to retroactivity doctrine. *Griffith*'s "basic norms of constitutional adjudication" may no longer be as basic as they once were.

D. Status of International Law

Self-Execution of Treaties. — The debate over whether treaties should be presumed to be self-executing, meaning automatically enforceable in domestic courts, pits internationalists, who seek to enhance the force of international law, against nationalists, who oppose perceived threats to United States sovereignty.[1] With no conclusive Supreme Court decision on the issue, each side has invoked evidence of historical practices to support its preferred presumption.[2] Last Term, in *Medellín v. Texas*,[3] the Supreme Court provided its most direct answer to date, holding that the International Court of Justice's (ICJ) decision in *Avena and Other Mexican Nationals*[4] was not enforceable in U.S. courts. The Court's reasoning implicitly rejected a presumption in favor of self-execution, but was unclear as to whether the opposite presumption was at work. By elevating an inappropriately narrow textual analysis of treaty language and declining to adopt a clear presumption, the Court failed both in its own purported goal of increasing predictability and in the dissent's competing goal of maximizing accuracy. The Court should instead have implemented a categorical approach to self-execution, fulfilling both of those purposes as well as enhancing the accountability of the political branches in their exercise of foreign affairs powers.

José Ernesto Medellín, a Mexican national, was arrested in 1993 for participating in the gang rape and murder of two Houston teenagers.[5] After waiving his *Miranda* rights in writing, Medellín gave a written confession.[6] The local law enforcement officers, however, failed to inform Medellín of his right under Article 36 of the Vienna Convention on Consular Relations[7] to report his detention to the Mexican consu-

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[1] *See* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 466 (2003) (noting the two extreme positions).

[2] *Compare* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 697–704 (1995) (interpreting the history of the Supremacy Clause and early Supreme Court decisions to argue for a presumption in favor of self-execution), *with* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2092 (1999) (arguing that the debates over the ratification of the Constitution reflect a Framing-era understanding that treaties required implementing legislation "before they could have any domestic effect").

[3] 128 S. Ct. 1346 (2008).

[4] (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

[5] *Medellín*, 128 S. Ct. at 1354.

[6] *Id.*

[7] Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

late.[8] Medellín was found guilty of murder and sentenced to death, and the result was affirmed on appeal.[9]

On Medellín's first petition for state habeas corpus, the state trial court held that his Vienna Convention claim was procedurally barred because he had not raised it at trial or on appeal.[10] The court also concluded that Medellín had not shown any prejudice from the non-notification of Mexican authorities.[11] After the Texas Court of Criminal Appeals affirmed, Medellín filed a habeas petition in federal district court, which denied relief on the same two grounds.[12] Medellín then applied for a certificate of appealability in the Fifth Circuit.[13]

While that application was pending, the ICJ issued its decision in *Avena*, holding that fifty-one Mexican nationals, including Medellín, were entitled to review of their U.S. state court convictions because of Vienna Convention violations.[14] The ICJ indicated that this process was to trump any forfeiture due to state procedural rules of the right to raise Vienna Convention claims.[15] The Fifth Circuit ultimately denied Medellín's application for a certificate of appealability. The court concluded first that Vienna Convention rights were not enforceable by individuals, and second that, even if they were, the Supreme Court's decision in *Breard v. Greene*[16] required any Vienna Convention claim to be brought within state procedural rules.[17]

The Supreme Court first granted certiorari in 2004.[18] Before oral argument took place, however, President Bush issued a memorandum instructing state courts to give effect to the ICJ's judgment.[19] At this point, Medellín filed a second habeas petition in state court relying on *Avena* and the President's memorandum.[20] The Supreme Court therefore dismissed Medellín's petition as improvidently granted to allow

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[8] *Medellín*, 128 S. Ct. at 1354.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 1354–55.

[12] *Id.* at 1355.

[13] *Id.*

[14] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 72 (Mar. 31). The ICJ did not specify a procedure for review, but held that the United States was obligated "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences." *Id.*

[15] *See id.* at 56–57.

[16] 523 U.S. 371, 375 (1998) (per curiam).

[17] *Medellín*, 128 S. Ct. at 1355. The Supreme Court reaffirmed this requirement in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685–87 (2006), after considering the ICJ's contrary determination in *Avena*. *Sanchez-Llamas* did not, however, resolve the question of whether the *Avena* decision could be directly enforced as domestic law in U.S. state courts.

[18] Medellín v. Dretke, 543 U.S. 1032 (2004).

[19] Medellín v. Dretke, 544 U.S. 660, 663 (2005) (per curiam); *see also* Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005), http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html.

[20] *Medellín*, 544 U.S. at 663.

the state court proceedings to be resolved.[21] The Texas Court of Criminal Appeals rejected Medellín's second petition, concluding that neither *Avena* nor the President's memorandum could overcome Texas's rules limiting multiple habeas applications.[22]

The Supreme Court granted certiorari a second time and affirmed. Writing for the majority, Chief Justice Roberts[23] concluded that neither the *Avena* decision nor the President's memorandum entitled Medellín to the review and reconsideration he sought.[24] The Court first considered Medellín's argument that the decision by the ICJ, to whose jurisdiction the United States had submitted via treaty, established by virtue of the Supremacy Clause "a binding federal rule of decision that pre-empts contrary state limitations on successive habeas petitions."[25] To distinguish between self-executing treaties and those that "can only be enforced pursuant to legislation to carry them into effect,"[26] the Court explained that it would start with the text of a treaty, and noted that additional "aids to . . . interpretation" include the "negotiation and drafting history . . . as well as 'the postratification understanding' of signatory nations."[27] In this case, the question of whether *Avena* would have binding domestic legal effect required an analysis of the three treaties that governed the ICJ's jurisdiction over the United States: the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes,[28] the United Nations Charter, and the ICJ Statute.[29]

The Court interpreted the Optional Protocol as a "bare grant of jurisdiction" that "does not itself commit signatories to comply with an ICJ judgment."[30] Obligations to comply are instead governed by Article 94 of the U.N. Charter, which specifies that each member state "*undertakes to comply* with the decision of the [ICJ] in any case to which it is a party."[31] The Court interpreted the use of the phrase "undertakes to," rather than "shall" or "must," to suggest a call for future action rather than the creation of immediate domestic legal ef-

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[21] *Id.* at 664.

[22] *Medellín*, 128 S. Ct. at 1356.

[23] The Chief Justice was joined by Justices Scalia, Kennedy, Thomas, and Alito.

[24] *Medellín*, 128 S. Ct. at 1353.

[25] *Id.* at 1356.

[26] *Id.* (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)) (internal quotation mark omitted).

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

[28] Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol].

[29] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153 [hereinafter ICJ Statute].

[30] *Medellín*, 128 S. Ct. at 1358.

[31] *Id.* (alteration in original) (quoting U.N. Charter art. 94(1) (emphasis added)) (internal quotation mark omitted).

fect.[32] The Court further noted that Article 94(2) provides referral to the U.N. Security Council as "the sole remedy for noncompliance."[33] Because the United States can veto any Security Council resolution, it effectively reserved the power "to determine whether and how to comply with an ICJ judgment."[34] The Court reasoned that it was unlikely the President and Senate meant to forfeit this option of noncompliance by giving ICJ decisions automatic domestic effect.[35] Continuing to the ICJ Statute, the Court noted that "the ICJ can hear disputes only between nations, not individuals,"[36] and that ICJ decisions bind only "the parties . . . in respect of [the] particular case."[37] The Court held that Medellín could not be treated as a party to *Avena* and could not enforce the ICJ's judgment.[38]

The Court next considered Medellín's alternative argument, supported by the Solicitor General, that the President's memorandum bound state courts to follow the *Avena* decision. The Court invoked the *Youngstown*[39] framework, which identifies three levels of presidential authority depending on Congress's authorization, silence, or disapproval.[40] Whereas the United States argued that Congress's ratification of the relevant treaties implicitly authorized the President to implement the resulting obligations by giving them domestic legal effect, the Court interpreted Congress's ratification of non-self-executing treaties to be an implicit *prohibition* on unilateral implementation.[41]

The United States further argued that the memorandum constituted "a valid exercise of the President's foreign affairs authority to resolve claims disputes with foreign nations."[42] The Court distinguished the claims-settlement line of cases as involving "a narrow set of circumstances,"[43] providing no support for an unprecedented "Presidential directive issued to state courts."[44]

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[32] *Id.*

[33] *Id.* at 1359.

[34] *Id.* at 1360.

[35] *Id.*

[36] *Id.*

[37] *Id.* (quoting ICJ Statute, *supra* note 29, art. 59) (internal quotation mark omitted).

[38] *Id.* at 1360–61. The Court bolstered its interpretation by observing that Medellín had shown no evidence that ICJ judgments are binding in any nation's domestic courts. *Id.* at 1363 & n.10.

[39] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[40] *See id.* at 635–38 (Jackson, J., concurring).

[41] *Medellín*, 128 S. Ct. at 1369. The Court noted that the President retained the power to use "political and diplomatic means" to carry out the United States's foreign affairs obligations. *Id.* at 1368.

[42] *Id.* at 1371; *see, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Dames & Moore v. Regan, 453 U.S. 654 (1981).

[43] *Medellín*, 128 S. Ct. at 1371.

[44] *Id.* at 1372.

Justice Stevens concurred in the judgment. He saw the case as being closer than the Court's opinion suggested, and observed that the precedents relating to the meaning of "undertakes to comply" were not clear-cut.[45] Nevertheless, he concluded that the best reading was the majority's.[46] His main purpose in writing separately, then, was to urge Texas to comply with *Avena* because it had a duty to "protect[] the honor and integrity of the Nation."[47]

Justice Breyer dissented.[48] He first reviewed the Supreme Court's early jurisprudence on the Supremacy Clause to argue that the clause was originally understood to give domestic legal effect to treaties that would otherwise have required additional legislation.[49] Justice Breyer then called the majority's reliance on treaty language "misguided" insofar as the Court sought a "clear statement" regarding domestic legal effect and implicitly applied a presumption against self-execution in the absence of such a statement.[50] This approach was faulty, he argued, because whether a treaty was self-executing often depended on each particular country's domestic law.[51] Thus, he reasoned, "the absence or presence of language in a treaty about a provision's self-execution proves nothing at all."[52]

Instead, Justice Breyer applied what he considered "practical, context-specific criteria" drawn from the Court's past cases on treaties.[53] He considered the language of the treaties,[54] their subject matter and courts' familiarity and competence with it,[55] and the existence of "approximately 70" similar treaty provisions contemplating ICJ adjudication that had hitherto been thought self-executing.[56] These factors led Justice Breyer to conclude that the ICJ decision was enforceable in domestic courts, and that remand to Texas would have been the appropriate relief.[57]

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[45] *Id.* at 1372–73 (Stevens, J., concurring in the judgment).
[46] *Id.* at 1373.
[47] *Id.* at 1374.
[48] Justice Breyer was joined by Justices Souter and Ginsburg.
[49] *See Medellín*, 128 S. Ct. at 1377–80 (Breyer, J., dissenting).
[50] *Id.* at 1380.
[51] *Id.* at 1381.
[52] *Id.*
[53] *Id.* at 1382.
[54] *See id.* at 1382–85.
[55] *See id.* at 1382, 1385, 1388.
[56] *Id.* at 1383–84; *see also id.* at 1387–88. Justice Breyer also argued that the present dispute involved "the meaning of a Vienna Convention provision that is itself self-executing and judicially enforceable." *Id.* at 1385. Because *Avena* involved the interpretation of a self-executing provision, Justice Breyer argued that the ICJ's decision, described as binding in the ICJ Statute, should as a matter of logic be self-executing as well. *Id.* at 1386.
[57] *Id.* at 1389–90.

The majority believed its textual analysis offered the predictability necessary to protect the political branches' foreign affairs prerogative. In contrast, the dissent sought to maximize accuracy by considering every potentially relevant factor. By rigidly insisting on a textual analysis and nodding vaguely to a "clear statement" principle, the Court ultimately failed to advance either objective, while the dissent's winding multi-factor approach gave insufficient weight to predictability. If the Court had been serious about deferring to the intent of the political branches, it would have implemented a categorical approach, adopting default presumptions about self-execution according to the type of treaty provision involved. Such an approach — irrespective of the presumption chosen in any given category — would have increased the predictability and accuracy of the Court's interpretations, while also serving to advance the accountability of the political branches.

The Court's textual analysis purportedly sought to ascertain the intent of the political branches. Thus, with a hint of incredulity at the dissent's objection, the Chief Justice noted that he had "to confess that [he did] think it rather important to look to the treaty language to see what it has to say about the issue."[58] Yet Justice Breyer never disputed the relevance of treaty language; indeed, it was the first factor he considered. His specific criticism, which Chief Justice Roberts even quoted a few lines earlier, was that the majority "look[ed] for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)."[59] The point made by the dissent, and never answered by the majority, was that treaties were unlikely to address themselves to self-execution when that issue, under international law, was determined by the domestic law of each signatory nation.[60] Therefore, to insist upon finding an intention about self-execution in the treaty language was to ignore this reality and overlook other factors that could provide stronger evidence of the treaty provision's purpose.

The Court also fostered doubt as to the predictability of its approach by relying on a shaky interpretation of the phrase "undertakes to comply." As the dissent demonstrated, past treaties whose language contained less support for a self-executing interpretation have nevertheless been held to have domestic legal effect.[61] Perhaps the Court

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[58] *Id.* at 1362 (majority opinion).

[59] *Id.* at 1361–62 (quoting *id.* at 1389 (Breyer, J., dissenting)) (internal quotation marks omitted).

[60] *Id.* at 1381 (Breyer, J., dissenting); *see also* Curtis A. Bradley, Breard*, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530–31 (1999) (noting that most modern commentators agree that domestic law determines the status of international law in the domestic system).

[61] *See Medellín*, 128 S. Ct. at 1384 (Breyer, J., dissenting). The dissent cited the example of *Todok v. Union State Bank of Harvard*, 281 U.S. 449 (1930), in which the Court treated as self-

could have distinguished those treaties, but only by paying more attention to context and not by language alone. Such a concession to the dissent would have undermined the Court's point from within. But the contrary decision — which leaves those treaties inadequately addressed — will only muddy future self-execution analyses. Courts will look for clear language that will rarely be present, or give conflicting interpretations to phrases, like "undertakes to comply," that were not intended to carry such weight.

Moreover, the Court's ambiguous suggestion of a "clear statement" requirement where state procedural rules are at issue will compound the uncertainty. The opinion was unclear as to whether the "clear statement" rule actually influenced the result, or whether it merely bolstered a conclusion that was already settled by the Court's textual analysis.[62] Thus, courts will have little guidance in determining whether to extend this "clear statement" approach to other treaties. In light of these layers of ambiguity, the Court's criticism that the dissent's approach would foster uncertainty and would intrude on the political branches' territory[63] bears an unmistakable irony.

While the majority opinion failed to produce either accuracy or predictability, the dissent erred in giving the latter goal insufficient weight. The dissent's call for a more nuanced assessment of a treaty's full context likely would produce more accurate interpretations. But as the number of factors in an analysis increases, the level of unpredictability or indeterminacy often rises in turn.[64] The majority's primary concern about this indeterminacy was that it would afford courts too much discretion, thereby creating the risk of intrusion on the political branches' constitutionally allocated foreign affairs powers.[65] Moreover, uncertainty in treaty interpretation may produce international as well as domestic costs: if other nations cannot know how

executing a treaty that used the following language: "The United States . . . shall be at liberty to make respecting this matter, such laws as they think proper," *id.* at 453 (internal quotation mark omitted). *See also Medellín*, 128 S. Ct. at 1383 (Breyer, J., dissenting) (citing Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 247, 252 (1984); Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 160 & n.9, 161 (1940)).

[62] The Court did not mention the "clear statement" rule in its initial analysis of treaty language. Instead, it mentioned the rule in a brief paragraph, introduced as follows: "Our conclusion is further supported by general principles of interpretation." *Medellín*, 128 S. Ct. at 1363. Justice Stevens in concurrence noted that he reached his conclusion "[a]bsent a presumption one way or the other." *Id.* at 1373 (Stevens, J., concurring in the judgment).

[63] *See id.* at 1362–63 (majority opinion).

[64] *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59 (1992).

[65] *See Medellín*, 128 S. Ct. at 1362–63.

treaties will be interpreted in the United States, this uncertainty may affect their incentives to comply reciprocally.[66]

If the Court had instead begun a process of developing default presumptions about self-execution, it could have struck a better balance between accuracy and predictability while also advancing a third goal — accountability — that neither the majority nor the dissent identified. The idea would be to draw from Justice Breyer's attention to context, but address predictability concerns by applying rebuttable presumptions of self-execution or non-self-execution to different categories of treaty provisions. For example, Justice Breyer asked the following questions to illustrate how a provision's subject matter would affect his analysis:

> Does the treaty provision declare peace? Does it promise not to engage in hostilities? If so, it addresses itself to the political branches. 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.[67]

Such a categorical approach would, first of all, be more accurate than the Court's method because it would not insist on drawing strong conclusions from ambiguous phrases, but would still allow truly clear language to overcome a default presumption. And in the absence of such language, this approach would identify the presumption that best approximated the treatymakers' intent. Following Justice Breyer's lead, the inquiry should consider how U.S. courts have interpreted other treaty provisions within the same category and other analytical indicators of justiciability, including subject matter, the individual enforceability of the rights conferred, and separation of powers concerns.[68]

A second advantage of this approach is that it would increase predictability. In contrast to the Court's method, an openly adopted presumption would signal to the political branches how the courts would interpret a given treaty's domestic legal effect.[69] Moreover, it would give Congress an invitation to act on existing treaties if it disagreed

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[66] *See* ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS 33–34 (2008) (describing the costs of noncompliance in terms of reputation, retaliation, and reciprocity).

[67] *Medellín*, 128 S. Ct. at 1382 (Breyer, J., dissenting) (citation omitted).

[68] *See id.*

[69] The Senate could then refuse to ratify the treaty, while the President could withdraw from negotiations or seek to incorporate the appropriate language in the treaty to overcome the presumption. The United States could also attach a package of reservations, understandings, and declarations (RUDs) to its ratification clarifying its position on self-execution. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 401 (2000) (describing the general practice of using RUDs); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) (suggesting that such unilateral statements by the United States should be given effect). The use of RUDs for this purpose, however, is quite controversial. *See* Bradley & Goldsmith, *supra*, at 401 n.4 (collecting articles that criticize RUDs from both legal and policy standpoints).

with the way the stated presumption would operate on a given treaty or in a particular area.[70] Thus, although a retroactive interpretive presumption would raise legitimate concerns,[71] it seems preferable to put Congress on notice about the presumption's implications for other treaties. After all, the alternative interpretive approach of focusing on treaty language may be more likely to produce the wrong result and cannot offer even that advance warning.[72]

There are no doubt many complicating concerns, such as how to categorize along multiple axes of justiciability indicators. But the Court need not have tried to map the entire landscape in resolving a single case. All it needed to do was begin the process of developing sensible categories to increase the accuracy of its interpretations while employing default presumptions to better elicit Congress's input. That alone would have been a step forward.

Finally, a third advantage of default presumptions is that they would force the political branches to be more accountable for their foreign affairs decisionmaking. Previous scholarship in a variety of contexts has advocated the creation of default rules for the similar goal of eliciting further information from the relevant parties.[73] The idea of an information-forcing default rule in the statutory context, for example, is to interpret ambiguous language against the party better positioned to bring about correction, with the goal of maximizing legislative preferences in the long run.[74] Identifying the better information-forcing default rule for self-execution lies beyond the scope of this

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[70] According to the so-called last-in-time rule, a subsequently passed statute overrides a conflicting treaty, and vice versa. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888); Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 578 (2007).

[71] *Cf.* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1156 (1992) (asserting that it would be "entirely illegitimate" to subject preexisting treaties to a subsequently developed clear statement rule with respect to implied rights of action).

[72] There are other considerations worth noting for those who find this response to the retroactive application concern unsatisfying. First, the present proposal advocates developing presumptions category by category and thus avoids the instability that might result from a single, sweeping default rule about self-execution. Second, the presumptions are themselves supposed to track what the political branches most likely intended, so that widespread overrides should be unnecessary. *See* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 29 (Amy Gutmann ed., 1997) ("Some of the [presumptive] rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway.").

[73] The idea originated in contract theory. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (introducing the concept as "penalty defaults"). Scholars then applied the idea to statutory interpretation, *see* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002), as well as treaty interpretation, *see* Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 555–59 (2002).

[74] *See* Elhauge, *supra* note 73, at 2165.

comment.[75] The claim instead is that either presumption — for or against self-execution — would at the least force the political branches to be accountable for the treaty provision's effect in domestic law.[76] If all agree the political branches are best suited — and indeed vested with the constitutional authority — to deal with foreign affairs, then adopting an interpretive approach that prevents those branches from escaping accountability for the difficult questions involved would seem to be a natural corollary.[77]

Under such a regime of default presumptions, the political branches could no longer avoid the question of self-execution where new treaties were concerned. In the case of existing treaties, the announcement of a default presumption would make legislators accountable for that presumption's consequences, whether they actually responded with new information or not. As with the goal of predictability, accountability is all the more significant in treaty interpretation because the United States's reputation for compliance has international as well as domestic repercussions, affecting reciprocal compliance and other diplomatic concerns.[78] Thus, if the United States electorate is dissatisfied either with a treaty's domestic legal effect or with international-level harms related to treaty performance, it should be able to voice that discontent by holding the political branches accountable.

Whether treaty provisions are to be given domestic legal effect is a question that has broad implications for the United States's standing in the international community. In light of this significance, the Court's stated purpose of putting the issue in the political branches'

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[75] Professor Jack Goldsmith argues that a wholesale presumption against self-execution would have an information-forcing effect. Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1436 (1999). He reasons that foreign countries are more likely to object to nonenforcement than enforcement of a treaty provision in the U.S. *Id.* This may be an oversimplification, however. He does not consider the possibility that *domestic* actors may be more likely to object to *enforcement* of some kinds of treaties.

[76] *Cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2147 (2002) ("What is information-forcing in private law may be accountability-forcing in public law."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 458–59 (1989) (describing how interpretive presumptions in the statutory context serve to promote electoral accountability).

[77] It is perhaps not surprising that neither the majority nor the dissenting opinion mentioned accountability, because it is arguably not a value that the judiciary is charged with promoting. But the Court has elsewhere enforced accountability in another, related sense: by deferring to the accountable branches in order to limit its own policymaking discretion. *See* Sunstein, *supra* note 76, at 457–59. Thus, accountability goes hand in hand with the separation of powers, and interpretive presumptions are simply a more proactive way to reinforce those boundaries.

[78] Even the majority recognized the importance of such concerns. *See Medellín*, 128 S. Ct. at 1367 ("In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.").

hands was proper, inasmuch as it sought to avoid a judicial resolution of the internationalist-nationalist dispute. But the Court's chosen method, having produced a questionable conclusion in *Medellín*, paved the way to continued uncertainty and unavoidable judicial discretion. In the absence of clear presumptions, both sides of the debate will use a treaty provision's interpretive leeway to argue for their preferred result on a case-by-case basis — precisely the consequence the Court professed to avoid. That the Court adopt *a* presumption is therefore more important than *which* presumption it chooses. Such a step would truly clear the way for the self-execution debate to continue in the political arena where the Court has insisted it belongs.

III. FEDERAL STATUTES AND REGULATIONS

A. Age Discrimination in Employment Act

Retaliation. — The Supreme Court has been known to entertain the occasional "benign fiction."[1] One such fiction, the context canon,[2] attributes legal acumen to the legislature: Congress is presumed to be aware of judicial precedents and to incorporate the judiciary's gloss on statutes sharing common language, origins, or purpose.[3] The Court's fiction lacks empirical support[4] but remains attractive because it promotes values associated with the rule of law.[5] Last Term, in *Gómez-Pérez v. Potter*,[6] the Supreme Court applied this fiction to hold that the Age Discrimination in Employment Act[7] (ADEA) prohibits retaliation against federal employees who complain of age discrimination. The Court's opinion harmonizes and regularizes antidiscrimination

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[1] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment).

[2] Nancy Eisenhauer, Comment, *Implied Causes of Action Under Federal Statutes: The Air Carriers Access Act of 1986*, 59 U. CHI. L. REV. 1183, 1193 (1992).

[3] *See, e.g.*, *Bock Laundry*, 490 U.S. at 528 (Scalia, J., concurring in the judgment); Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."); The "Abbotsford," 98 U.S. 440, 444 (1878).

[4] *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 245 (2000) ("Due to the complexities of the legislative process and Congress's collective nature . . . even a single statute is unlikely to be drafted with such interpretive conventions in mind."); Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983) (noting "how little research" has been done to ascertain whether or not Congress is aware of judicial canons of construction).

[5] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 16–17 (Amy Gutmann ed., 1997) (arguing that courts seek "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*," in order to match citizens' reasonable expectations and to promote "[a] government of laws, not of men").

[6] 128 S. Ct. 1931 (2008).

[7] 29 U.S.C.A. §§ 621–634 (West 2000 & Supp. 2008).