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ENFORCING INTERNATIONAL COMMERCIAL ARBITRATION AGREEMENTS AND AWARDS IN U.S. COURTS: IS THE NEW YORK CONVENTION A "SELF-EXECUTING" TREATY?

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ABSTRACT

The contemporary system of international commercial arbitration rests on compliance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), to which the United States has been a party for over 50 years. Questions have recently been raised, however, about the status of the Convention in U.S. law – in particular, whether it can properly be considered directly applicable in state courts (as a "self-executing" treaty) notwithstanding its legislative implementation through the Federal Arbitration Act. This article considers (i) whether a duly-ratified treaty can simultaneously be directly applicable and legislatively implemented, (ii) whether a U.S. court could, in the context of a specific proceeding involving private parties, override the decision of the constitutionally empowered "treaty makers" regarding the treaty's implementation, and (iii) whether such a decision could give the federal government greater authority to compel compliance by state courts than the implementing statute. Answering those questions in the negative, it offers an alternative solution.

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I. INTRODUCTION

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the "New York Convention")[1] provides a critical cornerstone of the global system of international commercial arbitration. It requires States Parties to recognize and enforce certain agreements to arbitrate as well as the resulting awards.[2] The United States acceded to the Convention in 1970 and implemented it in U.S. law through Chapter 2 of the Federal Arbitration Act (FAA), which states that the Convention "shall be enforced in United States courts in accordance with this chapter."[3]

The recently completed RESTATEMENT OF U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION[4] recognizes the New York Convention's central role in international as well as U.S. law. Surprisingly, however, it reflects some hesitation about whether the Convention in fact applies in the state (as well as federal) courts of the United States. Although the ARBITRATION RESTATEMENT affirms that "[t]he [U.S.] Supreme Court has repeatedly held that federal law preempts conflicting state grounds for declining to enforce domestic arbitration agreements in both federal and state court,"[5] the Reporters observe that the Court "has not yet dealt with the preemptive effect of the FAA as applied to international arbitration."[6] In different parts of their analysis, the Reporters note that, if Article II(3) of the New York Convention were declared "self-executing," it would "supplant FAA § 2 as the source of authority making

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

2. The Convention applies to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." *Id.* art. 1.

3. 9 U.S.C. § 201. The New York Convention was implemented, and made directly applicable in all U.S. courts, by Chapter 2 of the Federal Arbitration Act, Pub. L. No. 91-368, § 1, 84 Stat. 692, 692 (1970) (codified at 9 U.S.C. §§ 201–208). The Act became effective and the Convention went into force for the United States on December 29, 1970.

4. RESTATEMENT OF THE LAW: THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION (AM. L. INST., Proposed Final Draft No. 9, 2019) [hereinafter ARBITRATION RESTATEMENT].

5. *See id.* § 1.6 cmt. b.

6. *Id.* § 1.6 reporters' note a.

international arbitration agreements enforceable in state and federal court"[7] and "[i]f Article V of the New York Convention were a self-executing treaty provision, it would be binding on state courts of its own force and in combination with the Supremacy Clause of the Constitution . . . ."[8]

Given the importance of continued U.S. compliance with the New York Convention, one may wonder about the source of this concern over the possible preemptive effect of the Convention, especially since the ARBITRATION RESTATEMENT does not point to any clear instance of non-compliance by state or federal courts. The answer appears to lie in a then-recent article by Professor Gary Born raising doubts about the Convention's enforceability in state courts.[9] That Article contended that, notwithstanding its legislative implementation, the Convention can and should be determined by a federal court to be a directly applicable "self-executing" treaty and thus more effective as pre-emptive law in state courts.[10] While Born's 2018 Article cited no instance where a state court decision had been clearly contrary to the Convention, it expressed concern about the possibility.[11]

In the end, the ARBITRATION RESTATEMENT observed that

> whether Article II(3) of the New York Convention is self-executing does not affect the scope of FAA preemption because

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7. *Id.* § 1.6 reporters' note a(iv).

8. *Id.* § 1.9 reporters' note b(iv).

9. Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 115–16 (2018) [hereinafter Born, *New York Convention*].

10. *Id.* at 115–16; *see also id.* at 185 ("It is important to the Convention's continued role in providing an effective legal framework for international arbitration that the Convention be treated as self-executing"). Born is not the first to argue that the New York Convention (or at least parts of it) should properly be considered "self-executing." *Cf.* Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. DISP. RESOL. 101, 112 (2012).

11. Professor Born actually went much further in his 2018 Article, contending (erroneously) that "[i]f the Convention were not self-executing, there would be *no basis* for its application in U.S. state courts, which would likely place the United States in material breach of its obligations under the Convention . . . ." Born, *New York Convention*, *supra* note 9, at 116 (emphasis added); *see also id.* at 184 ("[U]nless the Convention is self-executing, *nothing in the FAA (or otherwise) makes its terms applicable in state courts*—an unsatisfactory result that would place the United States in material breach of its international obligations—while important provisions of the Convention would arguably not apply in U.S. federal courts.") (emphasis added). While directed at the New York Convention, these arguments would seem to apply to the Inter-American Convention on International Commercial Arbitration, *adopted* Jan. 30, 1975, O.A.S.T.S. No. 24384, 1438 U.N.T.S. 245 (entered into force for the United States on Oct. 27, 1990) [hereinafter Panama Convention]. The Panama Convention was implemented by Ch. 3 of the Federal Arbitration Act. *See* Pub. L. No. 101-369, § 1, 104 Stat. 448, 448 (1990) (codified as amended at 9 U.S.C. §§ 301–307).

> . . . the Article II defenses to enforcement of international arbitration agreements are essentially equivalent (subject to possible differences in the applicable law) to the defenses applicable under the savings clause of FAA § 2.[12]

Noting that "[t]he academic literature on the self-executing or non-self-executing character of the New York Convention is rather scarce," it concluded by saying that "because it is not necessary for this Restatement to take a position on whether the New York Convention is self-executing, it does not do so."[13]

Even though resolving the issue was not considered critical for the ARBITRATION RESTATEMENT's purposes, the "self-execution" proposition (hereafter the "proposition") warrants careful analysis for two reasons: first, because it has been repeated at some length in the new edition of Professor Born's highly-regarded treatise on International Commercial Arbitration[14] and second, because it raises questions with significant implications for U.S. treaty practice far beyond the area of international commercial arbitration.

Could a duly-ratified treaty be both directly applicable and legislatively implemented, that is, simultaneously "self-executing" and "non-self-executing"? Could a U.S. court, in the context of a specific proceeding involving private parties, override the decision of the constitutionally empowered "treaty makers" regarding how a treaty is implemented in U.S. law? If a treaty has been implemented legislatively, could a subsequent judicial declaration that it is actually "self-executing" give the federal government greater authority to compel compliance by courts of the constituent States of the Union than the implementing statute?

This essay considers all three questions, arguing that: (1) a treaty cannot simultaneously be both "non-self-executing" and "self-executing"; (2) the decision of the political branches about the domestic status of a duly-ratified treaty in U.S. law is controlling and cannot be overruled by a court in the context of private litigation; and (3) the fact that a treaty is deemed "self-executing" cannot, in and of itself, expand the federal

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12. ARBITRATION RESTATEMENT, *supra* note 4, § 1.6 reporters' note a(iv).

13. *Id.* §1.9 reporters' note b(iv). The Reporters also observe that "[a]lthough the language of Article V of the New York Convention is clear and precise, nothing in the Convention itself indicates that its provisions are self-executing" and that "while most other signatory States have implemented the New York Convention statutorily, they have mostly not done so on the view that the Convention lacks direct effect in national courts." *Id.*

14. *See generally* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (3rd ed. 2021) [hereinafter INTERNATIONAL COMMERCIAL ARBITRATION TREATISE]. See, in particular, *id.* § 1.04(A)(1)(e) at 114–17 and § 1.04(B)(1)(e)(vii) at 165–80. The self-executing theme is repeated throughout the work.

government's authority to compel compliance by the constituent States beyond what it could do by legislation.

The discussion begins by presenting, in Parts II and III, some necessary background about the role of treaties in the U.S. legal system. Parts IV and V address several specific issues regarding the ratification and implementation of the New York Convention. Part VI critiques the apparent objective of the "self-executing" proposition. Part VII suggests an alternative (and much less drastic) way of resolving the concerns that apparently motivate the proposition by offering a simple clarifying amendment to Chapter 2 of the Federal Arbitration Act. Part VIII concludes.

II. The Status of Treaties in U.S. Law

The fundamental principle of U.S. treaty law is enshrined in Article VI cl. 2 of the U.S. Constitution:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The importance of "treaty supremacy" to the drafters of the U.S. Constitution has been amply described elsewhere, particularly in the Restatement (Fourth) of the Foreign Relations Law of the United States.[15] There can be little question that the formulation in Article VI cl. 2 contemplated the direct application of duly-ratified treaties as binding federal law, equivalent to enacted legislation and displacing all inconsistent state law.[16] Indeed, the U.S. Supreme Court

15. *See* Restatement (Fourth) of Foreign Rel. L. of the U.S. § 301(1) (Am. L. Inst. 2018) [hereinafter Restatement (Fourth) of Foreign Rel. L.] ("Treaties made under the authority of the United States are part of the laws of the United States and are supreme over State and local law."). *See generally* David L. Sloss, The Death of Treaty Supremacy: An Invisible Constitutional Change (2016); Michael J. Glennon & Robert D. Sloane, Foreign Affairs Federalism: The Myth of National Exclusivity 307–09 (2016).

16. *Cf.* Jade Ford & Mary Ella Simmons, Comment, *The Treaty Problem: Understanding the Framers' Approach to International Legal Commitments*, 128 Yale L.J. 843 (2019) (concluding "that Framers on both sides of the states' rights debate acknowledged that treaties approved by the federal government should take precedence over state laws and interests," *id.* at 847, and that "[t]o protect state and individual rights, the Framers strictly delineated the domain of the federal government, granting it plenary authority over foreign affairs and the power to conclude international agreements," *id.* at 870); Carlos Manuel

had early occasion to affirm the doctrine of treaty supremacy over inconsistent state law, even in the absence of implementing legislation.[17] It has never given reason to doubt that basic principle.

Within just a few years, however, the Court adopted an interpretation of the rule in *Foster v. Neilson* that distinguished between two types of treaties:

> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, *whenever it operates of itself without the aid of any legislative provision.* But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[18]

This distinction—between treaties that are today denominated "self-executing" and those that are not—has been the object of many judicial interpretations over the years, giving rise to a substantial body of not-entirely-consistent judicial and academic analysis, including a debate about whether the distinction must be understood to operate against a presumption in favor of self-execution.[19]

Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 600 (2008) [hereinafter Vázquez, *Treaties as Law of the Land*].

17. *See* Ware v. Hylton, 3 U.S. 199 (1796). In the words of Justice Chase, "[a] treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way . . . . If a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may controul [sic] or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the National Constitution, or laws of any of the States, contrary to a treaty, shall be disregarded." *Id.* at 236–37. That decision is often understood to embrace at least a presumption of "self-execution," given Justice Chase's statement that "[u]nder this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour [sic] of its own authority to be executed in fact. It would not otherwise be the supreme law in the new sense provided for, and it was so before in a moral sense." *Id.* at 277. *See generally* David M. Golove & Daniel J. Hulsebosch, *The Federalist Constitution as a Project in International Law*, 89 FORDHAM L. REV. 1841 (2021).

18. Foster v. Neilson, 27 U.S. 253, 314 (1829) (emphasis added).

19. *See generally* RESTATEMENT (FOURTH), *supra* note 15, § 310 cmt. c, reporters' note 3 ("The case law has not established a general presumption for or against self-execution . . . ."). The literature on this question is extensive and reflects disagreement. *See, e.g.*, Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999); Tim Wu,

What is not open to question, however, is that the U.S. Supreme Court views it as a type of "law-making" distinction; that is, while both types of treaties are federal law, they have different effects on the law and in the courts. On this point, *Medellín v. Texas*[20] is dispositive. In that case, the U.S. Supreme Court had occasion to address the domestic status of several treaties to which the United States is a party, including the U.N. Charter, the Vienna Convention on Consular Relations, and the Optional Protocol to that Convention. In deciding that neither the Charter nor the Optional Protocol was "self-executing" and therefore neither imposed any obligations that were directly enforceable as federal law, the Court observed:

> This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law. The distinction was well explained by Chief Justice Marshall's opinion in *Foster v. Neilson* . . . . When, in contrast, "[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect."[21]

Treaties' Domains, 93 VA. L. REV. 571, 578–79 (2007); Vázquez, *Treaties as Law of the Land*, *supra* note 16; Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. OF INT'L L. 540, 540 (2008); David L. Sloss, *Executing* Foster v. Neilson*: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135 (2012); Julian Ku & John Yoo, Bond, *the Treaty Power and the Overlooked Value of Non-Self-Executing Treaties*, 90 NOTRE DAME L. REV. 1607 (2015); David H. Moore, *Treaties and the Presumption Against Preemption*, 2015 B.Y.U. L. REV. 1555. Professor Sloss points out that the distinction between "self-executing" and "non-self-executing" treaties has not been historically consistent but has instead involved at least six loosely related doctrines that have varied over time. *See* David Sloss, *The New ALI Restatement and the Doctrine of Non-Self-Executing Treaties*, FED. LAW., OCT.–NOV. 2017, at 56, 57–63. Professor Born's use of the term appears to reflect what Sloss refers to as the "justiciability doctrine," applying a "political-judicial" approach by treating the question as a separation of powers issue.

20. Medellín v. Texas, 552 U.S. 491 (2008).

21. *Id.* at 504–06 (citations omitted) (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)); *see also* Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 598–99 (1884) ("A treaty, then, is the law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."); *Medellín*, 552 U.S. at 527 ("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.").

> . . . 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."[22]

Accordingly, in *Medellín*, the Court rejected the Executive Branch's assertion that the President could give domestic legal effect to a relevant judgment of the International Court of Justice (ICJ) based on his "implicit authority" to implement the treaty obligations of the United States under the treaties at issue. The Court stated clearly: "The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress. As this Court has explained, when treaty stipulations are 'not self-executing they can only be enforced pursuant to legislation to carry them into effect.'"[23]

In other words, in the view of the U.S. Supreme Court, the distinction between "self-execution" and "non-self-execution" rests on—and falls within—the explicit (but connected) constitutional powers of the executive and legislative branches.[24] The question, accordingly, is not whether a duly ratified treaty is encompassed by the Supremacy Clause (it clearly is) but rather, how and by whom it may be given effect or "implemented" in U.S. law.

> If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented in "mak[ing]" the treaty, by ensuring that it contains language plainly providing for domestic enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote . . . consistent with all other constitutional restraints. . . . Once a treaty is ratified

22. *Medellín*, 552 U.S. at 505 (quoting Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)) (alterations in original).

23. *Id.* at 525–26 (citations omitted) (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)); *see also id.* at 527 ("[T]he non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so.").

24. "Each of the two means described above for giving domestic effect to an international treaty obligation under the Constitution—for making law—requires joint action by the Executive and Legislative Branches: The Senate can ratify a self-executing treaty "ma[de]" by the Executive, or, if the ratified treaty is not self-executing, Congress can enact implementing legislation approved by the President." *Id.* at 527.

> without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "[t]he power to make the necessary laws is in Congress; the power to execute in the President."[25]

In *Medellín* the Court rejected a unilateral effort by the Executive to declare a non-self-executing (and previously un-implemented) treaty to be directly applicable in U.S. law (both state and federal) without the aid of duly enacted legislation. It did so on the specific ground that the distinction is "law-making" and therefore a matter for the political branches acting together.[26] This approach reflects an obvious solicitude for our constitutional mechanisms of law-making. As the Court said in *Medellín*, "[o]ur Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances."[27]

By that logic, when the President and Senate, acting together as the constitutional treaty-makers, have determined that a treaty will not be directly enforceable in U.S. law (i.e., will be "non-self-executing") but will instead be given effect by duly enacted statute, that determination is conclusive and the courts cannot thereafter substitute their (contrary) determination and declare the treaty "self-executing."[28] On this fundamental premise, the proposition that a court could now declare the New York Convention self-executing errs.

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25. *Id.* at 526 (alteration in original) (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006)).

26. "This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law. . . . [W]hile 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.'" *Id.* at 504–05 (quoting *Igartua-De La Rosa*, 417 F.3d at 150) (internal citations omitted). The opinion by Chief Justice Roberts also noted that "[t]he President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them." *Id.* at 525.

27. *Id.* at 515 (citing U.S. CONST. art I, § 7).

28. *Cf.* RESTATEMENT (FOURTH) OF FOREIGN REL. L., *supra* note 15, § 310(2) ("If the Senate's resolution of advice and consent specifies that a treaty provision is self-executing or non-self-executing, courts will defer to this specification."); RESTATEMENT (THIRD) OF FOREIGN REL. L. OF THE U.S. §111 cmt. h (1987) (explaining that the intent of constitutional treaty makers is dispositive).

III. Making The Self-Executing/Non-Self-Executing Distinction

Moreover, the proposition that a court could do so, notwithstanding the fact of the Convention's statutory incorporation, misapprehends the consequences of the "self-executing/non-self-executing" distinction. Under the Constitution, *all* duly ratified treaties are the "supreme Law of the Land."[29] The distinction between self-execution and non-self-execution, as modes of implementation, is essentially concerned with the "justiciability" of the treaty in domestic law. A "self-executing" treaty is directly applicable and enforceable in federal and state courts while a "non-self-executing" treaty, standing alone, is not.[30] For that reason alone, a treaty *cannot* simultaneously be both self-executing and non-self-executing.

It is a mistake, however, to understand the difference as a starkly binary ("either/or") proposition, in the sense that only a self-executing treaty is, or can be given judicial effect as, domestic law. The reality is more complicated. The distinction does not mean that a treaty or a treaty provision has legal effect, or is justiciable, in domestic law *only if* it is "self-executing," or that *every* treaty or treaty provision that is directly enforceable is therefore properly considered "self-executing," or even that treaties or treaty provisions that are (or might be) considered "self-executing" cannot also be legislatively implemented.[31]

For one thing, it is certainly possible for the President and the Senate to declare during the advice-and-consent process that *some provisions* of a treaty are self-executing (judicially enforceable as domestic law), and

29. As noted in *Medellín*, even "non-self-executing" treaties impose obligations on the federal government. *See* 552 U.S. at 516. The point of a non-self-executing treaty is that it "addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court." Id. (quoting *Foster*, 27 U.S. at 314) (emphasis added).

30. *See* Restatement (Fourth) of Foreign Rel. L., *supra* note 15, § 310; *see also Medellín*, 552 U.S. at 505 n.2 ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.").

31. In fact, the vast majority of "self-executing" treaties are implemented legislatively (including, in particular, extradition, mutual legal assistance, and tax treaties). In those instances, the "self-executing" designation is "empowering" or "connecting" in the sense that it permits the government to implement the treaties under pre-existing legislation. *See* David P. Stewart, *Recent Trends in Treaty Implementation*, *in* Supreme Law of the Land?: Debating the Contemporary Effects of Treaties Within the United States Legal System 228, 230–32, 276–281 (Gregory H. Fox, Paul R. Dubinsky & Brad R. Roth eds., 2017).

others are not (whether or not they have been implemented legislatively). Indeed, that has happened.[32]

As the RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW acknowledges, compliance with a non-self-executing treaty "may be achieved through judicial application of preexisting or newly enacted law, or through legislative, executive, administrative, or other action outside the courts."[33] Indeed, in some instances, a treaty will be ratified on a non-self-executing basis with no implementing legislation. That has typically been the case where (i) the obligations under the treaty have no domestic implications[34] or (ii) where existing domestic law is deemed already sufficient to satisfy those obligations.[35] Where the treaty does require changes to domestic law, however, implementing legislation will normally be drafted only to accomplish those specific changes deemed necessary to bring the United States into compliance with its obligations.[36]

Whether or not implemented legislatively, duly ratified non-self-executing treaties are still federal law and impose obligations of compliance on the government. As the *Medellín* Court acknowledged:

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32. *See* RESTATEMENT (FOURTH) OF FOREIGN REL. L., *supra* note 15, § 310 cmt. b, reporters' note 5. It has not happened, however, in the case of the New York Convention.

33. *Id.* § 310(1). As Chief Justice Marshall observed in *Foster*, "[a treaty] is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, wherever it operates of itself *without the aid of any legislative provision*." 27 U.S. at 314 (emphasis added). The ultimate question is whether the treaty is one that "operates of itself without the aid of any legislative provision," or rather "addresses itself to the political, not the judicial department . . . ." *Id.*; *see also* RESTATEMENT (FOURTH) OF FOREIGN REL. L., *supra* note 15, § 310 cmt. a; *Medellín*, 552 U.S. at 505.

34. Some treaties entail only "horizontal" relationships between contracting States, with no domestic effect. *See, e.g.*, Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., July 3, 1974, 27 U.S.T. 1645 (the United States withdrew in 2002); South Pacific Nuclear Free Zone Treaty protocols 1, 2, 3, Mar. 25, 1996, S. Treaty Doc. 112-2.

35. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, 660 U.N.T.S. 195, S. EXEC. DOC. C, 95-2 (1978); International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (ratified by the United States June 8, 1992); *cf.* RESTATEMENT (FOURTH) OF FOREIGN REL. L., *supra* note 15, § 310 reporters' note 13 ("If compliance with a non-self-executing treaty provision could be secured through newly passed legislation, it is equally tenable to do so through legislation previously enacted, which may afford the President the authority to direct compliance with the provision in question.").

36. *See, e.g.*, Message from the President Transmitting The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled, 1 PUB. PAPERS 125 (Feb. 10, 2016) (indicating that proposed legislation would be submitted to make the "narrow changes in U.S. law" necessary to implement certain provisions of the treaty).

> None of this is to say, however, that the combination of a non-self-executing treaty and the lack of implementing legislation precludes the President from acting to comply with an international treaty obligation. It is only to say that the Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect. That is, the non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts. The President may comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution. But he may not rely upon a non-self-executing treaty to "establish binding rules of decision that pre-empt contrary state law."[37]

Notably, it has been standard practice since *Medellín* for the President explicitly to address the question of domestic implementation in the formal treaty transmittal, and for the Senate Foreign Relations Committee to make clear its views in its various Reports on treaties proposed for ratification.[38] Typically, although not uniformly, the resulting joint determination has been reflected in the relevant Resolution of Advice and Consent and instrument of ratification.[39]

One line of argument, to which Professor Born appears to subscribe, contends that whether a given treaty or a specific provision in a treaty[40] is or is not "self-executing" must properly be determined by the language of the text itself—in effect that some treaties are inherently self-executing and that U.S. courts *must* apply relevant treaty provisions in cases properly brought before them to the extent the treaty provisions *by their own terms* provide applicable rules of decision for courts.[41]

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37. *Medellín*, 552 U.S. at 530.

38. *See, e.g.*, S. COMM. ON FOREIGN REL., UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, S. EXEC. DOC. NO. 115-7, at 6 (2018) ("The executive branch has indicated its view [in Treaty Doc, 114-7] that the treaty is self-executing. Accordingly, federal or state implementing legislation is not necessary. The Resolution of Advice and Consent to Ratification includes a declaration stating that the Convention is self-executing.").

39. *See, e.g.*, S. COMM. ON FOREIGN REL., PROTOCOL AMENDING TAX CONVENTION WITH THE SWISS CONFEDERATION, S. EXEC. DOC. NO. 116-2, at 8 (2019) ("The advice and consent of the Senate under section 1 is subject to the following declaration: The Protocol is self-executing.").

40. As the RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW acknowledges, in given situations the question may be whether a particular provision of a treaty is self-executing (rather than the treaty as whole). *See* RESTATEMENT (FOURTH) OF FOREIGN REL. L., *supra* note 15, § 310 cmt. b.

41. INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(vii)(1), at 166 ("The starting point for analysis of the Convention's status under U.S. law is its text, which

That is, in essence, an argument that the status of a treaty in U.S. domestic law is determined by the international community, or at least those States involved in drafting and concluding the treaty, and thus lies beyond the reach of the political branches. Yet that cannot be true—certainly not when that issue has been definitively determined by the constitutionally-empowered treaty makers.

Granted, U.S. courts have on occasion held that a treaty—or more often a specific provision in a treaty—"is" self-executing, but they have typically done so (i) in the absence of a definitive decision by the political branches (that is, when the domestic status of the treaty had not been determined by the President and the Senate during the "treaty making" process), and (ii) when the relevant textual formulation is sufficiently clear to permit a judge to give it effect as domestic law in the context of the specific case.[42] That is a very different approach, however, from claiming that, on the basis of the perceived "intent of the international community," a U.S. court can exercise inherent authority to overrule the express decision of the political branches made at the time of ratification.

The "self-executing" proposition put forward by Professor Born nonetheless contends that the specific wording and structure of an instrument, as adopted at the international level, is the proper referent for deciding whether its provisions were intended to apply directly in U.S. courts.[43] The question might turn, for instance, on whether the treaty is couched in mandatory language such as "shall" or "must" and "whether the provision constitutes 'a directive to domestic courts,' as distinguished from the legislative and executive branches."[44] Under this approach, Article II of the New York Convention is properly understood, in Born's view, to establish "mandatory, complete, and comprehensive substantive rules, directed … to national courts, for the recognition and enforcement of international arbitration agreements,"[45] and that "[t]he text of [the operative] provisions, as well as

argues decisively for self-executing status in U.S. courts."); *cf.* Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 B.Y.U. L. REV. 1639 (2015).

42. *See, e.g.*, Earl v. Boeing Co., 515 F. Supp. 3d 590, 602–05 (E.D. Tex. 2021); *see generally* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988).

43. *See* INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(vii)(3), at 168.

44. Born, *New York Convention*, *supra* note 9, at 135.

45. *Id.* at 115.

their objects and purposes, also indicate that they were intended to apply directly in [U.S.] courts."[46]

The RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW takes a different view, however: "[c]ourts will evaluate whether the text and context of the provision, along with other treaty materials, are consistent with an understanding by the U.S. treatymakers that the provision would be directly enforceable in courts in the United States."[47]

It continues by noting that in this context:

> [r]elevant considerations include: (a) whether the treaty provision is sufficiently precise or obligatory to be suitable for direct application by the judiciary; and (b) whether the provision was designed to have immediate effect, as opposed to contemplating additional measures by the political branches. If the Senate's resolution of advice and consent specifies that the treaty provision is self-executing or non-self-executing, courts will defer to this specification.[48]

The acknowledgement of the primacy of the intent of the "U.S. treaty makers" bears emphasis. When the issue has *not* been determined by them in respect of a particular treaty, a domestic court may be compelled to reach a decision, and the clarity of the relevant treaty language can surely make it easier to divine the meaning of a treaty provision and to apply it to the facts of a particular dispute. In the case of the New York Convention, it cannot be disputed that "Article II establishes mandatory, complete, and comprehensive substantive rules, directed specifically to national courts, for the recognition and enforcement of international arbitration agreements."[49]

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46. *Id.* at 116. Born's 2018 Article also asserts that by virtue of its language, object and purposes, "Article II of the Convention is self-executing." *Id.* at 137. It points in particular to the text of Article II, which "argues fairly clearly for self-executing status." *Id.* That conclusion, Born says, "is supported by the object and purposes of both that provision and the Convention more generally." *Id.* at 141. Moreover, "the nature of the Convention and the rights it confers confirm the self-executing character of Article II." *Id.* at 144. To the same effect, Born asserts that "the text, purposes, and history of the Convention all argue decisively for treating both Article II of the Convention . . . and Articles III, IV, V and VI . . . as self-executing." *Id.* at 185; *see also* INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(vii)(2), at 167–69.

47. RESTATEMENT (FOURTH) OF FOREIGN REL. L., *supra* note 15, § 310(2).

48. *Id.*

49. Born, *New York Convention*, *supra* note 9, at 115.

It is not uncommon for a treaty to require States Parties to give appropriate effect to its provisions in their domestic law.[50] Yet treaty language alone cannot mandate "self-execution" as a method of ensuring domestic implementation as understood under the U.S. Constitution, nor can a treaty's text empower the courts to overrule the express determination of the constitutionally-empowered treaty-makers.[51] To contend that treaty language determines the issue is to claim that the President and the Senate are somehow bound by an implicit decision of the "international community" regarding the effect of a treaty in domestic U.S. law and are precluded from alternatively implementing it through legislation, subject to correction by the courts in the context of private litigation. That cannot be true.[52]

There is, however, another reason why it is misleading to suggest that a particular treaty "is" or "is not" inherently self-executing. That distinction is one of domestic U.S. law and practice; it certainly is not imposed by the international community or any rule or principle of international law. Around the globe, no uniform approach to treaty incorporation and implementation exists in domestic practice; different national legal systems approach the question of treaty "domestication" differently.[53] To be sure, a few other countries make a comparable distinction in their domestic law but none have adopted an approach

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50. For example, Article 2(2) of the International Covenant on Civil and Political Rights, to which the United States is a party, provides that

> [w]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

ICCPR, *supra* note 35, art. 2(2) (*ratified* by the United States on June 8, 1992) (entered into force Sept. 8, 1992).

51. "[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." Medellín, 552 U.S. at 519.

52. Of course, it may be that, in a given bilateral context, the specific treaty language could reflect the intention of the two parties that they should each enact the necessary implementing legislation to give effect to their reciprocal obligations.

53. In his dissent to the *Medellín* decision, Justice Breyer (joined by Justices Souter and Ginsburg) noted that "the issue whether further legislative action is required before a treaty provision takes domestic effect in a signatory nation is often a matter of how that nation's domestic law regards the provision's legal status. And that domestic status-determining law differs markedly from one nation to another." *Medellín*, 552 U.S. at 547–48 (Breyer, J., dissenting). *See generally* Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, *in* NATIONAL TREATY LAW AND PRACTICE 1, 9–50 (D. Hollis, M.R. Blakeslee & L.B. Ederington eds., 2005) [hereinafter Hollis, *A Comparative Approach to Treaty Law and Practice*].

identical to the one in U.S. law and go as far as distinguishing between self-executing and non-self-executing treaties.[54] In some, *no* treaties are directly applicable (or "self-executing"); that is the case, for example, in the United Kingdom, and variations of that rule exist throughout the world. In many other countries — especially those following the so-called "monist" approach — most if not *all* duly ratified treaties become directly applicable (sometimes after requirements for official proclamation or publication have been satisfied).[55] In still others, different types of treaties have different effects: some, such as those involving human rights, not only supersede inconsistent domestic legislation but also displace inconsistent constitutional provisions.[56] In any event, neither the practice of foreign legal systems nor any perceived "intent" on the part of the "international community" can be determinative of the status of a treaty in the U.S. domestic legal system.[57]

Given the disparity of national practices, it is implausible to suggest that either the practice of foreign nations or the "intent of the international community" determines whether U.S. courts must consider a treaty self-executing, either in the face of or in the absence of a considered decision by the President and Senate.[58]

Accepting the proposition that (i) the intent of the "international community" and/or (ii) the *post-hoc* view of the judiciary can override the determinations of the President and the Congress (as the constitutionally-designated "treaty-makers") would create profound confusion, uncertainty and instability about the domestic status of all treaties—

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54. *See* David Sloss, *Domestic Application of Treaties*, *in* THE OXFORD GUIDE TO TREATIES 15, 357 (Duncan B. Hollis ed., 2d ed. 2020) ("In sum, in both monist and dualist States, it is rare for a treaty to have domestic legal force unless the legislature has acted either to approve the treaty before international entry into force, or to implement the treaty after international entry into force."); *see generally* Duncan B. Hollis & Carlos M. Vázquez, *Treaty Self-Execution as "Foreign" Foreign Relations Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 467 (Curtis A. Bradley ed., 2020).

55. For a survey of typologies and methods of incorporation, see generally Hollis, *A Comparative Approach to Treaty Law and Practice*, *supra* note 53.

56. For an overview of and references to resources regarding monism and dualism as different relationships between international and domestic law, see Madelaine Chiam, *Monism and Dualism in International Law*, OXFORD BIBLIOGRAPHIES (June 27, 2018), https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml.

57. *Cf.* Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 132 ("[T]he relevant intent in discerning self-execution is the intent of the U.S. treaty-makers (that is, the President and the Senate), not the collective intent of the various parties to the treaty.").

58. International law does not dictate how states must "domesticate" their treaty obligations; different states follow different approaches. *See generally*, Hollis, *A Comparative Approach to Treaty Law and Practice*, *supra* note 53.

past, present and future. If that were the rule, neither the President nor the Senate could be certain that their joint decisions about the domestic status of treaties would be respected, and private parties would be unable to rely with any certainty on the provisions of the implementing legislation as well.

There is, moreover, no inherent reason to suspect that judges are better equipped than the President and Senate (acting together as the constitutional "treaty makers") to determine how best to implement the country's international treaty obligations.[59] In the modern context, treaties cover a wide range of substantive topics. Some do involve legal issues that are familiar to judges, including (for example) questions about the interpretation and enforcement of arbitral agreements and awards. Many others involve subjects far removed from the ordinary courtroom and center on topics most judges are properly reticent to engage, such as treaties concerning the foreign relations and binding international commitments of the United States.

It is plausible, one supposes, that at some point *after* ratification the Congress might decide to adopt legislation (subsequently approved by the President) to implement a given treaty (in whole or part), although that does not seem to have happened.[60] What does not seem possible is for a court, in the face of legislative implementation pursuant to the decision of the constitutional treaty makers, to impose its own view about how the treaty should have been (or might best be) implemented.

IV. Implementation of The New York Convention

Regarding the specific case of the New York Convention, it does not appear that the terms "self-executing" or "non-self-executing" were actually used when U.S. ratification of the Convention was considered in 1968, either in the President's letter transmitting the Convention to the Senate or in the Senate's subsequent Resolution of Advice and Consent.[61] Yet the record reflects that the unmistakable shared intent of these constitutional "treaty makers" was one of "direct

59. For a recent discussion of the proper role of the "instrument of judicial control" at both the state and federal levels in respect of foreign relations and international law, see Paul B. Stephan, *One Voice in Foreign Relations and Federal Common Law*, 60 VA. J. INT'L L. 1 (2019) [hereinafter Stephan, *One Voice in Foreign Relations and Federal Common Law*].

60. Whether the President and the Senate together could decide—sometime after ratification—to change their collective mind and decide that a legislatively implemented treaty should properly be considered self-executing is an interesting question. I am aware of no precedent.

61. Message from the President of the United States, Transmitting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S. EXEC. DOC. E 90-2 (1968) [hereinafter S. EXEC. DOC. NO. 10].

incorporation" of the Convention—*through legislation*—as a matter of federal law.[62]

Indeed, as recognized by the Report of the Senate Committee on Foreign Relations recommending advice and consent: "Changes in the Federal Arbitration Act (title 9 of the United States Code) will be required before the United States becomes party to the convention. Accordingly, the President's letter of transmittal states that U.S. accession to the convention will be executed 'only after the necessary legislation is enacted.'"[63]

In *Medellín*, the Supreme Court acknowledged this fact by referring to the New York Convention as an example of a non-self-executing treaty that had been legislatively implemented.[64]

Congress chose not to repeat the entire text of the treaty in Chapter 2 of the FAA,[65] or even just its "operative" provisions. Instead, Congress said simply that the Convention "*shall be enforced* in United States courts in accordance with this chapter" and that "[a]n action or proceeding falling under the Convention *shall be deemed to arise under the laws and treaties* of the United States."[66] There cannot be serious doubt that the statute meets the criteria articulated by the Supreme Court for

62. S. EXEC. DOC. NO. 10, at 2 (1968).

63. *Id.* President Johnson's Letter of Transmittal stated explicitly that the U.S. instrument of accession "will be executed only after the necessary legislation is enacted." S. EXEC. DOC. E 90-2, at 1 (1968); See also the testimony of Amb. Richard Kearney at the Senate hearing, on behalf of the Department of State, confirming that "[w]e will not submit the U.S. ratification of the convention until this legislation establishing adequate procedures has been approved by the Congress." S. EXEC. DOC. NO. 10, app. at 6 (1968). *See generally* Stanley L. Levine, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CAL. W. INT'L L.J. 67, 73 (1971).

64. *See* Medellín v. Texas, 552 U.S. 491, 505 (2008) ("[W]hile treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty . . . is ratified [on a self-executing basis]."); *see also id.* at 521–22 ("Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes."). C*f.* 9 U.S.C. § 201 ("The [U.N.] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."). Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result.

65. *Cf.* S. EXEC. REP. NO. 10, at 2 (1968).

66. 9 U.S.C. §§ 201, 203 (emphasis added). The remaining sections deal with specific questions pertinent to cases involving the Convention in U.S. courts which are not covered in the Convention itself. Thus, § 202 addresses jurisdictional questions; § 204 concerns venue, § 205 addresses removal from state courts, § 206 provides for orders to compel arbitration and appoint arbitrators, § 207 provides a statute of limitations for enforcement of awards, and § 208 confirms the "residual application" of Chapter 1 to the extent "not in conflict with this chapter."

"language plainly providing for domestic enforceability."[67] It is thus clear that the Convention was "executed" (i.e., directly incorporated into U.S. law) by statute.

As Professor John Coyle noted some years ago, treaties (or particular treaty obligations) may be domesticated in U.S. law by means of "incorporative statutes."[68] Coyle distinguished between several types of such statutes: (1) those that incorporate the treaty by reference (which he describes as "enabling legislation" or "implementing legislation");[69] (2) those whose text mirrors or closely tracks the text of the treaty; or (3) those that are "otherwise clearly intended to give effect to a particular treaty provision." [70] In Coyle's view, legislation that translates language and concepts contained in non-self-executing treaties into domestic law—as opposed to merely "facilitating" U.S. compliance—fall within the definition of "incorporative statutes." [71] In his view, the legislation giving domestic effect to the New York Convention, in particular FAA section 207, is an example of such an enabling or incorporative statute.[72]

Surprisingly, both the 2018 Article and the Treatise nonetheless assert that nothing in the relevant legislative history or the treaty ratification record "contradicts" the conclusion that the Convention "is" self-executing.[73] Discounting the fact of statutory implementation, the Article finds "no indication in the U.S. ratification process that the Convention was considered non-self-executing."[74] Indeed, it argues to

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67. *Medellín*, 552 U.S. at 526. Indeed, more than one court has said that Chapter 2 of the Federal Arbitration Act "codifies" or "implements" the Convention; *see, e.g.*, Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 631 (1985); Cvoro v. Carnival Corp., 941 F.3d 487, 494 (11th Cir. 2019); Castro v. Tri Marine Fish Co., 921 F.3d 766, 773 (9th Cir. 2019); Chevron Corp. v. Republic of Ecuador, 949 F. Supp. 2d 57, 64 (D.D.C. 2013), *aff'd*, 795 F.3d 200 (D.C. Cir. 2015), *cert. denied*, 578 U.S. 1023 (2016).

68. John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 717 (2010). In his taxonomy, that term includes "any statute that incorporates language or concepts derived from an international treaty." *Id.* at 664.

69. *Id.* at 717 ("Incorporative statutes have long been a part of American law. Their purpose is now, and has always been, to *incorporate*—to bring international legal rules *into* the domestic law of the United States.").

70. *Id.* at 664–66.

71. *Id.* at 666.

72. *Id.* at 664 n.35.

73. Born, *New York Convention*, *supra* note 9, at 144; INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(v)(4), at 169 ("The language, structure and history of Chapter 2 of the FAA also indicate that the Convention is self-executing.").

74. Born, *New York Convention*, supra note 9, at 161; *see also* INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(v)(5), at 175–78. As indicated in Foster v. Neilson, 27 U.S. 253 (1829), there is no established presumption in U.S. law that treaties are (or

the contrary, finding—ironically in the very discussion of implementing legislation—inferential support for the Convention's self-executing character.[75]

It seems difficult, indeed, to square that assertion with the specific reference in the Senate Foreign Relations Committee Report to the statement in the President's Transmittal that the New York Convention "will be *executed* only after the necessary legislation is enacted"[76] and the Report's own explicit statement that "[c]hanges in the Federal Arbitration Act (title 9 of the United States Code) will be *required before* the United States becomes party to the convention."[77] The more compelling conclusion is to credit the adoption of implementing legislation (in particular, FAA section 207), together with the absence of a declaration of self-execution, as conclusive evidence of non-self-execution (and legislative implementation).

Granted, had the implementation question *not* been decided at the point of ratification—if the domestic legal status of the Convention had been left unaddressed or unresolved—the argument in favor of finding some or all of the relevant treaty articles to be capable of direct application would have some greater merit. U.S. courts have on occasion addressed the question of self-execution in the context of specific provisions or the treaty as a whole *when that issue had not been definitely resolved* by the political branches.[78] As discussed above, however, when such a decision has been made, it is far more difficult to contend that courts are empowered to second-guess or override it.[79]

Both the International Commercial Arbitration Treatise and Born's *New York Convention* article argue that self-execution would be the better

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are not) self-executing in U.S. law. *See* RESTATEMENT (FOURTH) OF FOREIGN REL. L., *supra* note 15, § 310 cmt. d, reporters' notes 1, 3 (no general or categorical presumption either for or against self-execution).

75. Born, *New York Convention*, *supra* note 9, at 162–63.

76. *Id.* at 147 n.175 (citing S. EXEC. E 90-2, at 2 (1968)) (emphasis added). President Johnson's Letter of Transmittal stated explicitly that the U.S. instrument of accession "will be executed only after the necessary legislation is enacted." S. Exec. E 90-2, at 1 (1968). See also the testimony of Amb. Richard Kearney at the Senate hearing, on behalf of the Department of State, confirming that "[w]e will not submit the U.S. ratification of the convention until this legislation establishing adequate procedures has been approved by the Congress." Appended to S. Exec. Rep. No. 10, at 6 (1968). *See generally* Levine, *supra* note 63.

77. S. EXEC. REP. NO. 10, at 2 (1968) (emphasis added).

78. *See, e.g.*, Republic of Marshall Islands. v. United States, 865 F.3d 1187, 1194 (9th Cir. 2017) ("[W]e must be wary of textual interpretations that would have the judiciary exercise powers constitutionally assigned to another branch; thus, we look for indications of the President's and the Senate's intentions regarding self-execution" (citing to *Medellín*)).

79. Neither the International Commercial Arbitration Treatise nor Born's *New York Convention* article cite any precedent for such a decision.

option. Is there any necessary reason to think that domesticating the New York Convention by an "incorporative" statute should be considered less effective, less comprehensive, or less conclusive than if, for example, the statute had repeated the entire text of the Convention *in haec verba*? To put the issue another way, should the statements in FAA Chapter 2—that the Convention "shall be enforced in United States courts in accordance with this chapter," and that actions or proceedings falling under the Convention "shall be deemed to arise under the laws and treaties of the United States"—be considered a less-compelling indication of the domestic treaty-makers' intent to make the Convention directly applicable and pre-emptive as federal law than if they had said explicitly that the treaty would be "self-executing"? The answer to both questions must be no.

The prospect of a definitive judicial determination that the New York Convention as a whole "is" self-executing (that is, directly applicable without regard to FAA Chapter 2) poses even more questions. What difference would it actually make? Would that holding operate only prospectively? Or would it mean that the Convention has always been directly applicable, thereby invalidating or displacing Chapter 2 retroactively? Would it nullify all decisions previously rendered on (or related to) its meaning and interpretation? The resulting uncertainty is, by itself, a strong reason to reject the "self-executing" proposition.

V. The Convention And The McCarran-Ferguson Act

It turns out that some aspects of the "self-execution" issue have already been considered in a line of judicial decisions addressing a very specific question: whether the New York Convention, as implemented by Chapter 2 of the FAA, is properly considered an "Act of Congress" subject to the "reverse-preemption" provisions of the McCarran-Ferguson Act.[80] Under that statute, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ."[81] In effect, the McCarran-Ferguson Act means that by enacting the particular federal legislation in question, Congress must have clearly intended to override the state insurance law in question. The legislative history of Chapter 2 of the FAA, however, does not reveal any such intent with respect to the New York Convention.

80. The McCarran-Ferguson Act is codified at 15 U.S.C. §§ 1011–15.

81. 15 U.S.C. § 1012(b). Because the Act allows state laws to supersede some federal laws, it is commonly said to permit "reverse-preemption."

In what appears to have been the earliest decision to address the issue in *Stephens v. American International Insurance Co.*,[82] the Second Circuit Court of Appeals concluded that Chapter 2 of the FAA is an "Act of Congress" and, lacking any indication of the necessary intent to override the relevant state insurance law, was accordingly "reverse-preempted" by state law under McCarran-Ferguson. In a relatively brief opinion, the Court reasoned that "the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation."[83] In consequence, the New York Convention itself was "simply inapplicable" in the particular instance.[84]

The majority of courts to have addressed the issue subsequently, however, have reached a contrary conclusion.[85] In *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*,[86] for example, the Fifth Circuit held that the Convention *did* override the relevant state statute because, in enacting McCarran-Ferguson, Congress did not intend to include treaties within the scope of the term "Act of Congress."[87] The Convention itself, therefore, superseded state law as an "implemented treaty" so that the McCarran-Ferguson provision was inapplicable.[88]

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82. Stephens v. American Int'l Ins., 66 F.3d 41, 45 (2d Cir. 1995). That decision has been followed by a few others, including Foresight Energy, LLC v. Certain London Mkt. Ins., 311 F. Supp. 3d 1085, 1100 (E.D. Mo. 2018) ("[T]he Court will follow the Second Circuit's holding in *Stephens*, that the non-self-executing Convention does not provide a rule of decision for U.S. courts, and only its implementing legislation the Convention Act is capable of preempting state law."). *See also* Transit Casualty Co. v. Certain Underwriters at Lloyd's of London, 119 F.3d 619 (8th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998).

83. *Stephens*, 66 F.3d at 45 (citing 9 U.S.C. §§ 201–208).

84. *Id.*

85. *See* ARBITRATION RESTATEMENT, *supra* note 4, §§ 1.1 reporters' note k, 1.6 reporters' note a (iv) (listing relevant case law); *see also* Brian A. Briz & César Mejía-Dueñas, *Which Law is Supreme? The Interplay Between the New York Convention and the McCarran-Ferguson Act*, 74 U. MIAMI L. REV. 1124, 1143 (2020) ("Consistent case law in the Eleventh Circuit demonstrates a strong likelihood that the Eleventh Circuit Court of Appeals would refuse to apply the reverse-preemption provision in the MFA to invalidate an agreement to arbitrate under the Convention.").

86. 587 F.3d 714, 724–25 (5th Cir. 2009) (en banc). That decision was followed in McDonnel Grp., LLC v. Great Lakes Ins., 923 F.3d 427, 432 (5th Cir. 2019) ("[T]he McCarran-Ferguson Act does not permit state laws to reverse-preempt the Convention.").

87. It would not be reasonable, the Court said, "to construe the term 'Act of Congress' in the McCarran-Ferguson Act as including 'a treaty implemented by an Act of Congress' or as an indication of congressional intent to permit state law to preempt implemented, non-self-executing treaty provisions but not to preempt self-executing treaty provisions . . . ." *Safety Nat'l*, 587 F.3d at 723–34.

88. *Id.* at 724. Because a court applying the implementing statute must consult the Convention to ascertain the conflict with state law, the majority held it was the Convention itself, rather than the statute, that is "construed" under McCarran-Ferguson. Because by its terms that Act did not apply to treaties, the majority concluded it could "not cause [state law] to reverse-preempt the

Acknowledging some doubt about the "self-executing" question, the Court of Appeals, somewhat confusingly, stated that

> Implementing legislation that does not conflict with or override a treaty does not replace or displace that treaty. A treaty remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress. The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an "Act of Congress."[89]

Subsequently, in *ESAB Group, Inc. v. Zurich Insurance PLC*,[90] the Fourth Circuit followed the Fifth Circuit in holding that Congress did not intend McCarran-Ferguson to encompass statutes implementing treaties. In doing so, however, it took a somewhat different approach. Citing the U.S. Supreme Court's decision in *American Insurance Association v. Garamendi*,[91] the Fourth Circuit said that "McCarran-Ferguson is limited to legislation within the domestic realm" and that "Congress did not intend for the McCarran-Ferguson Act to permit state law to vitiate international agreements entered [into] by the United States."[92] The Court of Appeals, therefore, held that "the

Convention . . . ." *Id.* at 732. A vigorous dissent by three judges argued that "[b]ecause a non-self-executing treaty [such as the Convention] cannot itself provide a rule of decision in U.S. courts, the only candidate for a source of federal law with preemptive force under the Supremacy Clause is the statute that implements the treaty." *Id.* at 737–52 (Elrod, J., dissenting).

89. *Id.* at 722–23. Judge Edith Brown Clement concurred in that decision but would have held, more narrowly, that Article II of the Convention is "self-executing" and therefore preempted the relevant state statute by virtue of the Supremacy Clause. *Id.* at 732–37 (Clement, J., concurring). Three other members of the court dissented, however, on the ground that a non-self-executing treaty cannot itself provide a rule of decision in U.S. courts and that a legislatively-implemented treaty is not a treaty within the meaning of the Supremacy Clause. *Id.* at 737–52 (Elrod, J., dissenting).

90. 685 F.3d 376 (4th Cir. 2012).

91. 539 U.S. 396, 428 (2003).

92. *ESAB Grp., Inc.*, 685 F.3d at 388-89; *see also id.* at 390 ("As we have observed, the federal government must be permitted to 'speak with one voice when regulating commercial relations with foreign governments.' With the Convention and Convention Act, the government has opted to use this voice to articulate a uniform policy in favor of enforcing agreements to arbitrate internationally, even when 'a contrary result would be forthcoming in a domestic context.' To allow 'parochial refusal[s]' to enforce foreign arbitration agreements would frustrate the very purposes for which the Convention was drafted: achieving the predictable and orderly resolution of disputes 'essential to any international business transaction' and ensuring parties are not haled into hostile or inappropriate forums.") (first quoting Michelin Tire v. Wages, 423 U.S. 276, 285 (1976); then quoting Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 629 (1985); and then quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974)).

Convention Act, as *legislation implementing a treaty*, is not subject to reverse pre-emption, so insurance disputes are not exempt from the Convention Act pursuant to McCarran-Ferguson's reverse preemption."[93]

Most subsequent decisions have generally followed the approach of *Safety National* and *ESAB* rather than *Stephens*.[94] Most recently, the Ninth Circuit did so in *CLMS Management Services Limited Partnership v. Amwins Brokerage of Georgia, LLC*,[95] holding that Article II(3) of the Convention is "self-executing" and therefore not an "Act of Congress" subject to reverse-preemption under the McCarran-Ferguson Act through application of Washington statute prohibiting mandatory pre-dispute arbitration clauses in insurance contracts.

In Professor Born's view, this approach reflects strong support for the proposition that the New York Convention itself is "self-executing."[96] Indeed, many of the opinions do, in one way or another, characterize the Convention (or at least its operative articles) as "self-executing." None, however, conclusively holds that the treaty operates directly in U.S. law without regard to its implementing legislation—the hallmark of "self-execution."

Instead, these decisions use the term "self-executing" to decide a different, and much narrower, question of legislative interpretation—whether Chapter 2 is properly considered a "federal statute" for the specific purposes of the "reverse preemption" provisions of McCarran-

93. *Id.* (emphasis added).

94. *See, e.g.*, Martin v. Certain Underwriters at Lloyd's, London, No. SACV 10-1298, 2011 WL 13227729, at *6 (C.D. Cal. Sept. 2, 2011) (holding that since no "Act of Congress" was necessary for Section 3's enforceability, the Convention was not preempted by California state law under McCarran-Ferguson); Catalina Holdings v. Hammer, 378 F. Supp. 3d 687, 693–95 (N.D. Ill. 2019) (holding the word "shall" (in section 2 of the FAA) is indicative of a self-executing treaty provision); CLMS Mgmt.v. Amwins Brokerage of Georgia, No. 3:19-cv-05785-RBL, 2019 WL 71875547 at *4, *5 (W.D. Wash. Dec. 26, 2019) (McCarran-Ferguson does not apply to Article II (3) because it is "self-executing" or at least is not an "Act of Congress" subject to preemption under that statute, *id.* at *5; "Section 3 contains exactly the type of 'directive to domestic courts' that was missing in *Medellín*, making it self-executing", *id.* at *4) (quoting Medellín v. Texas, 552 U.S. 491, 508 (2008)); Luna Music, LLC v. Exec. Ins. Servs., No. 1:20-cv-00002, 2020 WL 855954, at *4 (D.V.I. Feb. 20, 2020) ("Section 3 is self-executing and has automatic domestic legal effect. No implementing legislation, such that might be construed as an 'Act of Congress' in the McCarran-Ferguson context, was necessary to give Section 3 domestic legal effect . . . . [A]t least this provision of the Convention is not an 'Act of Congress' that is subject to preemption under McCarran-Ferguson.").

95. CLMS Mgmt. v. Amwins Brokerage of Georgia, 8 F.4th 1007 (9th Cir. 2021), *petition for cert. denied*, No. 21-708 (Jan. 18, 2022). The Court of Appeal cited Professor Born's *New York Convention* in support of its reasoning. *Id.* at 1014 (citing Born, *New York Convention*, *supra* note 9, at 147).

96. *See, e.g.*, INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(v)(6), at 178–80.

Ferguson.[97] Because Chapter 2 directly implements the Convention, the majority view is that it does not—and was not intended to—fall under the "reverse preemption" provision.[98] Consequently, even though the question can be debated, the use of the term "self-executing" in this context seems best understood to mean that the New York Convention applies directly *because of*, and not *without regard to*, Chapter 2.[99]

In support of its "self-executing" thesis, the 2018 Article pointed to the federal government's *amicus curiae* submission opposing a grant of certiorari in *Safety National*, which did expressly take the position that "Article II of the Convention is self-executing."[100] However, that brief made the assertion as an alternative proposition after first affirming that "[p]ursuant to the *Convention as implemented*, arbitration agreements pertaining to international commercial transactions are enforceable in United States courts notwithstanding any contrary provision of state law."[101] It noted:

> The court of appeals did not decide the threshold question whether Article II of the Convention is self-executing. The better view of the matter, however, is that Article II *is* self-executing, and all parties agree that the McCarran-Ferguson Act does not apply to self-executing treaties.
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> Even if Article II were not self-executing, the McCarran-Ferguson Act would not bar its application. The Convention's implementing legislation does not impose substantive rules of decision, but *rather directs United States courts to enforce the Convention itself*.[102]

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97. *See generally* Matthew James Quan, Comment, *Untangling the Collision Between the McCarran-Ferguson Act and the Recognition of International Arbitral Awards: Reconciling the Second, Fourth, and Fifth Circuits' Approaches*, 86 TEMP. L. REV. 663 (2014).

98. *Cf. CLMS Mgmt.*, 8 F.4th at 1016 (concluding that "state laws prohibiting arbitration provisions in insurance contracts do not reverse-preempt the Convention's command that domestic courts are obligated to enforce international arbitration agreements unless such agreements are null and void, inoperative, or incapable of being performed.").

99. This conclusion can be understood to mean, in Professor Coyle's terms, that Chapter 2 is an "incorporative" statute.

100. Born, *New York Convention*, *supra* note 9, at 169 n.280 (citing Brief for the United States as Amicus Curiae Opposing Petitioners, Louisiana Safety Ass'n of Timbermen-Self Ins. Fund v. Certain Underwriters at Lloyd's, London, 562 U.S. 827 (2010) (No. 09-945)); *see also* INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(vii)(3), at 168–69.

101. Brief for the United States, *supra* note 100, at 7 (emphasis added).

102. *Id.* (second emphasis added); *see also id.* ("As implemented by Chapter 2 of the FAA, moreover, the Convention establishes an exclusive scheme specifying the circumstances under which domestic courts must enforce arbitration provisions in international commercial

The government's point, of course, was to establish that McCarran-Ferguson did not bar application of the Convention because, under either mode of analysis—"self-execution" or direct incorporation by statute—its provisions are directly applicable in state as well as federal courts.[103]

> The Convention's implementing legislation . . . directs United States courts to enforce the Convention itself. As implemented by Chapter 2 of the FAA, moreover, the Convention establishes an exclusive scheme specifying the circumstances under which domestic courts must enforce arbitration provisions in international commercial agreements.[104]

The federal government's brief, like the line of decisions mentioned above, can thus best be understood to have considered the New York Convention as directly applicable *not* as a free-standing "self-executing" treaty but as directly executed by (but not absorbed into) the implementing legislation.[105]

Put differently, if the Convention had in fact been "self-executing" on its own, without any implementing legislation, the McCarran-Ferguson question would not have arisen, as there would have been no federal statute. On the other hand, had the FAA "absorbed" the treaty obligations and transformed them entirely into statutory form, then the Second Circuit's view in *Stephens* would have prevailed. Understood in this light, the Government's *amicus* brief in *Safety National* was correct

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agreements. Neither the Convention nor the implementing legislation except insurance contracts from its coverage, and the federal regime would be disrupted if a state-law arbitration ban were allowed to have that effect.").

103. The Brief for the United States further argues that

> [e]ven if (as the court of appeals assumed) Article II of the Convention were not self-executing, the Convention as implemented would preempt any contrary state law, including a state law barring enforcement of agreements to arbitrate insurance disputes. That is so for two reasons. First, Chapter 2 of the FAA does not establish substantive rules of decision that courts are bound to apply; rather, it directs courts to enforce the Convention itself. Second, the Convention and its implementing legislation were intended to establish an exclusive scheme for the enforceability of arbitration provisions in international commercial agreements.

Id. at 11–12.

104. *Id.* at 7.

105. For a recent proposal to clarify the issue, see Briz & Mejía-Dueñas, *supra* note 85, at 1143–44 (contending that Congress did not intend that a treaty, like the Convention, would be within the scope of the reverse-preemption provision in the MFA and that it should therefore should amend the MFA to state that anti-arbitration provisions are valid only in domestic cases so as not to interfere with international obligations under the Convention).

to equate the "directive" effect of Chapter 2 with "self-execution" for the specific purpose of properly interpreting the relationship between the Convention and the McCarran-Ferguson Act.

To be sure, this particular question is complicated, and the decisions are less than clear, but there is support for the foregoing interpretation. Drawing on Professor Coyle's work, for example, Professor S.I. Strong has also described Chapter 2 as an "incorporative" statute meant to give effect to (but not alter the terms of) the Convention.[106] The purpose of such a statute, she contends, "is to incorporate into . . . [domestic law] a set of rules that are consistent with an internationally agreed upon standard set forth in a treaty. . . . International treaties first establish these international standards and, thereafter, those states that choose to ratify the treaties incorporate them into their own statutory law."[107]

Applying this rule "is entirely consistent with the institutional role of courts in the [U.S.] constitutional structure," because the rule expressly contemplates that when "the legislative and the executive branches, acting together, choose to enact legislation that incorporates the terms of a treaty, they are making a decision to conform domestic law to international law."[108]

Whether one considers Chapter 2 as "incorporative," "directive," "implementing," or "conforming," logic and authority together support the proposition that it was intended to—and in fact does—apply the New York Convention directly to relevant proceedings in both federal and state courts. At least for the purpose of pre-empting inconsistent state law, there is no substantive difference between its direct incorporation by federal legislation and the proposition that it is "self-executing." In either case, the Convention has become part of the "Supreme Law of the Land," effective in *all* courts.[109]

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106. S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty, and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 530 (2013). Strong's analysis draws in relevant part from Coyle, *supra* note 68.

107. Strong, *supra* note 106, at 566 (quoting Coyle, *supra* note 68, at 671–72) (alterations in original).

108. *Id.* (alteration in original). "Indeed, if the courts were 'to interpret an incorporative statute in a way that differs materially from the way they would interpret the relevant provision in the text of the source treaty, they would, in effect, be undermining the political branches' decision to incorporate a particular international rule into [domestic law].'" *Id.* (quoting Coyle, *supra* note 68, at 672–73) (alteration in original).

109. As Professor Born acknowledged,

> [u]nder this analysis, Section 201 rests on the premise, and expressly provides, that it is the Convention itself, as a self-executing treaty, that is applicable in state and federal courts, with Chapter 2 of the FAA supplying ancillary provisions to facilitate enforcement of the Convention in federal courts. This is the most natural reading of Section

More to the point, there has been no decisive ruling that the Convention is not applicable in U.S. courts or preemptive of contrary state law.[110]

Notwithstanding the express determination of the President and the Senate to implement the New York Convention legislatively, both the Treatise and the 2018 Article alike contend that it remains possible for a U.S. court, half a century later, to reach a different conclusion and to substitute its own judgment about the appropriate status of the Convention in domestic law for that of the constitutionally-empowered "treaty makers." Wholly apart from the conceptual confusion that would flow from such an approach, the underlying rationale of *Medellín* offers a compelling constitutional basis for rejecting its proposition out-of-hand.[111]

VI. The Federalism Implications

What motivates the proposition to recast the New York Convention as "self-executing"? Perhaps generalizing from the McCarran-Ferguson debate discussed above, both the Article and the Treatise speculate that if the Convention is not clearly preemptive federal law—directly applicable in state as well as federal courts and capable of overriding inconsistent state law—then a judicial decision by a state court *might* place the United States in material breach of its international obligations, leaving no way for the federal government to remedy that breach.[112]

201's language, which provides that "*the Convention* . . . shall be *enforced in United States courts* in accordance with this Chapter." This is a formula declaring that it is the substantive terms of the Convention itself, as a self-executing treaty, that are "enforced in U.S. courts" rather than the terms of a federal statutory provision.

Born, *New York Convention*, *supra* note 9, at 158–59.

110. Arbitration Restatement, *supra* note 4, § 1.9 reporters' note b(iv). While acknowledging the issue and citing to Professor Born's *New York Convention* article, the reporters' note declined to take a clear position, noting that "[u]nder the requirements set forth in [*Medellín*] . . . the Convention would have difficulty in meeting the criteria of a self-executing treaty," but "because it is not necessary for this Restatement to take a position on whether the New York Convention is self-executing, it does not do so." *Id.*

111. That conclusion does not, of course, preclude the courts from interpreting the Convention's provisions or those of the implementing legislation. It does, however, prevent courts from disregarding the decision of the political branches by holding the treaty to have been self-executing *ab initio*.

112. *See, e.g.*, Born, *New York Convention*, *supra* note 9, at 153 (asserting that differences between the Convention's substantive requirements and domestic U.S. law "very likely leave the United States in material breach"); *see also* International Commercial Arbitration Treatise, *supra* note 14, §1.04(B)(1)(e)(vii)(4), at 169–75. This problem has also been explored in Jonathan Remy Nash, *Doubly Uncooperative Federalism and the Challenge of U.S. Treaty Compliance*, 55 Colum. J. Transnat'l L. 3 (2016); *cf.* Drahozal, *supra* note 10, at 112.

The possibility of domestic non-compliance with treaty obligations is a legitimate concern. It rightly engages the constitutional treaty–makers—the President and the Senate—when they consider how treaty obligations should be implemented.[113] Not infrequently, the federal system, in which the central government is one of limited or "delegated" authorities, presents challenges to ensuring full compliance with our international legal undertakings. To a certain extent, we share those challenges with other "non-unitary" states in the international community. It is entirely appropriate to want to ensure that the Convention is sufficiently respected and enforced in *all* U.S. courts, state as well as federal.

Yet, on closer analysis, there is little foundation for this concern with respect to the New York Convention.

To begin, the Convention actually addresses the "federal states" issue. Article XI provides that States Parties with federal (or non-unitary) systems must fully implement those provisions "that come within the legislative jurisdiction of the federal authority"[114] and that provisions falling "within the legislative jurisdiction of constituent states or provinces" must be brought to their attention by the central government "with a favourable [sic] recommendation."[115]

However, the United States did not invoke Article XI when ratifying the Convention.[116] The reason, as indicated in the detailed report on the Convention appended to the President's Transmittal, was the determination that "[t]he Federal Arbitration Act of 1925 (9 U.S.C. §§ 1-14) and the decisions of U.S. Courts relating thereto show that legislation on arbitration is clearly within the competence of the Federal Government."[117] That report also proposed specific implementing legislation for the Convention, which was eventually adopted as FAA

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113. The House of Representatives is also engaged, to the extent that implementing legislation is required.

114. New York Convention, *supra* note 1, art. XI(a).

115. *Id.* art. XI(b). Textually, the Convention does not mandate compliance at the subnational level. Paragraph (b) was phrased as a "requirement to recommend" because in many non-unitary systems the central government's authority to compel compliance by its separate components is constrained. *See* S. EXEC. REP. DOC. NO. 10, at 6 (1968).

116. *See* Born, *New York Convention*, *supra* note 9, at 118–19. It is of course understandable that § 207 addressed only the procedures to be followed in federal courts; the federal government cannot legislate procedural rules for the state courts. However, the New York Convention's substantive rules apply (where relevant) in all courts. *Id.* at 185.

117. S. EXEC. DOC. E 90-2, at 22 (1968). One can understand this comment as a somewhat elliptical reference to the sharp debate that had occurred when Congress initially adopted the Federal Arbitration Act. Those sensitivities had significantly abated over the intervening forty years. In any event, there was no significant dispute that Congress had constitutional authority

Chapter 2. The necessary implication is that the Convention, as implemented by statute, would apply fully to proceedings in both state as well as federal courts so that the concerns reflected in Article XI would not be implicated.

The President and the Senate were hardly blind to the "federalism" implications of the Convention. On the contrary, the Senate discussed the issue explicitly during the chamber's hearing on the Convention. Ambassador Richard Kearney, then the U.S. member of the International Law Commission, testified on behalf of the Administration that there had been some concern during the negotiation of the Convention about "the extent to which this convention might change the law in the various States of the Union and the effect it might have on the State courts."[118] However, he noted, in the years since the conclusion of the Convention in 1958, there had been significant developments in that regard, particularly due to the adoption of a uniform law at the state level which "in effect covers all of the requirements for internal U.S. practice which are contained in the [C]onvention for foreign problems."[119]

Indeed, the 2018 Article acknowledges that the "ratification history reflects an understanding that the Convention would override state law, thereby ensuring that the United States would comply with its obligations under the Convention . . . ."[120] It notes that the record indicates "a consistent recognition that the Convention would be applicable in both state and federal courts and that the Convention's terms would produce materially different results from those under existing state arbitration legislation."[121] It also accepts that state courts have consistently applied the Convention directly in relevant proceedings and that

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under the Commerce Clause to provide for recognition and enforcement of foreign arbitral agreements and awards.

118. S. EXEC. REP. DOC. 10, at 6 (1968).

119. *Id.* In response to questions from Senator Sparkman, Amb. Kearney testified that the Department had not received any indication of opposition to the Convention and that ratification of the Convention did not seek to extend Federal jurisdiction into "areas not now within Federal jurisdiction." *Id.* at 7 (the Senator's words). In an apparent reference to *Moseley v. Elec.* & Missile Facilities, Inc., 374 U.S. 167 (1963), Amb. Kearney also expressed the opinion that the Supreme Court "established that the general subject of arbitration is beyond doubt completely within the Federal jurisdiction if it concerns foreign or interstate commerce." *Id.* at 8.

120. Born, *New York Convention*, *supra* note 9, at 177. The Treatise makes the same point but errs, of course, in contending that the Convention can only be applied in state courts if it is self-executing. S*ee, e.g.*, INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(vii)(4), at 170 ("[U]nless the Convention is self-executing, its substantive terms would not be applicable at all in U.S. state courts.").

121. Born, *New York Convention*, *supra* note 9, at 161; *see also* INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(vii)(5), at 175 (meaning, one assumes, at least with respect to arbitration agreements and awards arising in interstate or foreign commerce).

no state court appears to have held that the Convention is not directly applicable to relevant proceedings.[122]

Nonetheless, the Article contends, the *possibility* of non-compliance by state courts exists:

> Although it is likely that [Chapter] 2 of the FAA now preempts state law applicable to many international arbitration agreements, including in state courts, this conclusion is not free from doubt. Insofar as state arbitration law applies to international arbitration agreements subject to the Convention, it is clear that these standards will frequently differ materially from those under the Convention.[123]

The argument is that self-execution is needed to ensure that the Convention will be fully applicable in all courts of the United States so that "the Convention's objective of uniformity can be fulfilled."[124] More specifically, the Article contends, "if the Convention were non-self-executing, nothing in Chapter 2 or otherwise would implement the Convention in state courts, leaving the Convention's substantive terms wholly inapplicable in state courts."[125]

The motivation seems to be essentially prophylactic: because an explicit statement of "self-execution" would be *more* compelling (or perhaps more *preemptive*) than the "shall be enforced" language of the statute, it would guarantee "that the Convention will be fully applicable in [U.S.] courts, both state and federal, and that the Convention's objective of uniformity can be fulfilled, providing the basis for national courts to work together in applying the Convention and developing the international rules that it prescribes."[126]

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122. *See* INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(ii), at 159. Of course, entirely "domestic" arbitration agreements and awards would fall under FAA Chapter 1.

123. Born, *New York Convention*, *supra* note 9, at 154.

124. *Id.* at 185. For the risks of assuming that "local actors inevitably have an incentive to act so as to disadvantage outsiders," see Paul B. Stephan, *What Story Got Wrong – Federalism, Localist Opportunism and International Law*, 73 MO. L. REV. 1041, 1043 (2008).

125. Born, *New York Convention*, *supra* note 9, at 151; *see also* INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(vii)(4), at 170 ("[I]t is clear that Chapter 2 of the FAA addresses only the application of the Convention by U.S. *federal* (and not *state*) courts. As a consequence, unless the Convention is self-executing, its substantive terms would not be applicable at all in U.S. state courts.").

126. Born, *New York Convention*, *supra* note 9, at 185.

The underlying assumption is evidently that "self-executing" treaties somehow enhance or augment the federal government's authority with respect to the states, empowering pre-emptive federal action in ways that treaties that have been directly (and fully) implemented by legislation cannot.[127] That is an enormously consequential and politically sensitive proposition with broad implications for U.S. treaty practice.[128]

On one hand, there is no basis for assuming that a non-self-executing treaty cannot be pre-emptive of contrary state law, or that a self-executing treaty is somehow *more* pre-emptive than legislation that implements a treaty. Neither the Article nor the Treatise offers compelling support for such a conclusion, and one can certainly not be found in the text or interpretation of Article VI clause 2 of the Constitution.

Whether a treaty concluded with one or more foreign countries can *expand* the powers of the federal government, permitting it to do things that it could not otherwise do, is a somewhat different question. It was addressed a century ago by the U.S. Supreme Court in *Missouri v. Holland*.[129] There, the federal government had adopted legislation asserting a right to regulate (through licensing) the hunting of migratory birds crossing the border with Canada. Missouri challenged the legislation as exceeding the scope of the Commerce Clause (as then understood) and prevailed in federal court. Undaunted, the federal government concluded a treaty with the United Kingdom calling for such regulation, and on that basis enacted essentially the same legislation. Missouri again challenged but this time was turned away by the Supreme Court.

In his famous 1920 decision, Justice Holmes, in writing for the Court over the dissent of Justices Van Devanter and Pitney, rejected Missouri's argument that "what an act of Congress could not do

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127. Indeed, the assertion goes further, contending that "[i]f the Convention were not self-executing, there would be *no basis* for its application in U.S. state courts, which would likely place the United States in material breach of its international obligations . . . ." *Id.* at 116 (emphasis added). That statement seemingly contradicts the contention made elsewhere in Professor Born's *New York Convention* article that the Convention is (and was understood to be) preemptive of state law. Indeed, it appears to question whether, "if the Convention [is] not self-executing, the application of some of its terms, including the critical provisions of Article II, might also be inapplicable in U.S. federal courts." *Id.* It further asserts that "[i]f the Convention were non-self-executing, it is unclear what substantive rules of law would apply today in either federal or state courts to international arbitration agreements and awards." *Id.* at 153.

128. *Cf.* Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 HARV. L. REV. 1867, 1938 (2005) ("In short, the treaty power remains a formidable and ample tool for a vigorous foreign policy. Treaties may do many things. But what they may not do is increase the legislative power of Congress.").

129. Missouri v. Holland, 252 U.S. 416, 432–34 (1920).

unaided, in derogation of the powers reserved to the States, a treaty cannot do."[130] Observing that the treaty itself did not "contravene any prohibitory words to be found in the Constitution," he framed the issue as "whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment."[131] He found none, observing that "[n]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."[132]

Justice Holmes continued:

> We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being [sic] that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.[133]

Over time, the decision proved to be quite controversial and led, in part, to the proposal of the so-called "Bricker Amendment," the implications of which have been widely discussed elsewhere.[134] The decision has never been expressly overruled, and its implications are reflected in

130. *Id.* at 432.

131. *Id.* at 433–35.

132. *Id.* at 434.

133. *Id.* at 433 (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)).

134. The so-called "Bricker Amendment" was actually a series of proposed constitutional amendments introduced in the Senate in the early 1950s intended to resolve the perceived threat that ratification of the proposed UN human rights covenant would pose to the U.S. constitutional system. Although there were multiple variations, the proposals would in essence have overridden *Missouri v. Holland* by providing that: (i) any treaty or treaty provision in conflict with the U.S. Constitution would have no direct force or effect, and (ii) treaties could only become effective as domestic law through federal legislation that would otherwise be valid in the absence of the treaty. Senator John Bricker (R-Ohio) was the leading proponent—and, hence, the eponym of the proposals. Ultimately, the Senate failed to adopt the Bricker Amendment by one vote. However, variants have occasionally been introduced in subsequent years. *See generally* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP (1988); Arthur H. Dean, *The Bricker Amendment and Authority over Foreign Affairs*, 32 FOREIGN AFF. 1 (1953); Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 NW. U.L. REV. 635, 658–74 (2011); *cf.* Oona A. Hathaway et al., *The Treaty Power: Its History, Scope and Limits*, 98 CORNELL L. REV. 239, 260–62 (2013).

section 312 of the RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW.[135]

To be sure, the argument in favor of self-execution is a variation on the theme, because it (rightly) does not question the constitutionality of Chapter 2 of the FAA or suggest that ratification or implementation of the Convention directly poses any Tenth Amendment issues. Rather, it contends that the Convention, if applied as a self-executing treaty, would give the federal government *more* (or perhaps *clearer*) authority to regulate state law and courts than it has (or could have) as implemented by legislation—even though that legislation was clearly intended to make the Convention directly effective in both state and federal courts.

In so doing, the argument implicates the Supreme Court's more recent decision in *Bond v. United States*.[136] The question there was whether a statute implementing a valid treaty could permit federal criminal prosecution of "purely local" conduct that, absent the treaty, the federal government could not have regulated. The answer was in the negative: even if the treaty power itself is not limited by the reserved powers of the States, the Court said, the "principles of federalism inherent in our constitutional structure" apply to the interpretation and application of a statute implementing a treaty.[137] Indeed, it is "'incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'"[138]

Given the facts of what it described as a "curious case," the *Bond* majority found it appropriate to "insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statue's

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135. RESTATEMENT (FOURTH) OF FOREIGN REL. L., *supra* note 15, § 312. Entitled "Relationship of Treaty Power to Federalism," §312 states: "(1) The treaty power conferred by Article II of the Constitution may be used to enter into treaties addressing matters that would fall outside of Congress' legislative authority in the absence of the treaty. (2) Congress has the constitutional authority to enact legislation that is necessary and proper to implement treaties, even if such legislation addresses matters that would otherwise fall outside of Congress's legislative authority." *Id.*; *see also id.* § 312 reporters' note 5 ("Even if the treaty power is not limited by the reserved powers of the States, the Supreme Court made clear in *Bond*, 134 S. Ct. 2077, that federalism is relevant when interpreting a statute that implements a treaty.").

136. 572 U.S. 844 (2014).

137. *Id.* at 856 ("[T]he statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure."). *Cf.* RESTATEMENT (FOURTH) OF FOREIGN REL. L., *supra* note 15, § 312 reporters' note 5 (observing that "[e]ven if the treaty power is not limited by the reserved powers of the States, the Supreme Court made clear in *Bond*, 134 S. Ct. 2077, that federalism is relevant when interpreting a statute that implements a treaty.").

138. *Bond*, 572 U.S. at 858 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

expansive language in a way that intrudes on the police power of the States."[139] Lacking such indication, the Court concluded that "the background assumption that Congress normally preserves 'the constitutional balance between the National Government and the States'" was dispositive.[140]

The decision in *Bond* can be read narrowly, limited to the criminal context and reflecting the lack of any "clear statement"[141] that the treaty in question was intended to reach purely local violations of criminal law of the kind that, in the United States, has traditionally been the responsibility of the States. At the same time, the *Bond* decision can also be understood as raising significant questions about (if not implicitly overturning) the broad treaty-implementing approach of *Holland*.[142]

While neither the Article nor the Treatise discuss *Bond* directly, the decision is obviously relevant to their central contention that a self-executing treaty, standing alone, can have greater preemptive force with regard to state law than its implementing legislation might. Of course, there is no reason to doubt that both the New York Convention and its implementing legislation fall within the constitutional competence of the federal government.[143] In consequence, it is unnecessary to engage in the difficult debates about whether the Treaty Clause empowers the federal government to enter into treaties on subjects that are otherwise beyond Congress's enumerated legislative powers,[144] or extends

139. *Id.* at 860.

140. *Id.* at 862 (citing Bond v. United States, 564 U.S. 211, 222 (2011)).

141. *Id.* at 860.

142. *See, e.g.*, GLENNON & SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY, *supra* note 15, at 208–18; Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 74 (2014); Nicholas Quinn Rosenkranz, Bond v. United States*: Concurring in the Judgment*, 2014 CATO SUP. CT. REV. 285, 300. *See also* Michael D. Ramsey, *Congress's Limited Power to Enforce Treaties*, 90 NOTRE DAME L. REV. 1539 (2015); Michael J. Glennon & Robert D. Sloane, *The Sad, Quiet Death of* Missouri v. Holland*: How* Bond *Hobbled the Treaty Power*, 41 YALE J. INT'L L. 51 (2016). C*f.* Carlos Vázquez, *The Abiding Exceptionalism of Foreign Relations Doctrine*, 128 HARV. L. REV. F. 305 (2015); Ford & Simmons, *supra* note 16.

143. *Cf.* Southland Corp. v. Keating, 465 U.S. 1, 10–11 (1984); Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 638–39 (1985); GE Energy Power Conversion Fr. SAS v. Outokumpu Stainless USA, LLC, 140 S.Ct. 1637, 1644 (2020).

144. The relationship between scope of the treaty power and the federalist structure has been extensively debated. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); Rosenkranz, *supra* note 128, at 1867; Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327 (2006); Michael D. Ramsey, Missouri v. Holland *and Historical Textualism*,

beyond the power to "make treaties" and to their implementation.[145] Nonetheless, the self-execution proposition is premised (at least implicitly) on the argument that a self-executing treaty can augment the powers of the central government in such ways, especially by permitting it to take action that might otherwise be limited by "federalism" constraints.

That argument has potential implications for prospective U.S. adherence to, and implementation of, other "private law" treaties, including but not limited to the 2005 Hague Choice of Court Convention and the recently concluded 2019 Hague Judgments Convention.[146] Like the New York Convention, both are important instruments with great significance for the private sector, especially in the context of international commercial dealings. Both deal with subjects more clearly within state jurisdiction than arbitration, and both will require some form of implementation in federal as well as state courts.[147]

For both, the options for implementation would presumably include self-execution as well as direct legislative incorporation into federal law, modeled on the approach taken with respect to the New York Convention.[148] If the self-execution proposition were accepted, however, the challenges of resolving the "implementation" question for those conventions would inevitably become much more difficult. Those are compelling reasons to avoid this disputed area.

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73 MO. L. REV. 969 (2008); Hathaway, *supra* note 134, at 239; Duncan B. Hollis, *An Intersubjective Treaty Power*, 90 NOTRE DAME L. REV. 1415 (2015); Ford & Simmons, *supra* note 16.

145. *Cf. Bond*, 572 U.S. at 876 (Scalia, J., concurring) ("[A] power to help the President *make* treaties is not a power to *implement* treaties already made.") (citing Nicholas Quinn Rosenkranz, *supra* note 128, at 1867); *id.* ("Once a treaty has been made, Congress's power to do what is 'necessary and proper' to assist the making of treaties drops out of the picture. To legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8, powers.").

146. Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294; Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, *opened for signature* July 2, 2019, https://www.hcch.net/en/instruments/conventions/full-text/?cid=137. For a discussion of the influence of federalism on U.S. treaty-making and observance in the private international arena, and a call for flexibility in private international law treaty making, see Paul R. Dubinsky, *Private Law Treaties and Federalism: Can the United States Lead?*, 54 TEX. INT'L L.J. 39 (2018). *See also* Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 30 AM. REV. INT'L ARB. 265 (2019).

147. *Cf.* Paul B. Stephan, *Competing Sovereignty and Laws' Domains*, 45 PEPP. L. REV. 239, 284–88 (2018) (contrasting the treatment of foreign arbitral awards with that of foreign court judgments).

148. *See generally*, Stephan, *One Voice in Foreign Relations and Federal Common Law*, *supra* note 59. Some form of state law implementation would also appear necessary.

Indeed, with respect to the New York Convention, the underlying concern seems more hypothetical than real. There cannot be a serious argument that the Convention, as implemented by Chapter 2, is not preemptive federal law.[149] Indeed, as both the Treatise and the Article acknowledge, the intention of the Convention (at the time of ratification) was to apply to relevant proceedings in both state and federal courts,[150] and state courts have in fact "consistently applied the Convention directly in state court proceedings" when it is applicable.[151] Questions regarding the constitutionality and pre-emptive effect of Chapter 1 of the FAA were resolved long ago,[152] no definitive judicial ruling has rejected the application of the Convention (or Chapter 2 of the FAA) in state courts ever since, and the United States has not been held in breach because a state court has declined to recognize or respect U.S. obligations under the Convention. Chapter 2 has already been interpreted to mean that the Convention applies in state as well as federal courts, and neither the Treatise nor the Article challenges that proposition.

Here, a brief comment is appropriate about the Supreme Court's most recent New York Convention decision, *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC.*[153] The issue there was whether GE, a sub-contractor and non-signatory to the main contract containing an arbitration clause, could invoke equitable estoppel doctrines under state law to preclude litigation and compel enforcement

149. *Cf. id.* at 21 (Both the New York Convention and FAA Chapter 2 "are uncontroversially federal and thus should preempt State law.").

150. *See* Born, *New York Convention*, *supra* note 9, at 116; INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 104(b)(1)(E)(vii)(5), at 175 (stating that "[t]he actions and statements of the U.S. political branches during the process of ratification . . . display a consistent recognition that the Convention would be applicable in both state and federal courts and that the Convention's terms would produce materially different results from those under existing state arbitration legislation." *See also id.* at 178 ("the Executive Branch's deliberate consideration, and rejection, of the possibility of an Article XI reservation argues decisively against the notion that the United States intended to comply with the Convention in federal, but not state, courts.").

151. Born, *New York Convention*, *supra* note 9, at 159. He offers no real basis for asserting that "there is surprising uncertainty whether the Convention, or any individual provision of the Convention, is 'self-executing' under U.S. law . . . without the interposition of domestic implementing legislation." *Id.* at 115.

152. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967). C*f.* Southland Corp. v. Keating, 465 U.S. 1, 11–13 (1984).

153. GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S.Ct. 1637 (2020) (holding that FAA Chapter 1 permits courts to apply state law doctrines to the enforcement of arbitral agreements covered by the New York Convention).

of the agreement to arbitrate. The Court held that GE could, because the application of state law doctrines that permit the enforcement of arbitration agreements by non-signatories did not conflict with the Convention.

Speaking for a unanimous Court, Justice Thomas wrote:

> [N]othing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines . . . . Article II(3) provides that arbitration agreements must be enforced in certain circumstances, but it does not prevent the application of domestic laws that are *more generous in enforcing arbitration agreements.*[154]

While the Court did not directly address the questions of pre-emption or self-execution, one can certainly understand the rationale for this decision as implying that the opposite result would have been reached had the relevant state laws *prohibited* enforcement of the relevant agreement or otherwise infringed on the obligations of the United States under the Convention. Clearly, nothing in the decision gives any support to the proposition that, as implemented by the federal statute, the Convention does not override conflicting state law.

VII. An Alternative Solution

At its most basic level, the concern underlying the self-execution proposition is that FAA Chapter 2 *must* be read restrictively to apply only to federal courts. It rests on the contention that section 201, which provides that "[t]he Convention . . . shall be enforced in United States courts in accordance with this chapter,"[155] refers "most naturally" to courts "of" or "established by" the United States—namely, federal courts.[156] It notes that subsequent sections, such as those referring to jurisdiction, venue, and removal, necessarily refer *only* to U.S. federal courts.[157] In consequence, the argument goes, the entire chapter must

154. *Id.* at 1645 (emphasis added). Although the Court's analysis turned on Chapter 1 of the FAA, it gave no reason to think that the approach would have been any different if the case had turned on Chapter 2.

155. Born, *New York Convention*, *supra* note 9, at 145 (citing 9 U.S.C. § 201).

156. *Id.* at 148.

157. *See* International Commercial Arbitration Treatise, *supra* note 14, § 1.04(B)(1)(e)(vii)(4), at 170 ("It is fairly clear . . . that the term 'United States courts,' as used in Chapter 2 [of the FAA], means U.S. *federal*, not *state*, courts."); 9 U.S.C. §§ 203 (jurisdiction and amount in controversy),

be understood, in context, as applicable only to federal courts.[158]

It is not implausible, although not clearly necessary, to interpret the term "United States courts," as used in Chapter 2, to mean federal courts established pursuant to the U.S. Constitution—not state courts.[159] Moreover, it is entirely logical for most of the Chapter to focus on federal courts, since the authority of the U.S. Congress to set the jurisdictional or procedural rules of the state courts is open to question.[160]

On the other hand, that reading is certainly not the only possible interpretation of section 201, and it gives insufficient weight to the clear statement in section 203 that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States."[161] Such a statement would have been unnecessary had the statute in fact been intended only for federal courts.

Moreover, the necessary implication of that statement is that the substantive provisions of the Convention were in fact intended to apply in both state and federal courts—in other words, that Chapter 2 was designed as an "incorporative" statute with pre-emptive force. Indeed, both the Article and the Treatise effectively concede as much.[162]

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204 (venue), 205 (removal of cases from state court), 206 (order to compel arbitration and appointment of arbitrators).

158. *See* INTERNATIONAL COMMERCIAL ARBITRATION TREATISE, *supra* note 14, § 1.04(B)(1)(e)(vii)(4), at 170 ("[U]nless the Convention is self-executing, its substantive terms would not be applicable at all in U.S. state courts . . . . This is a highly unattractive result which the U.S. political branches would not likely have intended."). While the conclusion is correct, the premise is faulty.

159. Born, *New York Convention*, *supra* note 9, at 149.

160. *See, e.g.*, Anthony J. Bellia, *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001); Josh Blackman, *State Judicial Sovereignty*, 2016 U. Ill L. Rev. 2033 (2016). Amb. Kearney's testimony is less than conclusive on this point but appears to have been intended to convey the thought that state courts were unlikely to disregard the substantive requirements of the New York Convention.

161. 9 U.S.C. § 203.

162. As Professor Born's article acknowledges,

> [u]nder this analysis, Section 201 rests on the premise, and expressly provides, that it is the Convention itself, as a self-executing treaty, that is applicable in state and federal courts, with Chapter 2 of the FAA supplying ancillary provisions to facilitate enforcement of the Convention in federal courts. This is the most natural reading of Section 201's language, which provides that "*the Convention* . . . shall be *enforced in United States courts* in accordance with this Chapter.

Born, *New York Convention*, *supra* note 9, at 158–59 (quoting 9 U.S.C. § 201); *See also* INTERNATIONAL COMMERCIAL ARBITRATION. TREATISE, *supra* note 14, § 104(b)(1)(E)(vii)(6), at p. 180 (stating that the Convention's substantive provisions "are directly applicable in U.S. courts, preempting (or superseding) inconsistent provisions of state or federal (or foreign) law.").

Nothing in the record of the Senate Foreign Relations Committee's consideration of the Convention[163] contradicts such an interpretation, and a necessary implication of section 205 of the FAA regarding removal from state courts.[164]

In any event, there are several alternative solutions to the problem that the Article and Treatise describe. One possibility is that a court might decide, definitively, that Chapter 2 of the FAA is—and was intended from the outset to be—an "incorporative" statute, and the statement in section 201 of the FAA (that the Convention "shall be enforced in United States courts in accordance with this chapter") means that the Convention is directly applicable in both state and federal courts. That interpretation seems the most logical, efficient, and consistent with the intent of the constitutional treaty-makers, and it would provide appropriate guidance for avoiding these issues in the future.[165]

An alternative solution, also effective and possibly just as expedient, would be to amend Chapter 2 to clarify the applicability of the New York Convention as a matter of pre-emptive substantive law. For instance, such an amendment might entail (i) a slight revision of section 201 together with (ii) moving the first sentence of section 203 (referred to above) into section 201 so that the amended provision would read:

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 shall be enforced and

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Born's basic error, of course, is concluding that only self-execution, and not legislative implementation, could accomplish this result.

163. During the Senate Foreign Relations Committee's hearing on the Convention, Senator Sparkman asked whether the Convention "seeks in any way to extend Federal jurisdiction into areas not now within Federal jurisdiction?" Amb. Kearney replied in the negative, noting that the Federal Arbitration Act "already provides more with respect to disputes arising in foreign and interstate commerce than is required under this convention." *See* S. Exec. Doc. 10 at 7 (90th Cong. 2d Sess., Sep, 27, 1968).

164. *See* 9 U.S.C. § 205 ("Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.").

165. It would also accord with the prevailing view of the courts regarding the McCarran-Ferguson Act "reverse preemption" issue described above.

> given effect in all courts in the United States. Any action or proceeding to enforce an agreement to arbitrate, or an award resulting from such an agreement falling under the Convention shall be deemed to arise under the laws and treaties of the United States.

The point would be to restate clearly the well-accepted understanding that the intention has always been for the Convention to be directly applicable in state as well as federal courts.[166] The "removal" provisions in section 205 would remain unaltered.[167]

Beyond resolving the principal concern that underlies the self-execution proposition, that approach would underscore the constitutionally-rooted principle that determination of a treaty's status in domestic law lies with the political branches, at least when they address the issue. It might also offer a useful alternative in the coming discussions about whether (and how) to ratify (and give effect in U.S. law to) other private international law treaties, including the Choice of Court and Judgments Conventions, respectively.

VIII. Conclusion

As Professor Born rightly notes, the New York Convention is "the world's most successful private international law treaty," and faithful implementation of its rules governing the recognition and enforcement of international arbitration agreements and awards is important to U.S. interests.[168] While there is substantial reason to question the claim that broad uncertainty exists regarding the Convention's applicability to proceedings in state courts of the United States, prudential steps to avoid the possibility of non-compliance could certainly be justified.

Fortunately, there is a viable alternative to the self-execution proposal: a modest statutory amendment to Chapter 2 of the FAA, clarifying the Convention's applicability in both state and federal court along the lines proposed above.

166. To the extent that the Court's decision in *Bond* requires a "clear statement" of intent to preempt contrary state law, such a provision would also be helpful.

167. A parallel amendment could be made to Chapter 3 of the Federal Arbitration Act, which implements the Panama Convention.

168. Born, *New York Convention*, *supra* note 9, at 184.

By contrast, seeking a judicial declaration that, notwithstanding its legislative implementation in FAA Chapter 2, the Convention is "self-executing" is the wrong approach. Not only would such a declaration be of questionable validity, it would also raise a number of difficult issues with potentially adverse implications for the Convention itself, and more broadly for U.S. treaty practice in other areas. Indeed, it could make ratification of other pending treaties potentially much more difficult.