Less than Zero?

Carlos Manuel Vázquez
Georgetown University Law Center, vazquez@law.georgetown.edu

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January 2009

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Carlos Manuel Vázquez
Professor of Law
Georgetown University Law Center
vazquez@law.georgetown.edu

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LESS THAN ZERO?

By Carlos Manuel Vázquez*

Medellín v. Texas1 is the first case in which the Supreme Court has denied a treaty-based claim solely on the ground that the treaty relied upon was non-self-executing. In Foster v. Neilson,2 the only other case in which the Court had denied relief on this ground,3 the Court offered its view that the treaty was non-self-executing as an alternative ground for denying relief.4 The Court soon thereafter disavowed its conclusion that the treaty involved in Foster was non-self-executing,5 and, in the intervening years, it repeatedly declined invitations to deny relief on this or related grounds.6 Many observers (including me) thought that the Court would again skirt a ruling on non-self-execution in Medellín because the president had issued a memorandum ordering compliance with the judgment of the International Court of Justice (ICJ) in Avena.7 After all, the Court in American Insurance Ass’n v. Garamendi had recently struck down a California law on the ground that it conflicted with a “policy” reflected in certain sole executive agreements.8 The president in Medellín seemed to be standing on stronger ground, as he was insisting that state law give way to an obligation imposed by a treaty that had received the consent of the Senate and was accordingly the supreme law of the land.9 But the Court defied this expectation, with potentially regrettable results for the law of treaties.

My comments here will focus on the path the Court might have taken to avoid a self-execution holding. Bush’s memorandum ordering compliance with the Avena judgment bears

* Of the Board of Editors.

3 Id. at 314. In his dissent in Medellín, Justice Breyer noted that Foster and Cameron Septic Tank Co. v. Knoxville, 227 U.S. 39 (1913), were the only cases in which the Supreme Court had denied relief on this ground. Medellín, 128 S.Ct. at 1379 (Breyer, J., dissenting) (citing Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 AJIL 695, 716 (1995) [hereinafter Vázquez, Four Doctrines]). The majority did not dispute the point. 128 S.Ct. at 1366 n.12. In the article cited by the dissent for this point, I noted, out of an excess of caution, that Cameron Septic Tank may have denied relief on non-self-execution grounds, but, if so, it was ambiguous in doing so. Vázquez, Four Doctrines, supra, at 716 n.96. I now do not regard Cameron Septic Tank as having based its holding on a conclusion that the treaty was non-self-executing. See Brief for Louis Henkin et al. as Amici Curiae Supporting Petitioner at 16 n.10, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184) (“[In Cameron,] this Court noted but did not endorse the apparent view of Congress . . . that the treaty of Brussels of 1900 was not self-executing. Instead, it ruled against the plaintiff on the merits . . . .”) (I was a coauthor of this brief).
9 I refer here to Article 94 of the United Nations Charter [hereinafter Article 94], by which the United States undertook to comply with judgments of the ICJ in cases to which it is a party.
some resemblance to a proposal I made in these pages a decade ago when the ICJ ordered the United States to stay the execution of Angel Breard pending resolution of the proceeding brought by Paraguay on his behalf at the ICJ. Given the failure of Bush’s memorandum to garner a single vote in Medellín, it seems fitting to revisit the issue. As discussed below, the majority’s reasons for rejecting the president’s action rest on its idiosyncratic and countertextual views about what it means for a treaty to be non-self-executing. As a result, the majority’s analysis of the president’s memorandum in Medellín tells us little about the president’s power to displace state law to promote foreign policy interests unrelated to non-self-executing treaties. (The majority itself disclaimed broad implications for its presidential power holding by inserting a this-day-and-train-only footnote reminiscent of its similar disclaimer in Bush v. Gore.) But the majority’s analysis of the presidential power issue offers some basis for resolving some ambiguities in the Court’s analysis of the self-execution issue: interpreting the majority’s non-self-execution holding narrowly is the only way to avoid reducing the majority’s presidential power analysis to absurdity.

I. PRESIDENTIAL POWER IN BREARD

When the ICJ issued an order of provisional measures in Paraguay v. United States, requiring a stay of Virginia’s execution of Angel Breard, the solicitor general took the position that, under our Constitution, the responsibility for deciding whether to comply with the ICJ’s order rested with the governor of Virginia. It seemed clear to me at the time that the solicitor general’s position was untenable. One of the principal reasons for the adoption of a new Constitution to replace the Articles of Confederation was the states’ repeated violations of treaty obligations during the period before the Constitution, which resulted in serious foreign relations problems for the fledgling nation. The founders were unanimous in believing that the new Constitution had to place responsibility for treaty compliance in the hands of the federal government.

The real question in Breard was not whether the federal government had the power to require compliance with the ICJ’s order but, rather, whether the power rested with the judicial, executive, or legislative branches. The answer to that question was complicated by the uncertainty that existed at the time about whether ICJ orders of provisional measures were binding as a matter of international law. The ICJ later held that such orders are binding, but at the time of Breard, the United States took the position that they were

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11 Vienna Convention on Consular Relations (Para. v. U.S.), 1998 ICJ REP. 248, 258 (Nov. 10) ("The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.").

12 The Medellín majority denied that it was holding 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,” 128 S.Ct. at 1367 n.13, and it stressed that it was addressing only the “far more limited [questions] of whether he may unilaterally create federal law by giving effect to the judgment of this international tribunal pursuant to this non-self-executing treaty, and, if not, whether he may rely on other authority under the Constitution to support the action taken in this particular case.” Id.


16 LaGrand (FRG v. U.S.), 2001 ICJ REP. 446 (June 27).
I argued that, even assuming that ICJ orders of provisional measures were not binding as a matter of international law, and for that reason were not directly enforceable in our courts, an act of the legislature was not needed: the president had the power to issue an executive order requiring Virginia to comply with the ICJ’s order. After all, the United States was party to one treaty submitting the case to the compulsory jurisdiction of the ICJ and another that gave the ICJ the authority to issue orders of provisional measures. Under the Supremacy Clause, those treaties were the supreme law of the land, and, under Article II, the president had the duty to take care that they were faithfully executed. Even if ICJ orders of provisional measures were not binding under international law (and for that reason not directly enforceable in our courts), the treaties contemplated that parties would generally comply. It was thus reasonable, I argued, to construe the treaties as implicitly delegating to the president the authority to require compliance. Because provisional measures orders are by their nature provisional, their effect on individual liberty or on the prerogative of the states would be temporary. More important, provisional measures are by their nature emergency measures. Thus, holding that compliance with those orders must await legislative action would render the treaty’s authorization of those orders completely inefficacious given the significant obstacles to federal legislation built into our constitutional system.

II. THE PRESIDENT’S MEMORANDUM IN MEDELLÍN

Fast forward to 2005, after the ICJ’s judgment in Avena. Because Avena was a concededly binding final judgment, the case for direct judicial enforcement was stronger than in Breard, as a third treaty—the United Nations Charter—obligates parties to comply with ICJ final

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17 Brief for the United States, supra note 14, at 51; LaGrand at 507–08, paras. 112, 115.

18 Vázquez, Breard and Federal Power, supra note 10, at 685–86.

19 Although I also suggested that the president’s power to “Take Care” that the relevant treaties be faithfully executed would have supported a presidential order to comply with a (hypothetically) binding order of provisional measures even if it were regarded as not directly enforceable for political question reasons, see Vázquez, Breard and Federal Power, supra note 10, at 685, I regarded the delegation rationale as narrower and sufficient to sustain an executive order staying Breard’s execution. For a careful and persuasive argument that the president’s memorandum in Medellín was a valid exercise of his “Take Care” power, see Edward T. Swaine, Taking Care of Treaties, 108 COLUM. L. REV. 331, 372–86 (2008). Although Swaine argues that a “Take Care” rationale would be narrower than a delegation rationale, id. at 377, he does not seem to be referring to the delegation argument discussed here and in my prior article, which was specific to orders of provisional measures. His article discusses the validity of the president’s order requiring compliance with the final judgment in Avena. Id. at 337–42. As discussed below, my delegation argument would not necessarily apply to such an order.

20 Bernard H. Oxman, Jurisdiction and the Power to Indicate Provisional Measures, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 323, 323 (Lori F. Damrosch ed., 1987) (“Urgency is a basic characteristic of those situations.”).

21 See Vázquez, Breard and Federal Power, supra note 10, at 689 & n.37. Of course, the treaty authorizing such measures does not say expressly that it delegates such power to the president. Treaties generally do not address details of domestic enforcement (nor can they, given the diversity of constitutional systems covered by multilateral treaties of this sort). My argument was that treaties authorizing emergency measures of this sort should be construed as implicitly authorizing action by domestic officials who have the ability to act expeditiously and who otherwise can be delegated power to perform the contemplated acts. See id. at 689 n.37. In countries with a more streamlined legislative process, compliance through legislation might be appropriate, but in a legal system such as ours, which imposes significant obstacles to legislation, executive action is necessary.

judgments against them. In Medellín, the Bush administration argued that the ICJ judgment was not directly enforceable in court, but it concluded that the president had the power to require the states to comply; the president accordingly issued what he called a “memorandum,” effectively requiring the state courts to provide the hearings called for by the Avena judgment.

Some commentators believed that the case for a presidential order requiring state compliance was stronger in Medellín than in Breard because the former involved a concededly binding final judgment. In my view, the constitutional case for Bush’s order is, if anything, slightly weaker. An order requiring compliance with a final judgment cannot be characterized as a temporary measure. Had the hearing required by Avena been held, and the requisite prejudice been found, the state court would presumably have been required to order an effective remedy, such as a new trial or a new sentence for Medellín. More important, unlike provisional measures, final judgments are not necessarily emergency measures. Thus, awaiting action by Congress would not completely gut the treaty provisions authorizing such judgments and requiring compliance. The solicitor general in Medellín made an argument along the lines of my defense of a Breard executive order, noting that compliance might often require swift action. This argument might support the conclusion that the president has the power to order compliance with final judgments in certain situations, but, if this were the only basis for upholding presidential power, it might be countered that the president should only have the power to maintain the status quo for the time necessary to give Congress a chance to consider the matter. By contrast, provisional measures will always be temporary emergency measures, so it is reasonable to interpret the treaty authorizing such measures to grant the president the power to require full compliance.

In the end, the strength of the argument for a presidential power to require compliance with an international tribunal’s judgment depends on the reasons for concluding that the judgment is not directly enforceable in the courts. If Article 94 had provided that the states parties agreed to take action through their legislatures to comply with any judgment against them rendered by the ICJ, then the treaty would clearly have contemplated action by Congress. The treaty would have been a “stipulation for a future legislative act,” which is what the Court in United States v. Percheman regarded as the archetype of a non-self-executing treaty. Critics of President Bush’s memorandum worried that, if the president were recognized to have the power to require compliance with ICJ orders pursuant to Article 94, he would have the power to execute any non-self-executing treaty. That would certainly be a very broad power, given the broad scope of existing human rights treaties that have been deemed non-self-executing.

The Spanish version of UN Charter Article 94 indicates that the parties “agree[d] to comply” with the judgments of the ICJ. See Medellín, 128 S.Ct. at 1384 (Breyer, J., dissenting) (quoting Spanish counterpart to “undertakes to comply”—“compromete a cumplir”—which translates most directly as “agrees to comply”).


These treaties include the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, 6 ILM 368; the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21,
upholding the president’s memorandum need not have had such broad ramifications. To paraphrase the Medellín majority, some treaties delegate power to the president and some do not, depending on the treaty.30 If the human rights treaties are indeed non-self-executing, it is because they were so declared by the United States through “declarations” appended to the instruments of ratification.31 Whether these treaties confer execution power on the president thus depends on whether the declarations of non-self-execution can be so construed. In my view, these declarations are best read to require legislation.32 Article 94 contains no express or even implied requirement of legislative action. The article provides that each party “undertakes” or “agrees”33 to comply with ICJ judgments. The Supremacy Clause gives that obligation the force of supreme federal law and instructs state courts to give it effect, notwithstanding the laws of the states. In the absence of some constitutional impediment to judicial implementation, the Court should have concluded that the Avena judgment was directly enforceable by virtue of Article 94 and the Supremacy Clause, as the dissenters argued. A constitutional impediment to direct judicial enforcement of an ICJ judgment might have existed, for example, if the judgment had required the appropriation of money34 or the criminalization of conduct.35 The Due Process Clause would have been an additional impediment to the direct judicial enforcement of a hypothetical ICJ judgment requiring that state officials who had violated Article 36 of the Vienna Convention be imprisoned.36 Separation-of-powers problems of a “political question” sort might impede direct judicial enforcement of ICJ judgments in politically charged cases, such as the case the United States lost to Nicaragua in the 1980s.37

Nothing in the Constitution impedes the courts from affording the hearing that the ICJ called for in Avena. I had thus thought that, if the Avena judgment were to be found not to be directly enforceable in the courts, it would have been on the basis of a different sort of constitutional concern—a concern that giving legal effect to such judgments would be an unconstitutional delegation of legislative power to international tribunals. Unlike a treaty that

30 C.f. Medellín, 128 S.Ct. at 1365 (“[S]ome treaties are self-executing and some are not, depending on the treaty.”).
32 See id. at 70–75.
33 As noted by the dissent, the equally authoritative Spanish version provided that the parties “agreed” to comply with ICJ judgments. See supra note 23.
34 See Vázquez, Four Doctrines, supra note 3, at 718–19.
35 See id.
36 This was one of the hypotheticals posed by Chief Justice John Roberts at the Medellin oral argument, apparently to raise concerns about an interpretation of Article 94 requiring compliance with ICJ judgments without exception. Transcript of Record at 4, Medellin v. Texas, 128 S.Ct. 1346 (2008) (No. 06-984). In addition to the due process problem with any attempt at direct judicial enforcement of such a (highly unlikely) ICJ judgment, it is worth noting that enforcement could in any case be precluded through a subsequent federal statute forbidding compliance.
imposes determinate obligations on the United States, a treaty agreeing to comply with judgments of an international tribunal imposes commitments that are not fully known at the time of ratification. Scholars have suggested that such commitments may constitute unconstitutional delegations of legislative power and that the constitutional solution is to regard such judgments as non-self-executing under domestic law.\textsuperscript{38} If this had been the reason for concluding that the\textit{Avena} judgment was not directly enforceable, however, the constitutional problem would be resolved by treating the judgment as enforceable if the president so orders. There would clearly be no constitutional problem with an express delegation of such authority to the president. It is well established that the limitations on Congress’s power to delegate authority to the president, weak as they are in the domestic context, are even weaker in the international context.\textsuperscript{39} It is also well established that rule-making power can be delegated to the president by treaty.\textsuperscript{40} If there is no constitutional impediment to a treaty’s delegating to the president the power to require compliance with the judgments of international tribunals (assuming the judgments do not themselves raise constitutional problems) and if the only reason for finding the\textit{Avena} judgment not to be directly enforceable in court is a constitutionally based nondelegation concern, then the obvious solution would be to regard the treaty as a delegation to the president of the authority to determine whether to require compliance. Insisting on legislative action would compromise the goal of compliance considerably further than necessary to meet the constitutional concern.

In the end, the \textit{Medellin} Court did not conclude that nondelegation principles impeded direct judicial enforcement of the\textit{Avena} judgment.\textsuperscript{41} Rather, the majority declared the\textit{Avena} judgment to be unenforceable for a reason that I had thought (and still believe) to be ruled out by the plain text of the Constitution. It said that Article 94, though a valid treaty imposing binding international obligations on the United States, lacks the force of domestic law.\textsuperscript{42} My argument for a presidential power to require compliance with the\textit{Breard} order was based, in part, on the understanding that the order was authorized by treaties that, even if not directly enforceable in the courts, were still the supreme law of the land. The argument for a presidential power to require compliance with final ICJ judgments is similarly based on the understanding that Article 94, even if not self-executing, is the law of the land. Thus, even if for some reason not directly enforceable in court, the Article 94 obligation could operate as a delegation to the executive of the power to require compliance. The question would be one of interpretation of the treaty (e.g., does it by its terms require legislative action?) or application of domestic separation-of-powers principles (e.g., is the obligation suitable for judicial enforcement?). The Court appeared to obviate any


\textsuperscript{40} See Vázquez, \textit{Breard and Federal Power}, supra note 10, at 689 n.35.

\textsuperscript{41} Indeed, the Court appears to have rejected a delegation objection to an agreement to give domestic legal force to the judgments of international tribunals. See 128 S.Ct. at 1364 – 65 (“We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments.”).

\textsuperscript{42} I share the view, noted elsewhere in this Agora, that the position that non-self-executing treaties lack domestic law status would be difficult to reconcile with the text of the Supremacy Clause. See Curtis A. Bradley, \textit{Intent, Presumptions, and Non-Self-Executing Treaties}, 102 AJIL 540, 550 (2008). For this reason, and for the additional reasons set forth below and in Vázquez, \textit{Treaties as Law}, supra note 31, \textit{Medellin} should be read in a way that would preserve the domestic law status of valid non-self-executing treaties. Notwithstanding the aspects of \textit{Medellin}’s analysis that I discuss in the next several paragraphs, the majority opinion as a whole is susceptible to a narrower reading. See generally Vázquez, \textit{Treaties as Law}, supra note 31.
such inquiry by decreeing that the Constitution’s declaration that “all” treaties have the force of domestic law does not apply to Article 94 and other non-self-executing treaties.\textsuperscript{43}

If the treaty lacks the force of domestic law, the conclusion that an act of legislation is required to displace otherwise applicable state law follows as a matter of course. An instrument that lacks any force as domestic law cannot delegate any sort of authority to the president. As the majority saw it, the president was claiming nothing short of the power to “create domestic law.”\textsuperscript{44} Resolving the presidential power issue thus required no greater sophistication than that of Justice Black’s opinion in \textit{Youngstown}: “[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”\textsuperscript{45}

The glaring flaw in that analysis is, of course, the fact that the Constitution declares that all treaties are domestic law. The majority appears to have drawn a negative inference from \textit{Foster’s} dictum that a treaty is “to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”\textsuperscript{46} But, in \textit{Foster}, Chief Justice Marshall did not say that only treaties that operate of themselves are to be regarded by courts as equivalent to acts of the legislature. If one were nevertheless to draw a negative inference from Marshall’s statement, it would be that only such treaties are equivalent to legislative acts, not that only such treaties have the force of domestic law. And even if Marshall (and the other Justices in \textit{Foster}) had intended the negative inference that the majority drew in \textit{Medellin}, dicta in an alternative holding on an issue not briefed or argued,\textsuperscript{47} which were subsequently overruled and never since relied on by the Court as the basis for denying relief, are a slim reed on which to rest a view so directly in conflict with the constitutional text. One hopes that the majority will soon clarify that it did not mean to read treaties out of the Supremacy Clause. Otherwise, \textit{Medellin} would provide grounds to suspect that even our most textualist Justices are, at best, fair-weather textualists (which is to say, not textualists at all).

But the Court did not stop there. Its analysis suggests that it regarded non-self-executing treaties as not just nonlaw, but as antilaw, their force as domestic law less than zero. In deciding whether the president had the power to require the states to comply with the \textit{Avena} judgment, the majority applied Justice Jackson’s familiar tripartite analysis from \textit{Youngstown}.\textsuperscript{48} The president’s power is at its apex when he is acting in accordance with the will of the legislature. Had the majority acknowledged that Article 94 was domestic law, it might have concluded that President Bush’s action fell within this first category, as the president was acting in accordance with a law by which the nation agreed to comply with ICJ judgments. If Article 94 lacked the force of domestic law, one might have expected the majority to place the president’s action in Jackson’s middle, twilight category for conduct taken by the president in the face of legal

\textsuperscript{43} This analysis would appear to rule out presidential action requiring compliance with provisional measures orders as well, if the obligation to comply with such measures (now recognized to be binding) derives from Article 94. Insofar as the obligation to comply with provisional measures derives from other treaty provisions, \textit{cf. LaGrand} (FRG v. U.S.), 2001 ICJ REP. 446, 505–06 (June 27) (noting that Article 94 “confirm[s] the binding nature of provisional measures”), the president’s power to require compliance would turn, as a threshold matter, on whether those treaty provisions are self-executing under the majority’s test.

\textsuperscript{44} Medellin v. Texas, 128 S.Ct. 1346, 1371 (2008).

\textsuperscript{45} Id. at 1369 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).

\textsuperscript{46} Id. at 1356 (citing \textit{Foster} v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)).

\textsuperscript{47} See \textit{Vásquez}, \textit{Story of Foster and Percheman}, \textit{supra} note 4, at 166–67.

\textsuperscript{48} \textit{Youngstown}, 343 U.S. at 634–55 (Jackson, J., concurring).
silence. But the Court found that the existence of a non-self-executing treaty placed the president’s action in the third category, in which presidential power is at its weakest.\footnote{Medellin, 128 S.Ct. at 1369.} In other words, according to the majority, the president would have had \textit{greater} power to require the states to comply with the ICJ’s judgment if the United States had \textit{not} ratified a treaty agreeing to comply with the judgments of the ICJ!

The purported basis for this counterintuitive holding was the idea that “[a] non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force.”\footnote{Id.} The treaty thus reflects, in the majority’s view, “the implicit understanding of the ratifying Senate” that implementing legislation was necessary.\footnote{Id.} But, according to the immediately preceding paragraph, the majority deemed Article 94 to be non-self-executing because it was “ratified without provisions clearly according it domestic effect.” This is one of several statements in the opinion suggesting that the majority believed treaties to be presumptively non-self-executing.\footnote{Id.} If so, then the need for legislative implementation resulted from the \textit{absence} of affirmative evidence that the treaty was intended to have domestic effect—evidence that the president and the Senate might have been forgiven for regarding as superfluous, given the constitutional text. Insisting on evidence of an intent to give the treaty domestic legal force is itself problematic in light of constitutional text purporting to do that work. Treating the absence of such intent as evidence of an affirmative intent to require legislative action, leaving the president with less power to require compliance than if there had been no treaty obligation to comply, would take the majority’s analysis into the realm of the absurd.

III. AVOIDING ABSURDITY

Despite the language quoted above, there is substantial ground for rejecting a reading of \textit{Medellin} as requiring evidence that the treaty was intended to have the force of domestic law. If such evidence were required, few, if any, treaties—and no multilateral treaties—would be self-executing. States rarely, if ever, address a treaty’s status as domestic law in the treaty itself.\footnote{Accord Bradley, \textit{supra} note 42.} Such a test would accordingly conflict with many, many Supreme Court decisions, stretching back to the 1790s, that have applied unexecuted treaties,\footnote{See \textit{Ware v. Hylton}, 3 U.S. (3 Dall.) 199, 236–37 (1796), \textit{discussed in Carlos Manuel Vázquez, The Separation of Powers as a Safeguard of Nationalism, 8 NOTRE DAME L. REV. 1601, 1621–22 (2008) [hereinafter Vázquez, Safeguard of Nationalism]; see also Vázquez, \textit{Treaties as Law, supra} note 31, at 40 n.191 (citing other cases).} including decisions the majority in

\footnote{\textit{Id.} For a sampling of other indications that the majority believed a treaty to be self-executing only if its text affirmatively conveys an intent that it have the force of domestic law, see \textit{Medellin}, 128 S.Ct. at 1356 (“In sum, while treaties may comprise international commitments . . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms.”) (alteration in original) (quoting Igartúa-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)); \textit{id.} at 1369; see also \textit{id.} at 1364 (“[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.”); \textit{id.} 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.”).}
Medellín purported not to disturb. The portions of the majority opinion purporting to require affirmative evidence of an intent to give the treaty domestic legal force are thus in conflict with the portions of the same opinion recognizing that “some international agreements are self-executing” and purporting not to disturb decisions enforcing treaties that lack “provisions clearly according [them] domestic effect.” Avoidance of the absurdities that would otherwise be produced by its Youngstown analysis is another reason to reject the test and to interpret the opinion instead to regard treaties as non-self-executing only if they contain evidence of an intent to require legislation. In the absence of such evidence, there would be no basis for placing the president’s memorandum in Jackson’s third category.

Admittedly, the affirmative evidence the majority cited in support of its conclusion that Article 94 contemplated implementing legislation was weak. First, the Court read the language of Article 94—“undertakes to comply”—as “confirm[ing] that further action to give effect to an ICJ judgment was contemplated.” But, while the term “undertake” may, in colloquial usage, suggest a soft, attenuated obligation, in international law, an “undertaking” is understood to be a hard, immediate obligation. Moreover, the need for “further action” does not explain why that further action might not come from the president or even from the courts. The majority also appeared to perceive a pertinent, though apparently inarticulable, similarity between the “undertakes to comply” language in Article 94 and the “shall be ratified” language in the treaty involved in Foster. It overlooked the fact that the Court in Percheman later concluded that this same language was consistent with self-execution. (Indeed, by ignoring the Spanish version of the treaty, the Court repeated the error it committed in Foster, although this time with its eyes wide open.)

As an additional reason for concluding that Article 94(1) was not automatically enforceable in our courts, the majority also relied on “Article 94(2)—the enforcement provision—[which] provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state.” The Court noted that, because the United States retained a veto in the Security Council, it was effectively immune from Security Council resolutions against it. The veto made any purported obligation of the United States to comply with ICJ judgments illusory. The United States always retained the option of “[n]oncompliance with an ICJ judgment through exercise of the Security Council veto.” Because direct enforceability would remove this “option” of noncompliance, the majority regarded Article 94(2) as

56 Id. at 1364.
57 Id. at 1369.
58 Id. at 1359 n.5.
59 See Vázquez, Treaties as Law, supra note 31, at 35 n.172.
60 Medellín, 128 S.Ct. at 1358.
61 The Court in Percheman wrote that “[a]lthough the words ‘shall be ratified and confirmed,’ are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they ‘shall be ratified and confirmed,’ by force of the instrument itself.” United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833).
62 Medellín, 128 S.Ct. at 1359.
63 Id. at 1360.
affirmative evidence that Article 94(1) was not intended to be directly enforceable in our courts.64

This argument produces absurdities of its own, however. The veto is only relevant because the UN Charter creates a formal international enforcement mechanism. For the nations holding the veto, it just makes that enforcement mechanism ineffective. Most treaties, however, including many that the Court has found to be self-executing, include no formal international enforcement mechanism at all. If a treaty that establishes an enforcement mechanism but gives the United States a veto is non-self-executing because of the veto, then, a fortiori, a treaty that does not establish an effective international enforcement mechanism would be non-self-executing. In other words, the majority’s analysis suggests that a treaty is self-executing only if it creates a formal international enforcement mechanism that would be effective against the United States. That, of course, has never been a requirement for self-execution.

In short, the majority’s reasons for concluding that Article 94 affirmatively reflects an intent to require legislative implementation are unconvincing. Still, interpreting *Medellín* to rest on a questionable construction of Article 94 would be preferable to interpreting it to establish that treaties are self-executing only if they affirmatively indicate that they were intended to have the force of domestic law. The latter would conflict with constitutional text, history, and longstanding Supreme Court precedent.65 The majority’s analysis of the presidential power issue—specifically, its conclusion that the existence of a non-self-executing treaty places presidential action in the third *Youngstown* category—provides additional support for the view that *Medellín* rests on a construction of Article 94(1) as affirmatively contemplating implementing legislation.

IV. Conclusion

The majority’s rejection of the president’s memorandum appears to have been based on its countertextual view that non-self-executing treaties lack the force of domestic law and hence require legislative action to acquire domestic legal force. As a result, its analysis of the presidential power issue has little to say about presidential action unrelated to non-self-executing treaties. Ironically, the Court’s claim that the existence of a non-self-executing treaty on point places presidential action in *Youngstown’s* third category provides some basis for rejecting the majority’s highly problematic suggestion that a treaty is self-executing only if its text affirmatively indicates that it was intended to have the force of domestic law. The absence of such an intent cannot be said to indicate that the Senate meant to require legislation. To rely on the absence of such evidence, therefore, would be to treat ratified treaties as negative law. Avoiding this absurd result should lead us to treat *Medellín* as having held that a treaty is self-executing unless it affirmatively indicates that it was “ratified with the understanding that it is not to have domestic effect of its own force.”66 So understood, the majority’s error was in finding that Article 94 reflected such an understanding.

64 Id.
66 *Medellín*, 128 S.Ct. at 1369.