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## The Politicization of Judgment Enforcement

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# THE POLITICIZATION OF JUDGMENT ENFORCEMENT

*Cassandra Burke Robertson\**

*In Medellín v. Texas, the Supreme Court went out of its way to disavow any intent to bring its analysis into the realm of civil litigation. This Article, prepared for the Frederick K. Cox International Law Center Symposium “Presidential Power, Foreign Affairs, & the 2012 Election,” argues that in spite of the Court’s stated intent, there is reason to believe that the policies animating Medellín may nonetheless bleed into transnational civil litigation. Medellín represents a noteworthy shift in the process of international lawmaking; it moves away from a traditional process and de-emphasizes executive power at the federal level. In theory, it allows greater legislative and state participation in the international realm. For private international law—and especially for matters of forum selection and judgment enforcement—this participation is likely to mean politicization. By leaving an opening for further politicization of international law, the Court’s opinion in Medellín moves the United States further away from being able to implement a coherent court-access policy.*

The Supreme Court’s decision in *Medellín v. Texas*, which held that that a decision of the International Court of Justice would not pre-empt state limitations on the filing of successive habeas petitions,<sup>1</sup> can be read as a death-penalty case,<sup>2</sup> as a federalism case,<sup>3</sup> or as an international human-rights case.<sup>4</sup> By no stretch of the imagination is

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\* Associate Professor, Case Western Reserve University School of Law. This article was prepared for the Case Western Reserve Journal of International Law panel, “The President’s Power to Implement International Law After *Medellín v. Texas*,” as part of the symposium “Presidential Power, Foreign Affairs & the 2012 Election.”

1. *Medellín v. Texas*, 552 U.S. 491, 498–99 (2008).
2. See Christina M. Cerna, *The Right to Consular Notification as a Human Right*, 31 SUFFOLK TRANSNAT’L L. REV. 419, 438 (2008) (noting that the consular-notification issue arose “in the context of the frontal attack launched by Europe and Latin America against the continued imposition of the death penalty by the United States”).
3. See Ted Cruz, *Defending U.S. Sovereignty, Separation of Powers, and Federalism in Medellín v. Texas*, 33 HARV. J.L. & PUB. POL’Y 25, 35 (2010) (“*Medellín* was a significant victory for U.S. sovereignty, for separation of powers, and for federalism.”).
4. See Margaret E. McGuinness, *Three Narratives of Medellín v. Texas*, 31 SUFFOLK TRANSNAT’L L. REV. 227, 246 (2008) (“The enduring legacy of

it a case about ordinary civil litigation. It seems almost incongruous, then, that the majority opinion would go out of its way to disavow any intent to bring its analysis into the realm of civil litigation. But the Court does exactly that, asserting that its “holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements.”<sup>5</sup> This very disavowal reveals an underlying concern that the policies animating *Medellín* may indeed bleed into transnational civil litigation.<sup>6</sup> Nor is this concern unwarranted: although the Court is correct that *Medellín* does not directly affect ordinary judgment enforcement, the Court’s opinion increases the risk that domestic politics will influence transnational judgment enforcement in ways that harm the nation’s foreign policy interests, and ultimately, its economic interests as well.<sup>7</sup>

There is no doubt that questions of court access and foreign judgment enforcement implicate both foreign policy and economic vitality.<sup>8</sup> Professor Stephen Burbank has described how the “geopolitical ramifications of international commerce” interact with the domestic judicial system.<sup>9</sup> Over the last three decades, the United States has struggled with its role in transnational litigation. The availability of higher damage awards, liberal discovery, and accessible courts made United States courts an attractive destination for foreign plaintiffs, though it has made the United States much less attractive

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*Medellín II* may thus be the unflattering and unmoving image of American human rights exceptionalism, reflected back at states eager to use U.S. non-compliance with international norms as an example and excuse for rolling back rights protection.”).

5. *Medellín*, 552 U.S. at 519–20.
6. See James M. Fischer, *Discretion and Politics: Ruminations on the Recent Presidential Election and the Role of Discretion in the Florida Presidential Election Recount*, 69 U. CIN. L. REV. 807, 846 n.139 (2001) (noting that “[l]ike the Shakespearean lady who ‘doth protest too much,’” such statements may unintentionally reveal “the exactly opposite internal reality”).
7. See, e.g., Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 73 (2012) (“*Medellín* 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 postwar period up until *Medellín*.”).
8. See Stephen B. Burbank, *A Tea Party at the Hague?*, 18 SW. J. INT’L LAW 629 (2012) (“Transnational judgment recognition and enforcement law and practice are, inescapably, aspects of a country’s foreign policy.”).
9. See *id.* at 637–38 (discussing the impact of the American private bar on U.S. policy during international negotiations).

FOR FOREIGN DEFENDANTS.<sup>10</sup> THE CENTRALITY OF THE UNITED STATES' ROLE IN TRANSNATIONAL LITIGATION IS NOW SHRINKING, HOWEVER, AS BOTH COMMERCE AND COMMERCIAL LITIGATION ARE ENTERING A MORE MULTIPOLAR ERA.<sup>11</sup>

AS PARTIES PERCEIVE GREATER FREEDOM IN CHOOSING A DESTINATION FOR TRANSNATIONAL LAWSUITS, THE FOREIGN POLICY OF COURT ACCESS BECOMES EVER MORE IMPORTANT. IF THE UNITED STATES IS VIEWED AS AN UNCOOPERATIVE JUDICIAL PARTNER, NATIONS MAY RETALIATE BY ENACTING LEGISLATION THAT EITHER ENCOURAGES LITIGATION AGAINST U.S. COMPANIES OR DISCOURAGES INVESTMENT AND TRADE BY THOSE COMPANIES—BOTH SCENARIOS WOULD HARM U.S. ECONOMIC INTERESTS ABROAD.<sup>12</sup> LIKEWISE, UNILATERALLY GENEROUS JUDGMENT ENFORCEMENT POLICIES MAY MAKE IT MORE DIFFICULT TO NEGOTIATE A MULTILATERAL JUDGMENT ENFORCEMENT CONVENTION,<sup>13</sup> BUT MORE RESTRICTIVE POLICIES RUN THE RISK OF A WORLDWIDE SEARCH FOR CORPORATE ASSETS IN A POTENTIALLY MORE FAVORABLE FORUM.<sup>14</sup>

*Medellín*—EVEN THOUGH IT IS OSTENSIBLY SO FAR REMOVED FROM CIVIL LITIGATION PRACTICE—MOVES THE DOMESTIC DISCOURSE AWAY FROM A COHERENT COURT-ACCESS POLICY. BY REQUIRING WHAT AMOUNTS TO A “CLEAR STATEMENT RULE” FOR SELF-EXECUTING TREATIES, THE COURT MAKES IT MARGINALLY MORE DIFFICULT TO NEGOTIATE A JUDGMENTS CONVENTION, TO IMPLEMENT THE CHOICE OF COURT CONVENTION, OR TO ENGAGE IN OTHER

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10. See *id.* at 630 (referring to the United States as “a country whose courts have been called the light to which prospective foreign plaintiffs are drawn like moths, and are a light that most prospective foreign defendants would like to turn out”); see also Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1127 (2010) (noting “the increasing recognition that the court-access doctrine implicates U.S. foreign interests”).
  11. See Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT’L L. 31, 48 (2011) (“[A]s we move toward 2021, transnational litigation will be increasingly multipolar.”); Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT’L L. 159, 173 (2011) (“[T]here may well be a global diffusion of transnational cases, with courts in a much larger number of countries regularly hearing cases involving foreign parties.”).
  12. See Robertson, *supra* note 10, at 1111 (noting that “such a state will instead enact a more targeted blocking statute, or perhaps allow U.S.-level damages in cases dismissed from U.S. courts”).
  13. See Burbank, *supra* note 8, at 633 (discussing how unilateralism hindered international cooperation).
  14. Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1464 (2011) (“[I]n order to obtain an effective remedy, a plaintiff must rely on enforcement by a court that does have jurisdiction over assets of the defendant.”).

private international law negotiations.<sup>15</sup> Congress could, of course, pass the necessary enabling legislation. However, there are institutional competence factors that make Congress's participation in the area less likely to occur: Congress lacks both the specialized knowledge and the political will to focus on the details of litigation procedure.<sup>16</sup>

The larger impact of *Medellín*, however, may be how its role in domestic politics influences transnational lawmaking more broadly. The majority's opinion recognizes that states can exert power even in areas that directly affect foreign policy. As Professor Ronald Brand has pointed out, because the opinion "hold[s] that state procedural rules could prevent the application of the binding international-law rules created by these treaties," it may therefore "constitute an extraordinary delegation of authority to the states for matters of foreign affairs."<sup>17</sup> Although there may be some benefit to state-level competition in judgment enforcement,<sup>18</sup> there are also significant transaction costs in dealing with fifty different state policies; these transaction costs may well outweigh any gains from competition and experimentation.<sup>19</sup>

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15. See Burbank, *supra* note 8, at 641 (stating that although the "Hague Service and Evidence Conventions were ratified as self-executing treaties," *Medellín* makes it less likely that future conventions will follow suit, as the self-executing treaty is now "on the cutting edge of obsolescence in the United States"); see also Ronald A. Brand, *Treaties and the Separation of Powers in the United States: A Reassessment After Medellín v. Texas*, 47 DUQ. L. REV. 707, 727 (2009) ("This result is particularly likely in the areas of private international law and international private law, areas in which the United States is consistently involved in the negotiation of treaties and other international legal instruments at the Hague Conference on Private International Law, UNCITRAL, and UNIDROIT.").
  16. See James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493, 535 (2011) ("Interest groups may press for public expenditures, such as the repair of roads and bridges, but they are unlikely to press for jurisdictional repairs. The combined absence of interest group support and, dare I say it, intrinsic interest, can sometimes consign jurisdictional reform to legislative limbo.").
  17. Brand, *supra* note 15, at 726–27.
  18. See Gregory Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments*, 54 HARV. INT'L L. J. (forthcoming 2013), at 75–76 ("[T]he diversity of state recognition law, which has persisted despite the availability of judgment arbitration, suggests that declaring a uniform national rule would cut off an experiment in the 50 state laboratories before it may have run its course.").
  19. See Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 637 (2000) ("[A]

Making it more difficult to enter into international conventions on forum choice and judgment enforcement increases the chance that a more troubling aspect of domestic politics will come into play. At the current time, the domestic political landscape includes a significant xenophobic strain.<sup>20</sup> As a result, state-level foreign policy choices are subject to political second-guessing.

It is true that states may individually offer deference to international obligations; others have pointed out that “in the wake of some decisions by the [International Court of Justice] prior to the *Avena/Medellín* litigation, some governors commuted death sentences of individuals, perhaps in response to some of the pressure coming from these international tribunals.”<sup>21</sup> However, it is likely no coincidence that the state which offered the greatest deference to the *Avena* decision—Oklahoma—is also the state where the voters adopted a constitutional amendment purporting to bar the use of international law altogether.<sup>22</sup> As of 2012, the measure has been enjoined by federal courts and has not yet become effective.<sup>23</sup> But as a reflection of state politics, the Oklahoma amendment raises significant concerns about state-level participation in foreign policy, court access, and transnational litigation, especially since over seventy percent of Oklahoma’s electorate voted in favor of the provision.<sup>24</sup> Thus, even if the executive and judicial branches of the state are inclined to offer deference to international law—and they were in Oklahoma—there is no guarantee that a populist movement will not choose a different direction. Moreover, it is not clear that such state-by-state involvement is even necessary to protect state interests; as Professor

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uniform federal standard for those jurisdictional grounds that will be recognized for enforcement purposes would promote certainty and predictability.”).

20. See Burbank, *supra* note 8, at 632 (“[H]aving poked its head out of international law and private international law cocoons on the field of civil litigation, the United States appears to be regressing to a posture of isolationism and xenophobia that is reminiscent of the second half of the nineteenth century.”).
21. Peter B. Rutledge, *Medellín, Delegation and Conflicts (of Law)*, 17 GEO. MASON L. REV. 191, 225 (2009).
22. See Cerna, *supra* note 2, at 459 (noting that the Oklahoma Court of Criminal Appeals reconsidered a death-penalty case in “a decision that would not have been possible but for the decision of the ICJ in *Avena*,” and that the Oklahoma governor ultimately commuted the death sentence); *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1308 (W.D. Okla. 2010).
23. *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012).
24. *Tenth Circuit Upholds Injunction Barring Oklahoma Anti-Sharia, Anti-International Law Constitutional Amendment*, 106 AM. J. INT’L L. 365, 366 (2012).

John Quigley has pointed out, the ordinary treaty making process already integrates state concerns through the states' representation in the Senate, thereby integrating state input without the risk of capture by xenophobic interests.<sup>25</sup>

Of course, xenophobia is not going to prevail in every state. Nevertheless, overcoming such attitudes requires expending additional political capital—political capital that is in short supply in an increasingly partisan and polarized country.<sup>26</sup> Voters in such states may be focused on the more immediately salient questions of death-penalty policy or anti-terrorism initiatives; they are not likely to be thinking about transnational commercial litigation. Nevertheless, as Justice Breyer pointed out, state power in this area will have far-reaching effects in matters of foreign relations by “plac[ing] the fate of an international promise made by the United States in the hands of a single State.”<sup>27</sup> As a result, there is a significant risk that voters focused on crime and terrorism end up with a disproportionate influence in “the bread-and-butter commercial and other matters that are the typical subjects of self-executing treaty provisions.”<sup>28</sup>

There is also a significant risk such partisan political distinctions will create enduring rifts. As international law becomes a more salient issue at the state level, loosely held xenophobic attitudes may solidify into an integral part of the way in which political movements self-identify.<sup>29</sup> And in fact, *Medellín* has become something of a political rallying cry for those who identify with the Tea Party, whose “supporters perceive that foreign forces are succeeding in taking over the United States, transforming the country they love into an unrecognizable and alien land” and whose “[r]hetoric of foreign

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25. John B. Quigley, *A Tragi-Comedy of Errors Erodes Self-Execution of Treaties: Medellín v. Texas and Beyond*, 45 CASE W. RES. J. INT'L L. 403 (2012).
26. See Donna Leinwand, *States Enter Debate on Sharia Law*, USA TODAY, Dec. 9, 2010, at 3A. (“[L]egislators in at least seven states, including Arizona, Florida, Louisiana, Oklahoma, South Carolina, Tennessee and Utah, have proposed similar laws . . . . Tennessee and Louisiana have enacted versions of the law banning use of foreign law under certain circumstances.”).
27. *Medellín v. Texas*, 552 U.S. 491, 554 (2008) (Breyer, J., dissenting).
28. *Id.* at 554; but see Mark L. Movsesian, *International Commercial Arbitration and International Courts*, 18 DUKE J. COMP. & INT'L L. 423, 444 (2008) (noting that international arbitration is typically less controversial in part because of its focus on commercial matters).
29. See, e.g., Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT'L L. 389, 399 (2009) (describing how support for torture became associated with partisan identification).

invasion and foreign infiltration dominates [its] speeches and literature.”<sup>30</sup>

Even an international convention focused on litigation procedure can be re-framed as a partisan political issue. The Hague Convention on Choice of Courts Agreement, for example, “obligates the judicial branch of signatory nations generally to suspend litigation in favor of the country specified in a choice of courts clause and generally to enforce judgments rendered by that country,” and therefore would “bind a sovereign actor in some manner determined by reference to a rule or act of another entity not within the direct reach of the sovereign.”<sup>31</sup> Finding the political will to ratify the convention might be easier said than done in the current political climate.<sup>32</sup>

The development of international law is interactive, not static.<sup>33</sup> *Medellín* represents a noteworthy shift in the process of international lawmaking; it moves away from a traditional process and de-emphasizes executive power at the federal level. In theory it allows greater legislative and state participation in the international realm. For private international law—and especially for matters of forum selection and judgment enforcement—this participation is likely to mean politicization. By leaving an opening for further politicization of international law, the Court’s opinion in *Medellín* moves the United States further away from being able to implement a coherent court-access policy.

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30. Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. 1807, 1815 (2011).
31. Rutledge, *supra* note 21, at 197 (citing Hague Convention on Choice of Court Agreements art. 8, June 30, 2005, 44 I.L.M. 1294).
32. *See id.* at 197; Burbank, *supra* note 8, at 639–41.
33. Janet Koven Levit, *Does Medellín Matter?*, 77 FORDHAM L. REV. 617, 630 (2008) (referring to international law as “an interactive process”).