government regards a Public Right of Action as a viable option for enforcing treaties. The Legal Adviser to the State Department has contended to the Supreme Court that there is a "longstanding principl[e]" that the United States can "bring an action in court to enforce compliance with a treaty obligation" without statutory authorization.[310] And in a

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[305] *Id*. at 152-53 (internal citations omitted).

[306] United States v. County of Arlington, 669 F.2d 925, 929 (4th Cir. 1982) (internal citations omitted).

[307] Mora v. New York, 524 F.3d 183, 198-199 (2d. Cir. 2008).

[308] 386 F.3d 205, 212 (2d Cir. 2004). In *De Los Santos Mora v. New York*, the Second Circuit also cited *Sanitary District* in support of the proposition that the United States has authority to bring an action to enforce compliance with a treaty obligation. 524 F.3d 183, 199 (2d Cir. 2008).

[309] 604 F. Supp. 2d 152, 167 (D.D.C. 2009) ("The plaintiffs' argument that the United States lacks standing in this action is without merit and essentially frivolous. This Circuit has consistently recognized that the United States has standing to bring actions necessary to uphold its foreign policy obligations under international agreements, particularly those relating to Iran."); *see also* Persinger v. Islamic Republic of Iran, 729 F.2d 835, 837 (D.C. Cir. 1984); Roeder v. Islamic Republic of Iran, 333 F. 3d 228, 234 (D.D.C. 2003).

[310] Brief for United States as Amicus Curiae Supporting Respondents at 15, Bustillo v. Johnson, 546 U.S. 1213 (2006) (No. 04-10566); *see also* Brief for United States as Amicus Curiae Supporting Petitioner at 15, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984) (citing

September 2011 report recommending the Senate ratify a bilateral investment treaty ("BIT") with Rwanda,[311] the Senate Committee on Foreign Relations indicated that it shared this view. The report recognized that several provisions of the treaty were not self-executing, such as provisions relating to procedures for resolving disputes under the treaty. But it suggested that the federal government could use a Public Right of Action to enforce the treaty should states refuse to comply. Specifically, the report endorsed the views of the Director of the Office of Investment Affairs for the State Department, who had explained to Congress that "should an arbitral decision [issued pursuant to the treaty's dispute resolution mechanism] conclude that U.S. state law is inconsistent with the BIT, the U.S. government could, if necessary, choose to initiate a legal action against the state to ensure compliance with a self-executing provision of the BIT."[312]

The Public Right of Action is thus an option available to the government, but one that is likely to be sparingly used. The key drawback to using the Public Right of Action is that it places the federal government in an adversarial position vis-à-vis a state or local government. That is not only politically challenging, but it can be corrosive of the cooperative federal arrangement that is an essential element of the United States political landscape. In many cases, normal political channels—discussions between the federal government and local officials—will prove more effective at changing state or local government behavior to comply with international law obligations of the United States. Indeed, the experience of U.S. compliance with the Vienna Convention on Consular relations' requirements after *Medellin* shows that these tools can be quite effective, at least in addressing future compliance. There, the federal government advised local prosecutors and police departments about proper compliance procedures. Most local governments then began complying with the requirement that foreign citizens' consulates be notified when they are "arrested or committed to prison."[313]

Nonetheless, the Public Right of Action remains an important tool—and perhaps a bargaining chip--to be used by the president in instances where a state or local entity has placed the entire country in violation of an international legal obligation and there remains no other reasonable option for redressing the violation. In such cases, the local entity is placing the entire country at risk of sanction or retaliation. That harm can be redressed through a lawsuit to enforce

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Sanitary District); Brief for the United States in Opposition at 16-17, Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004) (No. 05-879) (same).

[311] Investment Treaty with Rwanda, Exec. Rept., *supra* note 28.

[312] *Id*. at 11.

[313] Vienna Convention on Consular Relations Art. 36(1)(b); *see* CRS Report for Congress, Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements (May 17, 2004); U.S. Department of State, Consular Notification and Access, Part 2: Detailed Instructions, available at http://travel.state.gov/law/consular/consular_747.html.

the treaty obligation on the local government that is responsible for creating the violation—and in a position to stop or prevent it. It would have been legally appropriate, for example, (though perhaps politically unimaginable) for the federal government to bring a Public Right of Action against Texas for its violation of the United States' obligations under the Vienna Convention on Consular Relations. By failing to abide by the United States obligations under the Convention, Texas placed U.S. diplomats and citizens abroad at risk of retaliatory violations. Moreover, it damaged the country's reputation for compliance with its international treaty obligations—leading to a unanimous decision by the International Court of Justice that the United States had breached its obligations under the Consular Relations Convention.[314]

IV. CONCLUSION

Today, more than ever before, international law is a part of daily life. The United States is party to hundreds of Article II treaties, many of them covering topics of the gravest importance to the country, ranging from the economy,[315] to criminal law enforcement,[316] to national security.[317] It is thus of no small importance that Supreme Court has cast the legal status of significant numbers of these treaties into doubt with its decision in *Medellin v. Texas*.

In this Article, we have aimed to bring perspective to this decision—and to the broader debate over the enforcement of international law in U.S. courts—by placing it into context. We have shown that for the first century and a half, the courts of the United States presumed that treaties that created private rights were necessarily self-executing and created a private right of action. But this presumption began to erode well before *Medellin*—in no small part in response to the backlash against the post-war human rights revolution that some perceived as a direct threat to racial segregation. *Medellin*, and an overbroad dictum hidden within it, has in the past two-and-a-half years been read by the lower courts not as a simple ratification of this more cautious post-war stance, but as a complete reversal of the founding presumption. Unless corrected, it appears the lower

[314] Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (19 Jan. 2009) (The Court "Unanimously, Finds that the United States of America has breached the obligation incumbent upon it under the Order indicating provisional measures of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas").

[315] These include the "Friendship, Commerce, and Navigation" treaties discussed above.

[316] *See, e.g.*, Treaty on Mutual Legal Assistance on Criminal Matters, U.S.-U.K., Jan. 6, 1994, S. Treaty Doc. No. 104-2.

[317] *See, e.g.*, Treaty with Russia on Measures for Further Reduction and Limitation of Strategic Offensive Arms (May 13, 2010).

courts will continue to read *Medellin* to endorse the conclusion that the only treaty that may be directly enforced is the rare one that expressly states as much.

Yet this Article also makes clear that the end to direct enforcement of Article II treaties in U.S. courts does not spell the end of *all* enforcement of Article II treaties in U.S. courts. For there remain several ways in which the courts allow treaties to be used even when they do not give rise to a private right of action. We call these "indirect enforcement," "defensive enforcement," and "interpretive enforcement," and we show how they operate to enforce treaty obligations in ways that are not always noticed but are nonetheless deeply influential.

This fuller picture of the enforcement of international law in U.S. courts allows us to see the peaks and the valleys more clearly. We see that the problem is at once more and less dire than sometimes acknowledged—lower courts have made much more than observers predicted of the *Medellin* dictum and yet there remain many ways aside from direct enforcement of treaty obligations to enforce treaties in court. Armed with this more complete understanding of the challenge, we are better positioned to make and evaluate proposals for improving enforcement.

Our proposals acknowledge that the problem of international law enforcement is not simply one for the courts to solve. Our proposals—for legislative enactment, for clear statements by the executive, and for use of the public right of action—call for Congress and the President to respond to a need that is as much within their power and responsibility to address as it is the courts'. It is the President and the Senate, after all, who concluded the Article II treaties now called into doubt—and it is they who must now work, along with the courts, to put those doubts to rest.