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Surrendering the Rule of Law in Foreign Relations

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Martin S. Flaherty

Abstract

Foreign relations specialists for the most part agree on this much: *Medellin v. Texas* may prove to be the most important case in the field in recent memory—more than even the recent line of Guantanamo decisions, significant as the general public assumes these to be. Agreement fades, however, concerning exactly what *Medellin*'s importance will be. Does it signal a reversal of the doctrine that treaties are presumptively self-executing? Or does it (merely) suggest hostility toward domestic application of multi-lateral agreements, especially when they confer individual rights? Is the Court's opinion driven by a salutary commitment to domestic democratic process in the face of elitist international institutions? Or does it reflect a cynical repudiation of text, history, and structure in the service of statist conservatism? Or both? (P) In the race to suggest less obvious reasons why *Medellin* may prove significant, this musing suggests two. Together they indicate that the case's legacy will likely be the undermining of a basic commitment to the rule of law, both domestic and international. (P) First, Chief Justice Roberts' analysis suggests that the type of doctrinal disingenuousness that has seeped into the Court's domestic jurisprudence has now arrived in foreign relations. By this term I mean the Justices' growing tendency to effect important shifts in doctrine without clearly announcing what they are doing. This unfortunate technique, evident in both conservative and liberal opinions, undermines rule of law values by yielding confusion where the Court should be providing guidance. For just this reason, debates over the doctrinal meaning of *Medellin* will persist until the Court gives a better idea of where it is heading. More importantly, the failure to announce and define doctrinal shifts further undermines the rule of law by allowing the Court to make ad hoc, inconsistent holdings given that enunciated doctrinal rules no longer serve to constrain judicial decision making. (P) Second, *Medellin* weakens the rule of law on a structural level through fundamentally misconceiving separation of powers, especially in an increasingly globalized world. Here the problem is not simply the Chief Justice abandoning his own ostensible commitment to constitutional text, history, structure, and case law, much as Justice Breyer's dissent points out. The real problem, rather, is doing all this to undermine perhaps the chief function that the separation of powers exists to promote, namely, a balance among the main departments of government the better to protect liberty. By holding the Vienna Convention as non-self-executing, the Court shirked its own express duty and so diminished its role in maintaining this balance. Yet despite appearances, the ultimate beneficiary was not Congress but instead the President. If one accepts that the Executive has become infinitely more powerful, the Court's action doubly undercuts separation of powers properly viewed. Add to the mix that globalization has accelerated the comparative supremacy of the Executive still further, and the misstep is that much greater.

SURRENDERING THE RULE OF LAW IN FOREIGN RELATIONS

*Martin S. Flaherty**

Foreign relations specialists for the most part agree on this much: *Medellin v. Texas*¹ may prove to be the most important case in the field in recent memory—more than even the recent line of Guantanamo decisions, significant as the general public assumes these to be. Agreement fades, however, concerning exactly what *Medellin*'s importance will be. Does it signal a reversal of the doctrine that treaties are presumptively self-executing? Or does it (merely) suggest hostility toward domestic application of multi-lateral agreements, especially when they confer individual rights? Is the Court's opinion driven by a salutary commitment to domestic democratic process in the face of elitist international institutions? Or does it reflect a cynical repudiation of text, history, and structure in the service of statist conservatism? Or both?

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First, Chief Justice Roberts' analysis suggests that the type of doctrinal disingenuousness that has seeped into the Court's domestic jurisprudence has now arrived in foreign relations. By this term I mean the Justices' growing tendency to effect important shifts in doctrine without clearly announcing what they are doing. This unfortunate technique, evident in both conservative and liberal opinions, undermines rule of law values by yielding confusion where the Court should be providing guidance. For just this reason, debates over the doctrinal meaning of *Medellin* will persist until the Court gives a better idea of where it is heading. More importantly, the failure to announce and define doctrinal shifts further undermines the rule of law by allowing the

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1. 128 S. Ct. 1346 (2008).

Court to make ad hoc, inconsistent holdings given that enunciated doctrinal rules no longer serve to constrain judicial decision making.

Second, *Medellin* weakens the rule of law on a structural level through fundamentally misconceiving separation of powers, especially in an increasingly globalized world. Here the problem is not simply the Chief Justice abandoning his own ostensible commitment to constitutional text, history, structure, and case law, much as Justice Breyer's dissent points out.² The real problem, rather, is doing all this to undermine perhaps the chief function that the separation of powers exists to promote, namely, a balance among the main departments of government the better to protect liberty. By holding the Vienna Convention as non-self-executing, the Court shirked its own express duty and so diminished its role in maintaining this balance. Yet despite appearances, the ultimate beneficiary was not Congress but instead the President. If one accepts that the Executive has become infinitely more powerful, the Court's action doubly undercuts separation of powers properly viewed. Add to the mix that globalization has accelerated the comparative supremacy of the Executive still further, and the misstep is that much greater.

DOCTRINAL DISINGENUOUSNESS

Doctrinal disingenuousness refers to a technique in which judges announce a significant shift in doctrine without fully acknowledging it, or even acknowledging it at all. Judges have various incentives to do this. Judging, especially in a common law system, puts a premium on stability. If change is to take place, it should be incremental, not radical. Beyond this, a judge seeking a major shift in doctrine may not infrequently face the choice of having enough votes to obtain a certain result that reflects such change, but not enough for an announcement adopting a new doctrinal stance that may affect many more cases than more hesitant colleagues may want to embrace.

Examples convey the technique better than description. Whether the phenomenon has been ebbing or flowing could be answered only by substantial research. An impressionist take, however, suggests this judicial version of "hiding the ball" has

2. See generally *id.* at 1375-92 (Breyer, J., dissenting).

been recently on the rise, perhaps as a function of a closely divided Court. One area in which it has arisen is Equal Protection jurisprudence, particularly in service of progressive results. Consider *City of Cleburne v. Cleburne Living Center*.³ There Justice White refused to recognize mental challenge as a suspect or quasi-suspect classification. The doctrinal result was application of rational relationship review, which ordinarily means a rubber stamp. The Court nonetheless invalidated the zoning measure at issue, which at least gives rise to the inference that mental challenge may actually trigger some *de facto* higher level of review, as was the case in gender with *Reed v. Reed*.⁴ Much the same pattern can be seen in *Romer v. Evans*.⁵ There the Court dodged the question of whether sexual orientation triggered higher scrutiny. Yet again, rational relationship yielded invalidation of nothing less than a state constitutional amendment ratified through a referendum. Not for nothing did Justice Scalia see the Court smuggling in a higher level of scrutiny while disclaiming doing anything of the sort.

Nor are more conservative majorities about doing this sort of thing. In Equal Protection once more, the Court appeared to settle a generation of contentiousness and declare that race-based affirmative action policies would trigger strict scrutiny. Yet Justice O'Connor immediately muddied the waters by disclaiming the idea that strict scrutiny would not always be fatal in fact, a suggestion apparently confirmed in *Grutter v. Bollinger*.⁶

One further example of doctrinal disingenuousness comes from recent Commerce Clause cases. In *United States v. Lopez*,⁷ the Court for the first time in almost three generations famously invalidated an Act of Congress as exceeding the Commerce Power, yet all the while stressed that nothing doctrinally had changed. *United States v. Morrison*⁸ echoed both this result and stance, though it did improve matters in one regard. There the Court did enunciate that, before courts determine whether the activity regulated substantially affects interstate commerce in the aggregate, they must engage in the threshold inquiry as to what

3. 473 U.S. 432 (1985).

4. 404 U.S. 71 (1971).

5. 517 U.S. 620 (1996).

6. 539 U.S. 306 (2003).

7. 514 U.S. 549 (1995).

8. 529 U.S. 598 (2000).

was economic in nature. The majority averred that this inquiry clearly emerged from prior decisions, a contestable reading at best. That said, at the very least the Court did make clear that Commerce Clause doctrine now included the prior inquiry.

By contrast, *Medellin* does not go even this far. Instead, Chief Justice Roberts' approach more closely resembles *Lopez* and the Equal Protection cases. In perfunctory fashion, the majority indicates that the case is no more than a straightforward application of *Foster v. Neilson*⁹ and the doctrine that the intent of the treaty-making parties may render treaties non-self-executing.¹⁰ It later more stridently declares its doctrinal conservatism with regard to treaty interpretation, claiming it is engaging in the tried-and-true methodology of looking to text, post-ratification action by other signatories, among other devices.¹¹

And yet, any number of the decision's moves cries out that a significant, if not major, doctrinal shift is underway. To start at the end, the judgment of course holds that the *Avena* judgment is non-self-executing, which among other things precludes what many saw as a cutting-edge opportunity for the Court to opine on the constitutional limits of delegation "outward" to international adjudicatory institutions. This is not the place to rehearse detailed arguments as to whether the Court's conclusion was simply wrong. It is, however, to note that the conclusion was hardly obvious. Moreover, as the dissent notes, the Court's textual and post-ratification analysis makes it hard to see how any judgment of an international adjudicatory body may be self-executing in a multilateral agreement.

What truly suggests that a major doctrinal shift is afoot, however, are various hints, emphases, and gaps in the Court's reasoning. First, the Chief Justice does not discuss the one constitutional text on point, the Supremacy Clause, that if read in the same way the majority reads the relevant treaties, would admit of no non-self-executing treaties. Second, the Court's quasi-treatment of history is suspiciously thin. It gives no background as to why the Founders adopted self-execution in the first place, or of the enduring relevance of those reasons. Rather, the Court misleadingly cites *The Federalist* for the proposition that treaties are

9. 27 U.S. 253 (1829).

10. *Medellin*, 128 S. Ct. at 1356-57.

11. See generally *id.* at 1357-60.

primarily compacts between nations, yet utterly ignoring their dual feature as supreme law.¹² Third, Chief Justice Roberts simply ignores early practice, which indicates that the judiciary presumed treaties to be self-executing. Nor, fourthly and with due respect to Messers. Bradley and Goldsmith, does the Court acknowledge that the “orthodox” position had been to presume that treaties were self-executing absent indications otherwise?

Only time will tell whether *Medellin* does signify a major shift masquerading as business as usual. But assuming this to be the case, this exercise in doctrinal disingenuousness suggests certain costs. Most obvious is simply confusion. Should judges, lawyers, and academics take their cues from the Court’s protestations of continuity? Or should the presumption now be that treaties, especially multilateral human rights treaties, are non-self-executing even without the usual Senate declaration to that effect? Second, doctrinal confusion of this sort tends to empower the judiciary, even when, as here, it undermines doctrines that would ordinarily accord it a greater role. This point follows simply because vague doctrine affords judges to pick and choose what results they desire. Yet most important, and related, is the idea that the judiciary’s failure to limit its own discretion is fundamentally at odds with most conceptions of the rule of law. A clear, and traditional, presumptive rule as to self-execution would at least channel the discretion of those charged with applying those treaties in all three branches. So too would a contrary rule. A doctrinal position that purports to be one thing, yet at the same time undermines the very position it is meant to further, begins to lose its claim to law at all. Instead, what results is an ad hoc, case-by-case, exercise in policy-making, at least until the rule later, if ever, becomes settled.

Until that point, only one group emerges as clear winners. These are, of course, academics who will reap the benefits of conferences, publications, op-eds, and speaking engagements opining on the meaning of the latest set of tea leaves from the Marble Palace.

SEPARATION OF POWERS

Medellin also undermines the rule of law substantively. The Court does this largely offstage, with the assumptions it makes

12. *See id.* at 1357.

concerning separation of powers. In this regard, many commentators will surely assert that the decision represents an abdication of judicial responsibility. Text, history, structure, and early practice all point toward a fairly strong presumption of treaty self-execution. On this assumption, the Court's judgment hands over domestically justiciable law to the political discretion of Congress. This argument will strike many as compelling as far as it goes. *Medellin's* approach to separation of powers nonetheless misfires in a more profound way. The Court has not merely failed to discharge its specified duty of applying treaties as the supreme law of the land. *Medellin* further violates separation of powers at a more general, functional, and important level. Specifically, the decision: 1) undermines balance among the branches, an essential separation of powers function; 2) by empowering in the end the executive, already the most powerful branch; which 3) will likely get even stronger as a function of globalization.

Consider first separation of powers at its most fundamental level. The Constitution generally treats the division of authority in functional, rather than categorical or specific, terms. There is simply little or no evidence that the Founders widely agreed on whether various specific powers, such as removal or treaty termination, were essentially legislative, executive, or judicial outside the core meaning of those terms. By partial contrast, the Constitution does specifically allocate numerous powers among the branches, sometimes in unprecedented ways. One such is judicial application of treaties as self-executing law, which creates the more specific problem for the *Medellin* majority. That said, text, history, and structure leaves a substantial number of specific issues unresolved. Here, the best that can be said is that separation of powers clearly promotes certain general functions, against which modern controversies should be weighed. Of these, by far the most important—at least as far as the Founders were concerned—was the maintenance of a balance of power among the branches to prevent a tyrannical accretion of authority in any one branch.

Medellin fails from a functionalist standpoint. Here the key question is whether fashioning a doctrine that takes domestic application of treaties from the judiciary advances or retards bal-

ance among the branches. *Bush v. Gore*¹³ notwithstanding, one would be hard pressed to argue that the judiciary wields so much power, at least in foreign affairs, that its authority needs to be reigned in. Yet the same observation could be made about Congress, the branch which at first blush appears to be the principal recipient of the power the judiciary is giving away. Under a strong self-execution regime, courts would apply treaties; under a weakened version, the decision to have treaties apply domestically in the first place would fall to Congress. On the assumption that Congress, in areas such as war and treaty termination, is not itself an overly powerful branch either, the most that could be said in functionalist terms is that one weak branch has accorded another weak branch an important power.

Further consideration, however, suggests a different beneficiary and a different conclusion. As a practical matter, movement from a doctrine of strong to weak self-execution will ultimately benefit not Congress but the President. If for no other reason than the press of business, it is unlikely that Congress would incorporate, or perhaps even consider incorporating, a substantial number of treaties into domestic law, even where there may be widespread support for doing so. By default, authority to apply treaties would fall to the executive in at least two ways. First, the President would have substantial control over whether a treaty might be incorporated or not by having the initiative to propose doing so or not. Second, at least in a regime of weak self-execution, an executive decision to treat a treaty as self-executing (or not), would create its own presumption. This is especially true where, as in *Medellin*, the Court employs the rhetoric of deference to executive treaty-interpretation.

At this point, the only remaining step in a functionalist analysis centers on considering the relative power of the President to the other branches, especially in the foreign affairs context. To this question, suffice it to say that the observations Justice Jackson made about the threat of an overbearing executive, especially in foreign affairs, appear to be truer today than they were in 1952.¹⁴

The one critical additional consideration would be a devel-

13. 531 U.S. 98 (2000).

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

opment that Justice Jackson, for all his reliance on comparative law, did not foresee. As Anne-Marie Slaughter among others has pointed out, globalization has eroded state sovereignty insofar as government actors deal more and more with their counterparts in other nations. Where states dealt with each other as states, today, legislators from one country visit, share information, and coordinate with one another, as do judges, as do especially executive officials and regulators.¹⁵ What Slaughter does not ask is what the net effect of this form of inter-governmental globalization is in separation of powers terms in any one country. The evidence she adduces, however, strongly suggests that the net beneficiary in any state is the executive branch. Much work needs to be done to demonstrate the thesis that separation of powers in a global context reveals comparatively stronger executive branches. On this assumption, however, it follows that *Medellin* is doubly ill-considered. From a functionalist perspective, it is bad enough the decision shifts power from the courts to the “most dangerous branch” on standard analysis. The decision is that much worse when considering the additional imbalance that globalization promises.

CODA

Much commentary on *Medellin* will no doubt focus on aspects that fall between the two features considered here. The battle over text, history, and structure waged between the majority and dissent should rightly frame the ongoing debate. That said, the Court’s treatment of doctrine on the micro level, and its unconcern for the implications of its decision from a functionalist separation of powers standpoint on the macro plane, raise troubling issues in their own right.

15. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).