Thoughts on Medellín v. Texas

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*Kristofer Monson*
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Kristofer Monson*

This article explores how the Supreme Court’s decision in Medellín v. Texas affected the scope of presidential powers. After analyzing the Court’s rationale and discussing the history of the role of states in treaty ratification, the article ultimately concludes that the Medellín decision properly restricts the ability of the president to bring non-self-executing treaties into force.

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I. INTRODUCTION

At the end of World War II, the victorious Allies imposed a constitution on Japan.¹ The Japanese constitution makes treaties entered into by the government automatically supersede contrary

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domestic law. This approach made sense: elements of the defeated Empire were unwilling to accept defeat, and the automatic domestic application of international agreements would quell efforts by hardliners in local, regional, and even the national government from reasserting the ultra-nationalist system displaced by peace in the Pacific.

Automatically incorporating multi-national legal norms into domestic law, without further action by domestic policy makers, undoes local political control and power. This is true not only in the international sense, but also internally. It has always been the province of the foreign affairs branch of a sovereign government to honor (or breach) its obligations as it sees fit. It is at least logical (although perhaps politically unworkable) to assume that the executive department of a government could dictate domestic policy in implementing this automatically binding international law.

This analysis is further complicated by the fact that most international agreements are at least initially appealing in the abstract. For example, it is hard to argue against the Kellogg-Briand Pact’s asserted goal of making international war “illegal.” International agreements often include such teleological goal setting, seeking to establish international standards on issues such as fair wages, the right of self-determination, and sharing natural resources. And yet, these noble objectives are often the same things duly-elected (or for that matter, appointed or hereditary) governments are charged with protecting. Government is in the business of ironing out policy differences that create different interests within the population they represent. Erasing domestic procedures for hashing out these policy differences in favor of achieving an abstract goal, however desirable, creates the impression that the practical impediments to implementing the new policy can be swept aside by its power as an abstract idea. After all, Kellogg-Briand did not work out so well.

2. See Nhonkoku Kenpō [Kenpō] [Constitution], art. 98 (Japan) (“The treaties concluded by Japan and established laws of nations shall be faithfully observed.”).


4. See, e.g., Convention Concerning Minimum Wage Fixing, with Special Reference to Developing Countries, June 22, 1970, ILO No. 131.


II. BACKGROUND

Medellín v. Texas, using the traditional tools for resolving disputes between the executive and judicial branches in the U.S. system, addressed the difficulty of implementing treaty obligations into domestic law in the context of the U.S. Constitution. The Medellín majority looked to the text of various international agreements to determine their meaning, an approach the Court justified, in part, by pointing out that plain-text analysis gives greatest effect to the power of the president to pull out of international obligations as appropriate and to the power of Congress to adopt laws that supersede treaty obligations.8

But there is another dynamic at play in the case law governing the internal application of treaty law—the relationship between the states and the federal government. I do not mean to suggest that the states’ residual sovereignty somehow overrides federal law establishing international obligations. Rather, I want to investigate the meaning of the president’s obligation to consult the Senate before entering into treaties. Judicial interpretation of the abstract ideas in international treaties should not, I submit, be a source of power for either the executive or the judicial branch to make new policies out of whole cloth in the service of abstract principles. This is not only an issue of the relationship between the people of the United States and the federal government, but also of the relationship between the federal government and the states.

Until the Seventeenth Amendment, the Senate’s role in ratification of treaties could be seen as involving the states in the treaty-making process.9 The senators represented the state legislatures and, as a result, the institutional interests of the state governments. It is only after the Senate became a popularly elected body that the interest of the states, as entities, was severed out of the Constitution’s schematic diagram for the exercise of the foreign affairs power.10 Any understanding of the nature of the president’s power with regard to treaties should be understood with regard to the fact that the nature

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871, 898–99 (2007) (explaining that the Kellogg-Briand Pact was intended to prevent future wars but ultimately failed to do so).


9. See Vikram David Amar, Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment, 49 VAND. L. REV. 1347, 1359–60 (1996) (suggesting the Seventeenth Amendment led to more senators who had previously served or would go onto serve in executive agencies, particularly in Cabinet positions, which demonstrates a shift in the power and interests of the Senate).

10. See id. at 1349 (explaining that since the passage of the Seventeenth Amendment, states have less power to advance their own interests).
of the entity with which the president must act in concert to effect a treaty obligation has changed significantly.

III. Medellín v. Texas and Its Implications for Treaty Implementation

The United States Supreme Court’s decision in Medellín v. Texas, focused on two legal questions: (1) whether the International Court of Justice’s (ICJ) Avena decision was enforceable domestic federal law that preempted contrary state law, and (2) whether a memorandum from the president to the attorney general of the United States, which stated that the United States would discharge its international obligations by having state courts give effect to the Avena decision, was binding federal law that required the states to provide reconsideration and review of capital sentences without regard to state procedural-default rules.

A. ICJ Decisions Are Not Self-Executing

Medellín had argued that a treaty becomes law automatically once it is ratified and, therefore, the Court’s power to interpret and apply the law was no different from its power to interpret and apply other laws. By virtue of the Supremacy Clause, Medellín argued, the ICJ’s Avena decision was directly binding on the state courts. The majority rejected this argument, holding that, in order to be adopted as the law of the United States, a treaty must be “self-executing,” meaning that its text manifests an intent to undertake a domestic and substantive obligation, as opposed to a mere diplomatic and international obligation. Substantive domestic law governs court decisions. International diplomatic obligations are a matter for the executive branch to honor or disavow as it sees fit. Given that it is international practice not to treat international obligations as domestic legal norms, it would make little sense to interpret a treaty as self-executing as a background matter.

11. See Medellín, 552 U.S. at 491–92 (discussing the enforceability of the ICJ’s Avena decision in state court). See also Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

12. See Medellín, 552 U.S. at 536 (discussing the validity of attempts to implement international obligations through presidential memorandum).

13. See id. at 504.

14. Id.

15. Id. at 505 n.2.

16. See id. at 522 (“The general rule, however, is that judgments of foreign courts awarding injunctive relief, even as to private parties, let alone sovereign States, ‘are not generally entitled to enforcement.’” (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1987)).
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Medellín further argued that the treaty was self-executing by virtue of the Optional Protocol to the Vienna Convention.\(^{17}\) Texas rebutted this argument by pointing out that the Optional Protocol is an accession to jurisdiction but does not otherwise enlarge the ICJ’s remedial powers.\(^{18}\) The Court determined that Article 94 of the UN Charter circumscribes the scope of the ICJ’s remedial powers and that the Rome Statute limited jurisdiction to diplomatic disputes and did not extend jurisdiction over individuals; therefore the relief Medellín sought was outside the ICJ’s authority.\(^{19}\) Any available ICJ remedies are diplomatic (i.e., nonjudicial) and as a result are subject to the ordinary limits of diplomatic action including the United States’ ability to veto enactments of the Security Council, the UN body with the greatest coercive power under the Charter.\(^{20}\) The majority further pointed out that Medellín’s argument was contrary to international understanding of ICJ jurisdiction and interpretation of the Vienna Convention.\(^{21}\)

The majority rounded out its treatment of ICJ jurisdiction by pointing out that Medellín’s position would render any treaty obligation both binding as a matter of domestic law and politically unassailable, because there is no recourse.\(^{22}\) The Court concluded, “Our cases simply require courts to decide whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.”\(^{23}\)

Justice Breyer’s dissent, by contrast, advocated a case-by-case approach, using a seven-part test to evaluate whether a treaty is enforceable if it conflicts with a particular state-court judgment.\(^{24}\) He

\(^{17}\) Id. at 506.

\(^{18}\) See id. at 507–08 (“The Protocol says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment. The Protocol is similarly silent as to any enforcement mechanism.”).

\(^{19}\) See id. at 508.


\(^{21}\) Medellín, 552 U.S. at 516 n.10. Justice Stevens, in his concurrence, would have held that Article 94 resulted in a self-executing requirement to follow international law because it does not contain affirmative language precluding self-execution, but that enforcement of this self-executing obligation is conferred on the political branches rather than the courts.

\(^{22}\) Id. at 517–18.

\(^{23}\) Id. at 521.

\(^{24}\) See id. at 549–551 (outlining Justice Breyer’s test and the need for context-specific evaluations).
would have justified this case-by-case approach by reference to all the cases in which a litigant has successfully relied on a treaty in litigation.25 Essentially, the dissent’s position was that because other treaties create self-executing obligations, the Court could not hold that the Vienna Convention on Consular Relations and Optional Protocol to the Vienna Convention do not create a self-executing obligation without undermining those other treaties. To Justice Breyer, this would create the possibility that a single state could resist an international obligation undertaken by the federal government, in contravention of the Supremacy Clause.26 He suggests that the Senate was considering broad international obligations, not “bread-and-butter” judgments involving individuals.27

Responding to the dissent’s arguments that general principles of international law put a close textual analysis of the relevant documents at odds with the international consensus on how to interpret treaties, the majority pointed out that paying close attention to the text of treaties has always been at the heart of treaty analysis.28 The majority emphasized the interaction between the president and Congress, focusing on the procedural requirements for creating federal law.

B. Lack of Presidential Authority to Transform a Non-Self-Executing Treaty into Federal Law Through an Executive Memorandum

The Medellín Court relied on a more functionalist approach to determine whether the president could, by issuing a memorandum to the attorney general, impose federal legal requirements directly on the states. Cautioning that the dissent framed the issue incorrectly, the majority emphasized that the question was whether the president’s memorandum created federal law capable of displacing state law under the Supremacy Clause.29 Invoking the three-part Youngstown test, the majority concluded that a non-self-executing treaty cannot

25. *Id.* at 547–48. Of course, those cases all involved textual analysis of the relevant treaty. See *id.* at 492 (noting that the Court’s textual approach is “hardly novel”).

26. *Id.* at 554.

27. *Id.* Justice Breyer’s reasoning is somewhat undercut by his failure to recognize that the ICJ’s own statute precludes it from considering cases involving individuals. See Rome Statute of the Court of International Justice, art. 34, ¶ 1, July 1, 2002, 2187 U.N.T.S. 90 (“Only states may be parties in cases before the Court.”).


29. See *id.* at 523 n.13 (stating that the dissent refrained from deciding the limited issue of whether the president’s memorandum created federal law pursuant to either the non-self-executing treaty or other Constitutional authority).
give a president independent authority to make a treaty’s provisions self-executing. That requires an act of Congress. Chief Justice Roberts’s opinion articulates a clear distinction between executing and making law. To make law, Congress must act either through the Senate’s ratification or by enactment of a statute implementing an otherwise non-self-executing treaty. The Court rejected the idea of congressional acquiescence because the president acted in the face of the two express grants of power that required congressional involvement. It likewise rejected the proposition that there was congressional acquiescence to the president’s authority to resolve diplomatic disputes with other nations through a claims-settlement process.

The Court framed the resolution of both questions in terms of the scope of executive branch power. Chief Justice Roberts’s opinion discusses the treaties at issue as being “negotiated by the President and signed by Congress.” In rebutting the dissent’s argument that the Court should not use textual analysis of a treaty to determine whether it is “self-executing,” the Chief Justice’s opinion focuses on the historic context.

IV. Analysis of the Supreme Court’s Reasoning

The dissent’s position was untenable—precedent clearly requires adherence to a treaty’s text. What’s interesting about the dissent’s approach, and Medellin’s position that treaties are generally self-executing in the United States, is that there might have been a better argument for automatic self-execution prior to the adoption of the Seventeenth Amendment. Thinking about self-execution in that light, and analyzing the scope of the president’s foreign affairs power in contrast to the Senate’s, gives further insight into why the Medellin

30. See id. at 524–30 (“[T]he non-self-executing character of a treaty constrains the President’s ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts.”).

31. See id. at 527 (“[G]iving domestic effect to an international treaty obligation under the Constitution—for making law—requires joint action by the Executive and Legislative Branches: The Senate can ratify a self-executing treaty ‘made’ by the Executive, or, if the ratified treaty is not self-executing, Congress can enact implementing legislation approved by the President.”).

32. See id. at 526 (“The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution, which divides the treaty-making power between the President and the Senate. The Constitution vests the President with the authority to ‘make’ a treaty.” (internal citation omitted)).

33. Id.

34. Id. at 512 n.8.
decision improves democratic accountability and responsible decision making.

It is the form of the arguments about the scope of the president’s foreign affairs power that is intriguing. The majority views the president’s power over foreign affairs as subject to express constitutional limitations on the mechanisms for creating federal law. By contrast, the dissent argues that complexity is required to protect simplicity. If a treaty looks like law, there must be a seven-part test by which the courts can sort it out. The majority assumes that both the executive and judicial branches are secondary to Congress’s power to make federal law, while Justice Breyer’s dissent presumes that because treaties are considered to be law, they are subject to judicial review, albeit with deference to the executive branch’s reasoned interpretation.

The opinions describe the scope of the foreign affairs power as a series of adjustments of the balance of powers between the branches of the federal government. Yet the underlying issue was whether the president could—in the exercise of his foreign affairs power under either the Vienna Convention or as a background matter—supplant the procedural requirements of state law. The omission is striking, giving the general deference accorded state procedural and substantive law by the federal courts, in light of the inherent limitations placed on the federal judicial power by Article III of the Constitution. Considering the role of the states as separate entities underscores the issue. As Justice Breyer pointed out in his dissent, and the victorious Allies knew when they drafted the Japanese constitution, a requirement that treaty obligations be directly incorporated into domestic law precludes the possibility that local political activity could undermine the expressed foreign policy goals of the federal government. That kind of limitation makes sense if you’re worried about a uniform trade-sanctions regime or suppressing imperialist coups in a newly-defeated empire. It doesn’t make as much sense when you’re talking about elected officials implementing the duly-enacted law of the land.

V. STATE INVOLVEMENT IN RATIFICATION OF TREATIES

Justice Breyer’s focus on the Supremacy Clause raises an important question: what if the states were directly involved in the ratification of treaties? At one point, they were. Prior to the enactment of the Seventeenth Amendment, senators were elected by the state legislatures and represented the interests of those legislatures.

35. See U.S. Const. art III.
If this were a David McCullough book (if you’ve read this far, I hope for your sake that you wish it were), I would launch into a tightly drawn profile of some policy maker who spearheaded (or fought) ratification of the Seventeenth Amendment. This is not such a book. And there is little fodder for a lawyer to build an argument about the Seventeenth Amendment’s impact on the states’ role in foreign affairs. The issue doesn’t really appear in the Congressional Record.\footnote{See generally H.R.J. Res. 39, 62d Cong. (1911) (enacted).} It is at least implied by the general narrative of the Seventeenth Amendment’s history. The Senate was designed to forestall concerns that the creation of a federal government would completely disenfranchise the states. The state legislatures retained authority to “instruct” their senators on how to vote on treaties.\footnote{See Todd. J. Zywicki, Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment, 73 OR. L. REV. 1007, 1036 (1994) (noting the historical practice of state governments “instructing” their state senators).} But the discussion of the amendment doesn’t seem relevant to the broader issue of the states’ participation in the federal government as corporate entities protecting their own residual sovereignty.

State participation does show up, however, in a key distinction in the case law Justice Breyer’s highlights in his dissent and the appendix. Justice Breyer correctly notes that the nineteenth-century self-execution cases do not elaborate a grand theory of self-execution, nor do they look for particular textual indicia of self-execution. For example, in early extradition case law, the Court treated the adoption of the rule of “specialty,” a term of art in international extradition law, as being specifically invoked by a treaty.\footnote{See United States v. Rauscher, 119 U.S. 407 (1886); Johnson v. Browne, 205 U.S. 309, 320–22 (1907).} The cases drew a strict distinction between the rights of the contracting parties (i.e., the signatory governments) and their citizens.\footnote{In \textit{Wildenuhus’s Case}, 120 U.S. 1 (1887), for example the Belgian Consul sought to bring a habeas corpus claim regarding a suspect in a murder committed aboard a Belgian vessel anchored in a U.S. port. In holding that the consul held a right under the bilateral consular-relations treaty between the United States and Belgium, the Court recognized that the treaty “settle[d] and define[d] the rights and duties of the contracting parties,” \textit{id.} at 12, and not those of the individual criminal suspect.} But the law was clear that the impact of a treaty should derive from its articulation of particular private rights, because in granting individuals particular rights, such as “rights of property by descent or inheritance,” the entities signing the agreement undertook to guarantee those rights to individuals.\footnote{Rauscher, 119 U.S. at 418–19.}
Justice Breyer’s understanding that these treaties create areas of law in which the courts were then free to recognize particular obligations as binding on the states would have had more purchase before the Seventeenth Amendment. The states would have had the opportunity, through the instruction process, to have their say on the subject-matter of treaties ratified by the Senate. The subject matter of those treaties would have potentially been a proper subject for federal judicial oversight, having been ceded by the states in a process that involved participation of their corporate representatives, the members of the Senate. The lack of careful analysis of self-execution prior to the Seventeenth Amendment may be explained by the fact that the states had at least some power to fend off ratification of treaties to which the majority of them could not agree.

Judge Jay Bybee has argued that the ratification of the Seventeenth Amendment resulted in a significant change in the balance of state and federal power: because the senators were now accountable to a generalized electorate, they were motivated to enact new federal law and exercise federal power, whereas when they had been obligated to the state legislatures, they had an incentive to restrict the scope of federal government.41 As Judge Bybee points out, the Seventeenth Amendment changed the states’ relationship to the treaty process. A necessary corollary of the fact that the states had a greater role in treaty ratification prior to the Seventeenth Amendment is that the courts’ treatment of treaties would be different.

Before the change, it would have made more sense to apply Justice Breyer’s approach to the case law governing self-executing treaties. Cases like United States v. Rauscher do not engage in substantial textual analysis in part because the meaning of the treaty was self-evident and in part because there was no question that the states, through the Senate, had consented to the terms of the treaty with Great Britain.42 But after the Seventeenth Amendment, we are in a world in which there is no separate institutional interest represented in the foreign affairs process—the president and the Senate are creatures solely of the federal government and do not represent the interest of the states. If the foreign affairs power is collapsed into horse trading between federal government officials, the states are left in the dust. All the more reason to adopt a more stringent analytical approach to treaties.


42. See Rauscher, 119 U.S. at 418–19 (discussing how treaties become the law of the land for citizens of the United States when Congress passes enacting legislation or the Senate ratifies the treaty).
Critics of the *Medellín* decision argue that by imposing a judicial plain-text gloss on a treaty’s implementation the Court bypassed the Supremacy Clause and failed to give effect to something that should have automatically become legally binding.\textsuperscript{43} Critics also argue that the prior case law on the interpretation of treaties never engaged in this kind of analysis.\textsuperscript{44} And some argue that *Medellín* is a unique case because of its bad facts and will have little impact on treaty-interpretation precedent.\textsuperscript{45} These criticisms are rooted in public international law and do not appreciate how the courts interpret statutes and administrative rules. After all, neither the majority nor the dissent in *Medellín* questioned the fact that it was up to a court to decide whether and to what extent a statutory requirement is self-executing: they parted ways on the framing of the analysis, not its necessity.

There is more to determining how federal law impacts the states than simply looking at the text of a statute. And it is the province of the courts to say what the law of the United States actually is. In a more run-of-the-mill case, the Court would still have to deal with federalism concerns such as whether Congress met the minimum requirements for preempting state law and whether Congress properly invoked an enumerated power. The tests that embody each of those concerns rely on assessing the degree of clarity with which a document reaches its goals. *Medellín* merely extends the practices that underlie statutory construction to the determination of whether a treaty creates an individual procedural right.

That treaties creating procedural rights are rare—and arguably non-existent, given that the Vienna Convention itself did not impose a right to procedural reconsideration of criminal convictions—is what makes *Medellín* most likely to be a one-off decision. The federal government has always been careful not to intervene in state criminal

\begin{footnotes}
\item[44] See, e.g., id. at 648–649 (asserting that the Court had no legal basis for denying the force of domestic law to a treaty that imposes an obligation on the United States that is not beyond the treaty power and has not been superseded by a statute).
\end{footnotes}
procedure. But that does not make the decision meaningless. It sets an outer limit on what changes in domestic law an ambiguously drafted treaty can create. This is analytically consistent with treaty-interpretation precedent, moreover, because it merely looks for a textual indication that a treaty creates an identifiable right before enforcing that right as a matter of law. If a treaty on its face creates such a right, there’s no need to go to the edges of analytical possibility to determine its meaning.

VI. Conclusion

H.L.A. Hart described law as rules that are validated and enforceable because of their pedigree. This view is deeply rooted in the Anglo-American tradition of laws. By contrast, in the civil law tradition, law is seen as the application of universal principles in particular circumstances. Treaties offer us an interesting cross-section of the two approaches. The type of bilateral trade and commerce treaties that have always governed world trade, sometimes thought of as “private” international law, have been treated as self-executing as a matter of course. If sovereigns are negotiating rights for their nationals abroad, that marks the substance of the negotiation. By contrast, many twentieth-century treaties embody abstract concepts like peace and self-determination. It is not entirely clear what the negotiating parties specifically intended. If a court treats the second kind of aspirational principle as a source of law, it bypasses the mechanisms by which domestic political bodies implement policies that balance the competing policy interests brought to bear by the democratic process.

46. See, e.g., Stefanelli v. Minard, 342 U.S. 118, 120 (1951) (holding that “the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure”).

47. See generally H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) (explaining that rules supply criteria of validity, also known as pedigree, which refers to how laws are created or adopted).


50. See, e.g., Treaty of Peace at Versailles, arts. 11, 87, 433, June 28, 1919, Ger.-Allies, 225 Consol. T. S. 188 (promoting international peace by ending World War I and encouraging self-determination through the creation of Poland, Estonia, Latvia, and Lithuania).
The best judicial tool for determining the effect of treaties has to be plain-text analysis. The parties to an international agreement chose particular language, at a particular time, for a particular purpose. In the U.S. system, those choices can be second guessed by other bodies, such as the president acting alone, or the Congress acting as a whole, but the content of a treaty will never be revisited by the same entity that initially ratified it: the president acting together with the Senate.

Textual analysis safeguards the U.S. Constitution’s particularized design of creating a pedigree by which laws would be adopted. Focusing closely on the text used by the decision makers helps courts to cleave most closely to the source of law’s coercive power—the process by which the decision-making body was empowered to make a decision in the first place. Stripping concepts of the words in which they are expressed, as Justice Breyer would do, unmoors legal principles from what gives them authority. The ultimate purpose of the courts is to set up a predictable system that hews closely to text, because the text is the only way to tie a concept to a pedigree that makes it a law.