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Chief Justices Marshall and Roberts and the Non-Self-Execution of Treaties

Responding to David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135 (2012).

Carlos M. Vázquez *

David Sloss's article, *Executing Foster v. Neilson*, is an important contribution to the literature on the judicial enforcement of treaties.¹ I agree with much of it, as I agree with much of Professor Sloss' other writing on treaties.² In particular, I agree that the two-step approach to treaty enforcement that he proposes is generally the right approach, and I agree that the "intent-based" approach to the self-execution issue that

* Professor of Law, Georgetown University Law Center.

¹ David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135 (2012).

² See, e.g., David L. Sloss, *Self-Executing Treaties and Domestic Judicial Remedies*, 98 AM. SOC'Y INT'L L. PROC. 364 (2004); David L. Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); David L. Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999).

he criticizes is highly problematic.³ But Professor Sloss and I disagree about the source of this problematic approach. I have traced this approach to Chief Justice Marshall's opinion in *Foster v. Neilson*.⁴ Professor Sloss traces it to courts and scholars (including me) who, in his view, have misread *Foster*.⁵ I shall address our differences on this point below. First, however, I shall explain my general agreement with the two-step approach to treaty enforcement that Professor Sloss defends.

The much-controverted question of treaty self-execution is widely understood to concern whether a treaty may be enforced directly by the courts or must instead await legislative implementation.⁶ Professor Sloss proposes a two-step analysis for addressing this question. The first step is to determine what the treaty obligates the United States to do.⁷ This is a question of treaty interpretation, to be answered through the application of the international law of treaty interpretation. The second step is to identify which domestic officials have the power and duty to enforce the obligation.⁸ This, Professor Sloss argues, is entirely a matter of U.S. domestic law, not a matter of treaty interpretation.⁹ Courts and commentators have fallen into error, and produced much confusion, by treating the second question as one of treaty interpretation, seeking an answer in the text of the treaty or in the parties' intent.¹⁰ Professor Sloss notes that treaties seldom address the question of which domestic officials—legislative, executive, or judicial—are responsible for enforcing the treaty.¹¹ Instead, treaty parties almost always leave that question to the domestic law of the states-parties.

Professor Sloss is entirely correct to note that seeking the answer to this question in the treaty itself is highly problematic. Although there is nothing in international law that prevents states from addressing that question in the treaty itself, the fact is that

³ Sloss, *supra* note 1, at 163.

⁴ Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 607 (2008) [hereinafter Vázquez, *Treaties as Law*]; Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 700–05 (1995) [hereinafter Vázquez, *Four Doctrines*]; Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in JOHN E. NOYES ET AL., INTERNATIONAL LAW STORIES 151, 167–68 (2007) [hereinafter Vázquez, INTERNATIONAL LAW STORIES]; *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

⁵ Sloss, *supra* note 1, at n.26 (citing Vázquez, *Treaties as Law*); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131; Ernest A. Young, *Treaties as "Part of Our Law,"* 88 TEX. L. REV. 91 (2009).

⁶ See Sloss, *supra* note 1, at 137.

⁷ *Id.* at 143.

⁸ *Id.*

⁹ *Id.* at 137–40, 143, 162, 188.

¹⁰ See generally *id.*; see, e.g., *Medellín v. Texas*, 552 U.S. 491, 504–05 (2008).

¹¹ Sloss, *supra* note 1, at 163.

states almost never do so.¹² Domestic officials take their cues from domestic law, and states have very different constitutional rules concerning the need for legislative implementation of treaties.¹³ In the United Kingdom and most nations of the British Commonwealth, treaties are never enforceable in the courts until they have been implemented by legislation.¹⁴ The constitutional law of other countries permits the direct judicial enforcement of some treaties but not of others.¹⁵ In the United States, for example, treaties that require the criminalization of conduct or the appropriation of money must be legislatively implemented because the Constitution has been interpreted to require a statute for those purposes.¹⁶ Because of the diversity of domestic constitutional rules on the question, states rarely, if ever, address the issue of domestic implementation in the treaties they conclude. Seeking an answer to the self-executing question in the treaty itself is thus, in Justice Breyer’s words, like “hunting [for] the snark.”¹⁷ No matter how hard they look, the courts will almost never find an answer there.

States instead leave the question to the domestic law of each state-party. The most relevant provision of our Constitution is the Supremacy Clause, which provides that “all Treaties” of the United States are “the supreme Law of the Land,” and instructs judges to give them effect.¹⁸ This clause, I have argued, was intended to reverse the British rule, which we would otherwise have inherited.¹⁹ It establishes that treaties in the United States do not, as a constitutional matter, always require implementing legislation, and it appears to establish that treaties are judicially enforceable in the same circumstances as constitutional and statutory provisions of like content.²⁰ The first task for a court confronted with a treaty should thus be to identify the treaty’s content, which, as Professor Sloss argues, is a matter of treaty interpretation.²¹ The next step should be to ask whether the obligation imposed by the treaty is one that would be judicially enforceable if it were found in a statute.²² Thus, as with statutes, a treaty would not be judicially enforceable if it were unconstitutional—for example, if

¹² Vázquez, *Treaties as Law*, *supra* note 4, at 607.

¹³ *Id.*

¹⁴ *Id.* at 679; DUNCAN B. BLAKESLEE ET AL., NATIONAL TREATY LAW AND PRACTICE 733–34 (2005).

¹⁵ *Id.* at 17–18.

¹⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4)(c) cmt.i, n.6 (1987).

¹⁷ Medellín, 552 U.S. at 549 (Breyer, J., dissenting).

¹⁸ U.S. CONST. art. VI, cl. 2.

¹⁹ Vázquez, *Four Doctrines*, *supra* note 4, at 698–99; Vázquez, *Treaties as Law*, *supra* note 4, at 614–15; Vázquez, INTERNATIONAL LAW STORIES, *supra* note 4, at 165.

²⁰ Vázquez, *Treaties as Law*, *supra* note 4, at 602; Vázquez, INTERNATIONAL LAW STORIES, *supra* note 4, at 167.

²¹ Sloss, *supra* note 1, at 162.

²² Vázquez, *Treaties as Law*, *supra* note 4, at 602.

it purported to accomplish something for which the Constitution requires a statute, such as criminalization of conduct or appropriation of money.²³ Similarly, a treaty would not be judicially enforceable if it imposed an obligation requiring the exercise of political judgment. This category would include treaties that set forth aspirations or that contemplate the exercise of discretion requiring political judgment.²⁴ But, as Professor Sloss correctly argues, a treaty imposing a nondiscretionary duty of government to behave in a determinate way towards individuals should not generally give rise to questions regarding its judicial enforceability at the behest of such individuals.²⁵

Regarding all of the above, Professor Sloss and I appear to agree. Our main point of disagreement concerns my claim that the Supreme Court in *Foster* recognized another category of non-self-executing treaty: treaties that are non-self-executing because the treaty parties intended that the United States' obligation be subject to legislative implementation.²⁶ Professor Sloss contends that the Court in *Foster* did not treat the issue as one of treaty interpretation, but instead held that the treaty in question was non-self-executing because it imposed an obligation that required legislative implementation for constitutional reasons.²⁷

Even here, my disagreement with Professor Sloss is narrow: for the reasons that Professor Sloss highlights in his article, and that I have sketched out above, I have always regarded the intent-based category of non-self-execution as highly problematic. Because states rarely address the issue, courts will rarely find evidence of any intent regarding the need for legislative implementation. If they think that they have found evidence, they are almost certainly misreading the treaty, attributing to the parties a nonexistent intent.²⁸ I have accordingly argued that the Supremacy Clause should be understood to establish a strong presumption that a treaty was not intended to require legislative implementation, reversible only through clear evidence that the parties did so intend.²⁹ If Professor Sloss and I are right that the parties to a treaty rarely, if ever, address the question of implementing legislation, then the clear statement rule that I have proposed should lead the courts rarely, if ever, to find a treaty non-self-executing

²³ See Vázquez, *Four Doctrines*, *supra* note 4, at 718.

²⁴ See Vázquez, *Treaties as Law*, *supra* note 4, at 631; Vázquez, *Four Doctrines*, *supra* note 4, at 718.

²⁵ Sloss, *supra* note 1, at 140–41.

²⁶ Sloss, *supra* note 1, at 153; Vázquez, *Treaties as Law*, *supra* note 4, at 631; Vázquez, *INTERNATIONAL LAW STORIES*, *supra* note 4, at 166–67.

²⁷ Sloss, *supra* note 1, at 157–58.

²⁸ *Id.* at 138 (citing Vázquez, *Treaties as Law*, *supra* note 4, at 607).

²⁹ Vázquez, *Treaties as Law*, *supra* note 4, at 602.

on the basis of the parties' intent.³⁰ Thus, my approach and that of Professor Sloss will almost always lead to the same result.

Professor Sloss claims that this problematic approach to the self-execution question is based on a misreading of *Foster*.³¹ He argues that the Court in *Foster* determined that the obligation that the treaty imposed on the parties was one that required legislative implementation by virtue of Article IV of the U.S. Constitution.³² Specifically, he argues that the treaty at issue in *Foster* conferred on the grantee only an inchoate or equitable title in the property at issue.³³ Legislation was required, according to Professor Sloss, because Article IV of the U.S. Constitution assigns exclusively to Congress the power to transform an inchoate title to property otherwise held by the United States into a perfect title.³⁴

Unfortunately, Professor Sloss' attempt to reinterpret *Foster* lacks support in the Court's opinion. *Foster* involved Article 8 of an 1819 treaty with Spain, which provided that

all grants of land made before the 24th of January 1818 by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty.³⁵

³⁰ The presumption that I have proposed relates only to the parties' intent regarding the need for implementing legislation. See Vázquez, *Treaties as Law*, *supra* note 4, at 667. I have not proposed an across-the-board presumption that treaties are self-executing. *Cf., e.g.*, Jide Nzelibe, *Partisan Conflicts Over Presidential Authority*, 53 WM. & MARY L. REV. 389, n.53 (2011); Anthony S. Winer, *An Escape Route From the Medellín Maze*, 25 CONN. J. INT'L L. 331, n.13 (2010); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, n.385 (2009). Thus, I do not claim that treaties should be presumed not to require implementing legislation because the obligations they establish require the exercise of political judgment. See Vázquez, *Treaties as Law*, *supra* note 4, at 651; Vázquez, INTERNATIONAL LAW STORIES, *supra* note 4, at 166–67.

³¹ Sloss, *supra* note 1, at 157.

³² *Id.* at 162.

³³ *Id.* at 161–62.

³⁴ *Id.*

³⁵ Treaty of Amity, Settlement and Limits, U.S.–Spain, Feb. 22, 1819, 8 Stat. 252.

Professor Sloss notes that some of the grants of land made by his catholic majesty conferred perfect titles and some conferred inchoate titles.³⁶ If the Spanish grant conferred a perfect title, then the treaty, correctly construed, required the United States to recognize a perfect title, enforceable without prior legislative intervention.³⁷ If the Spanish grant conferred an inchoate title, then the United States was only required to recognize an inchoate title, and, by virtue of Article IV of the Constitution, the power to transform and inchoate title into an actual title belongs to Congress.³⁸ Professor Sloss points to a line of post-*Percheman* cases articulating this distinction and holding that legislation is required with respect to inchoate grants but not with respect to perfect grants.³⁹

Foster, however, involved a Spanish grant of land located in territory that the Court in *Foster* held had ceased to belong to Spain in 1803.⁴⁰ Because the grant related to land that was not within the “territories ceded by his catholic majesty to the United States,”⁴¹ a majority of the Court held that Article 8 was simply inapplicable.⁴² For these Justices, the analysis ended there. The portion of the *Foster* opinion that has come to be understood as recognizing the doctrine of non-self-executing treaties was relevant only to Chief Justice Marshall and one other Justice, and that was because these two Justices construed Article 8 to require the United States to recognize these grants *as if* the land had in fact belonged to Spain between 1803 and 1819.⁴³ These two Justices were inclined to accept such a construction because a declaration was appended to the treaty specifying that, notwithstanding Article 8, three specified grants did not need to be recognized.⁴⁴ One of these three specifically-excluded grants lay in territory that, according to the Court’s earlier analysis in *Foster*, did not belong to Spain between 1803 and 1819.⁴⁵ In the view of the Chief Justice, this declaration made it “difficult to resist the construction that the excepted grants . . . would otherwise have been within [Article 8].”⁴⁶ But Marshall went on to hold that, even if Article 8 were construed to apply to lands located within the disputed territory, the

³⁶ Sloss, *supra* note 1, at 150.

³⁷ *Id.*

³⁸ *Id.* at 151.

³⁹ *Id.* at 151 n.83 (citing *United States v. Reynes*, 50 U.S. 127, 153 (1850); *Menard’s Heirs v. Massey*, 49 U.S. 293, 307 (1850)).

⁴⁰ See Vázquez, INTERNATIONAL LAW STORIES, *supra* note 4, at 159–61.

⁴¹ *Foster*, 27 U.S. at 310.

⁴² *Id.* at 149–50.

⁴³ See Vázquez, *Four Doctrines*, *supra* note 4, at 700–05; Vázquez, INTERNATIONAL LAW STORIES, *supra* note 4, at 163.

⁴⁴ *Foster*, 27 U.S. at 313.

⁴⁵ *Id.* at 145–46.

⁴⁶ *Id.* at 147.

courts could not enforce the Spanish grants because Article 8 was non-self-executing.⁴⁷

Professor Sloss points to Supreme Court decisions, handed down after Marshall's death, holding that individuals holding Spanish grants within this disputed territory acquired an inchoate or equitable interest in the land binding on the conscience of the sovereign.⁴⁸ According to Professor Sloss, *Foster* is best read, in light of these subsequent cases, as holding that equitable interests of this sort may be transformed into perfect titles only through legislative action.⁴⁹

But the *Foster* opinion leaves no doubt that the Court understood the need for legislation to arise from what the treaty itself had to say about the need for legislation, which in turn depended on the particular wording of Article 8. According to the Court, the matter turned on the “*sound construction* of the eighth article.”⁵⁰ Legislation was necessary because Article 8 “*addresses itself* to the political, not the judicial department.”⁵¹ The question, according to the Court, was: “*Do these words* act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States *to pass acts* which shall ratify and confirm them?”⁵² Most importantly, the Court emphasized that “[t]he article . . . does not say that those grants are hereby confirmed. *Had such been its language*, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it; but *its language* [is different].”⁵³ The Court did not distinguish between grants of perfect titles and grants of inchoate titles, nor did it point to any particular characteristic of the grants involved in the case.

According to the Court's reading of Article 8, therefore, even perfect grants would not have been directly enforceable in court. Had Article 8 provided that the grants were “hereby” confirmed, on the other hand, the treaty would have had the effect that Sloss claims it had: perfect grants would have been directly enforceable and inchoate grants would have been subject to implementing legislation. The fact that the Court distinguished the actual wording of Article 8 from a different wording that would have produced the result that Sloss defends shows that the Court was not reading Article 8 as Professor Sloss contends.

⁴⁷ *Id.* at 148–51.

⁴⁸ Sloss, *supra* note 1, at 152, nn.88–89 (citing *Lessee of Pollard v. Files*, 43 U.S. 591 (1844); *Lessee of Pollard's Heirs v. Kibbe*, 39 U.S. 353 (1840)).

⁴⁹ *Id.* at 149–52.

⁵⁰ *Foster*, 27 U.S. at 314 (emphasis added).

⁵¹ *Id.* (emphasis added).

⁵² *Id.* (emphasis added).

⁵³ *Id.* at 314–15 (emphasis added).

The Court's subsequent analysis in *Percheman* confirms the conventional understanding of *Foster*.⁵⁴ Had Marshall understood *Foster*'s non-self-execution holding to be limited to inchoate grants, his analysis in *Percheman* could have stopped upon concluding that *Percheman* involved a perfect grant. But the Court found it necessary in *Percheman* to revisit *Foster*'s reading of Article 8 as requiring legislative implementation.⁵⁵ The Court thus apparently understood *Foster* to hold that even grants of perfect titles were unenforceable in the absence of implementing legislation. In reconsidering *Foster*'s holding, the Court again focused on the words of the Article 8. But, this time, with the Spanish text before him, Marshall concluded that the words did not necessarily “*stipulat[e]* for some future legislative act,” as the Court had mistakenly concluded in *Foster*.⁵⁶

In short, while Professor Sloss has offered an alternative basis on which the Court in *Foster* could perhaps have reached the same result, he has not shown that the Court in fact decided the case on such grounds. To the contrary, the conclusion that the Court based its decision on what the treaty itself had to say about whether the United States was required to “pass acts” is irresistible. While much about *Foster* is unclear, the Court's understanding of the issue as one of treaty interpretation is not.

Professor Sloss gives three reasons for rejecting this conclusion. First, he notes that “the claim that Article 8 requires legislative implementation . . . has no basis in the treaty text.”⁵⁷ I agree, but that just means that the Court misread the treaty. The fact that the text does not support the Court's conclusion does not show that the Court did not base its decision on the words of the treaty, any more than the fact that the *Medellín* Court misunderstood the meaning of the term “undertakes” in the U.N. Charter⁵⁸ establishes that the Court in *Medellín* did not purport to be answering the self-executing question by reference to the words of that treaty.⁵⁹ Second, Professor Sloss notes that it was already well established at the time “that international law does not govern the internal processes by which a nation implements its treaty obligations.”⁶⁰ That is also true, but that, too, is a basis for criticizing the Court's approach to the self-execution question, just as Professor Sloss, Justice Breyer⁶¹ and

⁵⁴ *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88–91 (1833).

⁵⁵ *Id.*

⁵⁶ *Id.* at 89 (emphasis added).

⁵⁷ Sloss, *supra* note 1, at 158.

⁵⁸ See Vázquez, *Treaties as Law*, *supra* note 4, at 656.

⁵⁹ See *Medellín*, 552 U.S. at 508–09 (2008). See also Vázquez, *Treaties as Law*, *supra* note 4, at 656.

⁶⁰ Sloss, *supra* note 1, at 159.

⁶¹ *Medellín*, 552 U.S. at 549 (Breyer, J., dissenting).

I⁶² have criticized the *Medellín* majority's focus on treaty text in answering the same question.

Finally, Professor Sloss argues that the conventional interpretation of *Foster* and *Percheman* is inconsistent with the Court's post-*Percheman* decisions, which "repeatedly affirmed that congressional legislation was necessary to perfect inchoate titles."⁶³ But these latter decisions are not inconsistent with the conventional interpretation of *Foster*. Under the *Foster* interpretation, because of the wording of Article 8, legislative implementation was necessary before the courts could enforce *any* Spanish grants, even perfect grants such as that involved in *Percheman*. That is why the Court had to revisit the self-execution question in *Percheman*. Having corrected its misconstruction of Article 8, the Court held in *Percheman* that the no legislation was required to authorize the courts to recognize Spanish grants of perfect titles.⁶⁴ But, since Article 8 only required recognition of Spanish grants "to the same extent that the same grants would be valid if the territories had remained under the dominion of [Spain]," the U.S. courts were only required to recognize inchoate grants as inchoate.⁶⁵ That is why the post-*Percheman* cases continued to require implementing legislation for grants in this category. If Professor Sloss is right about the constitutional need for legislation to transform inchoate grants into perfect grants, and if, as Professor Sloss maintains, the grant involved in *Foster* was indeed an inchoate one, then the Court in *Foster* might well have reached the same result in that case even if it had not misconstrued Article 8 as requiring legislation across the board. Marshall could thus perhaps have avoided his unfortunate disquisition on treaties that are self-executing because of the parties' intent, sparing us this problematic category of non-self-executing treaties.

But, unfortunately, Marshall did not take that course. As a result, we were left with the highly problematic intent-based approach to determining when treaties require implementing legislation. Marshall himself eventually recognized his mistake in reading Article 8 to require legislation.⁶⁶ I have argued that, consistent with the Court's approach and language in *Percheman*, a treaty should not be read to reflect an intent to require implementing legislation unless it "stipulates for some future legislative act."⁶⁷ As noted, this approach to the intent-based category of non-self-executing treaties should produce the same results as Professor Sloss' approach. In

⁶² See, e.g., Vázquez, *Treaties as Law*, *supra* note 4, at 646–51.

⁶³ Sloss, *supra* note 1, at 159.

⁶⁴ *Percheman*, 32 U.S. at 65 ("Absolute or perfect grants, it is believed, would be protected by the law of nations, independent of the treaty. Some legislative recognition of their validity might indeed be necessary to sustain a suit upon them in our courts, but the national obligation to respect them could hardly be denied.").

⁶⁵ *Id.* at 88.

⁶⁶ See Vázquez, *INTERNATIONAL LAW STORIES*, *supra* note 4, at 165–66.

⁶⁷ *Id.* at 89.

short, *Foster* is ripe for criticism and limitation, even outright overruling. But it is not susceptible to the reinterpretation that Professor Sloss proposes.

Professor Sloss' treatment of Chief Justice Marshall's opinion in *Foster* contrasts sharply with his treatment of Chief Justice Roberts' opinion in *Medellín*. As noted, Professor Sloss stretches mightily to avoid an interpretation of *Foster* that reflects misconceptions about the nature of treaties under international law. In examining *Medellín*, however, Professor Sloss offers an alternative rationale supporting the Court's result, without claiming that the Court's opinion can be read to adopt that rationale.⁶⁸ In offering an alternative rationale, Professor Sloss is in good company. Virtually all scholars who have commented on *Medellín*—those who have defended its holding as well as those who have criticized it—have proffered alternative rationales for the Court's holding.⁶⁹

My treatment of *Medellín*, on the other hand, resembles Professor's Sloss' treatment of *Foster*.⁷⁰ I have advanced a reading of Chief Justice Roberts' opinion that minimizes the problems it raises—prominently among them being the very problem that Professor Sloss cites as a reason for rejecting the conventional reading of *Foster*: its neglect of the fact that states negotiating treaties almost never address the need for implementing legislation.⁷¹ Is my treatment of *Medellín* subject to the criticism that I have directed at Professor Sloss' treatment of *Foster*?

I do not think so. First, the reading of *Medellín* that I offer is supported by some of the Court's analysis in the opinion. Specifically, I have argued that *Medellín* can and should be read to hold that Article 94 of the U.N. Charter merely imposes an obligation on States-Parties to do their best to comply with the International Court of Justice (ICJ)'s judgments.⁷² If so understood, the Court's conclusion that the treaty requires legislative implementation was correct. A treaty that obligates the states-parties to do their best to comply is one that requires the exercise of political judgment. It is up to the political branches to determine what doing their best means.⁷³ Admittedly, this interpretation is almost certainly wrong as a matter of treaty interpretation. Still, in my view, this interpretation is preferable to the alternatives because at least it would not upend the courts' general approach to the judicial enforcement of treaties. Unlike Professor Sloss' proposed reading of *Foster*, my

⁶⁸ Sloss, *supra* note 1, 182–87.

⁶⁹ See, e.g., Bradley, *supra* note 5, at 132–33; Young, *supra* note 5, at 93–95; David H. Moore, *Law(makers) of the Land: The Doctrine of Treaty Non-Self Execution*, 122 HARV. L. REV. F. 32, 33 (2009); John T. Parry, *Rewriting the Roberts Court's Law of Treaties*, 88 TEX. L. REV. 65, 65–67 (2010).

⁷⁰ See *infra* notes 72–78 and accompanying text.

⁷¹ See *supra* notes 11, 28 and accompanying text.

⁷² Vázquez, *Treaties as Law*, *supra* note 4, at 660–65.

⁷³ See, e.g., *id.* at 630–31; Vázquez, *Four Doctrines*, *supra* note 4, at 710–18.

proposed interpretation of *Medellín* finds some support in the Court's reasoning. Specifically, my reading is supported by the Court's statement that Article 94 was not directly enforceable because it does not say that the parties "shall" or "must" comply.⁷⁴ In so reasoning, the Court suggested that it read the treaty to leave the parties with some discretion to determine whether or not to comply with ICJ judgments. If the Court had understood Article 94 to impose a nondiscretionary obligation to comply with ICJ judgments, then the treaty *would* have effectively said that the parties "shall" or "must" comply.⁷⁵ Concededly, this reading of the opinion is in tension with other parts of the Court's analysis.⁷⁶ But this latter fact points to another pertinent distinction between *Foster* and *Medellín*: because the latter opinion is self-contradictory, there is no single interpretation that would make sense of all aspects of the Court's analysis.⁷⁷ The *Foster* opinion, by contrast, though based on a misconception, is relatively clear. In sum, Professor Sloss' reading of *Foster* is untenable, in my view, because it finds no affirmative support in the opinion and is inconsistent with the opinion's main thrust, whereas my reading of *Medellín* is tenable because it is supported by some parts of the Court's analysis and because no competing reading can be squared with the opinion as a whole.

Professor Sloss does not claim that the alternative rationale he has offered for the result in the *Medellín* case is a tenable interpretation of the opinion the Court handed down. Presumably, he offers the alternative rationale in order to assuage concerns that the approach to self-execution that he defends would necessarily have required the courts to enforce the ICJ's judgment in *Avena*.⁷⁸ In my view, however, the alternative rationale is not convincing, and there is little need to be concerned about a reading of Article 94 as, of its own force, requiring the U.S. courts to comply with ICJ judgments holding that certain judicial remedies must be afforded to individuals. Professor Sloss argues that the Court might properly have refused enforcement of the ICJ's judgment in *Avena* because the ICJ in *Avena* exceeded its jurisdiction.⁷⁹ (He offers this alternative rationale tentatively, as he admits that he is not sure that he would agree.⁸⁰) For reasons that I cannot go into here, I do not agree with the claim that the ICJ exceeded its jurisdiction by addressing remedial matters. Even if it did exceed its jurisdiction, however, I do not agree with Professor Sloss that this renders the

⁷⁴ *Medellín*, 552 U.S. at 508.

⁷⁵ Vázquez, *Treaties as Law*, *supra* note 4, at 661–65.

⁷⁶ *Id.* at 662.

⁷⁷ *Id.* at 664–67.

⁷⁸ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (holding that the Vienna Convention on Consular Relations of April 24, 1963 requires the United States to provide "review and reconsideration" of the convictions and sentences of Mexican nationals, including *Medellín*, who were convicted and sentenced after State officials violated the Convention to determine whether the nationals were prejudiced by the violations).

⁷⁹ Sloss, *supra* note 1, at 178–79.

⁸⁰ *Id.* at 179.

decision in *Avena ultra vires* and thus not binding on the United States.⁸¹ A litigant's obligation to comply with a tribunal's judgment cannot depend on the losing party's agreement with the tribunal's judgment—including its conclusion that it had jurisdiction over the case. And, in fact, the Statute of the ICJ, which has the force of a treaty, and is as such binding on the United States, makes it clear that the ICJ has jurisdiction to decide the scope of its jurisdiction, as Article 36(6) provides that “in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.”⁸²

In my view, there is no significant cause for concern. Professor Sloss is presumably trying to assuage concerns that the ICJ will render an exorbitant judgment and the U.S. courts will have no choice but to enforce it.⁸³ But, first, the ICJ does not often render exorbitant judgments. Certainly, the relief required by the ICJ's judgment in *Avena* was quite limited and, in my view, well supported.⁸⁴ If the ICJ were to render an exorbitant judgment, the U.S. courts would not inevitably have to enforce it even if Article 94 were construed as making such judgments self-executing.⁸⁵ The courts would not have to do so if Congress enacted a statute prohibiting them from doing so. Under the last-in-time rule, the later statute would prevail.⁸⁶ My sense is that, despite the well-known obstacles to enacting federal legislation, a statute barring compliance with an exorbitant ICJ judgment would be enacted without difficulty. On the other hand, a statute requiring compliance with a reasonable judgment—which is what the Supreme Court in *Medellín* read Article 94 to require⁸⁷—would likely be difficult to enact, as the federal government's efforts to pass such a statute after *Medellín* have shown.⁸⁸ Thus, in my view, there would have been no great cause to be concerned about a judgment interpreting Article 94 as imposing a nondiscretionary obligation to comply and holding that no intervening act of legislation was necessary to authorize the courts to enforce an ICJ judgment addressed to the courts.

In sum, Professor Sloss treats Chief Justice Marshall as infallible, arguing that the Chief Justice could not have meant what he appears to have held because such a holding would rest on a mistake about international law. On the other hand, he does not resist a reading of Chief Justice Roberts' opinion in *Medellín* that he correctly

⁸¹ *Id.* at 177–80.

⁸² Statute of the International Court of Justice, art. 36(6).

⁸³ Sloss, *supra* note 1, at 179–80.

⁸⁴ See *Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 12, 70–73 (March 31).

⁸⁵ Vázquez, *Treaties as Law*, *supra* note 4, at nn.233–35.

⁸⁶ Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self Execution*, 55 STAN. L. REV. 1557, 1592 (2003) (citing *Nicaragua v. Reagan*, 859 F.2d 929, 936–37 (D.C. Cir. 1988)).

⁸⁷ *Medellín*, 552 U.S. at 508–09; Vázquez, *Treaties as Law*, *supra* note 4, at 661–62.

⁸⁸ See *Leal García v. Texas*, 131 S. Ct. 2866, 2868 (2011).

regards as resting on the same error. (He proposes an alternative rationale for the holding but does not claim that the Court embraced it.) Alas, Marshall was only human. In *Percheman*, Marshall recognized his error in *Foster* regarding Article 8 of the treaty; as I read *Percheman*, Marshall also urged greater caution in finding treaties to be non-self-executing. Chief Justice Roberts repeated Marshall's early error in *Foster* while overlooking his course correction in *Percheman*. In my view, the reasoning that Professor Sloss attributes to Chief Justice Marshall in *Foster* should be viewed instead as an alternative rationale on which the Court could, and perhaps should, have relied. The alternative rationale that Professor Sloss advances for the *Medellin* outcome is not persuasive, but another rationale is available that would reconcile the holding with constitutional text and doctrine. Unlike Professor Sloss' rationale for either *Foster* or *Medellin*, this alternative rationale—resting on an interpretation of Article 94 of the U.N. Charter as merely obligating the United States to do its best to comply with ICJ judgments—does find support in the Court's opinion.