SUPREME COURT OF THE UNITED STATES

No. 06–984

JOSE ERNESTO MEDELLIN, PETITIONER *v.* TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[March 25, 2008]

JUSTICE BREYER, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

The Constitution's Supremacy Clause provides that "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." Art. VI, cl. 2. The Clause means that the "courts" must regard "a treaty . . . as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Foster* v. *Neilson*, 2 Pet. 253, 314 (1829) (majority opinion of Marshall, C. J.).

In the *Avena* case the International Court of Justice (ICJ) (interpreting and applying the Vienna Convention on Consular Relations) issued a judgment that requires the United States to reexamine certain criminal proceedings in the cases of 51 Mexican nationals. *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. 12 (Judgment of Mar. 31) *(Avena)*. The question here is whether the ICJ's *Avena* judgment is enforceable now as a matter of domestic law, *i.e.*, whether it "operates of itself without the aid" of any further legislation.

The United States has signed and ratified a series of treaties obliging it to comply with ICJ judgments in cases in which it has given its consent to the exercise of the ICJ's adjudicatory authority. Specifically, the United

States has agreed to submit, in this kind of case, to the ICJ's "compulsory jurisdiction" for purposes of "compulsory settlement." Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol or Protocol), Art. I, Apr. 24, 1963, [1970] 21 U. S. T. 325, 326 T. I. A. S. No. 6820 (capitalization altered). And it agreed that the ICJ's judgments would have "binding force . . . between the parties and in respect of [a] particular case." United Nations Charter, Art. 59, 59 Stat. 1062, T. S. No. 993 (1945). President Bush has determined that domestic courts should enforce this particular ICJ judgment. Memorandum to the Attorney General (Feb. 28, 2005), App. to Pet. for Cert. 187a (hereinafter President's Memorandum). And Congress has done nothing to suggest the contrary. Under these circumstances, I believe the treaty obligations, and hence the judgment, resting as it does upon the consent of the United States to the ICJ's jurisdiction, bind the courts no less than would "an act of the [federal] legislature." *Foster*, *supra*, at 314.

I

To understand the issue before us, the reader must keep in mind three separate ratified United States treaties and one ICJ judgment against the United States. The first treaty, the Vienna Convention, contains two relevant provisions. The first requires the United States and other signatory nations to inform arrested foreign nationals of their separate Convention-given right to contact their nation's consul. The second says that these rights (of an arrested person) "shall be exercised in conformity with the laws and regulations" of the arresting nation, *provided that the "laws and regulations . . . enable full effect to be given to the purposes for which" those "rights . . . are intended."* See Vienna Convention on Consular Relations, Arts. 36(1)(b), 36(2), Apr. 24, 1963, [1970] 21 U. S. T. 100–101, T. I. A. S. No. 6820 (emphasis added).

The second treaty, the Optional Protocol, concerns the "compulsory settlement" of Vienna Convention disputes. 21 U. S. T., at 326. It provides that for parties that elect to subscribe to the Protocol, "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" shall be submitted to the "compulsory jurisdiction of the International Court of Justice." Art. I, *ibid.* It authorizes any party that has consented to the ICJ's jurisdiction (by signing the Optional Protocol) to bring another such party before that Court. *Ibid.*

The third treaty, the United Nations Charter, says that every signatory Nation "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Art. 94(1), 59 Stat. 1051. In an annex to the Charter, the Statute of the International Court of Justice states that an ICJ judgment has "binding force . . . between the parties and in respect of that particular case." Art. 59, *id.,* at 1062. See also Art. 60, *id.,* at 1063 (ICJ "judgment is final and without appeal").

The judgment at issue is the ICJ's judgment in *Avena,* a case that Mexico brought against the United States on behalf of 52 nationals arrested in different States on different criminal charges. 2004 I. C. J., at 39. Mexico claimed that state authorities within the United States had failed to notify the arrested persons of their Vienna Convention rights and, by applying state procedural law in a manner which did not give full effect to the Vienna Convention rights, had deprived them of an appropriate remedy. *Ibid.* The ICJ judgment in *Avena* requires that the United States reexamine "by means of its own choosing" certain aspects of the relevant state criminal proceedings of 51 of these individual Mexican nationals. *Id.,* at 62. The President has determined that this should be done. See President's Memorandum.

The critical question here is whether the Supremacy Clause requires Texas to follow, *i.e.*, to enforce, this ICJ

judgment. The Court says "no." And it reaches its negative answer by interpreting the labyrinth of treaty provisions as creating a legal obligation that binds the United States internationally, but which, for Supremacy Clause purposes, is not automatically enforceable as domestic law. In the majority's view, the Optional Protocol simply sends the dispute to the ICJ; the ICJ statute says that the ICJ will subsequently reach a judgment; and the U. N. Charter contains no more than a promise to "'undertak[e] to comply'" with that judgment. *Ante,* at 3. Such a promise, the majority says, does not as a domestic law matter (in Chief Justice Marshall's words) "operat[e] of itself without the aid of any legislative provision." *Foster*, 2 Pet., at 314. Rather, here (and presumably in any other ICJ judgment rendered pursuant to any of the approximately 70 U. S. treaties in force that contain similar provisions for submitting treaty-based disputes to the ICJ for decisions that bind the parties) Congress must enact specific legislation before ICJ judgments entered pursuant to our consent to compulsory ICJ jurisdiction can become domestic law. See Brief for International Court of Justice Experts as *Amici Curiae* 18 ("Approximately 70 U. S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ"); see also *id.,* at 18, n. 25.

In my view, the President has correctly determined that Congress need not enact additional legislation. The majority places too much weight upon treaty language that says little about the matter. The words "undertak[e] to comply," for example, do not tell us whether an ICJ judgment rendered pursuant to the parties' consent to compulsory ICJ jurisdiction does, or does not, automatically become part of our domestic law. To answer that question we must look instead to our own domestic law, in particular, to the many treaty-related cases interpreting the Supremacy Clause. Those cases, including some written

by Justices well aware of the Founders' original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation.

A

Supreme Court case law stretching back more than 200 years helps explain what, for present purposes, the Founders meant when they wrote that "all Treaties . . . shall be the supreme Law of the Land." Art. VI, cl. 2. In 1796, for example, the Court decided the case of *Ware* v. *Hylton*, 3 Dall. 199. A British creditor sought payment of an American's Revolutionary War debt. The debtor argued that he had, under Virginia law, repaid the debt by complying with a state statute enacted during the Revolutionary War that required debtors to repay money owed to British creditors into a Virginia state fund. *Id.,* at 220–221 (opinion of Chase, J.). The creditor, however, claimed that this state-sanctioned repayment did not count because a provision of the 1783 Paris Peace Treaty between Britain and the United States said that "'the creditors of either side should meet with no lawful impediment to the recovery of the full value . . . of all *bona fide* debts, theretofore contracted'"; and that provision, the creditor argued, effectively nullified the state law. *Id.*, at 203–204. The Court, with each Justice writing separately, agreed with the British creditor, held the Virginia statute invalid, and found that the American debtor remained liable for the debt. *Id.,* at 285.

The key fact relevant here is that Congress had not enacted a specific statute enforcing the treaty provision at issue. Hence the Court had to decide whether the provision was (to put the matter in present terms) "self-executing." Justice Iredell, a member of North Carolina's Ratifying Convention, addressed the matter specifically, setting forth views on which Justice Story later relied to

explain the Founders' reasons for drafting the Supremacy Clause. 3 J. Story, Commentaries on the Constitution of the United States 696–697 (1833) (hereinafter Story). See Vázquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695, 697–700 (1995) (hereinafter Vázquez) (describing the history and purpose of the Supremacy Clause). See also Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land", 99 Colum. L. Rev. 2095 (1999) (contending that the Founders crafted the Supremacy Clause to make ratified treaties self-executing). But see Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955 (1999).

Justice Iredell pointed out that some Treaty provisions, those, for example, declaring the United States an independent Nation or acknowledging its right to navigate the Mississippi River, were "*executed*," taking effect automatically upon ratification. 3 Dall., at 272. Other provisions were "executory," in the sense that they were "to be carried into execution" by each signatory nation "in the manner which the Constitution of that nation prescribes." *Ibid.* *Before* adoption of the U. S. Constitution, all such provisions would have taken effect as domestic law *only if* Congress on the American side, or Parliament on the British side, had written them into domestic law. *Id.,* at 274–277.

But, Justice Iredell adds, *after* the Constitution's adoption, while further parliamentary action remained necessary in Britain (where the "practice" of the need for an "act of parliament" in respect to "any thing of a legislative nature" had "been constantly observed," *id.,* at 275–276), further legislative action in respect to the treaty's debt-collection provision *was no longer necessary* in the United States. *Id.,* at 276–277. The ratification of the Constitution with its Supremacy Clause means that treaty provi-

sions that bind the United States may (and in this instance did) also enter domestic law without further congressional action and automatically bind the States and courts as well. *Id.,* at 277.

"Under this Constitution," Justice Iredell concluded, "so far as a treaty constitutionally is binding, upon principles of *moral obligation,* it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the *Supreme law* in the new sense provided for." *Ibid.;* see also Story, *supra*, §1833, at 697 (noting that the Supremacy Clause's language was crafted to make the Clause's "obligation more strongly felt by the state judges" and to "remov[e] every pretense" by which they could "escape from [its] controlling power"); see also The Federalist No. 42, p. 264 (C. Rossiter ed. 1961) (J. Madison) (Supremacy Clause "disembarrassed" the Convention of the problem presented by the Articles of Confederation where "treaties might be substantially frustrated by regulations of the States"). Justice Iredell gave examples of provisions that would no longer require further legislative action, such as those requiring the release of prisoners, those forbidding war-related "future confiscations" and "'prosecutions,'" and, of course, the specific debt-collection provision at issue in the *Ware* case itself. 3 Dall., at 273, 277.

Some 30 years later, the Court returned to the "self-execution" problem. In *Foster*, 2 Pet. 253, the Court examined a provision in an 1819 treaty with Spain ceding Florida to the United States; the provision said that "'grants of land made'" by Spain before January 24, 1818, "'shall be ratified and confirmed'" to the grantee. *Id.,* at 310. Chief Justice Marshall, writing for the Court, noted that, as a general matter, one might expect a signatory nation to execute a treaty through a formal exercise of its domestic sovereign authority (*e.g.*, through an act of the legislature). *Id.,* at 314. But in the United States *"a different principle"* applies. *Ibid.* (emphasis added). The Suprem-

acy Clause means that, here, a treaty is "the law of the land . . . to be regarded in Courts of justice as equivalent to an act of the legislature" and "operates of itself without the aid of any legislative provision" unless it specifically contemplates execution by the legislature and thereby *"addresses itself to the political, not the judicial department*." *Ibid.* (emphasis added). The Court decided that the treaty provision in question was *not* self-executing; in its view, the words "shall be ratified" demonstrated that the provision foresaw further legislative action. *Id.,* at 315.

The Court, however, changed its mind about the result in *Foster* four years later, after being shown a less legislatively oriented, less tentative, but equally authentic Spanish-language version of the treaty. See *United States* v. *Percheman*, 7 Pet. 51, 88–89 (1833). And by 1840, instances in which treaty provisions automatically became part of domestic law were common enough for one Justice to write that "it would be a bold proposition" to assert "that an act of Congress must be first passed" in order to give a treaty effect as "a supreme law of the land." *Lessee of Pollard's Heirs* v. *Kibbe*, 14 Pet. 353, 388 (1840) (Baldwin, J., concurring).

Since *Foster* and *Pollard,* this Court has frequently held or assumed that particular treaty provisions are self-executing, automatically binding the States without more. See Appendix A, *infra* (listing, as examples, 29 such cases, including 12 concluding that the treaty provision invalidates state or territorial law or policy as a consequence). See also Wu, Treaties' Domains, 93 Va. L. Rev. 571, 583–584 (2007) (concluding "enforcement against States is the primary and historically most significant type of treaty enforcement in the United States"). As far as I can tell, the Court has held to the contrary only in two cases: *Foster*, *supra*, which was later reversed, and *Cameron Septic Tank Co.* v. *Knoxville*, 227 U. S. 39 (1913), where specific

congressional actions indicated that Congress thought further legislation necessary. See also Vázquez 716. The Court has found "self-executing" provisions in multilateral treaties as well as bilateral treaties. See, *e.g.*, *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U. S. 243, 252 (1984); *Bacardi Corp. of America* v. *Domenech*, 311 U. S. 150, 160, and n. 9, 161 (1940). And the subject matter of such provisions has varied widely, from extradition, see, *e.g.*, *United States* v. *Rauscher*, 119 U. S. 407, 411–412 (1886), to criminal trial jurisdiction, see *Wildenhus's Case*, 120 U. S. 1, 11, 17–18 (1887), to civil liability, see, *e.g.*, *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 161–163 (1999), to trademark infringement, see *Bacardi*, *supra*, at 160, and n. 9, 161, to an alien's freedom to engage in trade, see, *e.g.*, *Jordan* v. *Tashiro*, 278 U. S. 123, 126, n. 1 (1928), to immunity from state taxation, see *Nielsen* v. *Johnson*, 279 U. S. 47, 50, 58 (1929), to land ownership, *Percheman*, *supra*, at 88–89, and to inheritance, see, *e.g.*, *Kolovrat* v. *Oregon*, 366 U. S. 187, 191, n. 6, 198 (1961).

Of particular relevance to the present case, the Court has held that the United States may be obligated by treaty to comply with the judgment of an international tribunal interpreting that treaty, despite the absence of any congressional enactment specifically requiring such compliance. See *Comegys* v. *Vasse*, 1 Pet. 193, 211–212 (1828) (holding that decision of tribunal rendered pursuant to a United States-Spain treaty, which obliged the parties to "undertake to make satisfaction" of treaty-based rights, was "conclusive and final" and "not re-examinable" in American courts); see also *Meade* v. *United States*, 9 Wall. 691, 725 (1870) (holding that decision of tribunal adjudicating claims arising under United States-Spain treaty "was final and conclusive, and bar[red] a recovery upon the merits" in American court).

All of these cases make clear that self-executing treaty

provisions are not uncommon or peculiar creatures of our domestic law; that they cover a wide range of subjects; that the Supremacy Clause itself answers the self-execution question by applying many, but not all, treaty provisions directly to the States; and that the Clause answers the self-execution question differently than does the law in many other nations. See *supra*, at 5–9. The cases also provide criteria that help determine *which* provisions automatically so apply—a matter to which I now turn.

B

1

The case law provides no simple magic answer to the question whether a particular treaty provision is self-executing. But the case law does make clear that, insofar as today's majority looks for language about "self-execution" in the treaty itself and insofar as it erects "clear statement" presumptions designed to help find an answer, it is misguided. See, *e.g.*, *ante*, at 21 (expecting "clea[r] state[ment]" of parties' intent where treaty obligation "may interfere with state procedural rules"); *ante,* at 30 (for treaty to be self-executing, Executive should at drafting "ensur[e] that it contains language plainly providing for domestic enforceability").

The many treaty provisions that this Court has found self-executing contain no textual language on the point (see Appendix A, *infra*). Few, if any, of these provisions are clear. See, *e.g.*, *Ware*, 3 Dall., at 273 (opinion of Iredell, J.). Those that displace state law in respect to such quintessential state matters as, say, property, inheritance, or debt repayment, lack the "clea[r] state[ment]" that the Court today apparently requires. Compare *ante*, at 21 (majority expects "clea[r] state[ment]" of parties' intent where treaty obligation "may interfere with state procedural rules"). This is also true of those cases that deal

with state rules roughly comparable to the sort that the majority suggests require special accommodation. See, *e.g.*, *Hopkirk* v. *Bell*, 3 Cranch 454, 457–458 (1806) (treaty pre-empts Virginia state statute of limitations). Cf. *ante*, at 21 (setting forth majority's reliance on case law that is apparently inapposite). These many Supreme Court cases finding treaty provisions to be self-executing cannot be reconciled with the majority's demand for textual clarity.

Indeed, the majority does not point to a single ratified United States treaty that contains the kind of "clea[r]" or "plai[n]" textual indication for which the majority searches. *Ante*, at 21, 30. JUSTICE STEVENS' reliance upon one ratified and one *un*-ratified treaty to make the point that a treaty *could* speak clearly on the matter of self-execution, see *ante*, at 2 and n. 1, does suggest that there are a few such treaties. But that simply highlights how few of them actually *do* speak clearly on the matter. And that is not because the United States never, or hardly ever, has entered into a treaty with self-executing provisions. The case law belies any such conclusion. Rather, it is because the issue whether further legislative action is required before a treaty provision takes domestic effect in a signatory nation is often a matter of how that Nation's domestic law regards the provision's legal status. And that domestic status-determining law differs markedly from one nation to another. See generally Hollis, Comparative Approach to Treaty Law and Practice, in National Treaty Law and Practice 1, 9–50 (D. Hollis, M. Blakeslee, & L. Ederington eds. 2005) (hereinafter Hollis). As Justice Iredell pointed out 200 years ago, Britain, for example, taking the view that the British Crown makes treaties but Parliament makes domestic law, virtually always requires parliamentary legislation. See *Ware*, *supra*, at 274–277; Sinclair, Dickson, & Maciver, United Kingdom, in National Treaty Law and Practice, *supra,* at 727, 733, and n. 9 (citing *Queen* v. *Secretary of State for*

Foreign and Commonwealth Affairs, ex parte Lord Rees-Mogg, [1994] Q. B. 552 (1993) (in Britain, "'treaties are not self-executing'")). See also Torruella, The *Insular Cases*: The Establishment of a Regime of Political Apartheid, 29 U. Pa. J. Int'l L. 283, 337 (2007). On the other hand, the United States, with its Supremacy Clause, does not take Britain's view. See, *e.g., Ware, supra*, at 277 (opinion of Iredell, J.). And the law of other nations, the Netherlands for example, directly incorporates many treaties concluded by the executive into its domestic law even without explicit parliamentary approval of the treaty. See Brouwer, The Netherlands, in National Treaty Law and Practice, *supra,* at 483, 483–502.

The majority correctly notes that the treaties do not explicitly state that the relevant obligations are self-executing. But given the differences among nations, why would drafters write treaty language stating that a provision about, say, alien property inheritance, is self-executing? How could those drafters achieve agreement when one signatory nation follows one tradition and a second follows another? Why would such a difference matter sufficiently for drafters to try to secure language that would prevent, for example, Britain's following treaty ratification with a further law while (perhaps unnecessarily) insisting that the United States apply a treaty provision without further domestic legislation? Above all, what does the absence of specific language about "self-execution" prove? It may reflect the drafters' awareness of national differences. It may reflect the practical fact that drafters, favoring speedy, effective implementation, conclude they should best leave national legal practices alone. It may reflect the fact that achieving international agreement on *this* point is simply a game not worth the candle.

In a word, for present purposes, the absence or presence of language in a treaty about a provision's self-execution proves nothing at all. At best the Court is hunting the

snark. At worst it erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones. (For examples, see Appendix B, *infra*.)

2

The case law also suggests practical, context-specific criteria that this Court has previously used to help determine whether, for Supremacy Clause purposes, a treaty provision is self-executing. The provision's text matters very much. Cf. *ante*, at 17–19. But that is not because it contains language that explicitly refers to self-execution. For reasons I have already explained, Part I–B–1, *supra*, one should not expect *that* kind of textual statement. Drafting history is also relevant. But, again, that is not because it will explicitly address the relevant question. Instead text and history, along with subject matter and related characteristics will help our courts determine whether, as Chief Justice Marshall put it, the treaty provision "addresses itself to the political . . . department[s]" for further action or to "the judicial department" for direct enforcement. *Foster*, 2 Pet., at 314; see also *Ware*, 3 Dall., at 244 (opinion of Chase, J.) ("No one can doubt that a treaty may stipulate, that certain acts shall be done by the Legislature; that other acts shall be done by the Executive; and others by the Judiciary").

In making this determination, this Court has found the provision's subject matter of particular importance. Does the treaty provision declare peace? Does it promise not to engage in hostilities? If so, it addresses itself to the political branches. See *id.,* at 259–262 (opinion of Iredell, J.). Alternatively, does it concern the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery? If so, it may well address itself to the Judiciary. Enforcing

such rights and setting their boundaries is the bread-and-butter work of the courts. See, *e.g., Clark* v. *Allen*, 331 U. S. 503 (1947) (treating provision with such subject matter as self-executing); *Asakura* v. *Seattle*, 265 U. S. 332 (1924) (same).

One might also ask whether the treaty provision confers specific, detailed individual legal rights. Does it set forth definite standards that judges can readily enforce? Other things being equal, where rights are specific and readily enforceable, the treaty provision more likely "addresses" the judiciary. See, *e.g.*, *Olympic Airways* v. *Husain*, 540 U. S. 644 (2004) (specific conditions for air-carrier civil liability); *Geofroy* v. *Riggs*, 133 U. S. 258 (1890) (French citizens' inheritance rights). Compare *Foster, supra*, at 314–315 (treaty provision stating that landholders' titles "shall be ratified and confirmed" foresees legislative action).

Alternatively, would direct enforcement require the courts to create a new cause of action? Would such enforcement engender constitutional controversy? Would it create constitutionally undesirable conflict with the other branches? In such circumstances, it is not likely that the provision contemplates direct judicial enforcement. See, *e.g.*, *Asakura, supra*, at 341 (although "not limited by any express provision of the Constitution," the treaty-making power of the United States "does not extend 'so far as to authorize what the Constitution forbids'").

Such questions, drawn from case law stretching back 200 years, do not create a simple test, let alone a magic formula. But they do help to constitute a practical, context-specific judicial approach, seeking to separate run-of-the-mill judicial matters from other matters, sometimes more politically charged, sometimes more clearly the responsibility of other branches, sometimes lacking those attributes that would permit courts to act on their own without more ado. And such an approach is all that we

need to find an answer to the legal question now before us.

C

Applying the approach just described, I would find the relevant treaty provisions self-executing as applied to the ICJ judgment before us (giving that judgment domestic legal effect) for the following reasons, taken together.

First, the language of the relevant treaties strongly supports direct judicial enforceability, at least of judgments of the kind at issue here. The Optional Protocol bears the title "Compulsory Settlement of Disputes," thereby emphasizing the mandatory and binding nature of the procedures it sets forth. 21 U. S. T., at 326. The body of the Protocol says specifically that "any party" that has consented to the ICJ's "compulsory jurisdiction" may bring a "dispute" before the court against any other such party. Art. I, *ibid.* And the Protocol contrasts proceedings of the compulsory kind with an alternative "conciliation procedure," the recommendations of which a party may decide "not" to "accep[t]." Art. III, *id.,* at 327. Thus, the Optional Protocol's basic objective is not just to provide a forum for *settlement* but to provide a forum for *compulsory* settlement.

Moreover, in accepting Article 94(1) of the Charter, "[e]ach Member . . . undertakes to comply with the decision" of the ICJ "in any case to which it is a party." 59 Stat. 1051. And the ICJ Statute (part of the U. N. Charter) makes clear that, a decision of the ICJ between parties that have consented to the ICJ's compulsory jurisdiction has "*binding force* . . . between the parties and in respect of that particular case." Art. 59, *id.,* at 1062 (emphasis added). Enforcement of a court's judgment that has "binding force" involves quintessential judicial activity.

True, neither the Protocol nor the Charter explicitly states that the obligation to comply with an ICJ judgment

automatically binds a party *as a matter of domestic law* without further domestic legislation. *But how could the language of those documents do otherwise?* The treaties are multilateral. And, as I have explained, some signatories follow British further-legislation-always-needed principles, others follow United States Supremacy Clause principles, and still others, *e.g.*, the Netherlands, can directly incorporate treaty provisions into their domestic law in particular circumstances. See Hollis 9–50. Why, given national differences, would drafters, seeking as strong a legal obligation as is practically attainable, use treaty language that *requires* all signatories to adopt uniform domestic-law treatment in this respect?

The absence of that likely unobtainable language can make no difference. We are considering the language for purposes of applying the Supremacy Clause. And for that purpose, this Court has found to be self-executing multilateral treaty language that is far less direct or forceful (on the relevant point) than the language set forth in the present treaties. See, *e.g.*, *Trans World Airlines*, 466 U. S., at 247, 252; *Bacardi*, 311 U. S., at 160, and n. 9, 161. The language here in effect tells signatory nations to make an ICJ compulsory jurisdiction judgment "as binding as you can." Thus, assuming other factors favor self-execution, the language *adds,* rather than *subtracts*, support.

Indeed, as I have said, *supra*, at 4, the United States has ratified approximately 70 treaties with ICJ dispute resolution provisions roughly similar to those contained in the Optional Protocol; many of those treaties contemplate ICJ adjudication of the sort of substantive matters (property, commercial dealings, and the like) that the Court has found self-executing, or otherwise appear addressed to the judicial branch. See Appendix B, *infra.* None of the ICJ provisions in these treaties contains stronger language about self-execution than the language at issue here. See,

e.g., Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark, Art. XXIV(2), Oct. 1, 1951, [1961] 12 U. S. T. 935, T. I. A. S. No. 4797 ("Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means"). In signing these treaties (in respect to, say, alien land ownership provisions) was the United States engaging in a near useless act? Does the majority believe the drafters expected Congress to enact further legislation about, say, an alien's inheritance rights, decision by decision?

I recognize, as the majority emphasizes, that the U. N. Charter uses the words "undertakes to comply," rather than, say, "shall comply" or "must comply." But what is inadequate about the word "undertak[e]"? A leading contemporary dictionary defined it in terms of "lay[ing] oneself under obligation . . . to perform or to execute." Webster's New International Dictionary 2770 (2d ed. 1939). And that definition is just what the equally authoritative Spanish version of the provision (familiar to Mexico) says directly: The words "compromete a cumplir" indicate a present obligation to execute, without any tentativeness of the sort the majority finds in the English word "undertakes." See Carta de las Naciones Unidas, Articulo 94, 59 Stat. 1175 (1945); Spanish and English Legal and Commercial Dictionary 44 (1945) (defining "comprometer" as "become liable"); *id.,* at 59 (defining "cumplir" as "to perform, discharge, carry out, execute"); see also Art. 111, 59 Stat. 1054 (Spanish-language version equally valid); *Percheman*, 7 Pet., at 88–89 (looking to Spanish version of a treaty to clear up ambiguity in English version). Compare *Todok* v. *Union State Bank of Harvard*, 281 U. S. 449, 453 (1930) (treating a treaty provision as self-executing even though it *expressly* stated

what the majority says the word "undertakes" *implicitly* provides: that "'[t]he United States . . . shall be at liberty to make respecting this matter, such laws as they think proper'").

And even if I agreed with JUSTICE STEVENS that the language is perfectly ambiguous (which I do not), I could not agree that "the best reading . . . is . . . one that contemplates future action by the political branches." *Ante*, at 3. The consequence of such a reading is to place the fate of an international promise made by the United States in the hands of a single State. See *ante*, at 4–6. And that is precisely the situation that the Framers sought to prevent by enacting the Supremacy Clause. See 3 Story 696 (purpose of Supremacy Clause "was probably to obviate" the "difficulty" of system where treaties were "dependent upon the good will of the states for their execution"); see also *Ware*, 3 Dall., at 277–278 (opinion of Iredell, J.).

I also recognize, as the majority emphasizes (*ante*, at 13–14), that the U. N. Charter says that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the [ICJ], the other party may have recourse to the Security Council." Art. 94(2), 59 Stat. 1051. And when the Senate ratified the charter, it took comfort in the fact that the United States has a veto in the Security Council. See 92 Cong. Rec. 10694–10695 (1946) (statements of Sens. Pepper and Connally).

But what has that to do with the matter? To begin with, the Senate would have been contemplating politically significant ICJ decisions, not, *e.g.*, the bread-and-butter commercial and other matters that are the typical subjects of self-executing treaty provisions. And in any event, both the Senate debate and U. N. Charter provision discuss and describe what happens (or does not happen) when a nation decides *not* to carry out an ICJ decision. See Charter of the United Nations for the Maintenance of International

Peace and Security: Hearing before the Senate Committee on Foreign Relations, 79th Cong., 1st Sess., 286 (1945) (statement of Leo Pasvolsky, Special Assistant to the Secretary of State for International Organization and Security Affairs) ("[W]hen the Court has rendered a judgment and one of the parties refuses to accept it, then the dispute becomes political rather than legal"). The debates refer to remedies for a breach of our promise to carry out an ICJ decision. The Senate understood, for example, that Congress (unlike legislatures in other nations that do not permit domestic legislation to trump treaty obligations, Hollis 47–49) can block through legislation self-executing, as well as non-self-executing determinations. The debates nowhere refer to the method we use for affirmatively carrying out an ICJ obligation that no political branch has decided to dishonor, still less to a decision that the President (without congressional dissent) seeks to enforce. For that reason, these aspects of the ratification debates are here beside the point. See *infra*, at 23–24.

The upshot is that treaty language says that an ICJ decision is legally binding, but it leaves the implementation of that binding legal obligation to the domestic law of each signatory nation. In this Nation, the Supremacy Clause, as long and consistently interpreted, indicates that ICJ decisions rendered pursuant to provisions for binding adjudication must be domestically legally binding and enforceable in domestic courts *at least sometimes*. And for purposes of this argument, that conclusion is all that I need. The remainder of the discussion will explain why, if ICJ judgments *sometimes* bind domestic courts, then they have that effect here.

Second, the Optional Protocol here applies to a dispute about the meaning of a Vienna Convention provision that is itself self-executing and judicially enforceable. The Convention provision is about an individual's "rights," namely, his right upon being arrested to be informed of his

separate right to contact his nation's consul. See Art. 36(1)(b), 21 U. S. T., at 101. The provision language is precise. The dispute arises at the intersection of an individual right with ordinary rules of criminal procedure; it consequently concerns the kind of matter with which judges are familiar. The provisions contain judicially enforceable standards. See Art. 36(2), *ibid.* (providing for exercise of rights "in conformity with the laws and regulations" of the arresting nation provided that the "laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended"). And the judgment itself requires a further hearing of a sort that is typically judicial. See *infra*, at 25–26.

This Court has found similar treaty provisions self-executing. See, *e.g.*, *Rauscher*, 119 U. S., at 410–411, 429–430 (violation of extradition treaty could be raised as defense in criminal trial); *Johnson* v. *Browne*, 205 U. S. 309, 317–322 (1907) (extradition treaty required grant of writ of habeas corpus); *Wildenhus's Case*, 120 U. S., at 11, 17–18 (treaty defined scope of state jurisdiction in a criminal case). It is consequently not surprising that, when Congress ratified the Convention, the State Department reported that the "Convention is considered entirely self-executive and does not require any implementing or complementing legislation." S. Exec. Rep. No. 91–9, p. 5 (1969); see also *id.,* at 18 ("To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern"). And the Executive Branch has said in this Court that other, indistinguishable Vienna Convention provisions are self-executing. See Brief for United States as *Amicus Curiae* in *Sanchez-Llamas* v. *Oregon*, O. T. 2005, Nos. 05–51 and 04–10566, p. 14, n. 2; cf. *ante,* at 10, n. 4 (majority leaves question open).

Third, logic suggests that a treaty provision providing

for "final" and "binding" judgments that "settl[e]" treaty-based disputes is self-executing insofar as the judgment in question concerns the meaning of an underlying treaty provision that is itself self-executing. Imagine that two parties to a contract agree to binding arbitration about whether a contract provision's word "grain" includes rye. They would expect that, if the arbitrator decides that the word "grain" does include rye, the arbitrator will then simply read the relevant provision as if it said "grain including rye." They would also expect the arbitrator to issue a binding award that embodies whatever relief would be appropriate under that circumstance.

Why treat differently the parties' agreement to binding ICJ determination about, *e.g.*, the proper interpretation of the Vienna Convention clauses containing the rights here at issue? Why not simply read the relevant Vienna Convention provisions as if (between the parties and in respect to the 51 individuals at issue) they contain words that encapsulate the ICJ's decision? See Art. 59, 59 Stat. 1062 (ICJ decision has "binding force . . . between the parties and in respect of [the] particular case"). Why would the ICJ judgment not bind in precisely the same way those words would bind if they appeared in the relevant Vienna Convention provisions—just as the ICJ says, for purposes of this case, that they do?

To put the same point differently: What sense would it make (1) to make a self-executing promise and (2) to promise to accept as final an ICJ judgment interpreting that self-executing promise, yet (3) to insist that the judgment itself is not self-executing (*i.e.*, that Congress must enact specific legislation to enforce it)?

I am not aware of any satisfactory answer to these questions. It is no answer to point to the fact that in *Sanchez-Llamas* v. *Oregon*, 548 U. S. 331 (2006), this Court interpreted the relevant Convention provisions differently from the ICJ in *Avena*. This Court's *Sanchez-*

Llamas interpretation binds our courts with respect to individuals whose rights were not espoused by a state party in *Avena*. Moreover, as the Court itself recognizes, see *ante*, at 1–2, and as the President recognizes, see President's Memorandum, the question here is the very different question of applying the ICJ's *Avena* judgment to the very parties whose interests Mexico and the United States espoused in the ICJ *Avena* proceeding. It is in respect to these individuals that the United States has promised the ICJ decision will have binding force. Art. 59, 59 Stat. 1062. See 1 Restatement (Second) of Conflict of Laws §98 (1969); 2 Restatement (Third) of Foreign Relations §481 (1986); 1 Restatement (Second) of Judgments §17 (1980) (all calling for recognition of judgment rendered after fair hearing in a contested proceeding before a court with adjudicatory authority over the case). See also 1 Restatement (Second) of Conflict of Laws §106 ("A judgment will be recognized and enforced in other states even though an error of fact or law was made in the proceedings before judgment . . ."); *id.,* §106, Comment *a* ("Th[is] rule is . . . applicable to judgments rendered in foreign nations . . ."); Reese, The Status in This Country of Judgments Rendered Abroad, 50 Colum. L. Rev. 783, 789 (1950) ("[Foreign] judgments will not be denied effect merely because the original court made an error either of fact or of law").

Contrary to the majority's suggestion, see *ante*, at 15–16, that binding force does not disappear by virtue of the fact that Mexico, rather than Medellín himself, presented his claims to the ICJ. Mexico brought the *Avena* case in part in "the exercise of its right of diplomatic protection of its nationals," *e.g.*, 2004 I. C. J., at 21, ¶¶13(1), (3), including Medellín, see *id.,* at 25, ¶16. Such derivative claims are a well-established feature of international law, and the United States has several times asserted them on behalf of its own citizens. See 2 Restatement (Third) of Foreign

Relations, *supra*, §713, Comments *a*, *b*, at 217; *Case Concerning Elettronic Sicula S. p. A. (U. S.* v. *Italy)*, 1989 I. C. J. 15, 20 (Judgment of July 20); *Case Concerning United States Diplomatic and Consular Staff in Tehran (U. S.* v. *Iran)*, 1979 I. C. J. 7, 8 (Judgment of Dec. 15); *Case Concerning Rights of Nationals of the United States of America in Morocco (Fr.* v. *U. S.)*, 1952 I. C. J. 176, 180–181 (Judgment of Aug. 27). They are treated in relevant respects as the claims of the represented individuals themselves. See 2 Restatement (Third) of Foreign Relations, *supra*, §713, Comments *a*, *b*. In particular, they can give rise to remedies, tailored to the individual, that bind the Nation against whom the claims are brought (here, the United States). See *ibid.;* see also, *e.g.*, *Frelinghuysen* v. *Key*, 110 U. S. 63, 71–72 (1884).

Nor does recognition of the ICJ judgment as binding with respect to the individuals whose claims were espoused by Mexico in any way derogate from the Court's holding in *Sanchez-Llamas*, *supra*. See *ante*, at 16, n. 8. This case does not implicate the general interpretive question answered in *Sanchez-Llamas:* whether the Vienna Convention displaces state procedural rules. We are instead confronted with the discrete question of Texas' obligation to comply with a binding judgment issued by a tribunal with undisputed jurisdiction to adjudicate the rights of the individuals named therein. "It is inherent in international adjudication that an international tribunal may reject one country's legal position in favor of another's—and the United States explicitly accepted this possibility when it ratified the Optional Protocol." Brief for United States as *Amicus Curiae* 22.

Fourth, the majority's very different approach has seriously negative practical implications. The United States has entered into at least 70 treaties that contain provisions for ICJ dispute settlement similar to the Protocol before us. Many of these treaties contain provisions simi-

lar to those this Court has previously found self-executing—provisions that involve, for example, property rights, contract and commercial rights, trademarks, civil liability for personal injury, rights of foreign diplomats, taxation, domestic-court jurisdiction, and so forth. Compare Appendix A, *infra,* with Appendix B, *infra.* If the Optional Protocol here, taken together with the U. N. Charter and its annexed ICJ Statute, is insufficient to warrant enforcement of the ICJ judgment before us, it is difficult to see how one could reach a different conclusion in any of these other instances. And the consequence is to undermine longstanding efforts in those treaties to create an effective international system for interpreting and applying many, often commercial, self-executing treaty provisions. I thus doubt that the majority is right when it says, "We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments." *Ante*, at 23–24. In respect to the 70 treaties that currently refer disputes to the ICJ's binding adjudicatory authority, some multilateral, some bilateral, that is just what the majority has done.

Nor can the majority look to congressional legislation for a quick fix. Congress is unlikely to authorize automatic judicial enforceability of *all* ICJ judgments, for that could include some politically sensitive judgments and others better suited for enforcement by other branches: for example, those touching upon military hostilities, naval activity, handling of nuclear material, and so forth. Nor is Congress likely to have the time available, let alone the will, to legislate judgment-by-judgment enforcement of, say, the ICJ's (or other international tribunals') resolution of non-politically-sensitive commercial disputes. And as this Court's prior case law has avoided laying down bright-line rules but instead has adopted a more complex approach, it seems unlikely that Congress will find it easy to develop legislative bright lines that pick out those provi-

sions (addressed to the Judicial Branch) where self-execution seems warranted. But, of course, it is not necessary for Congress to do so—at least not if one believes that this Court's Supremacy Clause cases *already* embody criteria likely to work reasonably well. It is those criteria that I would apply here.

Fifth, other factors, related to the particular judgment here at issue, make that judgment well suited to direct judicial enforcement. The specific issue before the ICJ concerned "'review and reconsideration'" of the "possible prejudice" caused in each of the 51 affected cases by an arresting State's failure to provide the defendant with rights guaranteed by the Vienna Convention. *Avena,* 2004 I. C. J., at 65, ¶138. This review will call for an understanding of how criminal procedure works, including whether, and how, a notification failure may work prejudice. *Id.,* at 56–57. As the ICJ itself recognized, "it is the judicial process that is suited to this task." *Id.,* at 66, ¶140. Courts frequently work with criminal procedure and related prejudice. Legislatures do not. Judicial standards are readily available for working in this technical area. Legislative standards are not readily available. Judges typically determine such matters, deciding, for example, whether further hearings are necessary, after reviewing a record in an individual case. Congress does not normally legislate in respect to individual cases. Indeed, to repeat what I said above, what kind of special legislation does the majority believe Congress ought to consider?

Sixth, to find the United States' treaty obligations self-executing as applied to the ICJ judgment (and consequently to find that judgment enforceable) does not threaten constitutional conflict with other branches; it does not require us to engage in nonjudicial activity; and it does not require us to create a new cause of action. The only question before us concerns the application of the ICJ

judgment as binding law applicable to the parties in a particular criminal proceeding that Texas law creates independently of the treaty. I repeat that the question before us does not involve the creation of a private right of action (and the majority's reliance on authority regarding such a circumstance is misplaced, see *ante*, at 9, n. 3).

Seventh, neither the President nor Congress has expressed concern about direct judicial enforcement of the ICJ decision. To the contrary, the President favors enforcement of this judgment. Thus, insofar as foreign policy impact, the interrelation of treaty provisions, or any other matter within the President's special treaty, military, and foreign affairs responsibilities might prove relevant, such factors *favor,* rather than militate against, enforcement of the judgment before us. See, *e.g., Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 348 (2005) (noting Court's "customary policy of deference to the President in matters of foreign affairs").

For these seven reasons, I would find that the United States' treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action beyond Senate ratification of the relevant treaties. The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language). Hunting for what the text cannot contain, it takes a wrong turn. It threatens to deprive individuals, including businesses, property owners, testamentary beneficiaries, consular officials, and others, of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide. In a world where commerce, trade, and travel have become ever more international, that is a step in the wrong direction.

Were the Court for a moment to shift the direction of its legal gaze, looking instead to the Supremacy Clause and to

the extensive case law interpreting that Clause as applied to treaties, I believe it would reach a better supported, more felicitous conclusion. That approach, well embedded in Court case law, leads to the conclusion that the ICJ judgment before us is judicially enforceable without further legislative action.

II

A determination that the ICJ judgment is enforceable does not quite end the matter, for the judgment itself requires us to make one further decision. It directs the United States to provide further judicial review of the 51 cases of Mexican nationals "by means of its own choosing." *Avena,* 2004 I. C. J., at 72, ¶153(9). As I have explained, I believe the judgment addresses itself to the Judicial Branch. This Court consequently must "choose" the means. And rather than, say, conducting the further review in this Court, or requiring Medellín to seek the review in another federal court, I believe that the proper forum for review would be the Texas-court proceedings that would follow a remand of this case.

Beyond the fact that a remand would be the normal course upon reversing a lower court judgment, there are additional reasons why further state-court review would be particularly appropriate here. The crime took place in Texas, and the prosecution at issue is a Texas prosecution. The President has specifically endorsed further Texas court review. See President's Memorandum. The ICJ judgment requires further hearings as to whether the police failure to inform Medellín of his Vienna Convention rights prejudiced Medellín, even if such hearings would not otherwise be available under Texas' procedural default rules. While Texas has already considered that matter, it did not consider fully, for example, whether appointed counsel's coterminous 6-month suspension from the practice of the law "caused actual prejudice to the defendant"—

prejudice that would not have existed had Medellín known he could contact his consul and thereby find a different lawyer. *Id.,* at 60, ¶121.

Finally, Texas law authorizes a criminal defendant to seek postjudgment review. See Tex. Code Crim. Proc. Ann., Art. 11.071, §5(a)(1) (Vernon Supp. 2006). And Texas law provides for further review where American law provides a "legal basis" that was previously "unavailable." See *Ex parte Medellín*, 223 S. W. 3d 315, 352 (Tex. Crim. App. 2006). Thus, I would send this case back to the Texas courts, which must then apply the *Avena* judgment as binding law. See U. S. Const., Art. VI, cl. 2; see also, *e.g.*, *Dominguez* v. *State*, 90 Tex. Crim. 92, 99, 234 S. W. 79, 83 (1921) (recognizing that treaties are "part of the supreme law of the land" and that "it is the duty of the courts of the state to take cognizance of, construe and give effect" to them (internal quotation marks omitted)).

III

Because the majority concludes that the Nation's international legal obligation to enforce the ICJ's decision is not automatically a domestic legal obligation, it must then determine whether the President has the constitutional authority to enforce it. And the majority finds that he does not. See Part III, *ante*.

In my view, that second conclusion has broader implications than the majority suggests. The President here seeks to implement treaty provisions in which the United States agrees that the ICJ judgment is binding with respect to the *Avena* parties. Consequently, his actions draw upon his constitutional authority in the area of foreign affairs. In this case, his exercise of that power falls within that middle range of Presidential authority where Congress has neither specifically authorized nor specifically forbidden the Presidential action in question. See *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S.

579, 637 (1952) (Jackson, J., concurring). At the same time, if the President were to have the authority he asserts here, it would require setting aside a state procedural law.

It is difficult to believe that in the exercise of his Article II powers pursuant to a ratified treaty, the President can *never* take action that would result in setting aside state law. Cf. *United States* v. *Pink*, 315 U. S. 203, 233 (1942) ("No State can rewrite our foreign policy to conform to its own domestic policies"). Suppose that the President believes it necessary that he implement a treaty provision requiring a prisoner exchange involving someone in state custody in order to avoid a proven military threat. Cf. *Ware*, 3 Dall., at 205. Or suppose he believes it necessary to secure a foreign consul's treaty-based rights to move freely or to contact an arrested foreign national. Cf. Vienna Convention, Art. 34, 21 U. S. T., at 98. Does the Constitution require the President in each and every such instance to obtain a special statute authorizing his action? On the other hand, the Constitution must impose significant restrictions upon the President's ability, by invoking Article II treaty-implementation authority, to circumvent ordinary legislative processes and to pre-empt state law as he does so.

Previously this Court has said little about this question. It has held that the President has a fair amount of authority to make and to implement executive agreements, at least in respect to international claims settlement, and that this authority can require contrary state law to be set aside. See, *e.g.*, *Pink*, *supra,* at 223, 230–231, 233–234; *United States* v. *Belmont*, 301 U. S. 324, 326–327 (1937). It has made clear that principles of foreign sovereign immunity trump state law and that the Executive, operating without explicit legislative authority, can assert those principles in state court. See *Ex parte Peru*, 318 U. S. 578, 588 (1943). It has also made clear that the Executive has

inherent power to bring a lawsuit "to carry out treaty obligations." *Sanitary Dist. of Chicago* v. *United States*, 266 U. S. 405, 425, 426 (1925). But it has reserved judgment as to "the scope of the President's power to preempt state law pursuant to authority delegated by . . . a ratified treaty"—a fact that helps to explain the majority's inability to find support in precedent for its own conclusions. *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U. S. 298, 329 (1994).

Given the Court's comparative lack of expertise in foreign affairs; given the importance of the Nation's foreign relations; given the difficulty of finding the proper constitutional balance among state and federal, executive and legislative, powers in such matters; and given the likely future importance of this Court's efforts to do so, I would very much hesitate before concluding that the Constitution implicitly sets forth broad prohibitions (or permissions) in this area. Cf. *ante*, at 27–28, n. 13 (stating that the Court's holding is "limited" by the facts that (1) this treaty is non-self-executing and (2) the judgment of an international tribunal is involved).

I would thus be content to leave the matter in the constitutional shade from which it has emerged. Given my view of this case, I need not answer the question. And I shall not try to do so. That silence, however, cannot be taken as agreement with the majority's Part III conclusion.

IV

The majority's two holdings taken together produce practical anomalies. They unnecessarily complicate the President's foreign affairs task insofar as, for example, they increase the likelihood of Security Council *Avena* enforcement proceedings, of worsening relations with our neighbor Mexico, of precipitating actions by other nations putting at risk American citizens who have the misfortune

to be arrested while traveling abroad, or of diminishing our Nation's reputation abroad as a result of our failure to follow the "rule of law" principles that we preach. The holdings also encumber Congress with a task (postratification legislation) that, in respect to many decisions of international tribunals, it may not want and which it may find difficult to execute. See *supra*, at 23–24 (discussing the problems with case-by-case legislation). At the same time, insofar as today's holdings make it more difficult to enforce the judgments of international tribunals, including technical non-politically-controversial judgments, those holdings weaken that rule of law for which our Constitution stands. Compare Hughes Defends Foreign Policies in Plea for Lodge, N. Y. Times, Oct. 31, 1922, p. 1, col. 1, p. 4, col. 1 (then-Secretary of State Charles Evans Hughes stating that "we favor, and always have favored, an international court of justice for the determination according to judicial standards of justiciable international disputes"); Mr. Root Discusses International Problems, N. Y. Times, July 9, 1916, section 6, book review p. 276 (former Secretary of State and U. S. Senator Elihu Root stating that "'a court of international justice with a general obligation to submit all justiciable questions to its jurisdiction and to abide by its judgment is a primary requisite to any real restraint of law'"); Mills, The Obligation of the United States Toward the World Court, 114 Annals of the American Academy of Political and Social Science 128 (1924) (Congressman Ogden Mills describing the efforts of then-Secretary of State John Hay, and others, to establish a World Court, and the support therefor).

These institutional considerations make it difficult to reconcile the majority's holdings with the workable Constitution that the Founders envisaged. They reinforce the importance, in practice and in principle, of asking Chief Justice Marshall's question: Does a treaty provision address the "Judicial" Branch rather than the "Political

Branches" of Government. See *Foster*, 2 Pet., at 314. And they show the wisdom of the well-established precedent that indicates that the answer to the question here is "yes." See Parts I and II, *supra*.

V

In sum, a strong line of precedent, likely reflecting the views of the Founders, indicates that the treaty provisions before us and the judgment of the International Court of Justice address themselves to the Judicial Branch and consequently are self-executing. In reaching a contrary conclusion, the Court has failed to take proper account of that precedent and, as a result, the Nation may well break its word even though the President seeks to live up to that word and Congress has done nothing to suggest the contrary.

For the reasons set forth, I respectfully dissent.

APPENDIXES TO OPINION OF BREYER, J.

A

Examples of Supreme Court decisions considering a treaty provision to be self-executing. Parentheticals indicate the subject matter; an asterisk indicates that the Court applied the provision to invalidate a contrary state or territorial law or policy.

1. *Olympic Airways* v. *Husain*, 540 U. S. 644, 649, 657 (2004) (air carrier liability)
2. *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 161–163, 176 (1999) (same)*
3. *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217, 221, 231 (1996) (same)
4. *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 524, 533 (1987) (international discovery rules)
5. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 181, 189–190 (1982) (employment practices)
6. *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U. S. 243, 245, 252 (1984) (air carrier liability)
7. *Kolovrat* v. *Oregon*, 366 U. S. 187, 191, n. 6, 198 (1961) (property rights and inheritance)*
8. *Clark* v. *Allen*, 331 U. S. 503, 507–508, 517–518 (1947) (same)*
9. *Bacardi Corp. of America* v. *Domenech*, 311 U. S. 150, 160, and n. 9, 161 (1940) (trademark)*
10. *Todok* v. *Union State Bank of Harvard*, 281 U. S. 449, 453, 455 (1930) (property rights and inheritance)
11. *Nielsen* v. *Johnson*, 279 U. S. 47, 50, 58 (1929) (taxation)*
12. *Jordan* v. *Tashiro*, 278 U. S. 123, 126–127, n. 1, 128–129 (1928) (trade and commerce)

Appendix A to opinion of BREYER, J.

13. *Asakura* v. *Seattle*, 265 U. S. 332, 340, 343–344 (1924) (same)*
14. *Maiorano* v. *Baltimore & Ohio R. Co.*, 213 U. S. 268, 273–274 (1909) (travel, trade, access to courts)
15. *Johnson* v. *Browne*, 205 U. S. 309, 317–322 (1907) (extradition)
16. *Geofroy* v. *Riggs*, 133 U. S. 258, 267–268, 273 (1890) (inheritance)*
17. *Wildenhus's Case*, 120 U. S. 1, 11, 17–18 (1887) (criminal jurisdiction)
18. *United States* v. *Rauscher*, 119 U. S. 407, 410–411, 429–430 (1886) (extradition)
19. *Hauenstein* v. *Lynham*, 100 U. S. 483, 485–486, 490–491 (1880) (property rights and inheritance)*
20. *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 542 (1828) (property)
21. *United States* v. *Percheman*, 7 Pet. 51, 88–89 (1833) (land ownership)
22. *United States* v. *Arredondo*, 6 Pet. 691, 697, 749 (1832) (same)
23. *Orr* v. *Hodgson*, 4 Wheat. 453, 462–465 (1819) (same)*
24. *Chirac* v. *Lessee of Chirac*, 2 Wheat. 259, 270–271, 274, 275 (1817) (land ownership and inheritance)*
25. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 356–357 (1816) (land ownership)
26. *Hannay* v. *Eve*, 3 Cranch 242, 248 (1806) (monetary debts)
27. *Hopkirk* v. *Bell*, 3 Cranch 454, 457–458 (1806) (same)*
28. *Ware* v. *Hylton*, 3 Dall. 199, 203–204, 285 (1796) (same)*
29. *Georgia* v. *Brailsford*, 3 Dall. 1, 4 (1794) (same)

B

United States treaties in force containing provisions for the submission of treaty-based disputes to the International Court of Justice. Parentheticals indicate subject matters that can be the subject of ICJ adjudication that are of the sort that this Court has found self-executing.

Economic Cooperation Agreements

1. Economic Aid Agreement Between the United States of America and Spain, Sept. 26, 1953, [1953] 4 U. S. T. 1903, 1920–1921, T. I. A. S. No. 2851 (property and contract)
2. Agreement for Economic Assistance Between the Government of the United States of America and the Government of Israel Pursuant to the General Agreement for Technical Cooperation, May 9, 1952, [1952] 3 U. S. T. 4174, 4177, T. I. A. S. No. 2561 (same)
3. Economic Cooperation Agreement Between the United States of America and Portugal, 62 Stat. 2861–2862 (1948) (same)
4. Economic Cooperation Agreement Between the United States of America and the United Kingdom, 62 Stat. 2604 (1948) (same)
5. Economic Cooperation Agreement Between the United States of America and the Republic of Turkey, 62 Stat. 2572 (1948) (same)
6. Economic Cooperation Agreement Between the United States of America and Sweden, 62 Stat. 2557 (1948) (same)
7. Economic Cooperation Agreement Between the United States of America and Norway, 62 Stat. 2531 (1948) (same)
8. Economic Cooperation Agreement Between the Governments of the United States of America and the Kingdom of the Netherlands, 62 Stat. 2500

(1948) (same)

9. Economic Cooperation Agreement Between the United States of America and the Grand Duchy of Luxembourg, 62 Stat. 2468 (1948) (same)
10. Economic Cooperation Agreement Between the United States of America and Italy, 62 Stat. 2440 (1948) (same)
11. Economic Cooperation Agreement Between the United States of America and Iceland, 62 Stat. 2390 (1948) (same)
12. Economic Cooperation Agreement Between the United States of America and Greece, 62 Stat. 2344 (1948) (same)
13. Economic Cooperation Agreement Between the United States of America and France, 62 Stat. 2232, 2233 (1948) (same)
14. Economic Cooperation Agreement Between the United States of America and Denmark, 62 Stat. 2214 (1948) (same)
15. Economic Cooperation Agreement Between the United States of America and the Kingdom of Belgium, 62 Stat. 2190 (1948) (same)
16. Economic Cooperation Agreement Between the United States of America and Austria, 62 Stat. 2144 (1948) (same)

Bilateral Consular Conventions

1. Consular Convention Between the United States of America and the Kingdom of Belgium, Sept. 2, 1969, [1974] 25 U. S. T. 41, 47–49, 56–57, 60–61, 75, T. I. A. S. No. 7775 (domestic court jurisdiction and authority over consular officers, taxation of consular officers, consular notification)
2. Consular Convention Between the United States of America and the Republic of Korea, Jan. 8, 1963, [1963] 14 U. S. T. 1637, 1641, 1644–1648, T. I. A. S. No. 5469 (same)

Friendship, Commerce, and Navigation Treaties

1. Treaty of Amity and Economic Relations Between the United States of America and the Togolese Republic, Feb. 8, 1966, [1967] 18 U. S. T. 1, 3–4, 10, T. I. A. S. No. 6193 (contracts and property)
2. Treaty of Friendship, Establishment and Navigation Between the United States of America and The Kingdom of Belgium, Feb. 21, 1961, [1963] 14 U. S. T. 1284, 1290–1291, 1307, T. I. A. S. No. 5432 (same)
3. Treaty of Friendship, Establishment and Navigation between the United States of America and the Grand Duchy of Luxembourg, Feb. 23, 1962, [1963] 14 U. S. T. 251, 254–255, 262, T. I. A. S. No. 5306 (consular notification; contracts and property)
4. Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark, Oct. 1, 1951, [1961] 12 U. S. T. 908, 912–913, 935, T. I. A. S. No. 4797 (contracts and property)
5. Treaty of Friendship and Commerce Between the United States of America and Pakistan, Nov. 12,

1959, [1961] 12 U. S. T. 110, 113, 123, T. I. A. S. No. 4863 (same)

6. Convention of Establishment Between the United States of America and France, Nov. 25, 1959, [1960] 11 U. S. T. 2398, 2401–2403, 2417, T. I. A. S. No. 4625 (same)
7. Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of Korea, Nov. 28, 1956, [1957] 8 U. S. T. 2217, 2221–2222, 2233, T. I. A. S. No. 3947 (same)
8. Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of the Netherlands, Mar. 27, 1956, [1957] 8 U. S. T. 2043, 2047–2050, 2082–2083, T. I. A. S. No. 3942 (freedom to travel, consular notification, contracts and property)
9. Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, Aug. 15, 1955, [1957] 8 U. S. T. 899, 903, 907, 913, T. I. A. S. No. 3853 (property and freedom of commerce)
10. Treaty of Friendship, Commerce and Navigation Between the United States of America and the Federal Republic of Germany, Oct. 29, 1954, [1956] 7 U. S. T. 1839, 1844–1846, 1867, T. I. A. S. No. 3593 (property and contract)
11. reaty of Friendship, Commerce and Navigation Between the United States of America and Greece, Aug. 3, 1951, [1954] 5 U. S. T. 1829, 1841–1847, 1913–1915, T. I. A. S. No. 3057 (same)
12. Treaty of Friendship, Commerce and Navigation Between the United States of America and Israel, Aug. 23, 1951, [1954] 5 U. S. T 550, 555–556, 575, T. I. A. S. No. 2948 (same)
13. Treaty of Amity and Economic Relations Between

the United States of America and Ethiopia, Sept. 7, 1951, [1953] 4 U. S. T. 2134, 2141, 2145, 2147, T. I. A. S. No. 2864 (property and freedom of commerce)

14. Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, Apr. 2, 1953, [1953] 4 U. S. T. 2063, 2067–2069, 2080, T. I. A. S. No. 2863 (property and contract)
15. Treaty of Friendship, Commerce and Navigation between the United States of America and Ireland, Jan. 21, 1950, [1950] 1 U. S. T. 785, 792–794, 801, T. I. A. S. No. 2155 (same)
16. Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, 63 Stat. 2262, 2284, 2294 (1948) (property and freedom of commerce)

Multilateral Conventions

1. Patent Cooperation Treaty, June 19, 1970, [1976–77] 28 U. S. T. 7645, 7652–7676, 7708, T. I. A. S. No. 8733 (patents)
2. Universal Copyright Convention, July 24, 1971, [1974] 25 U. S. T. 1341, 1345, 1366, T. I. A. S. No. 7868 (copyright)
3. Vienna Convention on Diplomatic Relations and Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, [1972] 23 U. S. T. 3227, 3240–3243, 3375, T. I. A. S. No. 7502 (rights of diplomats in foreign nations)
4. Paris Convention for the Protection of Industrial Property, July 14, 1967, [1970] 21 U. S. T. 1583, 1631–1639, 1665–1666, T. I. A. S. No. 6923 (patents)
5. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, [1970] 21 U. S. T. 1418, 1426–1428, 1430–1432, 1438–1440,

T. I. A. S. No. 6900 (rights of U. N. diplomats and officials)

6. Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, [1969] 20 U. S. T. 2941, 2943–2947, 2952, T. I. A. S. No. 6768 (airlines' treatment of passengers)
7. Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, July 15, 1949, [1966] 17 U. S. T. 1578, 1581, 1586, T. I. A. S. No. 6116 (customs duties on importation of films and recordings)
8. Universal Copyright Convention, Sept. 6, 1952, [1955] 6 U. S. T. 2731, 2733–2739, 2743, T. I. A. S. No. 3324 (copyright)
9. Treaty of Peace with Japan, Sept. 8, 1951, [1952] 3 U. S. T. 3169, 3181–3183, 3188, T. I. A. S. No. 2490 (property)
10. Convention on Road Traffic, Sept. 19, 1949, [1952] 3 U. S. T. 3008, 3012–3017, 3020, T. I. A. S. No. 2487 (rights and obligations of drivers)
11. Convention on International Civil Aviation, 61 Stat. 1204 (1944) (seizure of aircraft to satisfy patent claims)