

HEINONLINE

Citation: 13 Lewis & Clark L. Rev. 1 2009

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue Aug 28 11:48:46 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.



DiscoverArchive

Retrieved from DiscoverArchive,
Vanderbilt University's Institutional Repository

This work was originally published in
13 Lewis & Clark L. Rev. 1 2009

MEDELLÍN: THE NEW, NEW FORMALISM?

by
Ingrid Wuert*

The Supreme Court's 2008 decision in Medellín v. Texas appears to represent a formalist turn in the Court's approach to foreign relations cases. The opinion emphasizes text as the key to treaty interpretation and it stresses the importance of the Constitution's specific law-making procedures. But the opinion does not deliver on its formalist promises. Emphasis on treaty text is undermined by the Court's insistence that the text reflects the intentions of the U.S. treaty-makers, a questionable proposition with respect to the issue of domestic implementation raised by the case, and one that will raise serious interpretative difficulties down the road. Most significantly, however, the opinion is saddled with an unnecessary and unconvincing application of Justice Jackson's tripartite Youngstown framework. The Court concludes that the President's effort to implement the treaty falls within the third category, but the indicia of congressional intent that the Court relies on are weak, and the analysis works a substantial expansion of this category. Moreover, as the Court frames the issue—one of treaty interpretation—it is unclear why Youngstown should apply at all.

I.	INTRODUCTION	1
II.	INTENT AND SELF-EXECUTION	3
III.	YOUNGSTOWN AND MEDELLÍN.....	5
IV.	CONCLUSION	8

I. INTRODUCTION

The decision in *Medellín v. Texas* looks like a significant victory for formalists in many respects. The Court rejected what it termed the dissent's "multifactor, judgment-by-judgment" test for treaty self-execution¹ that would "jettison relative predictability"² and opted instead for a text-based analysis of treaties.³ The decision also rejected the President's efforts to use the courts to enforce a non-self-executing treaty

* Professor, Vanderbilt University Law School. Thanks to Professor Ernest Young for helpful comments.

¹ A self-executing treaty "has automatic domestic effect as federal law," while a non-self-executing treaty requires legislation to give it domestic effect. *Medellín v. Texas*, 128 S. Ct. 1346, 1356 n.2 (2008).

² *Id.* at 1362 (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)).

³ *Id.* at 1362.

against the state of Texas.⁴ If the Court's foreign affairs reasoning had once turned toward formalism in the late 1990s,⁵ its 2003 and 2004 decisions in *American Insurance Association v. Garamendi*,⁶ and *Sosa v. Alvarez-Machain*,⁷ veered decidedly in the other direction.⁸ In this context, the *Medellín* opinion reads in places like a breath of formalist fresh air, emphasizing both the importance of the Constitution's specific law-making procedures in the context of treaties⁹ and a text-based interpretation of treaties aimed to vest control over foreign relations with the political branches, not the courts.¹⁰

Upon closer examination, however, *Medellín* looks less like a victory for formalists. Instead of cabining judicial discretion in treaty interpretation with clear presumptions and interpretive rules, the Court's self-execution analysis relies on a series of factors that seem to focus on treaty text as a vehicle for understanding the intentions of the U.S. treaty-makers. The focus on intent is in some tension with formalist interpretative principles, and is especially problematic in the context of treaty interpretation. Similarly, while the Court emphasizes the formal requirements for law-making in considering the President's power to enforce non-self-executing treaties,¹¹ this analysis is watered down by the Court's apparent acceptance that the President might, with sufficient acquiescence by Congress, be able to enforce a non-self-executing treaty in court absent implementing legislation.¹² This section of the opinion is also saddled with an odd, expansive, and unnecessary discussion of Justice Jackson's tripartite *Youngstown* framework—generally viewed as functionalist rather than formalist in approach.¹³ In both sections of the opinion, the lack of clarity and the tensions with formalism are generated in part by the Court's emphasis on the intentions of the U.S. treaty-

⁴ *Id.* at 1367–72.

⁵ See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1424–30 (1999).

⁶ 539 U.S. 396 (2003).

⁷ 542 U.S. 692 (2004).

⁸ See Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 912–13 (2004) (criticizing the Court's decision as contrary to constitutional text and longstanding practice); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 154 (2004) (arguing that the *Sosa* decision was based on functional reasoning).

⁹ See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326–27, 1391–92 (2001).

¹⁰ See Goldsmith, *supra* note 5, at 1424.

¹¹ Curtis A. Bradley, *Intent, Presumptions and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 547–50 (2008).

¹² *Medellín v. Texas*, 128 S. Ct. 1346, 1370 (2008).

¹³ See Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L. REV. (forthcoming), manuscript at 18, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134887; Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 442 (2007).

makers as the key to understanding both which treaties are self-executing and the domestic status of those that are not.

II. INTENT AND SELF-EXECUTION

The *Medellín* opinion states in several places that courts should look to the intentions of the U.S. treaty-makers to determine whether a treaty is self-executing.¹⁴ This focus on intent undermines the Court's effort to cabin judicial discretion in treaty interpretation in several ways. As an initial matter, the opinion goes on to suggest that it is the intent of the parties to the treaty that is relevant¹⁵ and relies on factors that seem to bear little relation to the intent of the domestic treaty-makers (i.e., the Senate and the President). Most significantly, the Court lists “the postratification understanding’ of signatory nations” as one of the three major tools of treaty interpretation¹⁶ and concludes that in this case the practices of the 47 nations party to the optional protocol and the 171 nations party to the Vienna Conventions confirm that the *Avena*¹⁷ judgment is not self-executing.¹⁸ The post-ratification practice of other countries is a weak way to evaluate the intentions of the Senate and the President as to self-execution, but is much more directly linked to the intentions of other countries and to the shared understanding of the parties as to the meaning of the treaty’s text.

The Court’s heavy reliance on treaty text is also in some tension with its strong emphasis on the intentions of the U.S. treaty-makers. Even in the domestic statutory context—the opinion equates treaty and statutory

¹⁴ *Medellín*, 128 S. Ct. at 1366 (“Our cases simply require courts to decide whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.”); *id.* at 1367 (“Nothing . . . suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by ‘many of our most fundamental constitutional protections.’” (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006)); *id.* at 1358 (“Article 94 . . . [does not] indicate that the Senate that ratified the U.N. charter intended to vest ICJ decisions with immediate legal effect in domestic courts.”); *id.* at 1361 (“The Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law.”); *id.* at 1356 (asking whether the “‘treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms’” (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005)); *id.* at 1359 (“as the President and the Senate were undoubtedly aware in subscribing to the U.N. Charter and Optional Protocol”).

¹⁵ *Id.* at 1362 (reasoning that the text of the 1819 land-grant treaty in *Foster and Perchman* “indicated the parties’ intent to ratify and confirm the land-grant ‘by force of the instrument itself.’” (quoting *U.S. v. Perchman*, 32 U.S. (7 Pet.) 51, 87 (1833)).

¹⁶ *Id.* at 1357 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)).

¹⁷ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

¹⁸ *Medellín*, 128 S. Ct. at 1363.

interpretation in terms of their reliance on text¹⁹—the distinction between textualism and intentionalism is a familiar one.²⁰ In the context of determining whether a complex group of interrelated multilateral treaty regimes have generated a self-executing judgment, gleaning the “intentions” of the President and the Senate from the treaty texts is especially difficult. Countries vary substantially in their domestic implementation of treaties, so it is difficult to discern any collective intentions from the text itself,²¹ much less how the intentions of one state out of dozens or scores of states is reflected (or not) in the text. The problem is compounded by U.S. courts’ general confusion around self-execution: the courts’ approaches have not done anything to give the Senate and the President clear interpretive rules against which they can legislate.

A better guide to the intentions of the U.S. treaty-makers may be their own statements, and the *Medellín* opinion cites to the views of the Executive Branch both during and following the Senate hearings.²² It does not cite to statements from the Senate or its members, but the opinion’s language focuses specifically on Senate intent, inviting such evidence.²³ Justice Scalia has strongly opposed the use of any statements from the Senate advice and consent hearings as an aid to treaty interpretation,²⁴ and Justices Kennedy and O’Connor have opposed their use unless treaty text is unclear (a determination that the *Medellín* court did not make).²⁵ Yet Justices Scalia and Kennedy both joined the *Medellín* opinion without comment. Perhaps the question of self-execution is distinct from other issues of treaty interpretation and, as suggested above, uniquely implicates questions of Senate and Presidential intent that are difficult to resolve through the text of the treaty itself. Or perhaps those who oppose the use of legislative history in both the statutory and treaty context believe that with the addition of Justices Roberts and Alito to the

¹⁹ *Id.* at 1357.

²⁰ Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

²¹ *Medellín*, 128 S. Ct. at 1381 (Breyer, J., dissenting).

²² *Id.* at 1359, 1361.

²³ See *id.* at 1358 (“ . . . nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in the domestic courts.”); *id.* at 1360 (“ . . . no reason to believe that the President and Senate signed up for such a result.”); *id.* at 1362 (“[text] is after all what the Senate looks to in deciding whether to approve the treaty.”); *id.* at 1362 (“ . . . President making the treaty and the Senate approving it.”); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325, Rep. n.5 (1987) (courts take into account “[c]ommittee reports, debates, and other indications of meaning that the legislative branch has attached to an agreement . . .”); United States v. Stuart, 489 U.S. 353 (1989) (defending the use of legislative materials in treaty interpretation outside self-execution context); *contra id.* at 375 (Scalia, J., concurring in the judgment).

²⁴ *Stuart*, 489 U.S. at 371–77 (Scalia, J., concurring in the judgment).

²⁵ *Id.* at 370 (Kennedy, J., concurring in part and concurring in the judgment) (joined by Justice O’Connor).

Court, their cause is a lost one.²⁶ In any event, citation to legislative history in *Medellín* generally runs counter to the opinion's privileging of treaty text as the product of a "careful set of procedures that must be followed before federal law can be created under the Constitution"; namely "the President *making* the treaty and the Senate approving it."²⁷ The word "make" comes, of course, from Article II of the Constitution, and the Court uses it here to emphasize the importance of the specific procedures the Constitution requires for the creation of federal law.

This tension also emerges to some extent with respect to Senate declarations of non-self-execution (not at issue in *Medellín*), which arguably by-pass the President *making* the treaty by allowing the Senate and the President to determine the domestic status of treaties through language that is not part of the regular, negotiated treaty-text. On the other hand, such declarations are conveyed to our treaty partners as part of the ratification process, and they also better reflect at least the collective intentions of the U.S. treaty-makers, and thus avoid some of the problems that arise in the use of legislative history. Similar issues arise with respect to declarations of self-execution that purport to make a treaty into domestic law (or explicitly provide a domestic cause of action) even if the treaty itself clearly (or implicitly) does not contemplate self-execution or other aspects of its domestic effect. Indeed, the tension between the intentions of the U.S. treaty-makers and the formal requirements of law-making are even more acute in this context, because the U.S. treaty-makers are attempting to *create* domestic law without the consent of foreign nations required to make a treaty.²⁸

III. YOUNGSTOWN AND MEDELLÍN

The second part of the *Medellín* opinion considers the President's power to implement the *Avena* judgment based on what it frames as two distinct arguments: the treaties involved in the case and the history of claim settlement by the President. As to the first, the Court emphasizes the importance of formal law making procedures, and concludes that a non-self-executing treaty made by the President and consented to by the Senate cannot be "convert[ed]" into a "self-executing one."²⁹ This analysis is straightforward enough—if a welcome change from

²⁶ See, e.g., *Zedner v. United States*, 547 U.S. 489, 501–02 (2006); see also Elliot M. Davis, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983 (2007) (arguing that Justice Alito relies on legislative history more readily than Justice Scalia).

²⁷ *Medellín*, 128 S. Ct. at 1362 (emphasis added); see also ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 34–35 (1997).

²⁸ Cf. Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 350 n.109 (2008) (noting that "any international agreement also requires a foreign partner, which limits the potential for self-aggrandizement").

²⁹ *Medellín*, 128 S. Ct. at 1368.

*Garamendi*³⁰—but the Court’s effort to shoehorn its reasoning into Justice Jackson’s *Youngstown* categories is strained.

To the extent that the President relies on treaties for authority, and they do not provide such authority, then recourse to *Youngstown* seems misplaced. *Youngstown* was, in other words, a case about *constitutional* review of executive actions,³¹ but in this part of the opinion the Court is not evaluating (explicitly anyway) a claim by the President of constitutional authority, but instead the claim that “the relevant treaties . . . give the President the authority to implement [the *Avena* judgment].”³² The opinion appears to relegate any constitutional considerations to the claim settlement power which it characterized as “of a different nature than the one rejected above.”³³ Even the opinion’s opening sentence about *Youngstown*—reasoning that Justice Jackson’s “tripartite scheme provides the accepted framework for evaluating executive action in this area”—signals confusion, as it is entirely unclear what it means with “this area.”³⁴

The second oddity about the Court’s *Youngstown* analysis is the conclusion that the President’s assertion of authority is in Justice Jackson’s third category. Because the relevant treaties are non-self-executing, the Court reasons, they “implicitly prohibit” the President from enforcing them in domestic courts.³⁵ As a backward looking statement about the actual “understanding of the ratifying Senate,” this claim seems hard to defend. Given the lack of clarity about self-execution itself (much less its relationship to presidential power) and the treaties’ silence on these questions, it is very difficult to see how the Senate could have had any particular understanding of what the fact of non-self-execution (itself implied, not stated) would mean for the President’s executive power, especially when the underlying treaty may well be self-executing.

This is only the first time a majority of the Court has explicitly categorized an action of the President as coming within Justice Jackson’s third category, and it is a more expansive application of that category than in prior concurring opinions. In *Youngstown* itself Congress had deliberated—and refused—to give the President the power he later exercised.³⁶ In *Hamdan*, Justice Kennedy’s concurring opinion puts the

³⁰ Justice Kennedy is the only Justice who joined the majority opinions in both *Garamendi* and *Medellín*.

³¹ Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005).

³² *Medellín*, 128 S. Ct. at 1368. Later the Court characterizes the argument as “relying on the United States’ treaty obligations.” *Id.* at 1371.

³³ *Id.* at 1371; *see also id.* at 1368 (“dispute-resolution power [is] wholly apart from the asserted authority based on the pertinent treaties”). Not surprisingly, this is not how the government litigated the case.

³⁴ *Id.* at 1350.

³⁵ *Id.* at 1351.

³⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–86 (1952). Justice Black’s opinion for the Court agreed with Justice Jackson on this point, but did not

President's actions in category three because while the relevant statutes "provide authority for certain forms of military courts, they also impose limitations," which the President's order transgressed.³⁷ Justice Stevens's opinion for the Court in *Hamdan* acknowledges as much in a footnote, but does not explicitly put the case in one of Justice Jackson's categories. In contrast to *Hamdan*, in *Medellín* the President acted consistently with an intertwined set of treaty commitments made by the Vienna Convention's optional protocol and the U.N. Charter; it is difficult to see the failure to force language of self-execution into these major multilateral treaty regimes as an implicit limitation on the President's power to act to enforce the treaty.

Finally, this conclusion seems at odds with the *Charming Betsy* canon, which directs that "where fairly possible" courts are to construe statutes "so as not to conflict with international law or with an international agreement of the United States."³⁸ Although this case involved the interpretation of treaties, not statutes, it is hard to see why the canon would not apply equally to treaties. If the canon is based on the presumptive intentions of Congress,³⁹ its application to treaties (reflecting the presumptive intentions of the Senate) seems more straightforward than to statutes, because Congress may not even consider international obligations when passing a statute, but the Senate would almost certainly do so when consenting to a treaty. If the canon is based on separation of powers considerations⁴⁰—courts should not put the United States in violation of its international obligations unless the political branches clearly intend to do so—then it would seem to apply here to prevent the Court from interpreting a treaty in a way that puts the United States in violation of international obligations contrary to the explicit views of the President.⁴¹

explicitly apply Jackson's tripartite structure; *compare id.* at 694 (Jackson, J., concurring).

³⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557, 639, 653 (2006) (Kennedy, J., concurring); *see also id.* at 593 n.23 (majority opinion) (suggesting that the case falls within Justice Jackson's third category); *see also New York Times v. United States*, 403 U.S. 713, 740 (1971) (White, J., concurring) (citing *Youngstown* and noting that "Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information" but that Congress has not "authorized the injunctive remedy against threatened publication.").

³⁸ RESTatement (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114.

³⁹ Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 333–38 (2005).

⁴⁰ Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 524–25 (1998).

⁴¹ *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), is distinguishable both because the case was resolved in keeping with the views of the Executive Branch and because the case did not involve individuals named in the *Avena* judgment.

The Court's *Youngstown* analysis is arguably strengthened by the federal habeas statute, which carefully limits the power of federal courts to interfere in state criminal cases.⁴² The President's efforts to enforce the *Avena* judgment in Texas state court are, this argument goes, an "end-run around" the restrictions in the habeas statute and thus belong in *Youngstown* category three.⁴³ But apparently the federal habeas regime is largely directed to the relationship between federal and state courts, not presidential power. In *Youngstown* and *Hamdan*, by contrast, the intentions of Congress were gleaned from statutes that specifically addressed the question of executive authority of precisely the sort at issue in the case. Even had the *Medellín* Court relied on this argument, it would still have worked a substantial expansion of *Youngstown* category three; perhaps for this reason it did not rely on the habeas argument. Moreover, had it done so, the Court would have strengthened the President's argument that loosely related statutes evinced congressional authorization for his enforcement of the *Avena* judgment.⁴⁴ Instead, the Court rejected the claim that Congress had authorized the President's actions and based its category three conclusion on the fact that the treaties were self-executing, but not on the federal habeas statute.

Looking forward, of course, with benefit of this opinion, it is far clearer that when the Senate ratifies a non-self-executing treaty, the President will lack the power to enforce it in domestic courts. But by stuffing the treaty analysis into the doesn't-really-fit *Youngstown* framework, the Court undermines the formalist reasoning in this and other parts of the opinion. The *Youngstown* framework is about the will of Congress, not the formal constitutional requirements for lawmaking, and the opinion leaves open the question of whether the President could enforce a non-self-executing treaty in domestic courts if the Senate and President attached a declaration to a treaty stating that the treaty was not self-executing but could nevertheless be enforced by the President in domestic courts.

IV. CONCLUSION

In the end, perhaps formalism and the self-execution doctrine are strange bedfellows. Formalism's emphasis on the Constitution's specific procedure for enacting federal laws is difficult to effectuate in the context of self-execution, because the distinction between self-executing and non-self-executing treaties is of constitutional significance, yet is not reflected in the Constitution's text. Formalist emphasis on text (at least in the statutory context) puts treaties in a difficult spot. Their text is

⁴² Amicus Curiae Brief of Constitutional and International Law Scholars in Support of Respondent State of Texas at 4, 14–17, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984).

⁴³ *Id.* at 17.

⁴⁴ *Medellín v. Texas*, 128 S. Ct. 1346, 1371 (2008).

negotiated to reflect the will of the treaty parties as a whole, yet is also the principle vehicle for understanding the will of the U.S. treaty-makers with respect to the (still) complicated questions about the enforceability of treaties in domestic courts. Reliance on statements of the President and Senate ease that pressure on treaty text, but also seem to represent a retreat from some versions of formalism. The Court's limping formalism is perhaps most obvious in its application of Justice Jackson's framework in *Youngstown*; a discussion of the importance of formal law-making is sandwiched between two decidedly odd *Youngstown* analyses. In these, the Court first concludes that Justice Jackson's framework for constitutional review applies to a question of pure treaty interpretation, and then substantially expands the third category of the framework by reaching to conclude that the "ratifying parties" to the treaties implicitly prohibited the President from enforcing them. The unnecessary *Youngstown* analysis, like other aspects of the opinion, make it hard to predict whether *Medellín* signals a formalist turn in the Court's approach to foreign affairs.

