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Making Treaty Implementation More Like Statutory Implementation

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MAKING TREATY IMPLEMENTATION MORE LIKE STATUTORY IMPLEMENTATION

Jean Galbraith*

Both statutes and treaties are the “supreme law of the land,” and yet quite different practices have developed with respect to their implementation. For statutes, all three branches have embraced the development of administrative law, which allows the executive branch to translate broad statutory directives into enforceable obligations. But for treaties, there is a far more cumbersome process. Unless a treaty provision contains language that courts interpret to be directly enforceable, they will deem it to require implementing legislation from Congress. This Article explores and challenges the perplexing disparity between the administration of statutes and treaties. It shows that the conventional assumption that Congress must implement treaties that are not directly enforceable by courts stems from an unduly narrow historical perspective. Instead, largely forgotten nineteenth-century practice and cases reveal that the executive branch can implement treaties so as to make them enforceable in the courts. Drawing on this past practice, this Article argues that it is time to reconfigure the administration of treaties. In at least some circumstances, the executive branch should be able to translate treaty provisions into court-enforceable obligations in a manner comparable to the statutory context, including through rulemaking by administrative agencies. This approach is particularly desirable for multilateral regulatory treaties, which have come to play an increasingly important role in global governance.

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INTRODUCTION

There is a curious contrast between how statutes and treaties function within our constitutional system. Both are the “supreme Law of the Land,”¹ and yet quite different practices have developed with respect to their administration and enforcement. Since at least the New Deal, all three branches have embraced a pragmatic approach to the administration of statutes, one that puts a premium on effectiveness. This approach accepts that Congress can give broad statutory directives that administrative agencies or other executive branch actors translate into enforceable obligations through rulemaking or other agency action. This in turn provides Congress with “the necessary resources of flexibility and practicality . . . to perform its function.”²

For treaties, the process of translating generalized directives into enforceable obligations is far more cumbersome. The Supreme Court has indicated that unless a treaty provision is itself directly enforceable in the courts, it will be deemed “non-self-executing” such that only Congress can act to make it enforceable.³ In other words, unlike in the statutory context, the executive branch cannot be the administrative intermediary between a treaty provision and the courts. Instead, it takes a statute to administer the treaty, and thus one supreme law of the land is needed to implement another.

1. U.S. CONST. art. VI, cl. 2. Throughout this Article, I use the word “treaties” to refer to international agreements that the United States has joined or seeks to join following the process set forth in the Treaty Clause, which provides 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.” *Id.* art. II, § 2, cl. 2. My analysis in this Article only applies to such treaties and does not apply to other kinds of international agreements entered into by the United States.

2. *Yakus v. United States*, 321 U.S. 414, 425 (1944) (quoting *Currin v. Wallace*, 306 U.S. 1, 15 (1939)).

3. *Medellín v. Texas*, 552 U.S. 491, 525–26 (2008).

This added hurdle poses particular challenges for treaties, especially multilateral ones, that seek to regulate the conduct of private individuals. In the years since the end of the Cold War, these regulatory treaties have become an increasing part of global governance, appearing in contexts as diverse as business, security, and environmental protection.⁴ Like the drafters of congressional statutes, the negotiators of these treaties can prefer broad directives because of their usefulness in accommodating changing conditions and because of the advantages that ambiguity can offer to achieving consensus. In addition, for reasons based in their own domestic law, negotiators from other countries often require that commitments in treaties use language that obligates domestic action rather than directly constitutes this action.⁵ Regulatory treaties thus are often not directly enforceable by courts, and the need for congressional action makes it difficult and sometimes impossible for their provisions to be implemented. Getting an administrative agency to rulemake can be challenging, but getting Congress to pass a statute is likely to be far harder. There is no certainty that Congress will act in a timely manner or even that it will act at all. To give a particularly egregious example, in 1992, the Senate advised and consented to an important treaty on the transportation of hazardous waste and yet today—twenty-four years later—Congress has still not passed legislation to implement the treaty’s commitments.⁶

The challenge of administering treaty commitments can affect the entire treaty-making process. U.S. negotiators are fully aware of the difficulties of getting Congress to pass implementing legislation. Sometimes they respond by seeking to make treaty commitments that are explicitly “self-executing,”⁷ but this is often not feasible, particularly for multilateral treaties.⁸ A further strategy is to seek to limit the international commitments undertaken by the United States that will require domestic legal enforcement to actions that are already authorized by existing U.S. statutes.⁹ This strategy curtails the possible scope of international cooperation. It also adds to the reasons for the

4. Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT’L. L.J. 321, 344–45, 349–352 (2011) (describing this trend and observing that “[u]nlike previous practice, seemingly now the default position in international negotiations . . . is the regulation of individual behavior.”).

5. See Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 634 (2008); see also ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 178–95 (2d ed. 2007) (describing the range of domestic approaches with respect to treaty implementation).

6. *Basel Convention on Hazardous Wastes*, U.S. DEP’T ST., <http://www.state.gov/e/oes/eqt/chemicalpollution/83016.htm> [<https://perma.cc/4YPH-GH6A>].

7. E.g., Treaty Concerning Defense Trade Cooperation, Austl.-U.S., pmb., Sept. 5, 2007, S. TREATY DOC. NO. 110-10 (2007) [hereinafter Austl. Defense Trade Cooperation Treaty] (expressing the understanding that “the provisions of this Treaty are self-executing in the United States”). For the complicated further story regarding this treaty and a similar one between the United States and Great Britain, see *infra* notes 240–242 and accompanying text.

8. See Vázquez, *supra* note 5, at 668.

9. See, e.g., S. EXEC. REP. NO. 109-18, at 6 (2006) (emphasizing the lack of need for implementing legislation with respect to the U.N. Convention against Corruption); John B.

president to move away from making treaties altogether. A signature move of the Obama Administration had been to join the United States to major multilateral international agreements without seeking approval from the Senate on the grounds that their terms can already be implemented under existing U.S. law.¹⁰ The more hurdles the treaty-making process creates for the executive branch, the stronger its incentives are to bypass this process altogether.

The assumption that Congress needs to be the intermediary between otherwise unenforceable treaty provisions and the courts is prevalent, and yet its foundations are surprisingly unexamined. Most scholars addressing the issue of treaty non-self-execution devote their attention mainly to what makes a treaty provision non-self-executing rather than to how provisions that are not directly enforceable are to be implemented.¹¹ Those scholars who have considered executive branch implementation have done so largely by relying on the Take Care Clause or by emphasizing that the president's foreign-affairs powers give the president authority to execute treaties.¹² A foreign-affairs perspective also pervaded both the briefing and the Supreme Court's opinion in *Medellín v. Texas*,¹³ the case that appears to cement Congress's exclusive authority to translate treaty directives that are not directly enforceable into law that is enforceable by the courts.¹⁴

This Article explores and challenges the assumption that Congress is the only appropriate intermediary between the courts and treaty provisions that are not directly enforceable. Instead, it argues that actors in the executive branch can serve this intermediary role, at least when certain conditions are met. The argument rests not on the president's foreign-affairs powers, but rather on the claim that the legal and structural arrangements that have

Bellinger, III, Legal Adviser, U.S. Dep't of State, *The United States and International Law* 6 (June 6, 2007), http://photos.state.gov/libraries/unesco/182433/pdfs/JBB_Speech_on_International_Law_6-5-07.pdf [<https://perma.cc/G65P-UXUT>] (“[W]henever we consider taking on new obligations, we examine a number of factors . . . [including w]ill we be in a position to implement, or will there be complications because of domestic law?”).

10. See *infra* notes 81–86 and accompanying text.

11. See generally, e.g., David J. Bederman, *Medellín's New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529 (2008); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131; Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51 (2012); David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228 (2010); David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135, 183 (2012); Vázquez, *supra* note 5; Ernest A. Young, *Treaties as "Part of Our Law"*, 88 TEX. L. REV. 91 (2009).

12. See, e.g., Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. 11, 22–32 (2009) (emphasizing the president's foreign-affairs powers in arguing that the president should be able to implement non-self-executing treaties, although also touching more generally on administrative law parallels); Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 353–72 (2008) (arguing that the Take Care Clause authorizes the president to implement at least some non-self-executing treaties).

13. 552 U.S. 491 (2008).

14. See *infra* notes 199–202 and accompanying text.

developed with regard to the administration of statutes can constitutionally and appropriately be applied to treaty implementation. This approach offers new insight as to both *how* Congress came to be assumed to be the exclusive implementer of non-self-executing treaty provisions and *whether* this assumption is warranted today.

The broad lens used in this Article reveals that the implementation of treaties and statutes diverged over time less because of preordained constitutional differences than because of different developmental paths. The conventional account of Congress's exclusive role in implementing otherwise nonenforceable treaties depends heavily on dicta in *Foster v. Neilson*, an 1829 Supreme Court decision that described treaty enforcement as a matter for either Congress or the courts.¹⁵ This account overlooks other persuasive evidence from nineteenth-century practice and case law that shows that, far from being exceptional, the administration of treaties developed in ways that closely paralleled the administration of statutes, including through reliance on executive branch intermediation.

More specifically, a close look at past practice reveals that the executive branch has in fact already exercised power delegated by treaties to create court-enforceable law out of generalized treaty directives. This practice is most evident with regard to nineteenth-century Indian treaties, which often explicitly delegated administrative authority to the president, including rulemaking authority. These treaties were blessed by courts, including at times the Supreme Court, in ways that undercut the conventional assumption that treaty enforceability is a matter for either Congress or the courts. Instead, during the nineteenth and into the early twentieth century, the implementation of treaties came to rely on executive branch administration in ways that resembled the rise of administrative law in the statutory context.

This parallel between the treaty context and the statutory context is suggested as well by broader uses of the terms "self-executing" and "not self-executing." The Supreme Court began to use this terminology in the late nineteenth century with respect not only to treaties, but also to the two other types of supreme law of the land—the Constitution and statutes. This similar language suggests that the Court viewed treaty implementation not as exceptional, but rather as raising the same kinds of questions posed by the implementation of law generally. Moreover, while early uses of "not self-executing" almost always referred to a need for legislative implementation, later case law came to use this term in the statutory context with respect to a need for executive branch implementation as well. This suggests that the Court did not intend the phrase to be a term of art about the need for legislative implementation, but rather to mean more broadly that some actor needed to take further steps to trigger court enforceability.

Yet as executive branch administration of statutes took off, the administration of treaties stagnated. A selective narrative developed about treaty administration—one that privileged the dicta in *Foster* while overlooking that

15. 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part* by *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

this dicta arose at a time when the administrative capacities of the executive branch were far less developed. The arrested development of treaty administration relative to statutory administration was doubtless helped by the differing degrees of practical imperatives. The need for executive branch administration of regulatory statutes grew increasingly apparent with the rise of the national economy and culminated in the twentieth century in sweeping constitutional acceptance of delegations from Congress to administrative agencies. The rise of globalization was slower, and it was not until near the end of the twentieth century that multilateral treaties with a strong regulatory character became a common feature of the international legal landscape. By that time, the assumption that Congress must implement non-self-executing treaty provisions had become widespread and remains so, even as the sharp uptick in regulatory treaties in the years since the end of the Cold War has made this assumption increasingly cumbersome.

This Article argues that that we can and should abandon the assumption that Congress has exclusive authority to translate non-self-executing treaty provisions into obligations that are enforceable in the courts.¹⁶ Instead, we should conclude that executive branch actors can have the constitutional authority to act as the intermediary between otherwise unenforceable treaty provisions and the courts through administrative action. The normative justification for this position is similar to the one that underlies statutory delegations to the executive branch. Treaties, like statutes, “must often be adapted to conditions involving details with which it is impracticable for the [treaty makers] to deal directly”¹⁷ and “[w]ithout capacity to give authorizations [to executive branch actors,] we should have the anomaly of a . . . power [where] in many circumstances calling for its exertion would be but a futility.”¹⁸ Administrative law also points the way to structural and procedural safeguards that can further responsible treaty implementation by executive branch actors.

The rise of administrative law required the acquiescence of all three branches of government. For the executive branch to have the authority to implement otherwise nonenforceable treaty provisions through administrative actions, the acquiescence of the Senate and the courts would similarly be needed. On the surface, the Supreme Court’s decision in *Medellin* appears to close the door on such implementation: citing *Foster*, it states categorically

16. As I discuss *infra* note 224, my focus here is on effects rather than terminology. I favor a broader use of the term “non-self-executing” to refer to treaty provisions that require action, but not necessarily intervening legislative action, before they give rise to court-enforceable obligations. Such a use would be consistent with how the Supreme Court has come to use the term in the statutory context. See *infra* Section II.B.2. When I use the term here, I use it in this way, except when context makes clear that I am describing narrower uses by others. But one could also define non-self-executing treaty provisions as those that can only be implemented through legislation—an approach seemingly taken by the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008)—and yet recognize that some other treaty provisions that are not immediately enforceable in court can be made to be so by executive branch administration.

17. *Currin v. Wallace*, 306 U.S. 1, 15 (1939).

18. *Id.* (quoting *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935)).

that Congress is the actor charged with implementing treaty provisions that are not themselves directly enforceable.¹⁹ Yet a deeper reading of *Medellín* suggests a more nuanced conclusion. *Medellín* emphasizes the centrality of a treaty's text to understanding its import for U.S. domestic law.²⁰ The text of the treaty at issue in *Medellín* did not explicitly delegate administrative authority to executive branches of government, and thus, the Court concluded, the Senate had not intended such a delegation when it advised and consented to the treaty.²¹ But *Medellín* should not be read to bar executive branch implementation where the text of a treaty spells out such authority or where the Senate specifies the delegation of such authority in its resolution of advice and consent. This Article thus argues that during the making of future treaties, Senate resolutions providing advice and consent could specify the delegation of authority to administer these treaties to executive branch actors. More boldly, the Article suggests that the text of some already-negotiated treaties might bestow such authority on the president in the absence of contrary signals from the Senate.

The Article unfolds as follows. Part I describes how treaties and statutes are implemented in the United States today and identifies the far greater political and legal hurdles that confront the implementation of non-self-executing treaties. Part II explores how this disparity arose. It first describes the conventional account of this disparity, which relies heavily on dicta from *Foster*. It then offers an alternative narrative based in past practice and case law that shows similarities between the administration of treaties and of statutes, including examples of how the executive branch has turned treaty provisions into court-enforceable obligations through administrative action. Part III lays out a forward-looking argument for empowering the executive branch to implement most types of regulatory treaty provisions. It argues that treaties can be—and in some cases already are—structured to permit this implementation in ways that are consistent with *Medellín*.

Although this Article argues that the implementation of treaties should more closely resemble the implementation of statutes, it does not call for perfect parity. Treaties and statutes have their differences. The executive branch plays a more dominant role in the making of treaties than in the making of statutes. Treaties are as likely or perhaps more likely than statutes to be precise in their substantive specifications, but they are less likely to concern themselves with structural and procedural issues of domestic law. Constitutional practice establishes that some things must be done by statute rather than treaty, including at a minimum the appropriation of money. The foreign-affairs dimensions of treaties might support a somewhat different set of procedural safeguards related to implementation than those that are typically used in administrative law. These differences all matter, although they receive only brief consideration here. The hope underlying this Article is that, in future practice, we will be working through the implications of these

19. *Medellín*, 552 U.S. at 525–26 (citing *Foster*, 27 U.S. (2 Pet.) at 315).

20. *Id.* at 514.

21. *Id.* at 527.

differences, rather than continuing to rely on the outdated and cumbersome process that exists today.

I. THE LAW OF THE LAND TODAY: A TALE OF TWO DOCTRINES

The Supremacy Clause provides:

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 thereby²²

This text makes both laws and treaties the “supreme law of the land,” and yet today they are not treated alike. Instead, the administration of treaties is subject to a perceived constitutional constraint that is absent from the administration of statutes.²³ Where a treaty provision uses language that does not sound directly enforceable, intervening action by Congress is deemed a necessary predicate to enforcement by the courts. This Part summarizes the current difference between the implementation of treaties and statutes in terms of its doctrinal underpinnings and its practical consequences. Its purpose is descriptive. Later Parts explore how this difference arose and the extent to which it is warranted today.

A. *Treaties*

The status of treaties as the “law of the land” is intricately bound up with two terms which do not appear in the Constitution. These terms are “self-executing” and “non-self-executing.”²⁴ Whether treaty provisions are or are not self-executing has become a crucial inquiry for courts in deciding whether they can enforce a treaty’s requirements. The current contours of this inquiry are established by the Supreme Court’s 2008 decision in *Medellín v. Texas*, which is the Court’s most extended treatment of treaty implementation to date.²⁵

Medellín was an important and controversial case. A few years earlier, the International Court of Justice (“ICJ”) had ruled that the United States had an international legal obligation to reconsider the cases of dozens of

22. U.S. CONST. art. VI, cl. 2.

23. For reasons of space, I do not discuss certain ways in which treaties and statutes are treated similarly, such as the last-in-time rule, which provides that where there is a conflict between a self-executing treaty and a statute, the more recent one prevails. See CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 52–53 (2d ed. 2015). I also do not discuss whether a specific cause of action is needed before a private party can bring a claim based on a treaty or a statute—a matter to which the Supreme Court has paid increasing attention. See Hathaway et al., *supra* note 11, at 56–75 (describing this shift in the treaty context); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 100–06 (2005) (summarizing shifts in the Court’s approach in the statutory context).

24. See U.S. CONST. art. VI, cl. 2 (not including these terms).

25. 552 U.S. at 491.

Mexican nationals on death row, including Mr. Medellín.²⁶ Moreover, the United Nations Charter requires the United States to “undertake[] to comply with the decision of the International Court of Justice in any case to which it is a party.”²⁷ Given the ICJ’s ruling and the U.S. commitments under the U.N. Charter, President George W. Bush issued a memorandum instructing state courts to reconsider the death row cases at issue in the ICJ case.²⁸ In *Medellín*, the Supreme Court had to decide whether the Texas courts had to implement the ICJ decision, either because these courts had a direct obligation to comply with it or because the Bush Administration memo gave rise to such an obligation.²⁹

The Court considered the case to turn on whether or not the U.N. Charter provision was self-executing.³⁰ In the process, it had to address what “self-executing” and “non-self-executing” meant. The Court explained: “The label “self-executing” has on occasion been used to convey different meanings. What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law.”³¹ This passage distinguishes self-executing and non-self-executing treaties based on their effects. A self-executing treaty has “automatic domestic effect as federal law.”³² By contrast, a non-self-executing treaty has what sounds like a distinctly lesser status: it is not “by itself” enforceable in the courts.³³

In addition to distinguishing between self-executing and non-self-executing treaties based on their immediate legal effect, *Medellín* made two further, important pronouncements. First, the Court emphasized that the text of a treaty provision is central to the determination of whether or not the provision is self-executing.³⁴ The Court concluded that the language “*undertakes to comply*”³⁵ in the U.N. Charter provision at issue was not meant to give rise to obligations that were directly enforceable in domestic courts, but rather merely committed treaty parties “to take *future* action through their

26. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. Rep. 12 ¶¶ 106, 121–41 (Mar. 31).

27. U.N. Charter art. 94, ¶ 1.

28. *Medellín*, 552 U.S. at 503.

29. *Id.* at 504, 523.

30. *Id.* at 505–06.

31. *Id.* at 505 n.2. Although the Court distinguishes here between self-executing and non-self-executing *treaties*, in fact, its analysis focuses more on self-executing and non-self-executing *treaty provisions*. The practice of the political branches also accepts that a treaty need not be uniformly self-executing or non-self-executing. See, e.g., 152 CONG. REC. 18,398 (2006) (containing, in a Senate resolution of advice and consent to a treaty, a declaration providing that “the provisions of the Convention (with the exception of Articles 44 and 46) are non-self-executing”).

32. *Medellín*, 552 U.S. at 505 n.2.

33. *Id.*

34. *Id.* at 506–07.

35. *Id.* at 508 (quoting U.N. Charter art. 94, ¶ 1).

political branches to comply with an ICJ decision.³⁶ The Court explained that the text of a treaty provision is crucial to determining whether or not the provision is self-executing because this language “is after all what the Senate looks to in deciding whether to approve the treaty.”³⁷

The practical effect of *Medellin*'s textual focus is that the Court may consider many treaty provisions non-self-executing. This is more likely with regard to multilateral treaties, which are fewer in number than bilateral treaties but likely to be of greater importance.³⁸ As Justice Breyer observed in dissent, different countries have different domestic legal processes for implementing treaties.³⁹ For example, the United Kingdom and certain other countries always require legislation to implement treaty obligations into domestic law.⁴⁰ Because of the diversity of legal mechanisms governing treaty implementation, it can be hard for treaty negotiators to use language that sounds immediately binding across legal contexts.⁴¹ This issue is especially acute for regulatory treaties—treaties that require states to regulate the substantive conduct of individuals, corporations, or other nonstate actors. This is a category of treaties that has blossomed since the end of the Cold War, whether because of the increased ease of international cooperation or because of the increased need for cross-border coordination in response to globalization.⁴² Since regulatory treaties cannot directly apply to conduct in countries in which treaties do not have direct effect as domestic law, these

36. *Id.* (quoting the U.S. amicus brief and adding that “[the Court] agree[s] with this construction of Article 94”).

37. *Id.* at 514.

38. By my calculations, of the treaties submitted by the president to the Senate from 2001 through 2010, given advice and consent during this period, and assigned unique treaty numbers by the Senate, fifty-eight were bilateral and thirty-eight were multilateral. (Two of these multilateral treaties came packaged in single treaty numbers with a set of related bilateral treaties that, in light of their shared treaty number, are not separately counted here.) The Senate attached declarations of non-self-execution or partial non-self-execution to three of the bilateral treaties and thirteen of the multilateral treaties. All except one of these declarations came subsequent to the Court's decision in *Medellin*. The dataset was built from the Library of Congress's treaty collection, *Treaty Documents*, U.S. CONGRESS, <https://www.congress.gov/treaties> [<https://perma.cc/84MK-XEPR>], and is on file with the *Michigan Law Review*).

39. See *Medellin*, 552 U.S. at 541, 546–51 (Breyer, J., dissenting).

40. Aust, *supra* note 5, at 189–95. For the United Kingdom, this requirement serves as a democratic safeguard, since there is no constitutional obligation to obtain Parliament's advice and consent to the treaty. *Id.* at 189 (further describing the practice that has developed of giving Parliament twenty-one days of notice prior to ratifying a treaty so as to allow for consultation).

41. *Medellin*, 552 U.S. at 546–51 (Breyer, J., dissenting). As noted above, bilateral treaties are more likely to be immediately enforceable in courts. A good example is tax treaties, which are enforceable on their own, although supplemented in their interpretation by technical guidance issued by the Treasury Department. See Michael S. Kirsch, *The Limits of Administrative Guidance in the Interpretation of Tax Treaties*, 87 TEX. L. REV. 1063, 1073–77, 1095–97 (2009).

42. For a discussion of these treaties and their rise, see Cogan, *supra* note 4, at 349–52. Unlike treaties that require a nation to provide equal treatment to noncitizens (which can also affect private behavior), these treaties tend to require nations to regulate their own citizens and other actors on their soil with respect to behavior that has transborder implications.

treaties tend to use language that expressly contemplates future action. Sometimes, especially where criminal penalties are at issue, regulatory treaties explicitly call for implementing legislation, but at other times they specify the need for implementation without requiring that it be done through legislation. By way of example, the Rotterdam Convention regarding trade in hazardous chemicals provides that “[e]ach Party shall take such measures as may be necessary to establish and strengthen its national infrastructures and institutions for the effective implementation of this Convention. These measures may include, as required, the adoption or amendment of *national legislation or administrative measures*.”⁴³

Medellin’s other pronouncement involved the implementation of non-self-executing treaties. The Court rebuffed the Bush Administration’s argument that the executive branch should be able to implement a non-self-executing treaty provision like the U.N. Charter provision at issue.⁴⁴ Instead, it stated categorically that “[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”⁴⁵ Because Congress had not passed legislation implementing the U.N. Charter provision, the Texas courts were obligated to abide neither by this provision itself nor by the president’s directive with respect to it.⁴⁶

In stating that Congress should implement non-self-executing treaties, the Court effectively made it impossible for courts to treat non-self-executing treaties as the “law of the land.” For even if Congress does pass implementing legislation, the courts will not be enforcing the treaty. Rather, they will be enforcing a different “law of the land”—namely, the implementing legislation itself.⁴⁷ The Court justified the need for intervening legislation by explaining that when a treaty is non-self-executing, there is an “understanding that it is not to have domestic effect of its own force,” which in turn “precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result.”⁴⁸ Rather, “[i]f the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented in ‘mak[ing]’ the treaty, by ensuring that it contains language plainly providing for domestic enforceability.”⁴⁹

43. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade art. 15, Sept. 10, 1998, 2244 U.N.T.S. 337 [hereinafter Rotterdam Convention] (emphasis added).

44. *Medellin*, 552 U.S. at 494.

45. *Id.* at 525–26.

46. *Id.* at 498–99.

47. See *Bond v. United States*, 134 S. Ct. 2077, 2081, 2107 (2014) (observing that since the treaty at issue was not self-executing, the Court was only interpreting the implementing legislation).

48. *Medellin*, 552 U.S. at 527. The Court may have meant “the Senate” where it speaks of “Congress” here. See *infra* note 220.

49. *Medellin*, 552 U.S. at 526.

Medellín was and is a controversial decision. Some scholars have argued that it was wrongly decided.⁵⁰ In addition, and more importantly for this Article, there is substantial debate about its contours. Whether due to muddled thinking, sloppy drafting, or studied ambiguity, “[t]he opinion is not a model of clarity.”⁵¹ This lack of clarity is even stronger when *Medellín* is considered against the backdrop of precedents and practice related to the distinction between self-executing and non-self-executing treaties. Indeed, the disagreements are so substantial that the drafters of the treaty section of the forthcoming *Restatement (Fourth) of Foreign Relations Law* are having great difficulty in preparing the section devoted to self-execution.⁵² Part III returns to the question of how to understand *Medellín* going forward. For now, however, it is enough to note that some treaty provisions are non-self-executing and that *Medellín* states that such provisions may be translated into court-enforceable obligations only by Congress.

B. Statutes

Courts typically do not begin their analysis of federal statutes by considering whether or not they are “self-executing.” Instead, it is a matter of course that statutes are domestically enforceable federal law that can preempt state laws. Although the Supremacy Clause will not necessarily provide a cause of action, “once a case or controversy properly comes before a court, judges are bound by federal law.”⁵³ “Thus a court may not convict a criminal defendant of violating a state law that federal law prohibits”⁵⁴ and “a court may not hold a civil defendant liable under state law for conduct federal law requires.”⁵⁵

Nonetheless, quite often courts do *not* directly enforce statutes. Instead, as with non-self-executing treaties, they enforce intermediary actions. This is

50. E.g., Carlos Manuel Vázquez, *Less Than Zero?*, 102 AM. J. INT’L L. 563, 567 (2008); Sloss, *supra* note 11, at 183.

51. Vázquez, *supra* note 5, at 647 (considering six possible ways to read *Medellín*). For a few of the many other articles noting *Medellín*’s lack of clarity, see Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 541 (2008); Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OHIO ST. L.J. 559, 612 (2013); and Sloss, *supra* note 11, at 183.

52. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES, at xxiv (AM. LAW INST., Discussion Draft 2015) (noting that section 106, the draft section on self-execution, is a “challenging Section that has been reworked several times”).

53. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). For a few of the many pronouncements along these lines, see, for example, *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (“[I]t has long been settled that state laws that conflict with federal law are ‘without effect.’” (first citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); and then citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819))), and *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (“The Supremacy Clause provides a clear rule that federal law ‘shall be the supreme Law of the Land.’” (quoting U.S. CONST. art. VI, cl. 2)).

54. *Armstrong*, 135 S. Ct. at 1384 (citing *Pennsylvania v. Nelson*, 350 U.S. 497, 499, 509 (1956)).

55. *Id.* (citing *Mut. Pharm. Co.*, 133 S. Ct. at 2476–77).

the case with many regulatory statutes. Since at least the New Deal, the Supreme Court has accepted that Congress can effectively delegate regulatory authority to administrative agencies or other actors within the executive branch, provided that it adequately specifies the purposes for which the delegated authority is to be exercised.⁵⁶ Such delegation is a cornerstone of administrative law and is essential to effective national governance.

The statutes themselves specify the need for intermediate action prior to court enforcement. Major regulatory statutes operate by identifying statutory objectives and then delegating authority to administrative agencies to carry out these objectives, often through rulemaking. Thus, the “Clean Air Act directs the Environmental Protection Agency to regulate emissions of hazardous air pollutants from power plants if the Agency finds regulation ‘appropriate and necessary,’”⁵⁷ and the Federal Power Act “authorizes the Federal Energy Regulatory Commission . . . to regulate ‘the sale of electric energy at wholesale in interstate commerce.’”⁵⁸ It is the regulations that these agencies promulgate, rather than the statutes that underlie them, that apply directly to power plants and electricity wholesalers and may be enforced against them in adjudicative proceedings.⁵⁹ In these examples and many others, the intermediary chosen by Congress is an administrative agency, but this is not always the case. Sometimes Congress impliedly specifies itself as the intermediary—as when it authorizes uses of funds but leaves the actual appropriations of these funds to an appropriations act.⁶⁰ At other times Congress specifies the president as the intermediary, as when it delegates to the president the authority to activate a statutory provision.⁶¹

The parallels between treaties and statutes whose enforcement requires an intermediary are apparent. In both contexts, what the courts ultimately enforce are intermediary actions rather than the underlying treaty or statute:

56. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 470 (1989). The origins of administrative law go back far further than the New Deal and even predate the establishment of the Interstate Commerce Commission in 1887. For an overview of the practice of administrative law in the century after the Founding, see generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

57. *E.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2704 (2015).

58. *E.g.*, *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 766 (2016). In these examples and throughout this Article, I focus more on agency rulemaking (especially formal rulemaking) than on agency adjudication. I do so because I think it is more likely to be relevant for treaty implementation than agency adjudication, although my argument is broad enough to cover a range of types of agency action. For a discussion of the rise of rulemaking, see Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139 (2001).

59. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (noting how regulations carry the force of law where Congress has delegated such authority to an agency).

60. *See* JESSICA TOLLESTRUP, CONG. RESEARCH SERV., R42388, *THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION* 10–12 (2014).

61. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 312 (1936) (describing a statute that gave the president authority to proclaim certain acts criminal upon making a determination that this would advance specified objectives).

for treaties, Congress's implementing legislation, and for statutes, regulations (or other forms of agency action). In both contexts, moreover, the reason that intermediary action is needed is because the underlying treaty or statute is said to require it. In the regulatory context, Congress specifies the need for intervening regulation, and in *Medellín* the Court inferred that, in giving its advice and consent, the Senate had intended the treaty provision at issue to need implementing legislation.⁶² In light of these parallels, Ernest Young has argued that the Court's decision in *Medellín* simply reflects the "normalization" of treaty implementation within our constitutional system.⁶³ Yet although the parallels are strong conceptually, there are large and consequential differences between the two schemes—differences that disfavor treaties relative to statutes.

C. Implications

Despite the surface similarities, treaties deemed to require implementing legislation face much steeper barriers to domestic enforcement than do statutes that authorize administrative regulation. As a matter both of political process and of legal oversight, it is likely to be far harder to get Congress to pass implementing legislation than it is to get an executive branch actor to regulate. The challenge of getting implementing legislation in turn casts a shadow on the entire treaty-making process.

1. Differences in Political Process

Procedure and politics make it generally far easier to get an administrative agency to issue a rule than to get Congress to pass a law. As a procedural matter, getting a law passed requires not only a majority of congressional votes and presidential approval, but also surmounting the numerous other veto points that can arise from the committee process, the need for floor time, and practices such as the filibuster.⁶⁴ This process is all the harder because it involves navigating the political disagreements of members of Congress who, at the end of the day, each have a vote. Although agency rulemaking is far from a cakewalk, it is a less fraught process. Indeed, administrative law itself developed precisely because Congress recognized its comparative disadvantage in handling fine-grained regulatory decisionmaking. Congress delegates to agencies because of some or all of "the need to leave technical questions to experts, politicians' desire to duck blame for unpopular choices . . . the inability of multimember legislatures to reach

62. *Medellín v. Texas*, 552 U.S. 491, 525–26 (2008).

63. Young, *supra* note 11, at 137; *see also* Bradley, *supra* note 11, at 142 ("Statutes delegating implementation authority to the Executive provide a particularly close analogy to non-self-executing treaties.").

64. *See* William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1442–43 (2008).

stable consensus, and the impossibility (or excessive cost) of anticipating and resolving all relevant implementation issues in advance.”⁶⁵

The process embraced by administrative law thus involves a steep initial hurdle—the original congressional legislation—and then the easier step of agency rulemaking. By contrast, the process for implementation is far more stringent for a regulatory treaty that needs executing. It typically involves *two* steep domestic hurdles, in addition to the often enormous challenge of getting an internationally negotiated treaty in the first place. The first hurdle is getting two-thirds of the Senate to advise and consent to the treaty, and the second hurdle is getting Congress to pass the implementing legislation.⁶⁶ Surmounting the first of these hurdles can of course help with the second hurdle, since at least two-thirds of the Senate will have signed off on the overall objectives contained in the treaty. Thus, sometimes implementing legislation gets passed promptly.⁶⁷ Yet as a report commissioned by the Senate Committee on Foreign Relations acknowledges, “Treaties approved by the Senate have sometimes remained unfulfilled for long periods because implementing legislation was not passed.”⁶⁸ To give a recent example, the Senate advised and consented to four non-self-executing treaties related to nuclear security in September 2008, but it was not until seven years later—in June 2015—that Congress passed implementing legislation for these treaties.⁶⁹ And for some treaties, the wait for implementing legislation is far longer. The Senate advised and consented to the Basel Convention on the Transportation of Hazardous Waste in 1992 and today—twenty-four years later—Congress still has not passed implementing legislation.⁷⁰

Congressional legislation implementing treaties often in turn relies on delegations of rulemaking authority to executive branch actors. For all treaties relating to radio communications, for example, a preexisting law delegates to the Federal Communications Commission the authority to “[m]ake such rules and regulations . . . as may be necessary to carry out the provisions of . . . any treaty or convention insofar as it relates to the use of radio,

65. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–37 (2006).

66. U.S. CONST. art. II, § 2, cl. 2.

67. For example, with respect to the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, the Senate gave its advice and consent, and Congress passed implementing legislation within three years of the treaty’s submission to the Senate. See *Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, May 29, 1993, S. TREATY DOC. NO. 105-51 (1998).

68. CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 20 (2001).

69. 154 CONG. REC. 21775–76 (2008); Press Release, U.S. Dep’t of State, *Passage of Implementing Legislation for Nuclear Security Treaties* (June 4, 2015), <https://2009-2017.state.gov/secretary/remarks/2015/06/243196.htm> [<https://perma.cc/8883-J3XB>]. For another recent example where implementing legislation is taking a while to be enacted, see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law*, 108 AM. J. INT’L L. 516, 533 (2014) (describing fisheries treaties that received advice and consent but were awaiting implementing legislation at the time of publication).

70. U.S. DEP’T OF STATE, *supra* note 6.

to which the United States is or may hereafter become a party.”⁷¹ Such preauthorization effectively removes the hurdle of getting implementing legislation, but it is far from common. More typically, implementing legislation implements a specified treaty and, in doing so, delegates some regulatory authority to administrative agencies or other executive branch actors. This practice dates far back—the law passed in 1918 to implement the Migratory Bird Treaty provided the secretary of agriculture with considerable regulatory authority⁷²—and has become an important feature of regulatory treaties. The Clean Air Act Amendments of 1990, for example, give the EPA regulatory authority to implement the Montreal Protocol on Substances that Deplete the Ozone Layer.⁷³ This heavy reliance on delegations to the executive branch reveals that Congress does not wish to retain all rulemaking authority with respect to treaty implementation. It also adds yet a third layer of process—besides advice and consent and implementing legislation—to the already challenging and time-consuming task of turning regulatory treaty obligations into enforceable domestic law.

2. Differences in Legal Oversight

Not only is implementing legislation harder than administrative rulemaking to achieve as a structural matter, but such legislation also cannot be mandated as a matter of domestic law. In the statutory context, once Congress passes a law that instructs an agency to undertake administrative rulemaking, that agency has a domestic legal obligation to comply. With this domestic legal obligation comes some level of policing by the other two branches. Although courts are reluctant to review agency inaction, they will do so on occasion,⁷⁴ and Congress has considerable soft-law tools it can use to oversee agency behavior.

The oversight mechanisms for ensuring that Congress will legislate to implement treaties are far weaker. Once the United States has ratified a treaty, it does have an international legal obligation to act in compliance with a treaty. But it is an unresolved question whether or not Congress has a constitutional obligation to pass implementing legislation.⁷⁵ Article I of the Constitution does not specifically impose such obligation, although it does give Congress the power—in addition to its other Article I powers—to pass

71. 47 U.S.C. § 303(r) (2012).

72. Migratory Bird Treaty Act, ch. 128, § 3, 40 Stat. 755, 755 (1918) (codified as amended at 18 U.S.C. § 704 (2012)) (further providing that such “regulations shall become effective when approved by the President”).

73. 42 U.S.C. §§ 7671–7671q (2012).

74. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 532–35 (2007). In addition, courts review agency rulemaking to ensure that it is within the bounds of discretion accorded by the statute and administrative law principles. See, e.g., *id.* at 516, 527.

75. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 204–05 (2d ed. 1996) (discussing the issue, which goes back to the 1796 debates related to the Jay Treaty).

such laws as may be necessary and proper to carry into effect other powers,⁷⁶ and the Supreme Court has held that this encompasses treaty implementation.⁷⁷ But the Necessary and Proper Clause is a power, not a clear obligation. While members of Congress might consider themselves legally, morally, or pragmatically called upon to pass such implementing legislation, there are no oversight mechanisms for ensuring treaty implementation that are comparable to the ones available in the administration of statutes. There is also little if any judicial oversight available for reviewing the content of any implementing legislation that Congress does pass to see whether it faithfully implements the treaty.⁷⁸

3. Consequences for Treaty Making

Taken together, the difficulties of approving implementing legislation pose greater practical barriers than the difficulties of adopting administrative rulemaking. These heightened difficulties affect not only the implementation of treaties, but also other aspects of the treaty-making process, including the very decision to pursue a treaty in the first place. Three such implications are particularly noteworthy.

First, the need for implementing legislation makes it hard for the United States to fix situations in which it is found to be in violation of a non-self-executing treaty. The aftermath of *Medellín* illustrates this problem. Despite the fact that the United States is in violation of its international legal obligation to comply with the ICJ decision that formed the basis of *Medellín*'s argument against Texas, to date, Congress has shown no serious interest in legislating to achieve such compliance.⁷⁹ Moreover, the approach taken by the Court to determine whether or not a treaty is self-executing has "sent State Department lawyers scrambling to determine how many other treaties might also not be self-executing."⁸⁰ To the extent that *Medellín* has changed the ground rules by making treaties that were thought to be self-executing into non-self-executing ones, then compliance could become an issue with these treaties as well.

Second, the high risk that Congress will fail to enact implementing legislation has slowed U.S. practice with regard to treaty ratification. The executive branch now typically waits to ratify treaties until *after* Congress has passed the implementing legislation that would be needed to comply with

76. U.S. CONST. art. I, § 8.

77. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

78. See *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2006) (upholding a statutory amendment to the Migratory Bird Treaty Act despite its inconsistency with the underlying treaty).

79. Steve Charnovitz, Editorial Comment, *Correcting America's Continuing Failure to Comply with the Avena Judgment*, 106 AM. J. INT'L L. 572, 577–78 (2012).

80. John Bellinger, *Comments on "International Law at Home"*, OPINIO JURIS (Feb. 24, 2012, 9:00 AM), <http://opiniojuris.org/2012/02/24/john-bellinger-comments-on-international-law-at-home/> [https://perma.cc/3F25-2XER].

the treaty.⁸¹ This is a sharp difference from the practice with regard to statutes, since Congress does not delay the passage of its statutes until after agencies have drawn up the regulations by which they will administer it. Thus, with regard to treaties mentioned earlier, the United States did not ratify the nuclear-security treaties until the passage of their implementing legislation⁸² and to this date has not ratified the Basel Convention.⁸³ Although the decision not to ratify is safer from a compliance perspective, it reduces the moral pressure on Congress to pass the implementing legislation and also limits the voice of the United States in the treaty regimes that it is waiting to join.⁸⁴

Third, the need for separate implementing legislation for treaties that are not directly enforceable adds to the incentives of the executive branch to abandon treaties altogether in favor of other kinds of international commitments. Practice accepts that congressional-executive agreements—which consist of a combination of presidential approval and statutory authorization—are a constitutionally acceptable way of entering into at least most kinds of international agreements. Among other things, these congressional-executive agreements are used for international trade agreements.⁸⁵ Oona Hathaway has argued that rather than making treaties that require the president, two-thirds of the Senate, and an implementing statute, the executive branch should shift to pursuing congressional-executive agreements almost exclusively.⁸⁶ These provide “in effect, one-stop shopping: the same act that provides the authority to accede to the international agreement can also make the necessary statutory changes to implement the obligation incurred.”⁸⁷

In addition to the increased use of congressional-executive agreements, an even more striking move away from treaties is occurring—a move that is itself dependent on administrative law. In negotiating treaties that will be

81. Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM & MARY L. REV. 59, 76 & nn.61–62 (2014).

82. Press Release, U.S. Dep't of State, *supra* note 69.

83. *Basel Convention on Hazardous Wastes*, *supra* note 6. For some other environmental conventions, the executive branch has been seeking implementing legislation before or contemporaneous with its pursuit of Senate advice and consent. See Elana Schor, *Obama Admin Steps Up Pressure to Ratify Treaties on Toxics*, N.Y. TIMES (Sept. 24, 2010), <http://www.nytimes.com/gwire/2010/09/24/24greenwire-obama-admin-steps-up-pressure-to-ratify-treati-73636.html> [<https://perma.cc/5YNU-RYPA>].

84. Cf. Schor, *supra* note 83 (describing how one State Department official “felt like Oliver Twist” in attempting to participate in conversations in a treaty regime to which the United States was not yet a party).

85. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Law-making in the United States*, 117 YALE L.J. 1236, 1252–71, 1256 n.9 (2008) (examining the years 1980–2000 and documenting the widespread use of ex ante congressional-executive agreements but finding evidence of only nine ex post congressional-executive agreements, most of them trade agreements).

86. See generally *id.*

87. *Id.* at 1321.

non-self-executing, the executive branch often tries hard to have the obligations in these treaties be ones that U.S. law already satisfies, thus removing the need for implementing legislation.⁸⁸ Especially in recent years, however, the executive branch has been moving towards classifying such negotiated agreements not as treaties that require two-thirds of the Senate, but rather as agreements that the executive branch can enter into under its own authority because there is no need for formal changes to U.S. domestic law. Thus, in 2013, the United States joined the Minamata Convention on Mercury without the president ever seeking the advice and consent of the Senate.⁸⁹ The obligations set forth in the international agreement were ones that were covered by existing regulatory statutes—statutes which in turn delegated substantial regulatory authority to the EPA.⁹⁰ The Obama Administration made a similar move with respect to the recent Paris Agreement on climate.⁹¹ These developments have strong normative justifications.⁹² But they also highlight that if the Senate wants its treaty power to remain relevant, it must be open to ways to making the treaty process less cumbersome and more predictable.

* * *

Both implementing legislation and administrative action such as rulemaking can serve to translate legal directives into court-enforceable mandates. Yet despite the surface parallels, these two processes are very different. The comparative ease of administrative rulemaking has helped usher in the flourishing administrative state; it is almost impossible to imagine modern American governance without it. By contrast, the difficulty of getting congressional implementing legislation has helped to marginalize treaties, in part decreasing U.S. engagement with international regulation and in part channeling this engagement through other forms of international agreements. Getting a law of the land to implement another law of the land

88. See, e.g., S. EXEC. REP. NO. 109-18, at 6 (2006) (emphasizing the lack of need for implementing legislation with respect to the U.N. Convention Against Corruption); Bellinger, *supra* note 9, at 6 (“[W]henver we consider taking on new obligations, we examine a number of factors . . . [including w]ill we be in a position to implement, or will there be complications because of domestic law?”).

89. Tseming Yang, *The Minamata Convention on Mercury and the Future of Multilateral Environmental Agreements*, 45 ENVTL. L. REP. 10064, 10071 (2015) (“Why was Senate advice and consent skipped here? . . . [T]he answer can be found primarily in the determination by the executive branch that the Minamata Convention’s provisions can be implemented without new congressional legislation.”).

90. See generally United States Notification Regarding Measures to Implement the Minamata Convention, MERCURY CONVENTION (Oct. 18, 2013), <http://mercuryconvention.org/Portals/11/documents/submissions/US%20declaration.pdf> [<https://perma.cc/Y36B-SD87>] (describing the regulatory framework, including many references to existing regulations promulgated by federal agencies).

91. See Harold Hongju Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 338, 350–52 (2017).

92. See Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. (forthcoming 2017) (on file with author).

is a highly inefficient process. Before asking whether this should be, we should ask how it came to be.

II. HOW CONGRESS CAME TO IMPLEMENT NON-SELF-EXECUTING TREATIES

The concept of non-self-executing treaties is now typically equated with the need for congressional implementation. This equivalence long predates *Medellín*. It flows naturally from conventional accounts of the rise of non-self-executing treaties, which typically focus heavily on the 1829 Supreme Court case of *Foster v. Neilson*⁹³ and, to a lesser degree, on historical practice related to congressional implementation of treaties. Yet practice and precedent from the nineteenth and early twentieth centuries offer several reasons to question the assumption that non-self-executing treaties require implementing legislation. One reason stems from how some treaties were administered and treated by the courts, including the Supreme Court. In these cases, the judiciary accepted a flexible approach that allowed the executive branch to serve as the intermediary responsible for translating treaty provisions into court-enforceable obligations. A second reason comes from the broader landscape of public law. The implementation of treaties and the rise of the term “non-self-executing” (and its equivalent “not self-executing”) in relation to them were not isolated questions. Rather, they were part of a broader challenge of reconciling law and governance. Political actors and courts were wrestling with the same kinds of questions—and using the terms “self-executing” and “not self-executing”—with respect to the other kinds of law listed in the Supremacy Clause: the Constitution and statutes. In these contexts, Congress was not the sole actor deemed able to implement non-self-executing provisions. Instead, the language, context, and purpose of the provision at issue determined what actor could appropriately implement the underlying law.

This Part explores both the conventional account of how Congress came to be understood to be the actor responsible for implementing non-self-executing treaties and the alternative narrative that supports a broader view of treaty administration. It then considers how and why the conventional account has come to be taken as fixed doctrine while the other narrative has been almost entirely forgotten.

A. *The Conventional Story*

At the Constitutional Convention, the Framers chose to make treaties, like statutes, the “supreme law of the land” and preemptive of state law. This decision stemmed from a major foreign-affairs irritant during the era of the Articles of Confederation—the failure of state courts to honor obligations

93. 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

incurred in the treaty of peace with Great Britain.⁹⁴ The Supremacy Clause, combined with the establishment of the federal court system, was intended to ward off future problems of noncompliance with treaty obligations. As Alexander Hamilton wrote in Federalist No. 22, “The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.”⁹⁵

Despite the recognized importance of complying with international obligations, the inclusion of treaties in the Supremacy Clause was controversial, and debates during the Convention and the ratification process foreshadowed two themes that would later find expression in practice and precedent. The first of these themes was alarm about the exclusion of the House of Representatives from the treaty-making process. Anti-Federalists expressed concern that the Senate could “sell the whole Country by means of Treaties”⁹⁶ and proposed amendments to the Constitution included one that would have required a supermajority of both Houses to approve certain types of treaties.⁹⁷ The second theme involved debate over the extent to which, in making treaties the law of the land, the United States was diverging from the practice of other countries, particularly Britain. This issue came up in debates over the appropriateness of including treaties in the Supremacy Clause,⁹⁸ but it foreshadowed an issue about the international process of treaty making. For if other countries do not make treaty commitments the

94. See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 945, 995–1002 (2010). For legal scholarship exploring the Framers’ inclusion of treaties in the Supremacy Clause and the reactions to this choice during the ratification debates, see, for example, Martin S. Flaherty, Response, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land”*, 99 COLUM. L. REV. 2095, 2120–51 (1999); John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT’L L.J. 1209, 1222–64 (2009); and Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097–110 (1992).

95. THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

96. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 297 (Max Farrand ed., 1911) (statement of George Mason); see also Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty Clause as a Case Study*, in 1 PERSPECTIVES IN AMERICAN HISTORY 233, 240–47 (Bernard Bailyn et al. eds., 1984) (discussing the origins of the Treaty Clause).

97. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 660 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 1901) [hereinafter ELLIOT].

98. See, e.g., 4 ELLIOT, *supra* note 97, at 277–82 (South Carolina Convention); 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 459–62, 466 (Merrill Jensen ed., 1976) (Pennsylvania Convention); 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1380–97 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (Virginia Convention). These debates revealed considerable confusion over what the British approach to treaty implementation entailed. In practice, the King (via his ministers) would negotiate and ratify treaties, but in most cases Parliament would need to pass implementing legislation before domestic courts would enforce these treaties. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 697 n.12 (1995) (discussing the British approach).

law of the land, then those treaties might need to be written in such a way as to recognize the need for intermediate steps.

Early on, the practice of the political branches simultaneously embraced the plain meaning of the Supremacy Clause and recognized that its language did not resolve all questions related to the administration and enforcement of treaties. The controversy that followed the ratification of the Jay Treaty in 1796 is an early and striking illustration. Members of the House of Representatives argued that because this treaty with Great Britain was largely commercial in nature and therefore overlapped with Congress's commerce power, congressional legislation would be needed to carry the treaty into effect.⁹⁹ President Washington firmly rebuffed this argument, observing that "every treaty [made pursuant to the Treaty Clause] and promulgated thenceforward became the law of the land."¹⁰⁰ Yet although the provisions of the Jay Treaty were directly enforceable by domestic courts,¹⁰¹ legislation was deemed necessary to appropriate the funds needed by the U.S. government to implement the treaty.¹⁰² This need for separate legislation was not an issue distinctive to treaties. As one representative remarked, "Treaties may sometimes require Legislative aid to carry them into effect; so may laws, and they were constantly in the habit of making laws to carry into effect laws heretofore made."¹⁰³ But the experience of the Jay Treaty did make clear that the implementation of treaties would sometimes require further action by Congress.

In the Supreme Court as well, the meaning of treaties as the "supreme law of the land" began to develop through precedent. In the same year as the Jay Treaty debates, the Supreme Court in *Ware v. Hylton* interpreted the Supremacy Clause as making a provision about debt repayment in the Treaty of Peace with Great Britain enforceable in court and supreme over a conflicting state law.¹⁰⁴ Yet just as acceptance of the Supremacy Clause in the political branches took place against an undercurrent of concern for congressional prerogatives, so did the Supreme Court's acceptance of the Supremacy Clause leave it nonetheless grappling with further questions.

99. For discussion, including of the resolution passed by the House to this effect, see Golove & Hulsebosch, *supra* note 94, at 1039–61.

100. Letter from George Washington, President, to the House of Representatives of the United States (Mar. 30, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1902, at 194, 195 (James D. Richardson ed., 1907).

101. Galbraith, *supra* note 81, at 86 n.97. For discussion of later practice relating to commercial treaties, see *id.* at 88–93.

102. Act of May 6, 1796, ch. 17, 1 Stat. 459.

103. 5 ANNALS OF CONG. 661 (1796) (statement of Rep. Hillhouse). The need for separate appropriations legislation had constitutional underpinnings, since the Constitution specifies that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9.

104. 3 U.S. (3 Dall.) 199, 236 (1796) (opinion of Chase, J.). For analysis of the various justices' opinions, see Parry, *supra* note 94, at 1266–72, which notes that John Marshall, who argued the case for the Virginian debtor, "did not even ask the Court to deny its ability to enforce the treaty notwithstanding state law."

Ware contained hints of this,¹⁰⁵ and the Supreme Court's decision in *Foster v. Neilson* in 1829 did so even more.¹⁰⁶

In *Foster*, the Court considered whether a claimant was entitled to a land grant in Florida based on a provision of the 1819 treaty between the United States and Spain.¹⁰⁷ The English version of the treaty provided that Spanish land grants before a certain date “shall be ratified and confirmed . . . to the same extent that the same grants would be valid if the territories had remained under the dominion” of Spain.¹⁰⁸ After quoting this provision, Chief Justice Marshall's opinion for the Court continued as follows:

Do these words act directly on the grants . . . or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

. . . .

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

. . . .

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. *But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.*¹⁰⁹

The Court went on to rule against the holder of the Spanish land grant.¹¹⁰ It concluded that the language of this treaty—“shall be ratified”—was “the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature.”¹¹¹

Foster gives treaty makers a green light to structuring treaty provisions in ways that will not be immediately enforceable in court. Yet in another way, it seems to tie their hands, for it suggests a binary choice between provisions that are immediately enforceable in court and provisions that require legislative enactment. This passage in *Foster* entirely overlooked the existence of the executive branch, as shown by its use of the singular tense in speaking

105. Parry, *supra* note 96, at 1270–71 (discussing the Chase and Iredell opinions).

106. 27 U.S. (2 Pet.) 253 (1829), *overruled in part by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

107. *Foster*, 27 U.S. (2 Pet.) at 256.

108. *Id.* at 314 (quoting Treaty of Amity, Settlement, and Limits, Spain-U.S., art. VIII, Feb. 22, 1819, 8 Stat. 372).

109. *Id.* (emphasis added). This discussion is part of an alternative holding within *Foster*, as Marshall's opinion had previously stated that a majority of the Court thought the land at issue was not covered by the treaty provision. *Id.* at 313.

110. *Id.* at 317 (affirming the district court's dismissal of the petition filed by the holder of the Spanish land grant).

111. *Id.* at 315.

of “the political . . . department.”¹¹² It thus did not consider whether there could be treaty provisions that are not immediately enforceable in court but that could be made so following action by the executive branch. This omission is dicta, since in *Foster* there were no intervening acts by either the legislature or the executive branch that sought to execute the treaty in a way that favored the holder of the Spanish land grant.¹¹³ Given Congress’s usual role in legislating to quiet title,¹¹⁴ it is understandable that *Foster* focused only on the legislative branch.

Although dicta, *Foster*’s pronouncements on this issue have proven important to forming the widespread assumption that Congress is the actor charged with implementing non-self-executing treaties. Citing *Foster*, the Supreme Court perpetuated this assumption in dicta in later cases.¹¹⁵ (*Foster* itself did not use the terms “self-executing” or “not self-executing”; the Court’s earliest use of this terminology with respect to treaties came in 1887.¹¹⁶) Indeed, various opinions simply define non-self-execution in terms of legislative implementation: the Court’s 1888 opinion in *Whitney v. Robertson*, for example, explained in passing that when treaty “stipulations are not self-executing[,] they can only be enforced pursuant to legislation to carry them into effect.”¹¹⁷ But before *Medellín*, this equivalence between treaty provisions that are not immediately enforceable and the need for congressional implementation was not important to the Court in practice. For between *Foster* and *Medellín*, the Supreme Court almost never held a treaty provision to be non-self-executing.¹¹⁸ Indeed, it even reversed *Foster*’s holding that the provision in the 1819 treaty required legislative implementation before it could be enforced by a court.¹¹⁹

112. *Id.* at 314.

113. *See id.* at 282 (recognizing various acts of Congress contrary to the holder of the Spanish land grant insofar as they “clearly recognise the interpretation, that the territory in question was ceded to the United States by the treaty of Paris in 1803”).

114. *See id.* at 315–17 (discussing seven acts passed by Congress that deal with resolving land grant issues in territory acquired through treaties).

115. *E.g.*, *Terlinden v. Ames*, 184 U.S. 270, 288 (1902); *Fong Yue Ting v. United States*, 149 U.S. 698, 720–21 (1893); *United States v. Rauscher*, 119 U.S. 407, 418 (1886); *United States v. Arredondo*, 31 U.S. 691, 743 (1832).

116. *Bartram v. Robertson*, 122 U.S. 116, 120 (1887).

117. 124 U.S. 190, 194 (1888); *see also, e.g.*, *Cook v. United States*, 288 U.S. 102, 119 (1933) (“For in a strict sense the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions.”).

118. The only apparent exception is *Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39, 49–50 (1913), which inferred, as an alternative holding, that a treaty provision was non-self-executing. As with *Foster*, there was no attempted executive branch administration of this treaty provision, other than the usual presidential proclamation of the treaty’s entry into force. *See generally id.* Prior to *Medellín*, lower courts did at times find treaty provisions to be non-self-executing, especially treaties involving human rights. *See Hathaway et al., supra* note 11, at 65–67.

119. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88–89 (1833) (quoting the translated Spanish version and holding that the treaty provision might take effect “by force of the instrument itself” rather than “stipulating for some future legislative act” in light of new evidence,

Although the issue of treaty non-self-execution was mostly a nonissue for the Supreme Court, the political branches came to be quite accustomed to the use of implementing legislation for treaties. At times, the language of treaties would expressly contemplate legislative implementation, consistent with the green light given in *Foster*. An 1875 treaty with Hawaii, for example, specified that it would not take effect “until a law to carry it into operation shall have been passed by the Congress of the United States of America.”¹²⁰ As another example, the Migratory Bird Treaty of 1916 provided that the parties would “take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention.”¹²¹ This language was necessary for the other party to the treaty—Great Britain—because of its constitutional approach to treaty implementation.¹²² While the provision that the parties could simply “take” the necessary measures might be read to suggest that the United States did not in fact need implementing legislation, Congress nonetheless passed it.¹²³ Such congressional practice supplemented and strengthened the equivalence that developed between the concept of treaty non-self-execution and the need for congressional implementation.

B. A Broader View of Treaty Administration

The account just given is the standard one about how our constitutional tradition came to encompass non-self-executing treaties and to understand such treaties to require congressional implementation. In what follows here, I describe a quite different narrative—one which supports a broad, flexible approach to treaty administration that is closely akin to statutory administration. I focus in particular on two strands of this narrative: first, a long-standing executive branch role in implementing certain regulatory treaties; and, second, a recognition in the courts and political branches that the concept of “not self-executing” provisions was an issue that encompassed not only treaties, but also other forms of law. This other narrative has as strong or perhaps an even stronger pedigree in nineteenth- and early twentieth-century practice, but it is nonetheless almost entirely overlooked in current understandings of treaty non-self-execution. It does not question the concept of treaty non-self-execution, but it does undermine claims that such non-self-execution involves a binary choice between legislative implementation and direct judicial enforceability. Instead, it suggests that the executive branch can, in some cases, translate treaty provisions into court-enforceable obligations.

not before the Court in *Foster*, that the Spanish version of the treaty provision in translation provided that the land grants “shall remain ratified and confirmed”).

120. Convention on Commercial Reciprocity, Haw.-U.S., art. V, June 3, 1875, 19 Stat. 625.

121. Convention for the Protection of Migratory Birds, U.K.-U.S., art. VIII, Aug. 16, 1916, 39 Stat. 1702.

122. See Vázquez, *supra* note 5, at 617.

123. See *supra* note 72 and accompanying text.

1. Regulatory Implementation by the Executive Branch

In the nineteenth and early twentieth centuries, the executive branch administered some regulatory treaties in ways that closely resemble how the executive branch can administer statutes. In essence, the president or administrative agencies served as intermediaries between the courts and treaty provisions that were not immediately enforceable.¹²⁴ In other words, the executive branch played the role that Chief Justice Marshall's dicta had suggested belonged to the legislative branch, and the courts validated this role. This role for the executive branch was consistent with its broader role in using executive powers, both prosecutorial and administrative, to influence how courts enforced treaties.

The Jay Treaty gave rise to an early example of how executive branch action might be needed before a court would enforce a treaty. In one of its provisions, the United States and Great Britain each agreed to extradite fugitives facing criminal charges in the other country.¹²⁵ This provision was enforced against a man called Jonathan Robbins by executive branch actors in the John Adams Administration, who successfully requested a federal judge to authorize the extradition following a request by Great Britain.¹²⁶ This executive branch request was essential to the court's enforcement of the treaty provision, as the judge "did not believe he could order foreign delivery of [Robbins] under the Jay Treaty unless there had been a prior approval by the President."¹²⁷ This incident set off a heated debate in the House of Representatives over whether the extradition had been properly authorized in the absence of implementing legislation.¹²⁸ John Marshall (then a member of the House) famously defended Adams's authority, observing that the president "is charged to execute the laws[and a] treaty is declared to be a law."¹²⁹

124. I focus here only on the administration of treaties by the executive branch as it relates to private actors. Other kinds of treaty administration by the executive branch are common but unlikely to matter in the way that I focus on in this Article—i.e., they are unlikely to translate treaty provisions into law that is enforceable in the courts. Thus, treaty provisions commonly affect how the executive branch carries out its own business (e.g., interactions with foreign nations). Treaty provisions might also affect how the executive branch treats non-private individuals, such as members of the armed forces of another country. Justice Iredell recognized this possibility in his opinion in *Ware v. Hylton*, where, in noting in dicta that some treaty provisions might be executed by the president, he gave the example of a treaty authorizing an exchange of prisoners of war. 3 U.S. (1 Dall.) 199, 273 (1796) (opinion of Iredell, J.); see also *Ex parte Toscano*, 208 F. 938, 942–43 (S.D. Cal. 1913) (holding that the Hague Convention authorized the secretary of war, as an "officer of the executive department," to detain belligerents in the Mexican civil war who had come onto U.S. territory). Such activities implicate not only power delegated to the president under the treaty, but also his or her commander-in-chief authority.

125. Treaty of Amity, Commerce and Navigation, Gr. Brit.-U.S., art. XXVII, Nov. 19, 1794, 8 Stat. 116.

126. See Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 287–93 (1990).

127. *Id.* at 288.

128. 10 ANNALS OF CONG. 614 (1800).

129. *Id.* at 613.

Marshall argued that “Congress, unquestionably, may prescribe the mode [of implementing the treaty], and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.”¹³⁰

This incident showcases a quasi-prosecutorial role played by the executive branch in respect to treaties. Traditionally, treaties do not serve as criminal laws; instead, to the extent that they contemplate the criminalization of certain conduct, they will typically do so by specifying a need for implementing legislation. Indeed,

it has been assumed that an international agreement . . . requiring states parties to punish certain actions . . . could not itself become part of the criminal law of the United States, but would require Congress to enact an appropriate statute before an individual could be tried or punished for the offense.¹³¹

Nonetheless, with respect to some treaty provisions including but not limited to the extradition context,¹³² the executive branch has acted in ways that have a prosecutorial character. During Prohibition, for example, the executive branch enforced the “liquor treaties” aimed at limiting the smuggling of alcohol not only by seeking to stop the smugglers but also by criminally prosecuting them—even where the smugglers had not otherwise committed violations of U.S. law.¹³³ Lower courts split over whether the executive branch could directly enforce these treaties against private individuals in the absence of congressional legislation.¹³⁴

In this example, as in the extradition context, the role played by the executive branch is prosecutorial rather than administrative. It is thus more akin to bringing a cause of action than it is to administrative rulemaking or adjudication. It is a role that the executive branch continues to play today with respect to some treaties,¹³⁵ and without more we might think that the

130. *Id.* at 614.

131. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i (AM. LAW INST. 1987). *But see* Edwin D. Dickinson, *Are the Liquor Treaties Self-Executing?*, 20 AM. J. INT’L L. 444, 450 (1926) (noting that “evidence in support of such historical traditions seems meager; and really authoritative constitutional interpretation is lacking”). With regard to Indian treaties, for example, the Supreme Court recognized that preexisting criminal legislation “could constitutionally be extended to embrace Indians in the Indian country, by the mere force of a treaty.” *Ex parte Kan-gi-Shun-ca*, 109 U.S. 556, 567 (1883).

132. In 1848, Congress passed legislation specifying how extradition proceedings based on treaty obligations would be carried out in the United States. This brought a practical end to debate about whether extradition treaties require implementing legislation. *See Galbraith, supra* note 81, at 103.

133. Dickinson, *supra* note 131, at 444–46; *see also id.* at 450 (discussing forfeiture cases where the forfeitures were based solely on treaties and not on legislation).

134. *Id.* at 445–46.

135. A modern analogue can be found in Mutual Legal Assistance Treaties, which are typically bilateral treaties that provide that each country shall aid the other in criminal investigations. The text of the MLAT between the United States and Canada, for example, specifies

extent of executive branch action as an intermediary between treaty provisions and court enforceability is limited to such prosecutorial roles. A close look at history reveals, however, that the executive branch has also acted in the past as a rulemaker and administrative adjudicator with respect to certain treaties, making regulatory decisions that give rise to or otherwise affect the enforceability of these treaties in the courts.

The executive branch's role in administering treaties is most evident in the context of treaties with Indian tribes. These treaties predate 1871, when the United States switched to relying exclusively on statutes,¹³⁶ and they are sometimes dismissed or overlooked by foreign relations law scholars.¹³⁷ The complex issues of sovereignty implicated by them, the coercive character of their making, and their substance all may make scholars wary of engaging with them. Yet they form an important part of the history of treaty making and implementation. George Washington made a deliberate decision to treat them as comparable to other treaties for purposes of the need to obtain the Senate's advice and consent,¹³⁸ and the Supreme Court has consistently accepted them as similar to other treaties and as "the supreme law of the land."¹³⁹ Moreover, because these treaties involved the regulation of conduct on U.S. soil, they are a particularly significant source of evidence of early constitutional practice with respect to treaty implementation, which would often depend on further actions by the president or agency heads that were specified in the treaties' texts.

Consider, for example, the 1854 treaty between the United States and the Chippewa Indians, in which the Chippewas ceded their land to the United States and received in return various payments and land grants.¹⁴⁰ Seven out of the twelve substantive articles of this treaty specifically entrusted the president with obligations or discretionary powers.¹⁴¹ Article 2 provided that the president would direct the fixing of boundaries of various tracts of land. Article 3 gave sweeping discretionary authority to the president:

The United States will define the boundaries of the reserved tracts [of land for the Chippewas], whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over

that the attorney general and his or her designees will execute Canadian requests for assistance and that U.S. courts have jurisdiction to issue subpoenas and warrants that are needed to execute these requests. Treaty on Mutual Legal Assistance in Criminal Matters, Can.-U.S., arts. I, II, VII, Mar. 18, 1985, S. TREATY DOC. NO. 100-14 (1988).

136. See Indian Appropriations Act, ch. 120, 16 Stat. 544 (1871).

137. Draft provisions of the treaty section of the *Restatement (Fourth) of Foreign Relations Law*, for example, do not discuss them.

138. Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 267 n.89 (2012).

139. E.g., *In re N.Y. Indians*, 72 U.S. 761, 768 (1866).

140. Treaty with the Chippewas, Chippewas-U.S., Sept. 30, 1854, 10 Stat. 1109.

141. *Id.* arts. 2-3, 5-7, 11-12.

twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights.¹⁴²

This language plainly confers power on the executive branch to administer the treaty. Just as some treaties discussed earlier expressly contemplate legislative implementation,¹⁴³ so this treaty expressly contemplates executive branch implementation. Indeed, this treaty sounds very much like a statute that confers regulatory authority on the executive branch; it even specifies that the president has the authority to make “rules and regulations” with regard to certain issues.¹⁴⁴

The treaty with the Chippewas was far from unique. As Greg Ablavsky has observed, “Indian treaties—perhaps the paradigmatic instance of treaties having domestic legislative effects” were regularly administered without implementing legislation, other than appropriations.¹⁴⁵ Indeed, the administration of Indian treaties is sometimes treated as an important example of nineteenth-century precursors to the twentieth-century administrative state.¹⁴⁶

The powerful regulatory role played by the executive branch in implementing Indian treaties was accepted not only by the Senate in advising and consenting to these treaties, but also by the judiciary in the course of their enforcement. Lower court opinions accepted that the treaties conferred administrative authority on the president and in some cases invoked administrative law principles of deference towards this authority. A 1903 D.C. Circuit decision, for example, held not only that Article 3 of the Chippewa treaty quoted above gave the president the authority to regulate the alienation of land grants, but also that where there was “serious controversy as to

142. *Id.* art. 3.

143. *See supra* note 121 and accompanying text.

144. Later statutes relating to Indian tribes used very similar language. *See, e.g.*, Dawes Act, ch. 119, 24 Stat. 388, 389 (1887).

145. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1080–81 (2014). Over the nineteenth century, Congress did pass legislation that interacted in complex ways with Indian treaties, but the executive branch nonetheless derived considerable administrative powers solely and directly from Indian treaties.

146. *See generally* STEPHEN J. ROCKWELL, *INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY* (2010).

the meaning of the regulation,” it would give deference to “the interpretation placed by the [Department of the Interior] upon its own regulation, or rather the regulation made by the President through the department.”¹⁴⁷

The Supreme Court likewise deflected challenges to executive branch administration of Indian treaties. In *Holden v. Joy*, the petitioner energetically disputed the validity and enforceability of various treaties involving land transfers between the United States and the Cherokees. He argued, among other things, that “[t]he Cherokee treaty could not constitutionally impose the official duties, or confer the official powers on executive officers necessary to execute it.”¹⁴⁸ Interestingly, in disputing the authority of the executive branch to execute the treaty, he expressly challenged the treaty on the grounds that it “attempts to confer various powers on, and require duties of, the Secretary of the Interior[and] the Commissioner of the General Land Office” even though these “officers are created by acts of Congress for specific purposes and their powers are defined and limited.”¹⁴⁹ The Court ruled against the petitioner, noting the broad reach of the treaty power and upholding the treaty provisions without expressing any doubt about either their validity or the delegations they contained to executive branch officials.¹⁵⁰

Another even earlier Supreme Court case regarding Indian treaties, *Doe v. Wilson*, provides an interesting counterpoint to *Foster v. Neilson*. The 1832 treaty between the United States and the Pottawatomie tribe had provided that specific tribal members would retain title to certain lands covered in the treaties, with these lands to “be selected under the direction of the President of the United States, after the land shall have been surveyed, and the boundaries shall correspond with the public surveys,” and the members were to receive patents for the land.¹⁵¹ The case turned on whether a tribal member could sell his land before the survey took place and before the president issued the patents.¹⁵² The attorney arguing against alienation claimed that the treaty provision “was a mere executory promise of the United States . . .

147. *Hitchcock v. United States ex rel. Bigboy*, 22 App. D.C. 275, 287 (D.C. Cir. 1903); see also *Starr v. Campbell*, 208 U.S. 527, 533–35 (1908) (discussing regulations made by the president in 1893 stemming from Article 3 without expressing any doubt as to the president’s authority to make these regulations); *Tomkins v. Campbell*, 108 N.W. 216, 217 (Wisc. 1906) (reaching the same conclusion in a similar case); cf. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 355–57 (7th Cir. 1983) (holding that earlier treaties with the Chippewas that gave the president power to terminate their hunting and fishing rights implicitly required the president to exercise this right only if the Chippewas mistreated white settlers).

148. *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 225 (1872).

149. *Id.* (further claiming that the “treaty power cannot usurp legislative power or interrupt and prevent the performance of duties imposed by the latter power on officers whose offices are established by law”).

150. See *id.* at 242–43, 246–52.

151. *Doe v. Wilson*, 64 U.S. (23 How.) 457, 462 (1859) (quoting the treaty).

152. See *id.* at 462–63.

[that] was to be performed by the political department, and before its performance could create no inchoate title.”¹⁵³ Here, as in *Foster*, the argument was that the treaty provision was executory and had to be performed by the political department.¹⁵⁴ But, unlike in *Foster*, the political department referred to was not the legislative branch but rather the president.¹⁵⁵ The Court concluded that the tribal member’s right to the land was sufficiently vested at the time of the treaty to be alienable; the Court therefore did not reach a holding as to whether treaty provisions could be made enforceable only following presidential action.¹⁵⁶ It did not express any concern with the delegation of authority to the president in this treaty, however, and indeed observed that the land transfer itself took effect only “when the United States selected the lands reserved to him.”¹⁵⁷

The administration of the Indian treaties thus suggests continuity between treaties and statutes. The Supreme Court similarly signaled its support for such continuity in a case arising from an 1894 treaty with China that, as with other treaties and legislation from the time, sought to minimize Chinese emigration to the United States.¹⁵⁸ The treaty provided that

Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, *subject to such regulations by the Government of the United States as may be necessary* to prevent said privilege of transit from being abused.¹⁵⁹

In the “almost entirely overlooked” case of *Fok Yung Yo v. United States*,¹⁶⁰ the Court considered a claim by a Chinese citizen that the treaty entitled him to entry in the United States, where Department of the Treasury regulations stipulated that entry for transit required that the applicant could “satisfy the [customs official] that a *bona fide* transit only is intended.”¹⁶¹

153. *Id.* at 460.

154. *Id.*; *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part by* *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

155. *Wilson*, 64 U.S. (23 How.) at 460; *Foster*, 27 U.S. (2 Pet.) at 314.

156. *Wilson*, 64 U.S. (23 How.) at 463–64.

157. *Id.* at 464.

158. For discussion of anti-Chinese legislation from the time, as well as other treaties and Supreme Court cases addressing Chinese exclusion issues, see generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 112–50 (2002).

159. *Fok Yung Yo v. United States*, 185 U.S. 296, 301 (1902) (emphasis added) (quoting Immigration Convention, China-U.S., art. III, Mar. 17, 1894, 28 Stat. 1210).

160. Michael P. Van Alstine, *Treaties in the Supreme Court, 1901–1945*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 191, 197 (David L. Sloss et al. eds., 2011).

161. 185 U.S. at 301–02. The regulations stated that a through ticket to the foreign destination needed to be produced. *Fok Yung Yo*, 185 U.S. at 301–02. The petitioner produced such a ticket, but the Court interpreted the through ticket requirement in the regulation to be necessary but not sufficient to satisfy the regulatory standard. *See id.* at 304–05.

The petitioner argued that the executive branch could not issue regulations to administer this treaty:

We insist that these regulations are not governmental regulations, or regulations by the Government of the United States, in the sense in which those words are used in the treaty. A governmental regulation is a regulation authorized by Congress, and the mere rule of an executive officer of the Government, which he is not authorized by Congress to make, does not come within the meaning of the term. In other words, before the regulation of the Secretary of the Treasury, in regard to the transit of Chinese laborers across the territory of the United States, can become a governmental regulation, the Secretary of the Treasury must be authorized and directed to make it, by an Act of Congress.¹⁶²

The petitioner lost. The Court held that treaty authorized the regulations, as “[i]t dealt with the subject specifically, and was operative without an act of Congress to carry it into effect.”¹⁶³ Thus, the treaty “manifestly operate[s] to commit the subject of transit to executive regulation and determination,” and the government prevailed in the case.¹⁶⁴ The Court reached this holding even though, unlike the Indian treaties discussed above, the treaty with China did not specify what actors were to issue the “regulations by the Government of the United States.”¹⁶⁵ The Court thus accepted that the word “regulation” in the treaty authorized rulemaking action by the executive branch as opposed to requiring congressional implementation.¹⁶⁶

Fok Yung Yo in some sense turns the traditional self-execution analysis on its head. The treaty provision at issue was self-executing in the sense that it did not require congressional legislation, and yet the Chinese petitioner could not take advantage of this provision in the courts because of the intervening treaty-authorized regulation. This point is a piece of a bigger picture: as with the Indian treaties discussed earlier, the Court approached the treaty in a way similar to how it would approach a statute. As a lower court from around this time observed in dicta:

An examination of the decisions of the Supreme Court on this topic will show there is no practical distinction whatever as between [sic] a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission intrusted [sic]

162. Brief of Appellant at 15, *Fok Yung Yo*, 185 U.S. 296 (No. 478) (on file with author).

163. *Fok Yung Yo*, 185 U.S. at 303. Prior to the treaty, the executive branch had issued similar regulations. *Id.* at 299–300. The Court did not address whether these regulations were authorized by independent executive power or by a prior statute, instead basing its holding squarely on the authorization it concluded was contained in the treaty. *See id.* (noting, among other things, that “it may be doubtful” that a prior statutory provision on the issue “ever took effect”).

164. *Id.* at 305; *see also In re Lee Gon Yung*, 111 F. 998, 1001–02 (C.C.N.D. Cal. 1901) (reaching a similar holding).

165. *Fok Yung Yo*, 185 U.S. at 303, 305.

166. *Id.* at 305.

with certain powers with reference thereto. The same may be said with regard to a treaty.¹⁶⁷

Consistent with the broader narrative described here, this language envisions statutes and treaties as having the same tool kit available for implementation, with the choice of tool depending on what the statute or treaty specifies. This parallel between treaties and statutes is also suggested by another strand of evidence, to which this Article now turns: the use of the terms “self-executing” and “not self-executing” in reference to laws other than treaties.

2. Non-Self-Execution for All Kinds of Laws of the Land

The distinction between “self-executing” and “not self-executing” provisions is often treated as an issue specific to treaties. But it is not. Around the same time that the Supreme Court and the political branches began using these terms with respect to treaties, they also began using them in relation to the two other types of the law of the land—the Constitution and statutes. These uses suggest that the language of self-execution and non-self-execution was not initially a matter of treaty exceptionalism, but rather terminology directed to a broader issue of governance.¹⁶⁸ That issue is how to reconcile the dictates of the Supremacy Clause with the reality that some textual provisions seem to expressly contemplate intervening action, typically by the political branches, before they can be enforceable in the courts.¹⁶⁹ The Supreme Court and political actors used the terms “self-executing” and “not self-executing” in many different ways, including some that came to refer to implementation by the executive branch rather than Congress.

It was in the 1870s and 1880s that the terms “self-executing” and “not self-executing” came into the vocabulary of the Supreme Court. In 1875, the Court remarked in dicta that a particular statute “was self-executing, requiring no aid from legislation, either State or National.”¹⁷⁰ In 1883, the Court described the Thirteenth Amendment as “undoubtedly self-executing

167. *United Shoe Mach. Co. v. Duplessis Shoe Mach. Co.*, 155 F. 842, 845 (1st Cir. 1907).

168. My purpose in what follows is to highlight similarities, not to claim perfect parity. There are of course differences. Because a treaty is also a contract, the concept of non-self-execution is often tied to the idea of executory contractual provisions in a way that is rarely the case with respect to statutes. In addition, the use of the language of self-execution and non-self-execution in the statutory context has largely been supplanted by the vocabulary of administrative law.

169. I focus here only on the U.S. Constitution and federal statutes, but the concept of non-self-executing and self-executing provisions is also found in other public law contexts as well, such as state constitutions. *See, e.g.*, *Am. Fed’n of Labor v. Watson*, 327 U.S. 582, 596 (1946) (“There is, in the first place, some question whether this new provision of Florida’s constitution is self-executing or requires legislation for its enforcement.” (footnote omitted)).

170. *United States v. Reese*, 92 U.S. 214, 255 (1875).

without any ancillary legislation.”¹⁷¹ In 1885, it described the Extradition Clause of the Constitution as “not, in its nature, self executing” and instead requiring congressional implementation.¹⁷² In 1887, the Court first used this terminology with respect to treaties, observing that certain provisions would be inapplicable “even if conceded to be self-executing.”¹⁷³ In 1888, the Court stated in dicta that “not self-executing” treaty provisions require implementing legislation.¹⁷⁴

These early uses of “self-executing” and “not self-executing” have both a substantive and procedural component. Substantively, they recognize that some provisions of the Constitution, statutes, and treaties will not be immediately enforceable. Procedurally, they seem to assume that legislation will be needed to make them enforceable. In the treaty context, it was not until *Medellin* that the Supreme Court was really invited to look hard at these two components and decide if they necessarily went together.¹⁷⁵ In the constitutional and especially the statutory context, however, the Supreme Court has come to treat the substantive rather than the procedural component of “not self-executing” as its core. This is shown by its use of “self-executing” and “not self-executing” to refer to provisions that require further intermediary action before their enforcement in court, even where this further action would be undertaken by actors other than a legislature.

In constitutional discourse, when the Supreme Court mentions “not self-executing” provisions, it usually is referring to provisions that need to be implemented by Congress. This is because the text, structure, or purpose of the constitutional provisions at issue require Congress to be the implementer.¹⁷⁶ Examples include the establishment and jurisdictional reach of

171. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (adding, however, that “legislation may be necessary and proper . . . to prescribe proper modes of redress for its violation in letter or spirit”).

172. *Roberts v. Reilly*, 116 U.S. 80, 94 (1885). For another early example in the constitutional context, see *In re Neagle*, 135 U.S. 1, 81–82 (1890) (Lamar, J., dissenting), which used the term “self-executing” to refer to constitutional powers that are “independent of statute.”

173. *Bartram v. Robertson*, 122 U.S. 116, 120 (1887).

174. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

175. See *Medellin v. Texas*, 552 U.S. 491, 525–26 (2008).

176. An interesting point of comparison is the Commerce Clause. It is held to have a self-executing component—the dormant commerce clause—even though its text reads simply like a grant of power to Congress. *E.g.*, *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) (“Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.”); see also *Obstruction to Navigation*, 18 Op. Att’y Gen. 404, 405 (1886) (noting the “self-executing commercial power of the Constitution”).

the lower federal courts¹⁷⁷ and the Extradition Clause.¹⁷⁸ Statements by actors in the political branches similarly use the language of non-self-execution in connection with legislation.¹⁷⁹ But there are other instances in which the Court has described a constitutional provision as “not self-executing” without deeming Congress to be the actor charged with implementing the provision. In the Fifth Amendment context, the Court has repeatedly described its protection against self-incrimination as typically “not self-executing” but instead requiring individuals to affirmatively invoke its protections.¹⁸⁰ This suggests that in the constitutional context, the idea of self-executing and non-self-executing provisions is not rigidly tied to Congress as the implementer.

In the statutory context, the Court has come even more clearly to distance the terminology of non-self-execution from the process of congressional implementation. The Court now sometimes uses the term “not self-executing” to refer to a statutory provision that needs to be implemented by the executive branch, often through an administrative process. Perhaps not surprisingly, the Court began doing this during the New Deal era. Administrative activity by the executive branch goes back to the very beginning of constitutional history, and indeed in the *Congressional Record* the terms “not self-executing” and “self-executing” are used at least on rare occasion with

177. The text of Article III makes the establishment of lower courts take effect only upon congressional action. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress *may* from time to time ordain and establish.” (emphasis added)). Their jurisdiction is similarly deemed to require congressional action. *E.g.*, *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (“Article III of the Constitution gives the federal courts power to hear cases ‘arising under’ federal statutes. That grant of power, however, is not self-executing, and it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction.” (footnote omitted)); *cf.* *California v. Arizona*, 440 U.S. 59, 65 (1979) (observing that the Supreme Court’s original jurisdiction under the Constitution “is self-executing, and needs no legislative implementation”).

178. *Roberts v. Reilly*, 116 U.S. 80, 94 (1885) (deriving Congress’s role as the implementer not from the text of Article IV but rather from the need for uniform rather than state-by-state procedures).

179. For a few examples, see 45 CONG. REC. 4,214 (1910) (statement of Sen. Crawford) (“It requires an act of Congress to give these inferior federal courts any jurisdiction. This part of the Constitution is not self-executing.”), and 8 CONG. REC. 160 (1879) (statement of Sen. Bayard) (“[I]s not the Constitution filled with powers some of which are self-executing, and some of which are called non-self-executing, which require the legislative power of Congress to make provision for their exercise?”).

180. *E.g.*, *Minnesota v. Murphy*, 465 U.S. 420, 429, 434 (1984); *Roberts v. United States*, 445 U.S. 552, 559 (1980) (“The Fifth Amendment privilege against compelled self-incrimination is not self-executing . . . [and in certain circumstances] may not be relied upon unless it is invoked in a timely fashion.”). Another example of a non-self-executing constitutional provision is the Eighteenth Amendment establishing Prohibition. That provision gave enforcement power to “[t]he Congress and the several States.” U.S. CONST. amend. XVIII, § 2 (emphasis added), *repealed by* U.S. CONST. amend. XXI; 72 CONG. REC. 1,168 (1930) (statement of Sen. Blease) (describing the Eighteenth Amendment as “not self-executing” in that it “does not provide any means for enforcement or attach any penalty for violation” other than as set forth in legislation by Congress or the states).

respect to executive branch administration of statutes as far back as the 1870s.¹⁸¹ Yet as Jerry Mashaw has observed, “[N]ineteenth-century administrative law [has] remained invisible to us” largely because it took place outside the courts.¹⁸² With increased court scrutiny of administrative law from the New Deal onward, the Court had more reason to consider how the executive branch can serve as the intermediary between a statute and the courts.

United States v. Sponebarger is a helpful example.¹⁸³ In the course of that case, which addressed whether a flood control statute amounted to a taking under the Fifth Amendment, the Court spoke twice of non-self-executing provisions. Once, it remarked on “when legislation does not constitute self-executing appropriation,” implying that, in these circumstances, much would depend on “future decisions of Congress.”¹⁸⁴ But while this use of the language of non-self-execution invoked the need for further *congressional* administration, another use was directed to the need for future *executive branch* administration.¹⁸⁵ As part of her argument, the plaintiff had asserted that a provision of the statute preempted certain state laws that were protecting her property from flooding.¹⁸⁶ The Court rejected this argument, stating that the statute “does not represent a self-executing assumption of complete control over all levees to the exclusion of the States and local authorities.”¹⁸⁷ Instead, the Court found that the statute itself specified intermediate steps that would have to occur before the statute preempted state law and further noted that “the War Department, charged with its administration, has treated the Act as leaving local interests free” to continue to regulate.¹⁸⁸

Sponebarger’s dual uses suggest that the language of non-self-execution is not necessarily linked to congressional administration, but rather more generally to the need for further administration by the appropriate actor. This approach has been taken by the Court in other cases as well, ranging

181. *E.g.*, 79 CONG. REC. 8,538 (1935) (statement of Rep. Connery) (“Section 7(a) was not self-executing . . . [Rather, employers] became subject to a code of fair competition approved by the President . . .”); 67 CONG. REC. 11,875 (1926) (statement of Sen. Norris) (“This law is not self-executing. . . . It requires the action of this board”); 33 CONG. REC. 828 (1900) (statement of Rep. Jenkins) (“The statute of 1887 is not self-executing, but makes it the duty of the Attorney-General to proceed against such property to enforce forfeiture.”); 9 CONG. REC. 941 (1879) (statement of Rep. Springer) (“A law may be self-executing, or such that its operation does not require personal agents to carry it into effect Or a law may require agents or officials to enforce it, as for example regulations as to the registration of voters.”).

182. Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1367 (2010).

183. 308 U.S. 256 (1939).

184. *Sponebarger*, 308 U.S. at 268, 268 n.15.

185. *Id.* at 268, 269 (stating that “the Act naturally left much to the discretion of its administrators” in the War Department).

186. *Id.* at 268.

187. *Id.*

188. *Id.* at 269 (noting that the preemptive provision should not take effect unless, pursuant to the terms of the statute, the United States built or acquired its own levees).

from the New Deal era to the present day.¹⁸⁹ Such uses are not frequent, as the language of administrative law provides the Court with many other ways to say that an administrative agency must implement a statute. They nonetheless show that the term “not self-executing” need not be equated with congressional implementation.

Overall, the Court’s use of the terms “self-executing” and “not self-executing” outside the treaty context have revealed a certain fluidity. These uses are knit together only at a high level of generality by the concept that some intermediary actor must do something before a court can act. The terms are not immutable but instead have shifted in response to changing times and changing practices of governance. As in the treaty context,¹⁹⁰ they remain confusing terms, and we should probably be thankful that it is only in that context that they have become prevalent. But their use in these other contexts suggests that we should be wary of assuming that the meanings of these terms had to be fixed by their first uses or that these uses were meant to drive a wedge between treaties and other forms of the law of the land. Instead, as with the ways in which the executive branch did translate treaty provisions into court-enforceable obligations, the use of these terms across contexts suggests continuity between treaties and statutes.

C. *The Past Half-Obscured*

The past’s role as prologue depends on what we understand the past to be. The account above offers two sketches of the past. The first conceptualizes treaty implementation in our domestic legal system as a matter for

189. *E.g.*, *EC Term of Years Tr. v. United States*, 550 U.S. 429, 430–31 (2007) (“‘A federal tax lien, however, is not self-executing,’ and the IRS must take ‘[a]ffirmative action . . . to enforce collection of the unpaid taxes.’” (quoting *United States v. Nat’l Bank of Commerce*, 472 U.S. 713, 720 (1985))); *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 64 (1974) (“[T]he statute is not self-executing, and were the Secretary to take no action whatever under his authority there would be no possibility of criminal or civil sanctions being imposed on anyone”); *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 92 (1957) (“[W]e do not suggest that the National Transportation Policy is a set of self-executing principles that inevitably point the way to a clear result in each case. On the contrary, those principles overlap and may conflict, and, where this occurs, resolution is the task of the agency that is expert in the field.”); *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 418 (1942) (“Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals.”); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 142 (1940) (“Modern administrative tribunals . . . have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process.”). For usage in the executive branch, see, for example, Attorney General Francis Biddle’s advisory opinion on the pooling of traffic by carriers, which describes how one section of an act “is self-executing and becomes immediately operative without aid of powers conferred upon the Commission” while another section “is executed by the Commission in the exercise of emergency powers.” *Pooling of Traffic by Carriers*, 40 Op. Att’y Gen. 162, 166 (1949).

190. See generally DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* 295–318 (2016) (describing a range of ways in which treaty self-execution has been conceptualized); Vázquez, *supra* note 98 (discussing multiple possible meanings of self-execution in the treaty context).

either Congress or the courts. Its exclusion of the executive branch stems partly from concern about congressional prerogatives, but also—and heavily—from omissions in dicta that occurred at a time when the administrative capacities of the executive branch were comparatively undeveloped. The second sketch suggests that treaty implementation was like statutory implementation. In both cases, the practical needs of governance made intervening administration sometimes necessary. Whether Congress or the executive branch filled this intervening role turned on the interpretation of the treaty or statute in conjunction with background assumptions about the separation of powers.

Yet of these two sketches, the former dominates our contemporary understanding of treaty implementation, while the latter is forgotten or at best given cursory attention. *Foster v. Neilson* receives endless attention as the key case to understanding how treaties are or are not directly enforceable in courts as the law of the land, while cases like *Holden v. Joy*, *Doe v. Wilson*, and *Fok Yung Yo v. United States* barely receive mention.¹⁹¹ The equation of non-self-executing treaties with the need for congressional implementation is so strong that it is sometimes taken as a matter of definition. As a leading scholar in the field writes, “At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative ‘implementation.’”¹⁹²

This is not to say that foreign relations law scholars fail to recognize the possibility that the executive branch could implement treaties in ways that effect their judicial enforceability. To the contrary, most careful scholars on treaty self-execution recognize that the terms “self-executing” and “non-self-executing” may encompass multiple meanings and acknowledge the conceptual possibility of the executive branch serving as the intermediary. The attention given to this possibility, however, is often very brief, especially in the pre-*Medellín* literature.¹⁹³ The *Restatement (Third) of Foreign Relations Law*, for example, defines a non-self-executing treaty as a treaty that requires implementing legislation in its black letter section,¹⁹⁴ leaving it to the

191. For examples of scholarship giving substantial attention to *Foster* but not the other cases, see HENKIN, *supra* note 75, at 197–204; Bradley, *supra* note 11, at 132–39; Sloss, *supra* note 11, at 143–62; and Vázquez, *supra* note 5, at 628–44.

192. Vázquez, *supra* note 98, at 695.

193. See e.g., HENKIN, *supra* note 75, at 203; David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 23–24 (2002); Vázquez, *supra* note 98, at 707. Notable pre-*Medellín* exceptions include Swaine, *supra* note 12, at 353–59, which devotes several pages to the prospect of executive branch implementation of non-self-executing treaties, although not specifically considering regulatory treaties or their parallels to statutes), and Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 356–61, 366 (2006), which considers the possibility of executive branch administration of treaties but defending the binary approach to treaty implementation that has been derived from *Foster*.

194. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (AM. LAW INST. 1987).

comments to note in passing that “the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation *or appropriate executive or administrative action.*”¹⁹⁵

What explains why *Foster*'s narrative of Congress or the courts has dominated over the alternative narrative recognizing that the executive branch can serve as the intermediary? There is undoubtedly no single answer, but at least four complementary possibilities merit consideration. First, for much of the twentieth century, regulatory treaties that needed implementing action were not too common, and for these treaties the practice of the political branches relied on congressional implementation. Where administrative implementation of statutes blossomed, rooted in the necessity of governance, the need for regulatory implementation of treaties dwindled between the time of Indian treaties and the post-Cold War era. Less tied by partisan gridlock than today,¹⁹⁶ Congress could act when needed, and courts and scholars largely overlooked the earlier practice of executive branch implementation of regulatory treaties. Second, in the post-World War II era, a great debate arose over whether the United States should join human rights treaties and, if so, how they should be implemented. Opponents of these treaties pushed for a constitutional amendment that would have required all treaties to have congressional implementation in order to take effect as domestic law.¹⁹⁷ Although their efforts were unsuccessful, this debate reinforced a focus on congressional implementation, as opposed to other kinds of implementation. Third, the narrative based on *Foster* may reflect a privileging of Chief Justice Marshall and of international treaties with European powers over cases involving less-known justices and treaties with the Indian tribes and China. This is particularly understandable given the policies promoted by the latter treaties.¹⁹⁸ Fourth and finally, the idea of executive branch administration of regulatory treaties is most easily understood by ways of parallels to administrative law. Yet foreign relations law scholarship more naturally thinks of executive branch authority in terms of constitutional foreign-affairs powers rather than domestic administrative delegations.

195. *Id.* § 111 cmt. h (emphasis added); *see also id.* § 111 reporters' note 5 (also hinting briefly at the prospect of executive implementation).

196. *See* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 958 (2016) (describing how the rise of partisan polarization in the last half century has affected Congress).

197. Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348–49 (1995) (describing these efforts, which were led by Senator Bricker of Ohio, and noting the continuing shadow they have cast on practice in relation to treaty implementation, especially for human rights treaties).

198. Unsurprisingly, the most invoked aspect of the alternative narrative given above is the extradition of Jonathan Robbins, which took place not long after the Founding and involved a European treaty. *See, e.g.*, Parry, *supra* note 94, at 1295–1303; Sloss, *supra* note 11, at 146–48; Wedgwood, *supra* note 126.

Both the briefing and the Court's opinion in *Medellín* demonstrated how little the alternative narrative described above was considered in that case. In arguing that the president could implement the ICJ's decision, the brief for *Medellín* noted the Jonathan Robbins extradition but focused primarily on the president's general foreign-affairs powers.¹⁹⁹ The brief for the United States in support of *Medellín* similarly rested almost exclusively on the president's foreign-affairs powers.²⁰⁰ Neither brief cited *Fok Yung Yo* or discussed the president's power to implement Indian treaties, and any parallels they drew to statutory implementation focused mostly on constitutional law rather than administrative law.²⁰¹ The Court's opinion followed suit. It quoted *Foster* six times²⁰² but neither explored potential parallels between treaty implementation and administrative law nor discussed the ways in which the president has historically acted to implement treaties.

Since *Medellín*, some scholars have taken up whether the president can act to make judicially enforceable treaty provisions that otherwise would not be. Paul Stephan argues that treaties, like laws, should be able to "have no immediate effect but can authorize the Executive, without any further legislation, to adopt rules that do have direct domestic effect."²⁰³ David Sloss similarly argues that the executive branch should be able to implement executory treaty provisions where U.S. separation-of-powers principles make it the appropriate actor for doing so.²⁰⁴ In contrast, Ernest Young expresses skepticism over whether treaties might give domestic implementing authority to the president, especially where the exercise of this authority would seek to preempt state law.²⁰⁵ Each of these scholars goes well beyond the ground covered in the Court's opinion in *Medellín*. Stephan and Young engage at least briefly with administrative law analogies that are lacking in *Medellín*,²⁰⁶ and Sloss argues for a very different reading of *Foster* and other

199. See Brief for Petitioner at 30, *Medellín v. Texas*, 552 U.S. 491 (2008) (No. 06-984) (discussing the Robbins extradition); *id.* at 34–42 (discussing the president's foreign-affairs powers, particularly with regard to claim settlement).

200. Brief for the United States as Amicus Curiae Supporting Petitioner, *Medellín*, 552 U.S. 491 (No. 06-984); see also Brief of Former U.S. Diplomats as Amici Curiae in Support of Petitioner at 5–13, *Medellín*, 552 U.S. 491 (No. 06-984) (focusing heavily on the president's authority to settle claims with foreign nations).

201. Brief for the United States, *supra* note 200, at 9–10 (relying on Justice Jackson's *Youngstown* framework); Brief for Petitioner, *supra* note 199, at 34–36 (same). This brief did state that a "treaty requirement, just like a constitutional or statutory requirement, may call for legislative, executive, or judicial action." Brief for the United States, *supra* note 200, at 31.

202. *Medellín*, 552 U.S. at 505, 508, 514, 516, 526.

203. Stephan, *supra* note 12, at 24.

204. Sloss, *supra* note 11; see also Steve Charnovitz, *Revitalizing the U.S. Compliance Power*, 102 AM. J. INT'L L. 551, 551–59 (2008) (suggesting that *Medellín* got it wrong and should have held that the president had authority to implement the ICJ judgment).

205. Young, *supra* note 11, at 130–31.

206. Stephan, *supra* note 12, at 31 ("*Chevron* suggests that courts should give substantial deference to the President's interpretation of the Charter and the Protocol as containing an implicit delegation of discretion to implement ICJ judgments."); Young, *supra* note 11, at 103–07 (discussing forms of deference in administrative law as they relate to treaties).

precedents in the conventional narrative than was taken by the Court.²⁰⁷ Yet the work of these scholars focuses more on claims settlement issues than on administrative regulation and overlooks almost all of the alternative narrative described above. Recovering the historical connections between the implementation of treaties and the administration of statutes enables a more comprehensive evaluation of what can and should be done in the future.

III. IMPLEMENTING TREATIES THROUGH ADMINISTRATIVE ACTION

Why not administer treaties more like statutes? Right now, the administration of many treaties, especially regulatory multilateral treaties, is assumed to require implementing legislation.²⁰⁸ This makes it harder for the United States to join these treaties and increases the incentives for the executive branch to pursue global cooperation through means other than treaties. Moving to a system where the executive branch could administer regulatory treaties directly would in effect catch treaties up to a place that statutes reached long ago. This Part assesses the extent to which such a move would be constitutionally permissible, whether it would be desirable, and how it might be obtained. It also briefly considers how administrative law principles could be adapted to the treaty context.

A. *Constitutional Permissibility*

Before *Medellín*, executive branch administration of regulatory treaties would have been an easy constitutional issue. Given the parallel treatment of treaties and statutes in the Supremacy Clause, if the executive branch can translate statutory directives into court-enforceable obligations, then it should be able to do the same with regard to treaties in the absence of strong, constitutionally grounded reasons otherwise. Before *Medellín*, such contrary grounds either did not exist or set only modest constraints. A broad reading of *Medellín* would rule out executive branch administration of regulatory statutes, but such a reading is inconsistent with the internal logic of *Medellín* and unpersuasive, particularly read against a backdrop of other Supreme Court precedents. Instead, I argue that *Medellín* does not undermine the constitutionality of the executive branch's ability to serve as the regulatory intermediary between treaty provisions and court-enforceable obligations, although it does set limits on when the delegated power to fulfill this role can be inferred.

The text of the Constitution supports the executive branch's authority to implement treaties through administrative processes just as much—and possibly more—as it does the executive branch's authority to implement statutes through these processes. Both treaties and statutes are the “supreme

207. Sloss, *supra* note 11.

208. See generally *supra* Part II.

Law of the Land,²⁰⁹ and given that the Supremacy Clause can apply to administrative action taken pursuant to statutory authority,²¹⁰ it should logically be able to do the same with respect to similar actions taken pursuant to treaty authority. Indeed, delegations to the executive branch as a textual matter may be easier for treaties than for statutes. Congress's now well-established authority to delegate rulemaking authority is somewhat in tension with the text of the Article I Vesting Clause, which specifies that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."²¹¹ By contrast, treaty-based delegations to the executive branch would remain entirely within Article II, which contains not only the Treaty Clause but also the Executive Vesting Clause and the Take Care Clause.²¹² These latter two clauses give rise to the president's power to execute the laws and thereby relate to his or her ability to wield delegated authority. The Take Care Clause provides that the president shall "take Care that the Laws be faithfully executed," and both practice and precedents solidly support the conclusion that this reference to the "Laws" encompasses treaties.²¹³

In addition to text, the account given earlier of historical practice and precedents suggest that the implementation of treaty provisions that are not immediately enforceable in court need not be exclusively done by Congress. Such implementation of course may lie with Congress, and historically it has usually done so. But the historical practice discussed earlier with respect to Indian treaties and some treaties with foreign sovereigns, in combination with the Supreme Court's acceptance of this practice, supports the conclusion that the executive branch can be a constitutionally permissible intermediary between the courts and treaty provisions that are not directly enforceable.

Expressing wariness at the prospect of executive branch implementation of treaties, Ernest Young observes that statutory "[d]elegations to agencies have been accepted in our legal culture primarily because both the courts and Congress retain significant control over the exercise of delegated authority."²¹⁴ He questions "whether these checks [would] operate in an equally effective way for treaty delegations."²¹⁵ This concern is important, both as a

209. U.S. CONST. art. VI, cl. 2.

210. See *supra* Section I.B.

211. U.S. CONST. art. I, § 1. For reconciliation of this text with the practice of administrative law, see, for example, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

212. See U.S. CONST. art. II.

213. *Id.* art. II, § 3; see Swaine, *supra* note 12, at 342–48. In *Medellín*, the Court tersely rejected an argument made by Medellín with regard to the Take Care Clause but did so without addressing whether the word "Laws" in the Take Care Clause applies to treaties. See 552 U.S. 491, 532 (2008) (stating that the ICJ "judgment is not domestic law; accordingly, the President cannot rely on his Take Care powers here").

214. Young, *supra* note 11, at 130.

215. *Id.* at 131.

matter of good governance and because administrative procedure and constitutional substance are not necessarily independent of one another.²¹⁶ But it is a concern that can be addressed by building procedural protections encouraging regularity and accountability into the implementation of treaties, just as they have come over time to be built into the implementation of statutes.

That executive branch administration of treaties can be constitutional does not mean that it is without constitutional limits. Most importantly, power must in fact be delegated to the executive branch to administer a treaty before it can constitutionally do so. What it would take for such delegation to occur is discussed later in this Part. In addition, a treaty can only delegate power to the executive branch to do something that a treaty can authorize within our constitutional system. Thus, a treaty could not constitutionally authorize the executive branch to appropriate funds, given the textual and historical basis for concluding that the appropriation of money can be done only by Congress.²¹⁷ The appropriations power in turn could serve as a congressional check on executive branch administration of treaties, just as it does with respect to executive branch action more generally.

Medellin potentially complicates the constitutionality of treaty delegations to the executive branch. A broad reading of *Medellin* suggests that a treaty cannot delegate authority to the executive branch to translate treaty provisions into domestically enforceable obligations. *Medellin* states that “a ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law”²¹⁸ and further that “the 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.”²¹⁹ This language seems to entrench a binary approach, such that treaties must either be domestically enforceable by themselves or instead be implemented by Congress. If this were the case, then the executive branch would never be able to administer a treaty that was not “by itself” domestically enforceable in a way that would give rise to court enforceability. This in turn would suggest that a treaty provision cannot authorize the executive branch to make regulations that are enforceable in court unless the treaty provision is itself immediately enforceable in court.

But such a broad reading would be inconsistent with the internal logic of *Medellin* and more generally unpersuasive. *Medellin* concludes that the president could not make the treaty provision at issue enforceable in the courts because a “non-self-executing treaty, by definition, is one that was *ratified with the understanding* that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has

216. E.g., Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 487–504 (2010).

217. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 11 cmt. i (AM. LAW INST. 1987).

218. *Medellin*, 552 U.S. at 505 n.2.

219. *Id.* at 530.

implicitly authorized the President—acting on his own—to achieve precisely the same result.”²²⁰ *Medellín* thus grounded its conclusion that the president cannot execute a non-self-executing treaty in its perception that this was the intent, as manifested through text, of the actors involved in the ratification of a treaty. (These actors are the Senate, which advises and consents to a treaty, and the president, who then ratifies it.)

The conclusion that the president cannot implement the treaty because the Senate did not intend this is quite different from the conclusion that a treaty per se cannot authorize the executive branch to implement a treaty through rulemaking or other forms of administrative action. Reading *Medellín* in the former way does not bar the president and the Senate from choosing to make a treaty enforceable through executive branch administration (which in turn raises the further question, discussed shortly, of how such a choice would need to be manifested).²²¹ Understanding *Medellín* to center on intent makes its approach to treaties more consistent with the Court’s approach to statutory provisions, including its decision over time to recognize that “not self-executing” statutory provisions can be ones that give the role of intermediary to the executive branch. It also means that *Medellín* does not impliedly invalidate the domestic applicability of treaty provisions, like the one in the Chippewa treaty, that clearly delegate administrative authority to the president. Finally, understanding *Medellín* to focus on intent embraces the value of trusting the political branches with flexibility in institutional design. By contrast, as Paul Stephan has observed, a flat insistence on “either judicial rule or an insistence on express legislative authority impedes, rather than promotes, international cooperation and, in important ways, the progressive development of international law.”²²²

B. *Practical Desirability*

For treaties to delegate regulatory authority to the executive branch, it is not enough that such delegations be constitutional. This practice should also be in the public interest and, pragmatically speaking, the president and the

220. *Id.* at 527 (emphasis added). *Medellín* suffers from scrivener’s errors, and the word “Congress” may be meant to be “Senate” in this quotation. *Cf. id.* at 512–13 n.8 (mistakenly describing a treaty as something “negotiated by the President and signed by Congress”).

221. This focus on intent is consistent with the approach taken by other scholars. *E.g.*, Bradley, *supra* note 11, at 176–79; Ingrid Wuerth, *Medellín: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 3–5 (2009).

222. Stephan, *supra* note 12, at 33. Although *Medellín* thus does not present a categorical bar to treaty implementation through executive branch regulation, it does complicate the choice of terminology. By equating the term “non-self-executing treaties” with the need for congressional implementation, it may make it hard to use this term for treaties that require intermediary action by the executive branch. David Sloss has suggested accepting the term “non-self-executing treaties” as a term of art that refers to treaties which need congressional implementation, while using the term “executory” more broadly to refer to treaty provisions that require intermediary actions. *See* Sloss, *supra* note 11, at 145. I do not think the terminology matters much as long as there is substantive recognition that the executive branch can play similar roles for treaties as for statutes with respect to their administration.

Senate would also need institutional reasons to approve such delegations. These reasons exist, and they are closely connected to other, broader developments in foreign relations law.

The treaty-making process provides a path for U.S. engagement in international cooperation, while at the same time conditioning this engagement on strong, supermajoritarian support. In practice, the only treaties that make it through the Senate have bipartisan support and indeed typically lack any strong opposition. From 2001 to 2010, for example, only *one* treaty received the advice and consent of the Senate where there were any recorded votes in opposition.²²³ Once a treaty has gone through this challenging review, the value of further legislative process—of needing a second law of the land to implement it—is likely to be small relative to the costs of this process. It takes further energy and effort from the political branches to obtain implementing legislation—so much that the process can take years or even decades.²²⁴ This in turn keeps the United States from joining treaties that a strong supermajority recognizes as advancing the nation's substantive interests.

In addition to these policy-based reasons, in rare cases there might also be advantages from a constitutional perspective to having a treaty delegate authority directly to the executive branch rather than requiring implementing legislation. In a recent case about the treaty power, *Bond v. United States*, two justices took the position that Congress lacks the power under the Necessary and Proper Clause to pass implementing legislation for treaties and thus that there must be a separate basis in Article I for all implementing legislation.²²⁵ This position is contrary to existing precedent and poorly reasoned.²²⁶ If the political branches are concerned that it might eventually be adopted by the Court and wish to ensure the implementation of a regulatory treaty that might address matters outside of Congress's Article I powers, then they should favor direct delegations to the executive branch.

From an institutional perspective, the president should also favor the approach proposed here. The president should prefer a process that eases the making of treaties, since the president can already ensure through his or her control of treaty ratification that the United States only joins treaties that accord with presidential policy. The president should also be content with a process that has the effect of leaving the executive branch with considerable control over implementation.

The incentives of the Senate are more complex. Institutionally, the Senate might value the role played by implementing legislation, which gives it

223. Galbraith, *supra* note 138, at 287 (noting that the New START Treaty with Russia was the only such treaty).

224. See *supra* notes 68–70 and accompanying text. This discussion assumes that implementing legislation does not already exist. Where implementing legislation predates the treaty, as with radio treaties, then having the treaties effectuated through this pre-existing implementing legislation presents no difficulties. See *supra* note 71 and accompanying text.

225. 134 S. Ct. 2077, 2099 (2014) (Scalia, J., concurring in the judgment).

226. See Galbraith, *supra* note 81, at 65–81.

the chance to weigh in a second-time round. As discussed shortly, however, the Senate could retain the influence it exerts through implementing legislation by having its resolution of advice and consent include conditions that are presently left to implementing legislation. Moreover, the decision of whether to authorize executive branch implementation or instead to wait for implementing legislation is a determination that the Senate can make on a case-by-case basis, just as it already makes determinations about self-execution on a case-by-case basis.²²⁷ Recognizing that executive branch implementation is a viable option does not mean that the Senate needs to exercise it in every case. It does mean that where the Senate cares about the benefits that come with joining the treaty, it has a way to make these benefits materialize with more speed and certainty.

In addition to case-specific incentives, there is an overarching institutional reason why the Senate should favor a shift towards executive branch implementation. The more cumbersome the process is for making treaties, the greater are the president's incentives for ceasing to make treaties altogether. As noted earlier, the more the president needs both two-thirds of the Senate *and* a separate vote from a majority of Congress for a treaty, the more the president is incentivized to try to make international agreements on his or her own or in conjunction only with Congress.²²⁸ In trade, which is one of the areas where implementing legislation for treaties did become common in the nineteenth century, all major international agreements have already come to be done by Congress and the president rather than through treaties.²²⁹ If this shift occurs across the board, then the Senate will lose its traditional constitutional prerogative, and the higher voting threshold of two-thirds that accompanies it. Modernizing the process of treaty implementation may be necessary to ensuring the future use of treaties.²³⁰

Although the approach described here would thus have institutional benefits for the president and overall for the Senate, it would reduce the power of the House of Representatives. This is in keeping with the Framers' "explicit and unambiguous" decision to make the treaty-making process unicameral rather than bicameral.²³¹ In practice, however, the House of Representatives has long sought to play a role in treaty implementation, and its

227. See *Medellín v. Texas*, 552 U.S. 491, at 541, 546–51 (Breyer, J., dissenting).

228. See *supra* notes 85–86 and accompanying text.

229. See Galbraith, *supra* note 138, at 290–91.

230. There is a further issue of power shifts at the committee level within the Senate. The Senate Foreign Relations Committee is the Senate committee with jurisdiction over treaties, while implementing legislation on the Senate side would go through whatever Senate committee has jurisdiction over the subject matter covered in the treaty. The leaders of these other committees might resent the increased power that the approach advocated in this Article gives to the Senate Foreign Relations Committee. If such concerns were to arise, they could be potentially be addressed by consultation on a treaty-by-treaty basis between the Senate Foreign Relations Committee and whatever committee had jurisdiction over the subject matter of the treaty at hand.

231. *INS v. Chadha*, 462 U.S. 919, 955 (1983) (observing that the "Senate alone was given unreviewable power" to act "independent of the other House" with respect to treaties).

members might resent any developments that have the effect of reducing this role. While the appropriations power is the only formal constitutional tool that the House could bring directly to bear, its members could use other institutional tactics to persuade the president and the Senate to require implementing legislation. It is hard to predict how much members of the House would mobilize around this issue and how the Senate would respond. If the House were to mobilize and the Senate to have some sympathy for its viewpoint, then we might see bargains whereby the House agrees to pass implementing legislation speedily in return for the Senate not cutting it out. In other words, the shadow of the shift proposed here could itself have the effect of influencing institutional bargaining.

C. Structural Design

In deciding *Medellín*, the Court emphasized both the text of the treaty provision at issue and the intent of the Senate with regard to that provision. This suggests two possible places to place a treaty's delegation of authority to the executive branch to translate treaty directives into court-enforceable law: first, in the text of the treaty itself; and second, in the Senate's resolution of advice and consent to the treaty.

A treaty could expressly specify in its text how it is to be administered in the United States by executive branch actors. The Treaty with the Chippewas is an example of an Indian treaty that took exactly this approach, expressly empowering the president to take various actions including making certain "rules and regulations."²³² By negotiating such language into the text of a treaty—a future law of the land—the executive branch would provide not only a clear delegation of power but also one which gives ample notice to the Senate. For bilateral treaties, this kind of specificity is possible and indeed currently done with respect to quasi-prosecutorial matters.²³³ Yet realistically the inclusion of such language in treaties would be in tension with modern multilateral-treaty practice. The domestic implementation of a treaty is a matter of domestic law, and, especially for multilateral treaties, it would be highly unusual for a treaty to include a clause about how it will be implemented within the United States.

Perhaps more feasibly, the text of a treaty could delegate regulatory authority by using language that is less specific and yet sufficient to confer regulatory authority. Recall that in *Fok Yung Yo*, the Supreme Court held that, where a treaty provision specified that a right was "subject to such regulations by the Government of the United States," this provision "manifestly operate[s] to commit the subject of transit to *executive* regulation."²³⁴ The scant reference to "regulations" in the treaty was taken by the Court to be a source of regulatory authority for the executive branch, even though it

232. Treaty with the Chippewas, *supra* note 140, art. 3.

233. See *supra* note 135 (discussing MLATs).

234. *Fok Yung Yo v. United States*, 185 U.S. 296, 301–02, 305 (1902) (emphasis added).

did not clearly specify either that it was empowering regulations or that the executive branch was the actor that was empowered.

Some multilateral treaties already contain language that speaks to administrative action for implementation, rather than or as an alternative to legislation. The Basel Convention on Transboundary Waste, for example, provides that each state party “shall take appropriate legal, *administrative* and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.”²³⁵ Similarly, the Rotterdam Convention provides that state parties “shall” take measures to implement the Convention, and “[t]hese measures may include, as required, the adoption or amendment of national legislative or *administrative measures*”²³⁶ Yet another environmental treaty, the Stockholm Convention, states that each party “shall . . . [p]rohibit and/or take the legal and *administrative measures* necessary to eliminate” certain uses of chemicals.²³⁷

The texts of all these treaties are fairly specific on the substance of the regulatory schemes that they require. The Stockholm Convention, for example, requires state parties to take quite specific steps with respect to various chemicals, which in turn are listed by name in various annexes to the Convention.²³⁸ This level of particularity goes well beyond what would be required in a statute under the “intelligible principle” doctrine. Yet although these regulatory treaties are specific on substance, they are understandably thin on administrative process. The texts of these treaties do not specify what U.S. executive branch actors would carry out the requirements of the treaty, nor do they specify what penalties, if any, would attach to private actors who violated the treaty provisions or regulations implementing them. These gaps could be filled at least in large part through background principles. The president’s role as head of the executive branch (and as an actor with considerable independent foreign-affairs powers) would suggest that he or she should be regarded as the repository of delegated power, although able in turn to delegate to other figures within the executive branch.²³⁹ The gap with respect to penalties is more problematic, but at a minimum the executive branch could presumably seek injunctive relief against an actor that failed to abide by the treaty’s administrative implementation.

235. Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal art. 4, Mar. 22, 1989, 1673 U.N.T.S. 57 (emphasis added). Where the Convention does discuss legislation specifically, it does so without requiring it. *E.g., id.* art. 9(5) (stating that “[e]ach Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic [in hazardous waste]”).

236. Rotterdam Convention, *supra* note 43, art. 15 (emphasis added).

237. Stockholm Convention on Persistent Organic Pollutants art. 3, May 22, 2001, 2256 U.N.T.S. 119 [hereinafter Stockholm Convention] (emphasis added).

238. Articles 3 and 4, for example, provide that the parties shall prohibit the production, use, import, and export of chemicals listed in Annex A, except for certain specified permitted uses. *See, e.g., id.*, arts. 3, 4.

239. U.S. CONST. art. II, § 1, cl. 1.

The text of some treaties thus already does use language that, at a very high level of generality, could constitute a delegation of administering authority to the executive branch. Yet for the executive branch to treat such language as a delegation—or alternatively to include more specific language in the text of treaties—it would need the tacit or, better still, explicit approval of the Senate.

An exchange between the executive branch and the Senate from a few years ago is instructive for both the possibilities of delegations in a treaty's text and the limits. In 2007—after the executive branch had taken the position in relation to the *Medellin* litigation that it could implement treaty provisions that would not otherwise be directly enforceable but before *Medellin* was decided by the Court—the executive branch negotiated two bilateral treaties on the subject of defense trade cooperation with the United Kingdom and Australia.²⁴⁰ These treaties in essence sought to grant exemptions to an existing U.S. statute regulating the export of defense-related materials, with the exemptions to apply where the materials at issue were being exported to the United Kingdom or to Australia. (Previously the executive branch had sought and failed to obtain these exemptions through statutory amendment.²⁴¹) Each treaty's preamble expressed the understanding that “the provisions of this Treaty are self-executing in the United States.”²⁴² Executive branch officials “determined that, if ratified, the Treaties would be implemented in the United States through federal regulations.”²⁴³ These regulations would provide safe harbors to the administrative and criminal liability that would otherwise attach under the preexisting U.S. statutory scheme.²⁴⁴

The Senate Foreign Relations Committee was displeased. The core of this displeasure stemmed from a sense that the executive branch had attempted to usurp a senatorial prerogative by including the word “self-executing” in the treaties' preambles. The committee report stated:

The committee notes that the inclusion in a treaty of a statement on the purported self-executing nature of the treaty is highly unusual—perhaps unprecedented—and is contrary to the long-standing practice that such

240. Austl. Defense Trade Cooperation Treaty, *supra* note 7; Treaty Concerning Defense Trade Cooperation, U.K.-U.S., June 26, 2007, S. TREATY DOC. NO. 110-7 [hereinafter U.K. Defense Trade Cooperation Treaty].

241. S. EXEC. REP. NO. 111-5, at 4 (2010).

242. Austl. Defense Trade Cooperation Treaty, *supra* note 7, pmb1.; U.K. Defense Trade Cooperation Treaty, *supra* note 240, pmb1.

243. S. EXEC. REP. NO. 111-5, at 55 (2010) (statement of Andrew Shapiro, Assistant Secretary of State); *see also id.* at 57 (statement of James Baker, Associate Deputy Att'y Gen.) (“[B]ecause the treaties are self-executing, they are ‘equivalent to an act of the legislature’ for purposes of Federal law. Upon ratification of the treaties, therefore, the President would have the authority to issue regulations pursuant to the treaties themselves . . .”).

244. *Id.* at 55 (statement of Andrew Shapiro, Assistant Secretary of State); *id.* at 86 (response of James Baker, Associate Deputy Att'y Gen., to the questions of Sen. Lugar) (stating that “a treaty generally cannot itself establish a Federal criminal offense” but stating that treaties could “narrow[] the scope of[] criminal culpability under other Federal law”).

matters are determined through the shared understanding of the Senate and the executive branch. The committee strongly discourages the executive branch from including such provisions in future treaties.²⁴⁵

Unsatisfied with a mere rebuke, the committee rejected the position that the treaty was to be implemented through executive branch administration. Instead, it extracted an agreement from the executive branch that the treaties would be implemented through implementing legislation²⁴⁶ and included a declaration in the Senate's resolutions of advice and consent to the effect that the treaty was "not self-executing in the United States, notwithstanding the statement in the preamble to the contrary."²⁴⁷

This exchange shows the centrality of the Senate advice-and-consent process to decisions about how treaties are to be implemented in the United States. The executive branch attempted an approach similar to the one advocated for in this Article. It did so, however, without consulting the Senate in advance and without offering a strong normative or doctrinal justification of its approach. In this instance, the Senate declined to embrace an executive-branch centered approach to treaty administration, signaling that such efforts in the future would require true collaboration between the executive branch and the Senate.

The Senate's resolution of advice and consent to a treaty is the ideal place for such collaboration to occur. When the Senate advises and consents to a treaty, it frequently includes some combination of reservations, understandings, declarations, or conditions (collectively "RUDs") in its resolution of advice and consent. The resolution of advice and consent for each of these defense trade treaties, for example, took up over two full pages of the *Congressional Record* and included many minutia with respect to what certifications the president should provide to Congress, what the secretary of state should consult about with the president and Congress, how various phrases of the treaty's implementation should progress, and many other details.²⁴⁸ Indeed, the Senate's resolution of advice and consent for each treaty was roughly as long as the implementing legislation itself.²⁴⁹

A resolution for advice and consent could authorize the executive branch to implement a regulatory treaty or could flesh out an authorization contained in the text of the treaty itself (like the language in the Rotterdam and Stockholm Conventions about how the treaties could be implemented through administrative measures). Such resolutions could expressly designate the executive branch actors responsible for administering the treaty, provide specifications as to the scope of regulatory authority, and include

245. *Id.* at 27.

246. *Id.*; see also Security Cooperation Act of 2010, Pub. L. 111-266, 124 Stat. 2797 (2010) (implementing the treaties). The implementing legislation for these treaties was passed with unusual promptness, perhaps in an effort to head off support for the executive branch's preferred approach.

247. 156 CONG. REC. S7722 (daily ed. Sept. 29, 2010).

248. *Id.* at S7722–24.

249. Compare *id.*, with Security Cooperation Act of 2010, *supra* note 246.

provisions about enforcement, such as identification of the administrative or civil penalties. Having the Senate resolution of advice and consent be the main venue for determining the contours of executive branch implementation would not only appease the Senate's sense of its prerogatives, but also take advantage of its particular expertise. As a legislative body, the Senate is used to thinking through questions of domestic implementation in the statutory context and to thinking about how to maintain adequate checks on executive branch implementation. Given that two-thirds of the Senate must agree to a treaty, the odds are good that careful attention would be paid to ensuring that implementation by the executive branch occurs through an institutional design aimed at protecting against overreaching. The process of providing for implementation in the resolution of advice and consent might lengthen the advice and consent process, but it would remove the potentially far longer delays of waiting for implementing legislation.

The Senate's resolution of advice and consent thus seems an ideal vehicle for authorizing executive branch administration of treaties (or for specifying the contours of such administration where the text of the treaty can be read to provide an authorization already). It allows specificity that realistically cannot be written into multilateral treaties, draws upon the Senate's expertise, promotes democratic oversight, and satisfies *Medellin's* concern that the intent of the Senate with respect to implementation be honored. Nonetheless, there is an important formalist concern with this approach: that the Senate's resolution of advice and consent might not be considered part of the "treaty" and thus not part of the "supreme law of the land."

Although the issue is not free from doubt, there are good reasons to treat the provisions in the Senate's resolution of advice and consent regarding the process of domestic implementation as the law of the land once the treaty is ratified and enters into force, as long as the provisions in the resolution are reasonably tied to the subject matter of the treaty and the president accepts these provisions as part of the ratification process. As a matter of form, this approach requires the approval of the domestic treaty makers the president and two-thirds of the Senate—and thus satisfies all the domestic constitutional checks built into the Treaty Clause.²⁵⁰ As a matter of practice, both the Senate and the president have effectively come to treat the provisions in a Senate resolution of advice and consent as controlling with respect to the treaty's implementation²⁵¹—even where the text of the resolution is in

250. By contrast, the one-house legislative veto overturned by the Supreme Court in the statutory context failed to go through the institutional checks set out in the Bicameralism and Presentment Clause. See *INS v. Chadha*, 462 U.S. 919, 945–51 (1983); cf. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 444 (2000) (observing that RUDs "are analogous to a bill passed by both Houses of Congress and sent to the President for his approval or veto").

251. Cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. d (AM. LAW INST. 1987) (stating that "a condition [in the resolution of advice and consent] having plausible relation to the treaty, or to its adoption or implementation, is presumably not improper, and if the President proceeds to make the treaty he is bound by the condition").

contrast to the text of the treaty, as in the case of the defense trade treaties with Australia and the United Kingdom. This approach is particularly notable with regard to human rights treaties, where the Senate resolutions of advice and consent have included declarations that the treaties are non-self-executing. In defending the constitutionality of these declarations, Curtis Bradley and Jack Goldsmith point out that these declarations “are included within the U.S. instrument of ratification, and other nations are therefore on notice of the declarations and have an opportunity to object to them.”²⁵² Provisions in a Senate resolution of advice and consent that authorize or tailor executive branch implementation of a treaty could similarly be included by the United States in its declaration of ratification.

One important limit to consider on the approach proposed above has to do with criminal penalties. There is a long-standing belief that treaties cannot constitutionally criminalize conduct directly. Whether or not this belief is sufficiently supported as a matter of constitutional law,²⁵³ the exceptionally strong tradition of involving the House with respect to criminal penalties is one that the Senate probably would not wish to depart from in the foreseeable future. If a treaty provision obligates the criminalization of certain conduct, as is the case with some regulatory treaties, then implementing legislation will accordingly be needed. In future negotiations, however, the United States might do well to negotiate for the phase in of criminal penalties, such as a provision that legislation providing for criminal penalties shall be passed within four years of a treaty’s entry into force. If such a provision were in place, the United States could join the treaty without waiting for implementing legislation with respect to criminal provisions.²⁵⁴

In short, for a treaty to delegate regulatory authority to the executive branch in a way akin to statutory delegations, either the text of the treaty should contain such a delegation (even if in very general terms) without disagreement from the Senate, or the Senate’s resolution of advice and consent should specify such a delegation. Better still, both would occur. Turning to examples mentioned earlier in this section, I do not think that the executive branch has the authority to implement the Basel Convention through administrative rulemaking. When the Senate advised and consented to this treaty in 1992, it did so following representations by the executive branch that implementing legislation was necessary.²⁵⁵ The Senate’s resolution of advice and consent was silent with respect to implementation,²⁵⁶ and thus those who refuse to use legislative history might consider that the text of the treaty is sufficient for an executive branch delegation. Taking the legislative history into account, however, such an approach seems untenable. But for

252. Bradley & Goldsmith, *supra* note 250, at 449.

253. See *supra* notes 131–133 and accompanying text.

254. If the implementing legislation failed to materialize, the United States could withdraw from the treaty. The prospect of such withdrawal might in turn serve as a useful deadline for getting the implementing legislation passed.

255. See S. EXEC. REP. NO. 102-36, at 15–16 (1991).

256. See *id.* at 17.

treaties going forward, the executive branch could seek the support of the Senate during the advice and consent process for executive branch authority to implement treaties. The Rotterdam and Stockholm Conventions mentioned above are examples of such treaties, since they are presently awaiting advice and consent in the Senate.²⁵⁷

D. *Administrative Complexities*

The core argument of this Article is that the transformation of treaty provisions into court-enforceable obligations can and should rely far less on congressional implementing legislation and far more on executive branch implementation. If this comes to be, then the political branches and the courts will have to determine the extent to which core principles of administrative law that have developed with respect to statutes apply similarly to treaties. In what follows, I briefly identify three of the possible areas in which these issues might arise.

One area is the extent to which a regulatory treaty can delegate administrative authority to actors other than the president. There are precedents in the treaty context for considering issues of delegation—recall, for example, that in *Holden v. Joy*, the petitioner unsuccessfully argued that a treaty could not confer power on the Secretary of the Interior and the Commissioner of the General Land Office.²⁵⁸ The further the delegations get from executive branch actors subject to robust presidential control, however, the more room there is for debate. For example, could a treaty constitutionally delegate authority to an independent regulatory agency, and under what conditions should the treaty be interpreted to do so? Similarly, could the treaty delegate administrative decisionmaking power to an international organization, such that the executive branch would then be required to implement whatever future decisions were made by this international organization? These issues will undoubtedly present complicated choices in the first instance for the president and the Senate in the making of a treaty and potentially for the courts down the road.

A second area is the extent to which executive branch administration of treaties is bound by or should accept the constraints of procedural regularity and judicial review that have developed in the administrative law context. For example, to what extent would rulemaking require notice-and-comment procedures and be subject to judicial review, and what would the standards of review be? The Administrative Procedure Act does not apply to the president,²⁵⁹ but many of its provisions would be relevant for treaty delegations to agencies.²⁶⁰

257. *Treaties Pending in the Senate*, U.S. DEP'T ST. <http://www.state.gov/s/l/treaty/pending/> [<https://perma.cc/N3Q2-AXLY>]. Neither treaty requires parties to pass criminal legislation. See Rotterdam Convention, *supra* note 43; Stockholm Convention, *supra* note 237.

258. 84 U.S. 211, 225 (1872).

259. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

260. The text of the Administrative Procedure Act focuses on agencies and their actions. On occasion, its provisions make specific reference to “statutes,” but much of its language is

A third area is a cluster of issues related to the legal status of rules issued pursuant to a treaty delegation. Under what conditions does this rule carry the force of law, including the authority to preempt state law? If a rule made pursuant to a treaty appears to conflict with a statute or a rule made under a statute (or a different treaty), how are the conflicts to be resolved?

The answers to these kinds of questions will doubtless in many cases be difficult or context specific. Yet these questions all have statutory analogues, including some from the foreign-affairs context. With regard to delegation, there is vast literature and practice on statutory delegations to executive branch actors, including administrative agencies, as well as at least some initial case law on statutory delegations to international organizations.²⁶¹ The question of administrative law constraints on presidential action is already an important issue in the statutory context.²⁶² There is also a substantial body of precedent in the statutory context on issues like the reach of the APA provision that exempts foreign-affairs issues from notice-and-comment rulemaking and on whether extra deference is appropriate for administrative action implicating foreign affairs.²⁶³ Finally, the extent to which administrative rules constitute laws has received extensive attention with regard to statutes.²⁶⁴

That these issues all have analogues in the statutory context does not mean that the treaty context should borrow these answers wholesale. The Senate would likely choose to provide tailor-made procedural safeguards in its resolutions of advice and consent, and there might be reasons why the default presumptions should differ somewhat between treaties and statutes. In general, however, the answers that have developed through practice and experience in the statutory context should provide a useful starting point in the treaty context. The statutory analogues also show the answers in large part can and perhaps should develop in the process of application rather than through comprehensive initial theorizing.

broad enough to cover treaties. For example, its provision for judicial review of agency action provides that a court shall set aside agency action “in excess of statutory jurisdiction, authority, or limitations, or short of a statutory right” without having an equivalent provision for treaties. 5 U.S.C. § 706(2)(c) (2012). But the broader catch-all within this provision, which provides that a court shall set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” does not require that the agency action be pursuant to a statute as opposed to a treaty. *Id.* § 706(2)(a).

261. On the latter issue, see, for example, *NRDC v. EPA*, 464 F.3d 1 (2006), and Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707 (2007).

262. *E.g.*, Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 VAND. L. REV. 1171 (2009).

263. See Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 773–77 (2014).

264. *E.g.*, Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

CONCLUSION

“We live in an integrated world And if we cannot work together more effectively, we will all suffer the consequences.”²⁶⁵ This vision of cooperation—put forth here by President Obama but shared far more widely—requires that the United States have the constitutional capacity to engage internationally. Yet the existing constitutional process for entering into regulatory treaties is largely ineffective. The need for the executive branch to first negotiate an international treaty, then have it advised and consented to by two-thirds of the Senate, and then get implementing legislation from Congress (in addition to whatever further administrative rulemaking is needed) is cumbersome and can be prohibitively so. International regulatory cooperation is thus thwarted—or obtained outside the treaty context through some combination of executive branch and congressional action.

If treaties are to remain relevant to our constitutional system, they must be made easier to administer as the law of the land. For statutes, our constitutional system has accepted the delegation of substantial power to executive branch actors and administrative agencies as a necessary feature of effective governance. It is time and indeed long past time for this same move to occur with regard to treaties. Where the text of a treaty appears to authorize executive branch implementation or the Senate approves of such implementation in its resolution of advice and consent, the executive branch should be able to transform treaty provisions into court-enforceable mandates through rulemaking or other appropriate agency action. Such a development would be constitutional and frequently desirable.

265. President Barack Obama, Remarks to the United Nations General Assembly (Sept. 28, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/28/remarks-president-obama-united-nations-general-assembly> [<https://perma.cc/V843-AVCF>].