

The Interpretation of Treaties:  
Spirit of the Supremacy Clause

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INTRODUCTION

International cooperation is essential to maintaining peace and respect among nations due to the growing level of global interdependence. Nations use treaties as one of the methods for achieving international cooperation. Treaties are formal written agreements between countries that create obligations and promote understanding among those countries. When ratifying a treaty, each participant expects the other participating countries to fulfill their promises regarding terms set forth by the treaty. Although the requirements of a treaty may trigger further domestic obligations, each participant is expected to execute the promises made in the treaty as a show of good faith and cooperation.

The Supremacy Clause of the United States Constitution serves as this nation's demonstration of its intent to fulfill its obligations in the international community. This clause lists treaties as part of the "supreme law of the land,"<sup>1</sup> thereby binding federal and state representatives. Through precedent, federal courts categorize treaties in one of two ways: self-executing or non-self-executing. A "self-executing" treaty's language immediately binds the United States to the treaty's obligations without further legislation by Congress. A "non-self-executing" treaty expresses intent to fulfill obligations agreed upon by the participants; however, it requires Congress to enact further legislation before this can happen. The language of a treaty is not always clear in specifying which category applies. Thus, courts may be left to infer the intent of those who participated in the treaty's ratification.

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<sup>1</sup> U.S. Const. art. VI, § 2.

This article examines three different cases pertaining to the application of treaties as domestic law. *Ware v. Hylton* demonstrates the drafter's intentions as to the impact of a treaty. *United States v. Percheman* illustrates the use of specific language as a distinguishing factor between self-executing and non-self-executing treaties. The most recent case, *Medellin v. Texas*, demonstrates two ways in which the Supreme Court erred in the interpretation of a treaty obligation. First, the Court mistakenly examined the language of the treaty rather than the language of the Constitution in determining domestic law. Second, the Court's interpretation of the treaty language allowed for greater discretion on the part of the United States as to whether or not to implement its treaty obligations. These flaws in interpretation gave the United States overreaching discretion and strayed from the drafters' original intent in formulating the treaty. Ultimately, this article will demonstrate how the use of an analytical framework borrowed from another area of law can be more effective in identifying the intent behind a treaty and the role that treaty obligations were meant to play in our constitutional structure.

## CONSTITUTIONAL SOURCE OF THE "TREATY POWER"

### *The Treaty Clause*

The treaty-making process determines the power each political branch holds over treaties. The President has the general power of foreign affairs, and specifically, the power to negotiate treaties. Article II of the Constitution specifies that 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."<sup>2</sup> The power over treaty-making is therefore not exclusive to the executive branch; instead, a treaty is checked by a portion of the legislative branch (the Senate) before the United States will be obligated by its terms. Although the other portion of the legislative branch (the House of Representatives) shares in the power to create federal law, the Constitution does *not* explicitly bring the House into the treaty-making process.

### *The Supremacy Clause*

Article VI of the Constitution addresses the enforceability of treaties in the Supremacy Clause by stating:

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<sup>2</sup> U.S. Const. art. II, § 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>3</sup>

This clause establishes that the Constitution, federal laws, and U.S. treaties are to be considered the supreme laws in the United States, obligating state courts to uphold them even if they contradict state laws. Therefore, according to the Supremacy Clause, all treaties entered into by the United States become part of the “supreme law of the land.”<sup>4</sup> Obligations outlined in treaties ratified by the United States preempt state laws, compelling the courts to honor the treaty, even if it conflicts with a state law.

*Analytical Tool: A Variant of Jackson’s YOUNGSTOWN Framework*

When called upon to determine whether a treaty was meant to be self-executing, courts must consider the intent of the drafter. The analytical framework proposed in this article is similar to the one presented by Justice Jackson in the case of *Youngstown Sheet & Tube Co. v. Sawyer* in 1952. The *Youngstown* case involved a challenge to the President’s authority to seize domestic businesses for the broad purpose of keeping steel in production while the United States was involved in the Korean War.<sup>5</sup> Justice Jackson, concurring with the Court that the President lacked such authority, created a now-famous three-category analytical framework to illustrate the constitutional allocation of power between the executive and legislative branches.

Jackson’s model called for looking to the intent of the “drafter” of a federal law (Congress) to place each law in one of three theoretical “categories.” He then called for determining whether the “drafter” of the law

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<sup>3</sup> U. S. Const. art. IV.

<sup>4</sup> U.S. Const. art. VI, § 2.

<sup>5</sup> The case of *Youngstown Sheet & Tube Co. v. Sawyer* dealt with the extent of President Truman’s executive powers in seizing steel companies to supply troops deployed in Korea, while the workers were on strike. The Court determined that the President had overstepped his constitutional powers in seizing the steel companies because the power to seize companies was specifically reserved for Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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(Congress) shared any of its legislative power with the Executive Branch based on the initial categorization. By using this model, Justice Jackson determined that Congress had *declined* to add an emergency “Executive seizure” option into the federal labor relations law (first step), and that categorizing the case in that manner meant that the President did not have proper authority to seize the private steel mills to end the labor dispute (second step).

<i>Congress says OK</i>	<i>Congress silent</i>	<i>Congress says NO</i>
President's “maximum authority”	“Zone of Twilight”	President’s rule-making authority at its “lowest ebb”
President <i>can</i> make rules for domestic behavior (within parameters set by Congress)	Unclear how far Presidential authority can go	President <i>cannot</i> make rules for domestic behavior ( <i>unless</i> some other part of Constitution creates independent Executive authority)

Justice Jackson’s 3-category analytical framework was designed as a tool to illustrate the allocation of power between the executive and the legislative branches. The first category applies when it appears that Congress *did* intend to share some of its authority with the Executive branch. If so, the framework illustrates that the President has a great deal of rule-making authority because he has the combined authority of his own constitutional powers along with the powers of Congress. The middle category applies when it is *unclear* whether Congress intended to share any of its rulemaking authority with the Executive branch. Justice Jackson referred to this as the “zone of twilight,” and gave little guidance as to how a court should handle such a case.<sup>6</sup> Finally, the third category of the framework applies when it appears that Congress did *not* intend to share its rule-making authority over a particular topic with the Executive branch. If so, the framework shows that president’s power is at its lowest point, because without the support of Congress, he can only make rules for domestic behavior if some other, independent source of Executive authority can be found in the Constitution. Thus, Justice Jackson’s framework can help courts categorize a variety of separation of powers cases.

<sup>6</sup> Justice Jackson did not feel the need to elaborate further on the “zone of twilight” category, because he found that Congress had explicitly *declined* a proposal to include an Executive seizure option in its labor laws, thereby placing the *Youngstown* case in the third category instead. *Id.* at 639 (Jackson, J., concurring).

As this article will demonstrate, a variant of this same theoretical framework could be used by the courts when called upon to interpret the scope of treaty obligations. Because the courts view some treaties as self-executing (i.e., law of the land), and others as non-self-executing (i.e., *not* yet law of the land), the balance of authority between the Senate and the House of Representatives shifts accordingly. A self-executing treaty needs no consent by the House; however, a non-self-executing treaty will not become federal law until the full Congress, including the House, enacts some form of implementing domestic legislation.

Along the same lines as Justice Jackson’s model, this relationship can be viewed at the theoretical level by: (1) looking to the intent of the “drafter/ratifier” of the treaty (President/Senate) to place each treaty in one of three theoretical “categories,” and then (2) based upon that categorization, the President and Senate may, or may not, have shown an intent to share some authority for the treaty’s domestic execution with the House of Representatives.

Such a framework would take the following form:

<b>Treaty says “self-executing”</b>	<b>Treaty ambiguous</b>	<b>Treaty says “non-self-executing”</b>
House of Representatives has no influence; only President and Senate participated in the treaty-making process	Unclear whether further legislation is needed before treaty becomes part of the ‘supreme law of the land’	House of Representatives’ power is at its highest; treaty requires further legislation by full Congress to become ‘law of the land’

In the first category, when a treaty has expressly stated or clearly implied that it was meant to be self-executing, the power of state or federal actors to avoid its command is at its lowest. Taking the Supremacy Clause into account, a treaty should be treated as the supreme law of the land, without hesitation. In the instance of an expressly non-self-executing treaty (represented in the third category), Congress’ power is at its highest, because both the Senate and the House of Representatives will be involved in drafting further domestic legislation before the treaty obligations take effect. In addition to the Senate, the House of Representatives will now have a voice as to whether the treaty obligations ever become binding domestic law.

While these two categories clarify the powers given to the House in the treaty process, the middle category presents a zone of ambiguity.<sup>7</sup> Although the delegation of power is uncertain in this middle ground, Justice Jackson did provide tools in his framework for pushing a case toward one of the other categories whenever possible. For instance, he stated that the absence of congressional opinion “enable[s], if not invite[s], measures on independent presidential responsibility.”<sup>8</sup> In the *Youngstown* case, Jackson stated that Congress’ decision *not* to grant emergency seizure powers to the President, when it had been previously considered, should be viewed as a clear denial of such authority. Thus, he found his own way to avoid landing in the zone of ambiguity. Analysis of the following cases will include further discussion as to how the zone of ambiguity should be treated under a 3-part framework for *treaty* interpretation.

Overall, a 3-part framework proved useful in understanding the power-sharing relationship between Congress and the President in the *Youngstown* case. A similar 3-part framework can be applied when seeking to identify the power-sharing relationship between the House and the Senate in the treaty-making process. The following sections of this article will demonstrate how this proposed 3-part framework could be applied to cases dealing with treaty interpretation.

## INTERPRETATION OF TREATIES

The judicial branch, like the legislative and executive branches, has specific power with regard to treaties. Article III of the Constitution extends the judicial branch’s power of review “to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>9</sup> The federal courts have utilized their authority under Article III to examine the “intended reach” of several

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<sup>7</sup> The middle category of Justice Jackson’s framework provides the same difficulty when Congress is silent, and neither consents nor denies the power of the President to control certain forms of domestic behavior. *Id.* at 637.

<sup>8</sup> *Id.*

<sup>9</sup> U.S. Const. art. III, § 2. After treaties are negotiated by the President, approved by the Senate, and entered in by the United States, the Supreme Court has the power to review cases that arises under a treaty. This constitutional power gives the judicial branch a role in interpreting treaties.

treaties over the years. In the process, the courts have treated some as self-executing and others as non-self-executing. Treaties placed in the latter category by the drafter, or the courts, will not be considered binding until Congress passes some implementing domestic laws.

*Ware v. Hylton (1796)*

(1) Case Background

In *Ware v. Hylton*, the Supreme Court was called upon to determine whether the Treaty of Paris, signed by Great Britain and the United States, overturned a Virginia state law.<sup>10</sup> The Commonwealth of Virginia passed a law on October 20th, 1777 providing that all citizens of Virginia who owed debts to British subjects could pay their debts to the state treasury in a depreciated amount. The state treasury would then issue a certificate discharging the citizens of their debts.

The defendant, Daniel Hylton & Co., owed a sum of money to a British subject, William Jones, prior to the Revolutionary War. Both were British subjects before the War, but Daniel Hylton became a Virginia citizen afterward. Hylton paid his debt to the Virginia state treasury in a depreciated amount on April 20<sup>th</sup>, 1780, and he obtained a certificate of discharge.<sup>11</sup>

On September 3, 1783, the Treaty of Paris, a peace treaty between Great Britain and the United States, was ratified. The treaty stated: “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.”<sup>12</sup> Jones had died, but the administrator of his estate (Ware) contended that under the treaty Hylton should pay his debt, in total, directly to Ware. The issue presented was whether the Treaty of Paris overruled the conflicting Virginia state law, forcing the defendant to pay his pre-war creditor, even though he had already discharged his debt under Virginia law.

The Supreme Court unanimously ruled that the Treaty of Paris *did* override the Virginia state law. Justice Chase cited the Supremacy Clause in the newly ratified United States Constitution for the proposition that a treaty is superior to state law. Justice Chase reasoned that a treaty cannot be the

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<sup>10</sup> *Ware v. Hylton*, 3 U.S. 199 (1796).

<sup>11</sup> *Id.* at 221 (opinion of Chase, J.).

<sup>12</sup> *Id.* at 239.

supreme law of the land “if any act of a State Legislature can stand in its way.”<sup>13</sup> Therefore, the laws of a state must give way to a treaty and the Treaty of 1783 was superior according to the structure provided in the United States Constitution.<sup>14</sup> Since the Constitution provided that treaties are part of the supreme law of the land, any state legislation that contradicted the treaty would be void.

In a concurring opinion, Justice Iredell used the history behind the creation of the Supremacy Clause to support his reasoning. He believed that upon entering into a treaty, a nation had to honor the treaty because it was bound by moral obligation. Iredell explained that during the formation of the Constitution, the thirteen colonies found it hard to act in unison in certain areas of governance. This had impeded the adoption of treaties by and with the colonies. Iredell believed the moral obligation to comply with a treaty could not be constitutionally carried out unless the treaty was given a new level of authority under the federal Constitution.<sup>15</sup> The Supremacy Clause provided the solution to this problem by defining treaties made under the authority of the United States as part of the supreme law of the land.

Justice Iredell also determined that the Treaty of Paris should be considered a *self-executing* treaty, thereby forcing immediate compliance by State courts and legislatures. He stated that the “words of the treaty would have great operation” in deciding what the treaty required its signatories to do with regard to its execution.<sup>16</sup> Article Four of the treaty provided: “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.”<sup>17</sup> Iredell deconstructed Article four into different phrases. He determined that the phrase “no lawful impediment” affected the entire context of the treaty, and concerned the relationship between a lender and a debtor: there could be no lawful impediment to the former when reclaiming his debt from the latter.<sup>18</sup> Thus, the Virginia law that was biased against British subjects as a result of the Revolutionary War was not valid, because it was a lawful impediment to

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<sup>13</sup> *Id.* at 236.

<sup>14</sup> *Id.* at 237.

<sup>15</sup> *Id.* at 274 (opinion of Iredell, J.).

<sup>16</sup> *Id.* at 280.

<sup>17</sup> *Id.* at 278.

<sup>18</sup> *Id.*



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Ware's rights to reclaiming his otherwise valid debt.<sup>19</sup> This interpretation, coupled with the moral obligation of respecting a treaty as provided by the Supremacy Clause, led the Court to conclude that the Treaty of Paris did preclude the Virginia state law.

(2) Analysis of *Ware v. Hylton*

*Ware v. Hylton* illustrates the first category in the three-category framework, showing specified language that qualified the treaty as self-executing. Justice Iredell determined that the words were clear as to the treaty's intended mode of execution. He deconstructed each part of the controversial article in the Treaty of Paris and found that individually, as well as together, words clearly referenced a self-executing treaty. Article Four of the treaty specified that lenders were entitled to claim their debts without any legal impediment.

Since the language explicitly specified a self-executing treaty, the case falls into the first category. The Supremacy Clause allowed this treaty to preclude the contradictory Virginia state law. With the Supremacy Clause in full force, neither the House of Representatives nor the State had any power to avoid application of the treaty. Thus, in this case the House's power was at its lowest because the nation was constrained by the specific self-executing language in the Treaty of Paris. The analytical model helps to put this case, and the resulting allocation of power, into perspective.

<b>Treaty says "self-executing"</b>		
House of Representatives has no influence; only President and Senate participated in the treaty-making process		

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<sup>19</sup> The phrase, "to the recovery of the full value in sterling money of all bona fide debts heretofore contracted," Iredell interpreted as obliging the debtor to pay in sterling money, as to combat the inconsistencies of paper money, and in full to the creditor. In whole, the phrase came to mean that private debts cannot be impeded by any law, and obligated the debtor to pay the full debt to his creditor. *Id.* at 278.

In the *Ware* case, the Court acted in accordance with the spirit of the Supremacy Clause by deciding that the treaty was self-executing. The Supremacy Clause was meant to give more weight and authority to treaties after their ratification by the President and the Senate, so that the United States could present a stronger commitment to international cooperation. Thus, deeming a treaty non-self-executing would go against the intent of the drafters because it would invite additional political participation and deliberation by the House of Representatives or the State Legislatures. Through its *Hylton* opinion, the Court stated early on in the Nation's history that this spirit behind the Supremacy Clause has importance in the way treaties should be interpreted.

*United States v. Percheman*

(1) Case Background

In *United States v. Percheman*, the Supreme Court examined ambiguous language in the 1819 Treaty of Succession made between the United States and Spain.<sup>20</sup> Before the succession, Percheman, served in the Spanish military. A Spanish governor granted Percheman two thousand acres of land for defending the territory of Saint Augustine in East Florida during an 1812-1813 invasion.<sup>21</sup> Spain ceded Florida to the United States in the 1819 Treaty of Succession. Article Two of the treaty provided that:

His catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, by the name of East and West Florida.... The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which are not private property, archives and documents which relate directly to the property and sovereignty of the said provinces, are included in this article.<sup>22</sup>

Thus, Article Two of the treaty states that the lands ceded by Spain to the United States were public property, not privately owned land. Article Eight of the treaty outlined the execution of the treaty, stating:

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<sup>20</sup> *United States v. Percheman*, 32 U.S. 51, 83 (1833).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 87.

All the grants of land made before the 24th of January 1818 by his catholic majesty, or by 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, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty.<sup>23</sup>

This particular article was relevant to the Court when determining whether the treaty was self-executing or non-self-executing. This issue had previously been considered in the related case of *Foster v. Nielson*, where the Court determined that the article was *non-self-executing* due to use of the words “shall be ratified.”<sup>24</sup> In *Percheman*, the Court re-evaluated this article, comparing the language of the original Spanish document with the original English document, and thereby reaching a different conclusion.<sup>25</sup>

Previously, in *Foster v. Nielson*, the Court found that the phrase “shall be ratified” meant that the treaty required Congress to provide further legislation in order for the treaty to supersede domestic law. According to the Court, although the words “self-executing” or “non-self-executing” did not appear in the text of the treaty, the overall language made it clear that further

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<sup>23</sup> *Id.* at 88.

<sup>24</sup> *Foster v. Nielson*, 27 U.S. 253, 310 (1829). This case involved the validity of land grants in Spanish West Florida under the Treaty of Succession. The Court ruled that the treaty deferred the implementation of individual rights to Congress and the President. Since neither branch had implemented individual rights of the treaty, the land grants were invalid.

<sup>25</sup> The Act of May 8, 1822 and subsequent acts that dealt with the ceded land attempted to evaluate land acquisition. In doing so, the act gave the government the right to take land rightly owned by Percheman, which he claimed violated his rights under the Treaty of Succession. The Act of May 8, 1822 was passed to “[ascertain] claims and titles to land within the territory of Florida.” *Percheman*, 32 U.S. at 89. This act stipulated that owners must submit their land to a government survey. When Percheman submitted his land for survey, the commission rejected his land claim because its size surpassed the jurisdiction of the commission, which could only survey lands of less than one thousand acres. The Act of May 26, 1830 was passed after years of surveying land to “provide the final settlement of land claims in Florida.” *Percheman*, 32 U.S. at 85. Percheman’s claim was rejected by this act as well, placing his land in possession of the United States. Percheman brought a lawsuit against the United States to reclaim his land.

legislation would be needed before the treaty would take effect within the United States (thereby making it non-self-executing). In *Percheman*, the Court went back and reviewed the original Spanish version of the treaty. The Court found that Spain had introduced Article Eight to protect its previous grants of property.<sup>26</sup> The fresh English translation of the Spanish document stated that the treaty “shall remain ratified and confirmed to the persons in possession of them, to the same extent.”<sup>27</sup> This translation supported an entirely new interpretation of the treaty, changing the previous interpretation as a non-self-executing treaty into a *self-executing* treaty. Since this translation did not require any further legislation for the treaty to come into effect, the Supremacy Clause was applied. The self-executing treaty now applied to *Percheman*’s land claim, giving him the right to retain private ownership of his land in Florida.

(2) Analysis of *U.S. v. Percheman*

The 1819 Treaty of Succession in the *Percheman* case demonstrated both ends of the three-category spectrum; the first interpretation demonstrated how specified language can make a treaty non-self-executing, while the later interpretation of newly translated language made the treaty self-executing instead.

In *Foster*, the Court found that treaty language demonstrated that the 1819 Treaty of Succession required further domestic legislation to take full effect. Under this interpretation, the treaty fell into the third category of the three-category framework. This allowed the House its maximum power, meaning that without the support of Congress as a full body (including the House of Representatives), the treaty would never become binding law in the United States.

		<b>Treaty says “non-self-executing”</b>
		House of Representatives’ power is at its highest; treaty requires further legislation by full Congress to become “Supreme Law of the Land.”

<sup>26</sup> *Percheman*, 32 U.S. at 88.

<sup>27</sup> *Id.* (quoting the 1819 Treaty of Succession).

The re-interpretation of the treaty in *Percheman* emphasized the importance of language when interpreting a treaty. The Court revisited the treaty in the *Percheman* case, examined the Spanish version of the treaty, and determined that the language introduced by Spain demonstrated the intent that the treaty *was* self-executing. The difference between the translated words “shall be” and “shall remain” made a great difference in the interpretation of the treaty.<sup>28</sup> In Spain’s version, the language clearly specified an expectation that the duly negotiated treaty needed no further implementing legislation.

Thus, this revised view of the treaty would fall into the first category of the framework, allowing the Supremacy Clause to take its full effect and negating any need for support by the House in the implementation of this treaty. Placing such significance on the language used by the treaty’s signatories allows the Court to determine their intent, and to thereby honor the constitutional structure behind the Treaty clause and the Supremacy Clause.

<b>Treaty says “self-executing”</b>		
House of Representatives has no influence; only President and Senate participated in the treaty-making process		

*Medellin v. Texas*

(1) Case Background

(a) The International Court of Justice

In 1945, the United States became a member of the United Nations by ratifying the United Nations Charter. Article 92 of the Charter established the International Court of Justice (ICJ). As “the principal judicial organ of the United Nations,” the ICJ is a tribunal established by the Charter to resolve disputes between its members.<sup>29</sup>

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<sup>28</sup> *Id.* (citing *Foster*, 27 U.S. at 310).

<sup>29</sup> *Medellin v. Texas*, 128 S. Ct. 1346, 1353 (2008).

Article 94 of the U.N. Charter established the guiding principles of ICJ's jurisdiction, stating that "each member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party."<sup>30</sup> This article established compulsory obligation to the ICJ jurisdiction. Under compulsory jurisdiction, each member of the U.N. is arguably obligated to comply with ICJ decisions.

Under Article 36, the U.N. Charter separated the ICJ's jurisdiction into two categories: general jurisdiction and specific jurisdiction.<sup>31</sup> If a nation consents to general jurisdiction, the ICJ has jurisdiction over that nation on any dispute that arises over a treaty or international law.<sup>32</sup> Under specific jurisdiction the ICJ has jurisdiction only over a particular category of disputes that came from a separate treaty.<sup>33</sup> Although the United States consented to the general jurisdiction of the ICJ in 1964, it withdrew this consent in 1985.

(b) The Vienna Convention

In 1969, the United States ratified the Vienna Convention on Consular Relations (VCCR) and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Protocol) to "contribute to the development of friendly relations among nations."<sup>34</sup> Article 36 of the VCCR specifies that if a person is detained by a foreign country, the detainee would be informed of his or her right to request assistance from their home country.<sup>35</sup> In addition, the detaining country would notify the detainee's country's consular immediately. The Protocol provided that all "disputes arising out of the interpretation or application of the Vienna Convention," would be subjected to compulsory jurisdiction of the ICJ.<sup>36</sup> By ratifying the VCCR and the Optional Protocol, the United States consented to specific jurisdiction by the ICJ for any disputes arising from the VCCR.<sup>37</sup>

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<sup>30</sup> *Id.* at 1354.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1353.

<sup>35</sup> *Id.* at 1355.-

<sup>36</sup> *Id.* at 1353.

<sup>37</sup> *Id.* at 1376.

(c) The *Avena* Decision

As a result of the United States' failure to implement the VCCR for fifty-one Mexican nationals, the country of Mexico appealed to the ICJ on behalf of the Mexican nationals. In *Mexico v. United States, the Case Concerning Avena and other Mexican Nationals (Avena)*, the ICJ ruled that the United States violated VCCR by not informing Mexico of the detainment of their nationals or informing the Mexican nationals of their right to consular assistance. As a result, fifty-one of the named Mexican nationals in the *Avena* case were entitled to review and reconsideration of their convictions and sentences.<sup>38</sup> According to the ICJ, entitlement came regardless of state procedural default laws that could stand in the way of review.<sup>39</sup>

Jose Ernesto Medellin, one of the Mexican nationals from *Avena*, was denied his VCCR rights by the United States when he was convicted and sentenced by the Texas state court for the capital murder of two Houston teenagers. Upon his arrest, Medellin was read his Miranda rights but was not informed of his VCCR right to notify the Mexican consulate of his detainment.<sup>40</sup> Officers allowed Medellin to sign a waiver and give a written confession of his crime without the knowledge of his entitled VCCR rights.<sup>41</sup> However, after Medellin was convicted of capital murder and sentenced to death, he raised a VCCR claim.<sup>42</sup> At his state post-conviction relief hearing, Medellin argued that since he was not notified of his VCCR rights, the state should review and reconsider his case.<sup>43</sup> The trial court denied Medellin's claim and ruled that it had been procedurally defaulted because he had failed to raise the claim earlier at trial or on direct review. The Texas Court of Appeals affirmed this decision.<sup>44</sup>

Medellin filed a *habeas* petition for relief of the violation of his VCCR right but was denied relief. The Federal District Court also held that his VCCR

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<sup>38</sup> *Id.* at 1352.

<sup>39</sup> State procedural laws require that defendants seeking writ of *habeas corpus* present their arguments during direct review at state trial; any arguments presented after state trial would procedurally default and therefore would not be considered. *Id.* at 1354.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1355.

<sup>44</sup> *Id.*-

claims procedurally defaulted under Texas law.<sup>45</sup> Medellín then appealed to the Fifth Circuit, and while his appeal was pending, the ICJ's *Avena* decision was issued.<sup>46</sup> The Fifth Circuit was undeterred by the *Avena* decision, holding that VCCR claims still had to be subjected to state procedural default rules.<sup>47</sup> The Supreme Court granted certiorari to review the case.<sup>48</sup>

(2) The Supreme Court's Ruling

The *Medellin* Majority found Article 94 of the Charter to be non-self-executing because of the language of the United Nations Charter. Article 94 states that each member of the United Nations must "undertake to comply" with an ICJ decision.<sup>49</sup> The Court interpreted this to mean that a country *could* take further legislative action to comply with an ICJ decision domestically. The Majority held that in order for the treaty to be self-executing, the Charter should have used more authoritative language like "shall comply" or "must comply" instead of the words "undertake to comply." Due to the language of the United Nations Charter, the Court determined that decisions made by the ICJ were not self-executing, and therefore such decisions were not adopted as domestic law without further legislative action in the United States.

The Court then applied this reasoning to the ICJ's decision in *Avena* to determine its relevance in American courts. The Court ruled that "not all international law obligations automatically constitute binding federal law."<sup>50</sup> Even though the ICJ might be binding on the United States in the eyes of the international community, the Court decided that the ICJ's decision in *Avena* was not a part of United States federal law.

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<sup>45</sup> *Id.* at 1354-55.

<sup>46</sup> *Id.* at 1355.

<sup>47</sup> *Id.*

<sup>48</sup> Before oral arguments were presented to the Supreme Court President George W. Bush issued a Memorandum requesting that the State courts comply with the *Avena* decision. Relying on the *Avena* decision and the President's Memorandum, Medellín filed for a second *habeas* relief, but was dismissed by the Texas Court of Criminal Appeal for the abuse of the writ. *Id.* The Supreme Court again granted certiorari, this time incorporating the President's memorandum into their decision. Discussion of the Court's ruling discounting the President's memorandum is beyond the scope of this article.

<sup>49</sup> *Id.* at 1353.

<sup>50</sup> *Id.* at 1356.



The *Medellin* Majority cited Article II § 2 of the Constitution to further demonstrate that the treaty was *non-self-executing* and suffered from the absence of subsequent congressional action. The Majority believed that the Framers constructed a government containing checks and balances for each political branch. Although treaties may be incorporated into federal law, this can only be done when the President negotiates the treaty and the Senate approves it.<sup>51</sup> If the President or the Senate chooses to condition a non-self-executing treaty on further legislation by Congress, then such legislation must be enacted before the treaty would take effect. This provided the checks and balance needed to ensure that powers were not abused in the making of federal laws.

The Majority stated that the language of the treaty should hold great weight, because it is the very same language that the President and Senate approved. In the United Nations Charter, the Majority interpreted the language of the treaty to mean that further domestic legislation was required before ICJ decisions could trump state procedural law in Texas. Thus, according to the Majority, *Medellin's* right to consular notification had been defaulted in accordance with existing Texas state law.

Justice Stevens concurred in the Court's decision. In his view, the phrase "undertake to comply" did not determine whether the treaty was self-executing or non-self-executing, but rather the phrase promised further action to enforce an ICJ decision.<sup>52</sup> He felt, however, that Article 94 had more specific language pertaining to self-execution than some other treaties that the Court had previously interpreted as *self-executing*. If the Senate wanted to declare a treaty as non-self-executing, Stevens believed that the Senate would issue a declaration of non-self-execution at the ratification of the treaty. The Senate did not do so when ratifying the United Nations Charter. Thus, although Stevens agreed with the Majority that the language of Article 94 requires future action to implement ICJ decisions, he believed that the language of the article was more consistent with self-executing treaties than non-self-executing treaties.

In his dissenting opinion, Justice Breyer reviewed the history of the Supremacy Clause and argued that previous cases demonstrate that treaties do not need the legislation of Congress to become domestic law. He cited *Ware v.*

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<sup>51</sup> *Id.* at 1362.

<sup>52</sup> *Id.* at 1373 (Stevens, J., concurring).

*Hylton* to support the argument that the Framers' intent behind the Supremacy Clause was to allow treaty provisions to become domestic law without further congressional action. He felt that the Majority placed too much weight on the language of the treaty, and he cited a number of cases with far more ambiguous language than the United Nations Charter that were eventually interpreted by the Court as *self-executing*. In addition, Justice Breyer argued that a substantial number of treaties do not have the specific language that the Majority required to make them self-executing, but are still interpreted as such. He noted that the *Medellin* Majority could not identify a single case that contained the clear text the Majority was looking for to make a treaty self-executing.<sup>53</sup> Breyer would have found Article 94 of the UN Charter to be automatically enforceable as domestic law, thereby immediately enacting the ICJ decision in *Avena*, notwithstanding any Texas state law to the contrary.

(3) Analysis of the *Medellin* case

The *Medellin* case demonstrates an ambiguously written treaty, which according to the three-category framework would fall within the "zone of twilight," making the legal status of the treaty unclear.<sup>54</sup> According to the Majority, the words "undertake to comply" meant that the nation "could" take future legislative action to comply with the ICJ's decisions.<sup>55</sup>

	Treaty ambiguous	
	Unclear whether further legislation is needed before treaty becomes part of the 'supreme law of the land'	

The Majority emphasized the importance of a treaty's language in interpreting whether it was self-executing or non-self-executing. The argument that the UN Charter was non-self-executing (thus, rendering ICJ decisions ineffective in domestic courts without further legislation) is placed primarily on

<sup>53</sup> Of the two treaties the majority cited as containing the proposed text, one was unratified. *Id.* at 1381.

<sup>54</sup> *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

<sup>55</sup> *Medellin*, 128 S. Ct. at 1373.

the interpretation of the phrase “undertakes to comply.”<sup>56</sup> The Majority held that the phrase could be viewed as an implication of future action, as it uses the future tense.

The emphasis on treaty language is important for interpretation, but the Majority’s interpretation appears to be grasping at something that is not explicitly there. If the language of the treaty does not specifically state non-self-executing, the treaty should be interpreted as a self-executing treaty. This phrase in the UN Charter is fairly ambiguous and bears no explicit promise for the need of future legislation. Although its use of the future tense could be interpreted as the promise for future action, this type of interpretation is inconsistent with the interpretation of other treaties in previous cases.

In accordance with Justice Stevens’ concurrence and Justice Breyer’s dissent, the language of the UN Charter should be interpreted as self-executing due to its ambiguity. When in doubt as to whether a treaty is self-executing, the safest route is to find it self-executing and thereby honor the spirit of the Supremacy Clause. Congress may choose to legislate further on the specific details of implementing the *Avena* decision, but whether or not this happens, domestic courts must follow the general rule of *Avena*. This would fit better with the Framers’ intent behind the Supremacy Clause as well as the moral obligation the Framers felt toward enforcing treaties.

By holding that the treaty is non-self-executing, the Court invites more legislative deliberation (by the House and/or State Legislatures, in addition to the Senate) and impedes the implementation of the treaty. Such participation may slow down the process of implementation further, or, if the larger body of legislators fails to agree on a course of action, completely prevent the implementation of a treaty. This is the outcome the Framers intended to avoid by listing treaty obligations within the Supremacy Clause. The Framers wanted to show the international community that the United States would honor its duly-negotiated international obligations; if it were left to certain states to disagree on the terms of a treaty, the Framers’ streamlined federal approach to international relations would be thwarted.

The *Medellin* Majority steered away from the Framers’ original intent concerning the role of treaties in our legal system. The history of the Supremacy Clause, as well as rulings in previous cases, demonstrates a precedent of treating ambiguous treaties as self-executing. Thus, the Majority

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<sup>56</sup> *Id.*

decision should have reflected this precedent and treated the UN Charter as a *self-executing* treaty, rather than a non-self-executing-treaty. Although the Court found itself in the awkward middle category of the analytical framework, the Supremacy Clause provides a valuable tool to be used in resolving such cases.

### MORAL OBLIGATION

The middle “zone of twilight” category, emphasizing the importance of the Supremacy Clause, demonstrates the framers intentions behind the creation of the Supremacy Clause as well as treaty ratification. The Supremacy Clause was meant to bind the whole nation to our treaty obligations by ‘superadding’ the treaty to the laws of the land.<sup>57</sup> Before the Supremacy Clause, the states repeatedly violated treaty terms.<sup>58</sup> These violations implied that the new democracy could not be taken seriously in a world of monarchies, where a lone sovereign could definitively bind a nation. Inclusion of the Supremacy Clause in the new federal Constitution demonstrated an act of good faith towards the international community.

As shown by the decision in the *Hylton* case, the Framers and early Supreme Court justices were concerned with the “moral obligation” of entering into a treaty.<sup>59</sup> They felt that entering into a treaty was a serious commitment on the part of the United States, which should not be hindered by state laws. In *Medellin’s* case, the Texas courts ignored the nation’s commitment to the Vienna Convention and subjected *Medellin* to conflicting state procedural rules. Instead of following the Framers’ original intent for the Supremacy Clause, Texas is reverting backwards, causing a disregard for moral obligation that should have been resolved by the Supremacy Clause.

Ratifying a treaty creates a moral obligation to the other participant nations. When ambiguous language places a treaty in the middle category of the analytical framework, the United States should honor its moral obligation by assuming that the treaty must be self-executing. By doing so, the United States would demonstrate international cooperation.

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<sup>57</sup> Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int’l L.760 (1988).

<sup>58</sup> Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int’l L. 695, 698 (1995).

<sup>59</sup> *Hylton*, 3 U.S. at 264 (opinion of Iredell, J.).

If ambiguous language is interpreted as non-self-executing, this practice would send a message that the United States had found a loophole in its international obligations. In the long run, such a practice, bolstered by the *Medellin* ruling, will reflect negatively on the United States and imply that international obligations are not a priority for this country.

### CONCLUSION

This article demonstrates the application of the Supremacy Clause across three cases. *Ware v. Hylton* was first to establish the application of the Supremacy Clause to the interpretation of treaty law as intended by the framers. *United States v. Percheman* recognized the breadth of the Supremacy Clause over all treaties, yet exemplified the use of language as a distinguishing factor between self-executing and non-self-executing treaties. While these cases provide legal precedent for treaty interpretation, the *Medellin* Majority inappropriately chose to interpret treaty language rather than the language of the Constitution to determine the applicability of treaty as domestic law. Furthermore, the majority's interpretation of the ambiguous treaty language allowed the United States to exceed its acceptable power to execute treaty obligations and deviated from international moral commitments. The analysis demonstrates the need for an unconditional application of the Supremacy Clause to all treaties adopted into domestic law, and offers a three-part framework for determining whether further legislation is needed.

The *Medellin* Majority established an unfortunate precedent for both domestic law and international relations. If the federal courts continue down this dangerous path, they will undermine the United States Constitution. The *Medellin* ruling will also result in the loss of United States credibility within the international community. International law relies heavily upon the cooperation of nations, yet decisions like *Medellin* jeopardize the United States' image and ability to negotiate effective foreign policy in the future. In an age of global interdependence, such a danger cannot be ignored.

### POST SCRIPT

The Supreme Court ruled in *Medellin v. Texas* that Article 94 of the U.N. Charter was non-self-executing, thereby denying *Medellin's* application for a writ of *habeas corpus*. Following the Court's decision, "Mexico invoked

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Article 60 of the Statute of the ICJ, which allows a party to request that the ICJ decide the scope or meaning of its own judgment when a dispute over the judgment arises.”<sup>60</sup> The ICJ then ruled that the United States should *not* execute Medellin before it could properly consider Mexico’s request for interpretation.<sup>61</sup>

Based on this statement by the ICJ, Medellin appealed once again to the U.S. Supreme Court for a stay of execution. He argued that his execution should be delayed, because under the recent turn of events, “either Congress or the Legislature of the State of Texas [might] determine that actions of the [ICJ] should be given controlling weight in determining that a violation of the [VCCR] is grounds for vacation the sentence.”<sup>62</sup> In a 5-4 decision, the Supreme Court denied Medellin’s request. As a result, Medellin was executed by lethal injection in Texas.<sup>63</sup>

Medellin’s execution provides the strongest evidence for the potential ineffectiveness of international law when its operative treaties are not respected by the participants. The Supreme Court’s decision, deeming Article 94 of the U.N. Charter “non-self-executing,” gave the United States excessive opportunity to thwart the expectations of its treaty partners. By placing such little value on its international obligations, the United States has set a precedent for other countries to ignore the principles of signed treaties and the authority of international organizations as well. The result not only harms the trust that other countries can place in the United States – thereby thwarting the Founders’ efforts and the spirit of the Supremacy Clause – it also places U.S. citizens at an even greater risk that they themselves will not be protected by international agreements if they go traveling abroad.

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<sup>60</sup> Jennifer Stringfellow, *Court Watch: Tracking Current Developments in International Law*, 17 ILSA Quarterly 4, 7 (2008).

<sup>61</sup> *Id.* at 8.

<sup>62</sup> *Medellin v. Texas*, 171 L. Ed. 2d 833, 834 (2008).

<sup>63</sup> Jennifer Stringfellow, *Court Watch: Tracking Current Developments in International Law*, *supra*.