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Medellin and Originalism

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MEDELLÍN AND ORIGINALISM

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In Medellín v. Texas, *the Supreme Court permitted Texas to proceed with the execution of a Mexican national who had not been given timely notice of his right of consular notification and consultation in violation of the United States' obligations under the Vienna Convention on Consular Relations. It did so despite its finding that the United States had an obligation under treaty law to comply with an order of the International Court of Justice that Medellín's case be granted review and reconsideration. The international obligation, the Court found, was not domestically enforceable because the treaties at issue were not self-executing. The five Justices who signed the Chief Justice's Majority opinion, including the Court's self-proclaimed originalists, thus joined an opinion that construed the Constitution's Supremacy Clause without any serious consideration of its language or the history of its drafting, ignoring evidence of the Supremacy Clause's original meaning cited by the dissenting Justices.*

This Article explores the meaning of originalism in the context of the Court's Medellín *decision and contends that the Majority's opinion, while perhaps defensible on other grounds, cannot be reconciled with any identifiable version of originalism. Rather it is best understood as a decision reflecting the conservative Majority's political commitment to favor principles of U.S. sovereignty and federalism over compliance with international obligations, even when the consequences of such a commitment is to enable state governments to undermine the foreign policy decisions of the political branches of the federal government.*

Ultimately, however, the Article concludes that Medellín's case never should have come before the Court. The President has a duty to "take Care that the Laws be faithfully executed." The Court determined that the Bush administration did not satisfy this duty by issuing an Executive Memorandum directing states to comply with the judgment of the International Court of Justice. That being the case, the President now must comply with his Take Care Clause duties by working with Congress to make certain that federal law compels compliance with the International Court of Justice's judgment. Indeed, this Article contends that the Medellín case is emblematic of the U.S. executive branch's broader failure to ensure that all treaties requiring domestic

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implementation are in fact implemented so as to avoid placing the United States in violation of its international obligations.

> *[O]riginalism is not, and ha[s] perhaps never been, the sole method of constitutional exegesis. It would be hard to count on the fingers of both hands and the toes of both feet, yea even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean. . . . But in the past, nonoriginalist opinions have almost always had the decency to lie, or at least to dissemble about what they were doing – either ignoring strong evidence of an original intent that contradicted the minimal recited evidence of an original intent congenial to the court's desires, or else not discussing original intent at all, speaking in terms of broad constitutional generalities with no pretense of historical support.*[1]

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[1] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

I. INTRODUCTION

Justice Scalia knows whereof he speaks. In *Medellín v. Texas*,[2] the U.S. Supreme Court found that Texas was entitled to ignore the ruling of the International Court of Justice (ICJ) in the *Avena* case[3] as well as a Presidential memorandum directing states to comply with that ruling [hereinafter President's Memorandum].[4] The Court thus permitted Texas to proceed with the execution of a Mexican national who had not been given timely notice of his right of consular notification and consultation in violation of the United States' obligations under the Vienna Convention on Consular Relations (VCCR).[5]

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[2] Medellín v. Texas, 128 S.Ct. 1346 (2008).

[3] Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 12 (Mar. 31).

[4] Memorandum from President George W. Bush to Alberto R. Gonzales, U.S. Att'y Gen. (Feb. 28, 2005), available at http://www.whitehouse.gov/news/releases/2005/02/ 20050228-18.html (last visited June 12, 2008). The entire text of the memorandum is as follows:

> SUBJECT: Compliance with the Decision of the International Court of Justice in Avena
>
> The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.
>
> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.
>
> GEORGE W. BUSH

[5] Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. no. 6820. *See id.*, Art. 36(1)(b) (providing that, at the request of a foreign national criminal defendant, "the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of

It did so without serious consideration of the Supremacy Clause, which reads:

> 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 Untied States, **shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.**[6]

One would think that the Court would put some energy into explaining why, in this case, a state court must be permitted to allow state procedural laws prohibiting successive habeas petitions[7] to trump a treaty, in this case the U.N. Charter,[8] Article 94 of which requires member states to comply with decisions of the ICJ.[9] Its holding, in the end, turns on the extra-constitutional doctrine that some treaties are non-self-executing and therefore are not supreme law in the United States unless implemented through congressional legislation.[10] But the opinion makes no effort to square the doctrine of self-execution with the original meaning of

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that State is arrested or committed to prison or to custody pending trial or is detained in any other manner"). The ICJ found that the U.S. had violated its Article 36 obligations with respect to Avena and other Mexican nationals, including Medellín. *See* Avena, 2004 I.C.J. at 71-72, ¶ 153 (finding, by a vote of fourteen to one, that the United States had violated its obligations under Article 36(1) of the VCCR).

6 U.S. Const. art. VI, ¶ 2 (emphasis added).

7 Medellín, 128 S.Ct. at 1356 (reviewing the procedural history of Medellín's case and noting that the Texas Court of Criminal Appeals had found that "neither the *Avena* decision nor the President's Memorandum was 'binding federal law' that could displace the State's limitations on the filing of successive habeas applications").

8 59 Stat. 1051, T.S. No. 993 (1945).

9 *Id*. at Art. 94(1) (requiring member states to "undertake to comply" with decisions of the ICJ).

10 *See* Medellín, 128 S.Ct. at 1356 (noting that "[t]his Court has long recognized the distinction between treaties that automatically have effect as domestic law and those that . . . do not" and citing to Justice Marshall's 1828 opinion in *Foster v. Neilson*, 22 Pet. 253, 315 (1829), as explaining the doctrine).

the Supremacy Clause,[11] and it ignores historical legal scholarship cited by the dissent that suggests that the purpose of that clause was to guarantee that most treaties would be self-executing.[12]

By joining the opinion in *Medellín*, the Supreme Court's two self-proclaimed originalists, Justices Scalia[13] and Thomas,[14] as

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[11] *See infra* Part IV.

[12] Medellín, 128 S.Ct. at 1378 (Breyer, J., dissenting), *citing* Carlos Vázquez, *The Four Doctrines of Self-Executing Treaties*, 98 AM. J. INT'L L. 695 (1995); Martin Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land*," 99 COLUM. L. REV. 2095 (1999). Justice Breyer also includes a "*but see*" citation to John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999). Yoo's article, along with John Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) and JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 215-49 (2005), could have provided an originalist argument in support of the Majority's opinion, were the Majority interested in making such arguments. In any case, scholars have rejected Yoo's arguments. *See, e.g.,* D.A. Jeremy Telman, *The Foreign Affairs Power: Does the Constitution Matter?* 80 TEMP. L. REV. 245, 283 (2007) (noting that Yoo's views on self-execution are without support in the historical record); Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1451 (2006) (concluding that Yoo "drifts too far from the Framers' expressed understandings of their own text, and from the historical meanings of the words they used"); Michael D. Ramsey, *Torturing Executive* Power, 93 GEO. L. J. 1213, 1232, n. 75 (2005) (characterizing Yoo's position as "in tension with the plain language" of the Supremacy Clause, "not widely endorsed" and having "little judicial support"); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2161 (1999) (finding not a shred of evidence to support the view that the Framer's intended for the House of Representatives to have the power to block treaties in force); Flaherty, *History Right*, 99 COLUM. L. REV. at 2120-21 (reviewing records of the Constitutional Convention and finding them to support the notion that treaties were to be presumptively self-executing).

[13] Justices Scalia and Thomas are routinely identified as originalists. *See, e.g.*, Stephen Griffin, *Rebooting Originalism*, unpublished manuscript, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009393 (last visited Apr. 11, 2008), at 10 (describing Justices Scalia and Thomas as "conservative originalists) (cited with permission of the author); Mitchell N. Berman, *Originalism is Bunk*, unpublished manuscript, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078933 (last visited Apr. 11, 2008), at 1 (identifying Justices Scalia and Thomas as originalists). Justice Scalia has proclaimed himself an originalist in innumerable contexts. *See e.g.*,

well as Justice Alito and Chief Justice Roberts who, in their Senate confirmation hearings "evinced sympathy for the originalist position,"[15] are complicit in a return to what Justice Scalia ironically dubbed the "decent" judicial opinions of the past, in which judges dissemble about what they are doing, not discussing

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Boumediene v. Bush, 128 S.Ct. 2229, 2303 (2008) (Scalia, J., dissenting) ("The proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people."); Minnesota v. Dickerson, 113 S.Ct. 2130, 2139 (1993) (Scalia, J., concurring) ("I take it to be a fundamental principle of constitutional adjudication that the terms of in the Constitution must be given the meaning ascribed to them at the time of their ratification.").

[14] Justice Thomas has expressly embraced originalism in Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996) (reiterating a position expressed in his written opinions that "judges should seek the original understanding of the [constitutional] provision's text, if that text's meaning is not readily apparent"). Indeed, Thomas has repeatedly invoked originalism as his preferred method of interpretation in his legal opinions. *See, e.g.*, Morse v. Frederick, 127 S.Ct. 2618, 2630 (2007) (Thomas, J., concurring) (agreeing with the majority that public schools may prohibit speech advocating illegal drug use but writing separately to stress that the First Amendment, as originally understood, does not protect student speech in public schools); McIntyre v. Ohio Elections Comm'n, 115 S.Ct. 1511, 1525 (1995) (Thomas, J., concurring) (concurring in the result but reaching it by means of an inquiry into whether "the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafletting"); Helling v. McKinney,113 S.Ct. 2475, 2484 (1993) (Thomas, Scalia JJ., dissenting) (finding, based on the original meaning of "punishment," that the petitioners cannot not rely on the Eighth Amendment to protest prison conditions). Scholars have noted the originalist cast of Justice Thomas's jurisprudence. *See* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN CONSERVATISM 260 (2004) (characterizing Justice Thomas as making the most extensive originalist case for expanding judicially enforceable limits on congressional power).

[15] Lawrence Rosenthal, *Does Due Process Have an Original Meaning? Due Process Procedural Innovation and . . . Parking Tickets*, 60 OKLA. L. REV. 1, 3 (2007), *citing* Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 357 (2006) (statement of Samuel A. Alito, Jr., J., U.S. Court of Appeals for the Third Circuit, and Nominee to the U.S. Supreme Court); Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 159, 570 (2005) (statement and written response of John G. Roberts, Jr., J., U.S. Court of Appeals for the D.C. Circuit, and Nominee to the U.S. Supreme Court).

original intent or original meaning at all, and decide cases in accordance with their own views, with nary a pretense of historical support.[16] In *Medellín*, it was the "living constitutionalists"[17] who with one exception[18] joined in Justice Breyer's dissent.[19] That dissent relied heavily on historical scholarship into the original meaning of the Supremacy Clause,[20] and informed by that historical evidence and by case law largely ignored by the Majority, concluded that the Texas courts are bound, pursuant to the VCCR, the Optional Protocol to that Convention,[21] and Article 94 of the U.N. Charter, to implement the ICJ's Avena decision.[22]

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[16] Scalia, *The Lesser Evil*, 57 U. CIN. L. REV. at 852.

[17] Justices Stevens, Souter, Ginsburg and Breyer are often characterized as being in the living constitutionalist camp. *See, e.g.,* John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment over Bush v. Gore?* 94 GEO. L. J. 1475, 1481 (2006) (naming Justices Stevens, Souter, Ginsburg and Breyer as the court's "living constitutionalists"); Eric R. Claeys, *The Limits of Empirical Political Science and the Possibility of Living-Constitution Theory for a Retrospective on the Rehnquist Court*, 47 ST. LOUIS U. L. J. 737, 749 (2003) (stating that Justices Stevens, Souter, Ginsburg and Breyer subscribe to an agenda of living constitutionalism essentially consistent with that of the Warren Court). Justice Breyer has made his commitment to living constitutionalism more or less express in a recent publication, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2006). In that book, Justice Breyer describes his own approach as seeking to avoid constitutional interpretations that are either "willful, in the sense of enforcing individual views," that is simply enforcing "whatever [the judge] thinks best" or "wooden, in uncritically resting on formulas, in assuming the familiar to be the necessary, in not realizing that any problem can be solved if only one principle is involved but that unfortunately all controversies of importance involve if not a conflict at least an interplay of principles." *Id*. at 18, 19 (quoting Justice Frankfurter, Learned Hand and Justice Brandeis).

[18] Justice Stevens wrote a concurring opinion in Medellín, in which he relies only on the language of the relevant treaties in finding them to be non-self-executing, without any reference to the original meaning of the Supremacy Clause. Medellín, 128 S.Ct. at 1372-73 (Stevens, J., concurring).

[19] *Id*. at 1375 (Breyer, J., dissenting).

[20] *See* discussion *infa* Part IV.B.

[21] Optional Protocol to the Vienna Convention on consular Relations Concerning the Compulsory Settlement of Disputes, done on Apr. 24, 1963 [1970], 21 U.S.T. 325, 596 U.N.T.S. 487. T.I.A.S. no. 6820.

[22] Medellín, 128 S.Ct. at 1375 (Breyer, J., dissenting).

Chief Justice Roberts, writing for the , did not engage this historical evidence in earnest, instead relying on his own idiosyncratic and poorly documented version of our constitutional history and judicial precedent[23] in finding that the relevant treaties are all non-self-executing and therefore not enforceable as U.S. law absent congressional implementing legislation.[24]

This Article explores the paradoxical refusal of the originalist Justices to even acknowledge the strong originalist arguments of the dissenting Justices in *Medellín*. It thus contributes to the growing literature that exposes the inconsistency of the Court's self-proclaimed originalists.[25] It would be churlish to point out

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[23] *See* discussion *infra* Part IV.A.

[24] Medellín, 128 S.Ct. at 1356 (finding that because none of the treaties at issue in *Medellín* create binding federal law in the absence of implementing legislation and that no such legislation exists, the *Avena* judgment is not binding domestic law).

[25] *See, e.g.*, KECK, MOST ACTIVIST COURT, at 258 (arguing that the Rehnquist Court's conservative majority relies only sporadically on originalist arguments in "activist" decisions); Andrew Koppelman, *Phony Originalism and the Establishment Clause* (forthcoming NORTHWEST. L. REV. (2008), draft posted at http://ssrn.com/abstract=112482 (last visited June 12, 2008), manuscript at 2 (arguing that Justices Rehnquist's, Scalia's and Thomas's interpretations of the establishment clause "are remarkably indifferent to the original purposes of that clause"); Rosenthal, *Does Due Process Have an Original Meaning*, 60 OKLA L. REV. at 25-26 (contending that Scalia's interpretation of the Due Process Clause is not originalist); Randy E. Barnett, *Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism*, 75 U. CIN. L. REV. 7, 12 (2006) (contending that Scalia simply discards constitutional provisions that do not meet with his approval). Indeed, there are scholarly attacks on Scalia's consistency in interpretive strategies that go beyond constitutional interpretation. *See, e.g.,* Miranda Oshige McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, University of San Diego School of Law Legal Studies Research Paper Series, Research Paper No. 08-15, http://ssrn.com/abstract=1113541 (last visited June 15, 2008) (arguing that Scalia often departs from textualism in statutory interpretation and that in cases when he follows his purported methodology, he often finds, based on resort to an eclectic variety of extrinsic materials that the assumption in favor or the ordinary meaning of the statutory language is overcome); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995) (developing a positive account of the methodology of textualism – as opposed to viewing textualism simply as a critique of intentionalism – but concluding that textualism does not succeed in limiting or eliminating judicial discretion in

such inconsistency but for the fact that the originalist Justices have been outspoken in defending a version of originalism that they do not practice, and in his public statements on the subject Justice Scalia has posited a dichotomy between originalism and non-originalism in which he himself does not believe.[26] Such hypocrisy ought not to pass without scholarly comment.[27] As

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statutory or constitutional interpretation); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1173-86 (1992) (rejecting Scalia's argument that public respect for the courts is eroded when courts depart from the textualist approach and inquire into legislative intent); William Eskridge, *The New Textualism* 37 UCLA L. REV. 621, 671 (1990) ("It does not readily appear that the structure and background of the Constitution support the new textualism over other theories of statutory interpretation.").

[26] *See* Scalia, *The Lesser Evil*, 57 U. CIN. L. REV. at 862 (acknowledging that "there is really no difference between the faint-hearted originalist and the moderate nonoriginalist" and that "most originalists are faint-hearted and most nonoriginalists are moderate."). Scalia often claims that being an originalist is tough. He does not just get to vote however he likes in every case. Scalia illustrates this point with a story about his wife mockingly humming "It's a Grand Old Flag" or "Stars and Stripes Forever" (the song changes; the story does not) for him when he comes down for breakfast the morning after joining in an opinion that permitted flag burning. *See, e.g.*, Transcipt: NPR News *Morning Edition*, April 28, 2008, *Supreme Court Justice Antonin Scalia Discusses His New Book, Being a Part of the McCain Dream Ticket and His Eternal Gratitude Towards President George H.W. Bush*, http://www.npr.org/about/press/2008/042808.AntoninScalia.html (last visited June 11, 2008) (telling the "It's a Grand Old Flag" story and noting, that "the living constitution jurist is always a happy fella because the case always comes out the way he thinks it ought to"); University Record Online, *Scalia says to focus on original meaning of Constitution*, Nov. 24, 2004, http://www.ur.umich.edu/0405/Nov22_04/13.shtml (last visited June 11, 2008) (reporting on the "Grand Old Flag" story and noting that being an originalist does not always make Scalia popular with conservatives); W&M News, *Justice Antonin Scalia: The case for "dead Constitution"*, Mar. 21, 2004, http://www.wm.edu/news/?id=3486 (last visited June 11, 2008) (quoting Scalia as contrasting his experience with that of the "living constitutionalist" and characterizing the latter's position as "Whatever he thinks is good, is in the Constitution"). It is a nice story, but Scalia's faint-hearted originalism permits him to vote as he likes with great regularity.

[27] Another theme invoked by Justice Scalia and other originalists is that originalism is the only coherent approach to constitutional interpretation, unless one's approach is nihilism. *See* Thomas B. Colby & Peter J. Smith,

Mitchell Berman has recently argued, in at least some of its forms, originalism is, or can be, pernicious.[28]

> It is pernicious because of its tendency to be deployed in the public square – on the campaign trail, on talk radio, in Senate confirmation hearings, even in Supreme Court opinions – to bolster the popular fable that constitutional adjudication can be practiced in something close to an objective and mechanical fashion…. [T]here is little doubt that originalism is often used . . . to pander to that American populist taste for simple answers to complex questions. By thus nourishing skepticism, even demonization, of judicial reasoning that cannot be reduced to sound bite, originalism threatens to undermine the judiciary's unique and essential role in our system of government.[29]

It is not the position of the Article that the proper result in *Medellín* should have been determined solely by giving effect to the Court's understanding of the original meaning of the Supremacy Clause, although one certainly expects a constitutional case to be decided with some attention given to the constitutional text at issue and, if the text is unclear, to its ratification history.

Originalism's Living Constitutionalism, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090282 (last visited April 12, 2008), manuscript at 1-2 (summarizing the views of originalists, including Justice Scalia, Michael Stokes Paulsen, Randy Barnett, Robert Bork, Edwin Meese III and Raoul Berger, all of whom content that originalism is the only consistent theoretical approach to constitutional interpretation). Colby and Smith argue that originalism is, in fact, self-contradictory and incoherent and thus is no different from the living constitutionalism that originalists so abhor. *See id.* at 42-43 (characterizing originalism as "staggering array of sometimes inconsistent approaches which go a long way towards creating a living constitutionalism"). *See also* Berman, *Originalism is Bunk*, at 11 (contending that "originalist logical space" can be represented by a matrix consisting of 72 distinct theses).

[28] *Id*. at 5.

[29] *Id*. at 5-6.

Still, this Article maintains that, under the Take Care Clause,[30] cases such as *Medellín* should never arise if the executive branch is serious about its foreign affairs powers. That is, part of the job of the executive is to make certain that the U.S. is in full compliance with its international obligations. It must do so by taking whatever measures are necessary and effective to assure that such obligations are enforceable in domestic courts, wherever international obligations require such enforcement. While the *Medellín* Majority permits the State of Texas to determine the foreign policy of the United States, the Supreme Court was in a position to permit Texas to do so only because successive presidential administrations lacked the political will to guarantee that VCCR rights (as well as innumerable other rights created under treaties ratified by the United States) are enforceable in U.S. courts.

After a brief review of the background, facts and relevant procedural history of *Medellín* in Part II of the Article, Part III reviews the development of originalist doctrine, with a brief discussion of the commitment to original meaning associated with the positions of Justices Thomas and Scalia on the one hand and the non-originalist Justices on the other. Part IV discusses the *Medellín* opinions in the context of historical scholarship on the meaning of the Supremacy Clause and the development of the doctrine of self-execution. Part V offers a model for how the political branches might reconcile a properly historicized[31] approach to the Supremacy Clause[32] and the Take Care Clause[33] regardless of the Court's views of the doctrine of self-execution.[34]

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[30] U.S. Const. art. II, § 3.

[31] For a historicist critique of originalism, *see* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 164-69 (1996); Griffin, *Rebotting Originalism*, at 35-43.

[32] U.S. Const. art. VI, ¶ 2.

[33] U.S. Const. art. II, § 3.

[34] The opinion in Medellín also addresses the power of the President to direct state courts to implement a decision of an international tribunal. On that subject, the constitutional text provides only the most general guidance and so a discussion of that part of the opinion would go beyond the scope of this Article.

In brief, this Article argues that in order to avoid situations in which congressional inaction or state opposition creates tensions between U.S. obligations under international law and domestic law, the President must take care to use political and legal means to persuade Congress to make our international obligations enforceable as domestic law wherever compliance with a treaty demands congressional implementation.

II. THE *MEDELLÍN* CASE

On June 24, 1993, José Ernesto Medellín, a Mexican national and a member of the "Black and Whites" street gang, participated in an attack on two Houston teenagers, Jennifer Ertman and Elizabeth Pena.[35] Gang members raped the girls for over an hour and then murdered them to prevent them from identifying their attackers.[36] Medellín himself strangled at least one of the girls with her own shoelace.[37] Medellín was arrested five days later. Within hours of his arrest, he signed a written waiver and gave a detailed written confession.[38] Before he made this confession, Medellín was advised of his *Miranda* rights. He was not advised of his rights as a Mexican national under the VCCR to seek legal advice from the Mexican consulate.[39] Medellín was convicted of capital murder and sentenced to death. In 1997, the Texas Court of Criminal Appeals upheld both Medellín's conviction and his sentence.[40]

Years later, while Medellín was on death row in Texas and his petition for habeas corpus worked its way through the federal courts,[41] Mexico brought a case in the ICJ against the United States

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That part of the opinion is the subject of a separate article, Medellín *and the State as Unitary Actor in International Legal Theory*.

35 Medellín, 128 S.Ct. at 1354.

36 *Id.*

37 *Id*.

38 *Id*.

39 VCCR, Art. 36(1)(b); Medellín, 128 S.Ct. at 1353.

40 *Id*. at 1354-55.

41 *Id*. at 1355.

on behalf of Medellín[42] and other Mexican nationals who were convicted in courts within the United States without being given the access to consul provided for in the VCCR.[43] This case, known as *Avena*, was the third in a trilogy of cases brought before the ICJ by states whose nationals were facing the death penalty in the United States and who had been denied their VCCR rights.[44]

In the first case,[45] brought in April 1998, Paraguay instituted proceedings against the United States and sought a retrial of a Paraguayan national, Angel Francisco Breard, who had been sentenced to death in Virginia in 1993 but had been denied his consular consultation rights in connection with his arrest and prosecution for rape and murder.[46] In 1996, Paraguay had also attempted to use domestic legal mechanisms to prevent Breard's execution and to enjoin further violations of the VCCR.[47] A Virginia District Court found that it did not have subject-matter jurisdiction over Paraguay's claims.[48] The Fourth Circuit affirmed

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[42] *Avena*, 2004 I. C. J. Reports at 24-25, ¶ 16 (listing Medellín (#38) among the Mexican nationals on whose behalf Mexico sought relief).

[43] *Id*. at 12. The ICJ had jurisdiction over *Avena* pursuant to the Optional Protocol to the VCCR, which the United States ratified together with the VCCR itself in 1969, and which provides for jurisdiction in the ICJ for disputes arising under the VCCR. Medellín, 128 S.Ct at 1353. In response to the *Avena* decision, the United States withdrew from the Optional Protocol. Letter from Condaleeza Rice, U.S. Secretary of State, to Kofi Annan, United Nations Secretary-General, March 7, 2005, cited in Medellín, 128 S.Ct at 1354.

[44] *See* John F. Murphy, Medellín v. Texas: *Implications of the Supreme Court's Decision for the United States and the Rule of Law in International Affairs*, 31 SUFF. TRANSNAT'L L. REV. 247, 253-259 (recounting litigation relating to Angel Francisco Breard, a Paraguayan sentenced to death for a murder committed in Virginia, and Karl and Walter LaGrand, West Germans sentenced to death for a murder committed in Arizona).

[45] Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 249 (Application of the Republic of Paraguay of Apr. 3, 1998).

[46] Jonathan Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT'L L. 666, 666-68 (1998).

[47] Republic of Paraguay v. Allen, 949 F.Supp. 1269, 1272 (E.D. Va. 1996).

[48] *See id*. at 1273 (finding that the Eleventh Amendment deprives the court of subject-matter-jurisdiction over the relief sought by plaintiffs).

on the same ground,[49] and the Supreme Court refused to review that decision.[50]

On April 9, 1998, the ICJ voted unanimously to indicate provisional measures, directing the United States to ensure that Breard was not executed prior to the ICJ's final decision.[51] The response of the Clinton administration was ambivalent. On the one hand, the Secretary of State sent a letter to the Governor of Virginia urging the Governor not to allow Breard's execution to proceed.[52] At the same time, the Clinton administration filed an amicus brief with the U.S. Supreme Court urging the Court to deny a writ of certiorari and a stay in Breard's habeas petition on the ground that the ICJ's provisional measures are not binding on the United States.[53] By a vote of 6-3, the Supreme Court denied Breard's petition for habeas corpus and for certiorari on April 14, 1998.[54] The Governor of Virgina refused to issue a stay of execution,[55] and Breard was executed that same day.[56] Paraguay eventually dropped its suit against the United States in the ICJ.[57]

Within months of Paraguay's withdrawal of its suit, Germany initiated a new action against the United States in the ICJ on behalf of two of its nationals, Walter and Karl LaGrand, who were facing

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[49] *See* Republic of Paraguay v. Allen, 134 F.3d 615, 619 (4th Cir. 1998) (holding that the Eleventh Amendment does not permit federal courts to provide a remedy based on state officials' past violations).

[50] Breard v. Greene, 118 S.Ct. 1352 (1998).

[51] Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. Reports 248, 258 (Apr. 9, 1998).

[52] *See* Charney & Reisman, *Breard: The Facts*, 92 AM. J. INT'L L. at 671-72 (quoting from Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998)).

[53] *See* Charney & Reisman, *Breard: The Facts*, 92 AM. J. INT'L L. at 672-73 (quoting from Brief for the United States as Amicus Curiae at 49-51, Breard v. Greene, 118 S.Ct. 1352 (1998)).

[54] Breard v. Greene, 118 S.Ct. at 1354.

[55] *See* Charney & Reisman, *Breard: The Facts*, 92 AM. J. INT'L L. at 674-75 (quoting from Commonwealth of Virginia, Office of the Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (Apr. 14, 1998)).

[56] Murphy, Medellín v. Texas, 31 SUFF. TRANSNAT'L L. REV. at 257.

[57] *Id*.

execution for a murder committed in Arizona in 1982.[58] Although the LaGrands were tried and sentenced in 1984, the fact that they had been denied their VCCR rights did not come to light until 1992.[59] The Supreme Court denied their final habeas appeal in November 1998,[60] after the Ninth Circuit had rejected their VCCR claim as procedurally defaulted.[61] Karl LaGrand was executed on February 23, 1999, before Germany was able to initiate its suit in the ICJ.[62]

Germany acted in time to permit the ICJ to issue a provisional measure to prevent the execution of Walter LaGrand as scheduled on March 3, 1999.[63] Germany also had filed a suit in the U.S. Supreme Court, but on the same day, the Court refused to exercise its original jurisdiction in the case.[64] Despite a recommendation from Arizona's Board of Executive Clemency that the Governor grant a sixty-day reprieve to allow for the sorting out of issues surrounding Germany's ICJ case, Arizona Governor Jane Hull ordered the execution to proceed as scheduled,[65] and Walter was executed later that evening.[66]

Unlike Paraguay, Germany decided to pursue its case before the ICJ despite its inability to win a judgment that could benefit the LaGrand brothers. Rather than seeking compensation for the harm it suffered as a result of the U.S. breach of its VCCR obligations, Germany sought assurances that further breaches would not occur.[67] The Court, for the most part, granted Germany the

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[58] *See* Bruno Simma & Carsten Hoppe, *The* LaGrand *Case: A Story of Many Miscommunications*, in International Law Stories, 371, 380 (John E. Noyes*, et al*. eds., 2007) (stating that Germany filed its application with the ICJ on March 2, 1999, the day before Walter LaGrand was scheduled to be executed).

[59] *Id*. at 378.

[60] LaGrand v. Stewart, 119 S.Ct. 422 (1998) (mem.).

[61] LaGrand v. Stewart, 133 F.3d 1253, 1261 (9th Cir. 1998).

[62] Simma & Hoppe, *The* LaGrand *Case*, at 379-80.

[63] Murphy, Medellín v. Texas, 31 SUFF. TRANSNAT'L L. REV. at 258.

[64] F.R.G. v. United States, 119 S.Ct. 1016, 1017 (1999).

[65] Simma & Hoppe, *The* LaGrand *Case*, at 380

[66] Murphy, Medellín v. Texas, 31 SUFF. TRANSNAT'L L. REV. at 258.

[67] LaGrand (Germany v. United States of America), 2001 ICJ 466, 474, ¶ 12 (Judgment of June 27, 2001)

remedy it sought, holding that the United States must allow review and reconsideration of the convictions and sentences of foreign nationals who were denied their VCCR rights so as to take the violation into account, but it left the choice of means for so doing up to the United States.[68]

It came as no surprise when the ICJ, in the *Avena* case, found that the United States had violated its obligations under the VCCR, just as it had found in the *LaGrand* case.[69] Mexico sought a ruling from the ICJ ordering the United States to vacate the convictions and sentences of Mexico's nationals convicted and sentenced in violation of the VCCR and suppression of any statement or confessions made by those Mexican nationals prior to notification of their VCCR rights.[70] The ICJ opted for a more lenient penalty, requiring U.S. courts to "review and reconsider" the convictions and sentences of affected Mexican nationals to determine whether they had been prejudiced by the U.S. breach of its treaty obligations.[71] The U.S. Supreme Court initially granted certiorari to hear Medellín's VCCR claim on habeas,[72] but then dismissed the petition for certiorari as improvidently granted in order to give the Texas courts an opportunity to provide the review and reconsideration called for in *Avena*.[73]

This was necessary because, while Medellín's habeas petition was pending before the Supreme Court, although the United States disagreed with the *Avena* decision,[74] President Bush issued a

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[68] *Id.* at 516, ¶ 128(7).

[69] 2004 I.C.J. Reports, at 53-55, ¶ 106. *See* Simma & Hoppe, *The* LaGrand *Case*, at 388 ("The ICJ, faced with the same treaty and a substantially similar situation as in *LaGrand* . . . produced a judgment that was, to nobody's surprise, very similar to its judgment in *LaGrand*.").

[70] 2004 I.C.J. Reports, at 21, ¶ 13. Mexico also sought a ruling prohibiting the United States from relying on any procedural penalty or any other domestic law in denying relief to Mexican nationals affected by the decision. *Id.* at 21-22, ¶ 13.

[71] *Id.* at 72; Medellín, 128 S.Ct. at 1355.

[72] Medellín v. Dretke, 125 S.Ct. 686 (2005)

[73] Medellín v. Dretke, 125 S.Ct. 2088 (2005).

[74] *See* Verbatim Record, Oral Proceedings in the Case Concerning the Request for Interpretation of the Judgment of 31 March 2004 in the *Case Concerning*

memorandum to the Attorney General, stating that the United States would comply with the *Avena* judgment by directing state courts to implement that judgment.[75] In Medellín's case, the Texas criminal courts refused to do so. The Texas Court of Criminal Appeals dismissed Medellín's post-*Avena* habeas petition as an abuse of the writ.[76] The Texas court did not view either the *Avena* decision or the President's Memorandum as capable of displacing state limitations on the filing of successive habeas applications.[77]

In *Medellín v. Texas*, the U.S. Supreme Court agreed.[78] In a decision written by Chief Justice Roberts, the Court concluded that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions."[79] In so doing, the *Medellín* Majority found that the international obligations that might render the *Avena* decision "directly enforceable federal law" – the VCCR, its Optional Protocol and Article 94 of the United Nations Charter – were non-self-executing treaties that had never been implemented through congressional legislation.[80]

That the five-member conservative of the Court found that a decision of the ICJ does not trump state law surprised few, although some predicted that the Roberts Court, protective as it has been of the President's foreign affairs powers, would order Texas

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Avena and Other Mexican Nationals (United Mexican States v. United States of America) (Remarks of John Bellinger, June 19, 2008), at 10, ¶ 6, *available at* http://www.icj-cij.org/docket/files/139/14592.pdf (last visited July 17, 2008).

[75] *See* President's Memorandum, *supra* note 4.

[76] Ex parte Medellín, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).

[77] *Id*.; Medellín, 128 S.Ct. at 1356.

[78] This holding, in and of itself, was not a surprise, given that the Court had already held that states may apply the procedural default rule to bar VCCR claims. Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006).

[79] *Id*. at 1357.

[80] *See id*. ("Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not automatically binding domestic law.").

to comply with President's Memorandum.[81] It is surprising that in reaching that conclusion, the Majority devotes so little attention to the original meaning of the constitutional text with regard to whether and when international agreements should be given direct effect as domestic law. More surprising still, the Majority devotes very little attention to original meaning despite the fact that the non-originalist dissenters cite to the work of legal scholars who have explored the issue in great detail.[82] While the Justices in the Majority are free to be unpersuaded by the work of mere academics, it is surprising that they do not even attempt to address the overwhelming evidence of an original meaning to the Supremacy Clause, enforced in dozens of cases listed in an

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[81] *See* Julian Ku, *Medellín Gets Yet Another Day at the Supreme Court: This Time He Should Win*, Opinio Juris Blog, http://www.opiniojuris.org/posts/1192028188.shtml (Oct. 10, 2007) (last visited June 11, 2008) (predicting that Medellín would prevail because of the President's memorandum directing states to implement the ICJ's *Avena* decision). Ku's prediction was supported by his own scholarship and that of others. *See* Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 45-47 (2006) (contending that the President can implement international tribunal judgments pursuant to executive foreign affairs powers); Carlos Manuel Vázquez, Breard *and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 679, 685-86 (1998) (contending that the President, pursuant to the Constitution's Take Care Clause, could have ordered the effectuation of the ICJ's provisional measures in the *Breard* case and thus prevented Breard's execution).

[82] *See supra*, note 12 (citing the works of Carols Vázquez and Martin Flaherty); *see also* Medellín, 128 S.Ct. at 1379 (Breyer, J., dissenting) (citing Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571 (2007)). The dissenters, in keeping with their refusal to embrace a principled originalism, do not base their position solely on the original meaning of the Constitution. Rather, they also argue for a historical tradition of giving direct domestic effect to treaties that they are persuaded is consistent with the original meaning of the Supremacy Clause. Medellín, 128 S.Ct. at 1378-83 (Breyer, J., dissenting). They also point to caselaw relating to claims settlements in which Presidents used their Article II power pursuant to a ratified treaty to set aside state law. *Id.* at 1390-91. The Majority opinion *does respond* to the dissent's arguments relating to claims settlements. *Id*. at 1371-72.

appendix to the dissenting opinion,[83] at odds with the Majority's ruling.

III. ORIGINALISM AND THE *MEDELLÍN* OPINIONS

A. Varieties of Originalist Approaches to Constitutional Interpretation

As an articulated theory of constitutional interpretation, originalism is of rather recent vintage.[84] However, originalism has evolved, rapidly and with great contestation,[85] and debates within originalism have become extremely complicated.[86] Generations of scholars have now debated the original meaning of originalism.[87]

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[83] *See* Medellín, 128 S.Ct. at 1392-93 (Breyer, J., dissenting) (listing 29 Supreme Court cases decided 1794 and 2004 in which the Court held a treaty to be self-executing, 12 of which involved enforcement of a treaty despite contrary state or territorial law or policy).

[84] *See, e.g.*, Griffin, *Rebooting Originalism*, at 12-13 (noting that various contemporary methods of non-originalist constitutional interpretation are rooted in traditions that extend back to the time of the adoption of the Constitution and were employed by Justice John Marshall); Keith E. Whittington, *The New Origalism*, 2 GEO. J. L. & PUB. POL'Y 599, 599 (2004) (conceding that, for much of U.S. history, originalism "was not a terribly self-conscious theory of constitutional interpretation").

[85] Griffin, *Rebooting Originalism*, at 4-8 (summarizing the development of new originalism in the 1990s in response to the old originalism that arose in the 1960s); Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y at 599 (describing the old originalism as having flourished from the 1960s thorough the mid 1980s, while the new originalism has flourished since the early 1990s). Randy Barnett provides a remarkably concise and authoritative history of originalism. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611-13 (1999).

[86] *See* Colby & Smith, *Originalism's Living Constitutionalism*, at 4-5 (arguing that originalism is so conflicted as to be incoherent).

[87] *See, e.g.*, Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L. J. 569 (1998) (criticizing Scalia's view that originalism must entail fidelity to original practices and proposing an originalism committed to enforcing original *principles* embodied in the Constitution); Charles A. Lofgren, *The Original Understanding of Original Intent?* 5 CONST. COMM. 77 (1989) (arguing that the Framers were "hospitable to the use of original intent in the sense of ratifier intent, which is *the* original intent in a constitutional sense"); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985) (arguing that the original version of "original

The history of originalism has been recounted numerous times in recent scholarship.[88] Because the topic has been so exhaustively covered elsewhere, a short summary is all that is called for here.

To the extent that originalism can be reduced to its core, it consists of the view that "only certain sorts of historical evidence, such as the understandings of constitutional meaning of the Philadelphia framers or ratifiers of the Constitution, are legitimate in constitutional interpretation."[89] Originalists and non-originalists alike provide similar definitions.[90] Parsimony is the key advantage of originalism as a theory of constitutional adjudication: the

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intent" focused not on the expectations of the framers but on the "rights and powers sovereign polities could delegate to a common agent without destroying their own essential autonomy," making original intentionalism into a form of structural interpretation).

[88] Excellent, succinct summaries can be found in Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 529-33 (2008); Whittington, *The New Originalism,* 2 GEO. J. L. & PUB. POL'Y at 599-603; Barnett, *Originalism for Nonoriginalists*, 45 LOY. L. REV. at 611-29. Daniel Farber provides a concise narrative account of early originalism in Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L. J. 1095 (1989).

[89] Griffin, *Rebooting Originalism*, at 2.

[90] *See, e.g.*, Berman*, Originalism is Bunk*, at 3 ("[O]riginalism maintains that courts ought to interpret constitutional provisions *solely* in accordance with some feature of those provisions' original character."); Farber, *The Originalism Debate*, 49 OHIO ST. L. J. at 1086 ("Originalists are committed to the view that original intent is not only relevant but authoritative, that we are in some sense obligated to follow the intent of the framers."); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (defining originalism as the "approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters"); Scalia, *The Lesser Evil*, 57 U. CIN. L. REV. at 851-52 (describing the "originalist" approach to constitutional interpretation as seeking to establish the meaning of the Constitution in 1789 based on the Constitution's text and overall structure as well as the contemporaneous understanding of the relevant text); Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI-KENT L. REV. 211, 220-21 (1988) (describing textualists such as Robert Bork as treating "the constitutional text as the sole legitimate source of operative norms of constitutional law").

judge's role is to discover the original meaning of the Constitution and rule in accordance with that meaning.[91]

Originalism began as a response to the Warren and Burger Courts.[92] Just as romantic conservatism evolved as a response to enlightenment rationalism,[93] and just as modern conservatism in the United States emerged as a response to the perceived excesses of progressive movements from Roosevelt's New Deal to the Lyndon Johnson's Great Society,[94] originalism was "a reactive theory"[95] that sought to reign in judicial activism by forcing judicial attention to the original meaning of the Constitution.[96] As such, the old originalism had a clear political agenda,[97] and it assumed that its agenda could be realized if judges respected the wills of legislatures.[98] That assumption now seems oddly

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[91] *See* Colby & Smith, *Originalism's Living Constitutionalism*, at 2 ("to originalists, it is the relative predictability, determinacy and coherence of the originalist approach that both respects law and constrains judges.").

[92] Griffin, *Rebooting Originalism*, at 4; Colby & Smith, *Originalism's Living Constitutionalism*, at 5.

[93] *See* H.G. SCHENK, THE MIND OF THE EUROPEAN ROMANTICS 3-8 (1966) (characterizing romanticism as a "reaction against rationalism").

[94] *See* GEORGE NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945 xii (1976) (defining American post-war conservatism as being animated by "resistance to certain forces perceived to be leftist, revolutionary and profoundly subversive of what conservatives at the time deemed worth cherishing, defending and perhaps dying for"); Jonathan Rieder, *The Rise of the "Silent Majority*," in THE RISE AND FALL OF THE NEW DEAL ORDER 243, 244 (Steve Fraser & Gary Gerstle, eds., 1989) (attributing the rise of populist conservatism to feelings of resentment, betrayal and unhappiness with the cultural and political changes in American society from the New Deal to the civil rights movement).

[95] *See* Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y at 601 ("It is important to note that originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts."); *id*. at 604 ("As a reactive and critical posture, the old originalism thrived only in opposition.").

[96] *Id.*

[97] Keith Whittington concludes that the old originalists were "primarily concerned with empowering popular majorities" (*id.* at 602), which also entailed upholding government power. *Id*. at 602-03, n. 21.

[98] *See, e.g.,* RAOUL BERGER, GOVERNMENT BY JUDICIARY 4, 18 (2d ed. 1997) (lamenting the Warren Court's reading of "its libertarian convictions into the

misplaced, since originalist Justices have proven themselves at least as willing to strike down legislation as non-originalist Justices.[99]

In its first iteration, originalism focused on the intentions of the Constitution's framers or ratifiers, as the best source that interpreters ought to rely on if a constitutional provision is not clear.[100] But two scholars effectively demolished the original intentions approach[101] by demonstrating: first, the implausibility of reconstructing the original intentions of the framers;[102] and second, the framers' reluctance to have interpretations of the Constitution depend on claimed knowledge of their original intentions.[103]

Fourteenth Amendment" and claiming that is has, through its reading of that Amendment exceeded its power by rewriting the Constitution); ROBERT BORK, SLOUCHING TOWARDS GOMORRRAH: MODERN LIBERALISM AND AMERICAN DECLINE 109 (1996) (stating that the Supreme Court has usurped the powers of the American people and their representatives and pursuit of left-wing policy-making).

[99] *See* KECK, MOST ACTIVIST COURT, at 40, Table 2.1 (2004) (indicating that, on an annual basis, between 1995 and 2003, the Rehnquist Court struck down far more federal statutes on constitutional grounds than did the supposedly activist Burger and Warren Courts); *id*. at 268 (stating that Justices Rehnquist, Thomas and Scalia all support judicial activism when they believe the original Constitution calls for it); Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYANMIC 70, 87 (Earl M. Maltz, ed. 2003) (noting that Justice Thomas "exhibits no tendency to defer to local or national legislators").

[100] Griffin, *Rebooting Originalism*, at 4.

[101] *See* Colby & Smith, *Originalism's Living Constitutionalism*, at 6 (stating that original intent theory met with "savage criticism" which exposed its two fundamental weaknesses); *Barnett*, *Originalism for Nonoriginalists*, 45 LOY. L. REV. at 612 (describing the original intentions approach as having been "trounced" by its critics); *id*. at 613 ("If ever a theory had a stake driven through its heart, it seems to be originalism.").

[102] *See* Brest, *The Misconceived Quest*, 60 B.U. L. REV. at 222 (concluding that an "interpreter's understanding of original understanding may be so indeterminate as to undermine the rationale for originalism" in the case of many controversial constitutional provisions").

[103] *See* Powell, *Original Understanding*, 98 HARV. L. REV. at 906-07 (pointing out the Federalists' view that the intentions of the drafters of the Constitution would not be legally relevant because they were "mere scriveners" appointed to draft an instrument for the people).

Originalism, now called "new originalism" quickly overcame these objections by shifting from a focus on intention to a focus on the public meaning of the constitutional text as adopted – that is, on the meaning that the text would have for an ordinary 18th-century reader.[104] This shift is especially significant for the purposes of this Article because Justice Scalia was one of the earliest advocates of the shift from subjective intention to textual meaning.[105]

The new originalism has expanded beyond the reactive gestures of the old originalism. It no longer seeks to hold the judiciary in check.[106] Rather, it recognizes that originalism might require "the active exercise of the power of judicial review in order to keep faith with the principled commitments of the founding."[107] Moreover, originalism is no longer tethered to a political agenda: it seeks not to criticize an overreaching court but to engage

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[104] Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y at 609.

[105] *See* Colby & Smith, *Originalism's Living Constitutionalism*, at 6 (citing Scalia's "campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning"); Barnett, *Scalia's Infidelity*, 75 U. CIN. L. REV. at 9 ("Justice Scalia was perhaps the first defender of originalism to shift the theory from its previous focus on the intentions of the framers of the Constitution to the original public meaning of the text at the time of its enactment."); Caleb Nelson, *Originalism and Intepretive Conventions*, 70 U. CHI. L. REV. 519, 554-55 (2003), (crediting Justice Scalia with the suggestion, accepted by most originalists, to change the label of the doctrine from original intent to original meaning).

[106] *See, e.g.*, KECK, MOST ACTIVIST COURT, at 268 (indicating that the Rehnquist Court's originalists were not averse to activism in support of their originalism); Graber, *Clarence Thomas and the Perils of Amateur History*, at 71 (noting that Thomas "would overrule a remarkable number of cases, some dating back more than two hundred years, in the name of originalism."); David R. Dow, *et al*., *Judicial Activism on the Rehnquist Court: An Empirical Assessment*, 23 ST. JOHN'S J. LEG. COMM. 35, 71 (2008) (providing a statistical breakdown of the Justices' votes on an issue-by-issue basis and concluding that "Justice Scalia votes to thwart the majority in cases where the majoritarian view ought to rule"); Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L. J. 73, 132 & n.408 (2007) (noting that the Court's remedies jurisprudence supports the views of those who characterize the Rehnquist court as an activist court and citing numerous scholars who have so argued).

[107] Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y at 609.

previously unexplored aspects of our constitutional history.[108] New originalism has also developed a body of normative theory to justify reliance on original meaning.[109]

Still, the new originalism has much in common with the old originalism. Like the old originalism, the new originalism "regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present."[110] New originalists concede some of the criticisms of original intent originalism, but claim that such criticisms are largely irrelevant to their own version of originalism.[111] This claim is not entirely convincing for, as critics of the new originalism have pointed out, the sources that new originalists use to demonstrate original public meaning tend to be the same sources that old originalists used to demonstrate original intentions.[112] At least some new originalists concede this point.[113]

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[108] *See id*. at 608, (noting Randy Barnett's research into the origins of the commerce clause, Barnett and Don Kates' research on the origins of the Second Amendment, John Yoo's originalist approach to war powers and Steven Calebresi and Christopher Yoo's article on the historical origins of the concept of a unitary executive).

[109] S*ee* KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT AND JUDICIAL REVIEW 110-59 (1999) (developing a defense of originalism based on a version of popular sovereignty that he dubs "potential sovereignty"); John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism*, Northwestern Public Law Research Paper No. 08-05, available at SSRN: http://ssrn.com/abstract=1109247 (last visited July 2, 2008) (providing a consequentialist defense of originalism); Barnett, *Originalism for Nonoriginalists*, 45 LOY. L. REV. at 629-43 (developing a defense of originalism based on principles that inform doctrines in contract law such as the statute of frauds and the parole evidence rule).

[110] Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y at 599.

[111] *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 94-95 (2004) (noting that early critics of originalism, such as Paul Brest and H. Jefferson Powell "left considerable room for originalism," understood in this context as textualism rather than intentionalism, "to flourish"). For an earlier iteration of the same arguments, *see* Barnett, *Originalism for Non-Originalists*, 45 LOY. L. REV. at 623-29 (reconciling the views of Brest and Powell with the new originalism).

[112] *See, e.g.,* SOTORIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 79, n.1 (2007) ("The distinction

More generally, scholars have begun to suggest that originalism can be reconciled with its theoretical nemesis,[114] which has been variously characterized as living constitutionalism[115] (my preferred term), non-originalism,[116] pluralism,[117] and developmental theory.[118] In one sense, we are all originalists to the

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between intention and meaning is a refinement that cuts no ice with us."); Telman, *The Foreign Affairs Power*, 80 TEMP. L. REV. at 261, n. 106 (noting that textualist and intentionalist approaches are not as divergent as they may appear, since practitioners of both approaches rely on the same sources of information to establish the meaning of the Constitution); Nelson, *Originalism and Intepretive Conventions*, 70 U. CHI. L. REV. at 556-58 (pointing out that original intent and original meaning most likely align in most cases and where they do not, modern readers are not well positioned to discern original meaning); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375, n. 130 (1981) ("[T]he difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it.").

[113] *See* Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y at 609-610 (noting that the history of the constitutional drafting process can provide useful information about how the text was understood at the time and the significance of specific language that was included in or excluded from the document); Barnett, *Originalism for Nonoriginalists*, 45 LOY. L. REV. at 617 (remarking that the distinction between textualism and originalism is hard to maintain).

[114] *See, e.g.*, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMM. 427, 428 (2007) (contending that living constitutionalists need not be and should not be non-originalists, since originalism means fidelity to the Constitution's text and its principles); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291, 292 (2007) (contending that the debate between originalism and living constitutionalism rests on a false dichotomy). *See also* Colby & Smith, at 5 (arguing that originalists, in their internal debates, have produced their own version of living constitutionalism).

[115] Balkin, *Original Meaning*, at 428 (identifying himself both an originalist and a living constitutionalist).

[116] *Id*. (calling non-originalism a form of living constitutionalism), *but see* Griffin, *Rebooting Originalism*, at 3 ("[T]he alternative to originalism is *not* 'nonoriginalism," but rather traditional or conventional constitutional interpretation, which features a variety of forms, modes or methods."). But Griffin acknowledges that the division of scholars into originalism and nonoriginalism remains widespread. *Id*. at 8-9 notes 41-45.

[117] STEPHEN GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 143-52 (1996)

[118] Griffin, *Rebooting Originalism*, at 4.

extent that we must at least in some circumstances care about what constitutional language meant at the time it was drafted rather than what it might mean to us now. For example, the Guarantee Clause[119] makes reference to "domestic Violence." As Jack Balkin points out, in the 18th century, that phrase meant "riots or disturbances within a state," while today we associate the phrase with "assaults and batteries by intimates or by persons living within the same household."[120] It would be absurd to seek to change in our constitutional order simply because of change in linguistic usage.[121] Similarly, living constitutionalists have not sought to impose a more modern meaning of the Constitution's requirement that the President be 35 years of age, despite the fact that one could argue that the Framers simply intended that the President be a person of mature years.[122] Indeed, there are no scholars who would argue that the original meaning of the Constitution is irrelevant to debates about its contemporary meaning.[123]

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[119] U.S. Const. art. IV, § 4.

[120] Balkin, *Original Meaning*, at 430.

[121] *See id.* at 429-32 (arguing for a form of originalism, compatible with living constitutionalism in which legal meaning is preserved).

[122] U.S. Const. art. II, § 4. *See* Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. at 305 (noting that his underlying principles approach to constitutional interpretation does not override the textual command when the text is "relatively rule-like, concrete and specific").

[123] *See*, *e.g.*, YOO, POWERS OF WAR AND PEACE, at 25 (noting that academics differ over how much deference to accord the Framers, not over whether or not they are due any deference at all); Griffin, *Rebooting Originalism*, at 10 ("Scholars today distinguish among forms of originalism, not between originalism and nonoriginalism."); Farber, *The Originalism Debate*, 49 OHIO ST. L. J. at1086 ("Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation."). Eric Posner briefly posed as an exception to this general rule. *See* Posner, "The Founders," Opinio Juris Blog, http://www.opiniojuris.org/posts/1187656698.shtml (Aug. 21, 2007) (last visited July 10, 2008) ("If academics on both sides of the issue could agree to debate the presidency, emergency powers, and the constitution without mentioning the framers, this alone would count as progress."). But even Posner cannot resist reference to the framers as authority. *See* Posner, "The President Versus the Presidency," Opinio Juris Blog, http://www.opiniojuris.org/posts/1187708614.shtml (Aug. 21, 2007) (last visited

Just as there are limits to living constitutionalism, most originalists also acknowledge limits to their own principles of constitutional interpretation.[124] Living constitutionalists are not distinct from originalists because they pay no attention to the original meaning of the Constitution. What separates living constitutionalists from originalists is the extent to which they are willing to incorporate interpretive materials other than literal original meaning into their understanding of what the Constitution demands of us today.

B. Originalism and the Practice of the Medellín *Court*

Neither the nor the dissenting opinions in *Medellín* are originalist opinions. As explained in Part IV, Chief Justice Roberts' opinion is true neither to the original meaning of the Supremacy Clause nor to the early precedents, on which the opinion purports to rely, regarding the extent to which treaties must be given direct effect as binding U.S. law. Justice Breyer's dissenting opinion takes the constitutional text and the early precedents more seriously, but he does so, appropriately enough, within the context of a broader appreciation of constitutional text, structure and history, as one would expect from a Justice committed to a version of living constitutionalism. It is not inconsistent for a living constitutionalist to pay close attention to the original meaning of the constitutional text.[125]

However, as originalism comes in many variations, perhaps we should not be too hasty in criticizing the originalist Justices for signing off on Chief Justice Roberts' opinion. Justice Scalia describes himself as a "faint-hearted originalist"[126] and

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July 10, 2008) (commenting "oops!" on his own invocation of the founders as authority for his view of presidential power but invoking them nonetheless).

[124] *See*, *e.g.*, Scalia, *The Lesser Evil*, 57 U. CIN. L. REV. at 864 (conceding that he would not uphold a statute calling for the punishment of flogging even if such a statute would have been permissible in 1789).

[125] *See* Berman, *Originalism is Bunk*, at 22 (stating that non-originalism regards original meaning as relevant to judicial interpretation but that post-ratification facts can also bear on interpretation).

[126] Scalia, *The Lesser Evil*, 57 U. CIN. L. REV. at 864 ("I hasten to confess that in a crunch I may prove a faint-hearted originalist."). More recently, in

acknowledges that there are problems with originalist methodology.[127] For example, Justice Scalia recognizes that the originalist enterprise really requires training in historical research, a task for which most judges are ill-prepared.[128] Even a professional historian would need more time to undertake the originalist task properly than a judge typically has to decide a case.[129]

In the end, however, Scalia defends his originalism based on his view that a "thing worth doing is worth doing badly."[130] Justice Scalia neglects to note the source of his motto. It is from a chapter in Gilbert Chesterton's 1910 book *What's Wrong with the World,* in which Chesterton advocates separate and decidedly distinct education for women.[131] One of Chesterton's themes was the importance of maintaining the distinction between "specialists" and amateurs, or what he calls mankind's "comrade-like aspect."[132] He supported an educated amateurism, especially for women,[133] but his advice, quoted by Justice Scalia, was meant to guide people

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explaining that he would not undo all precedents associated with a non-originalist approach to constitutional interpretation, Scalia proclaimed, "I am a textualist. I am an originalist. I am not a nut." National Public Radio, *Interviews: Scalia Defends a "Dead" Constitution*, http://www.npr.org/templates/story/story.php?storyId=90011526 (Apr. 28, 2008) (last visited June 12, 2008)

[127] *See* Scalia, *The Lesser Evil*, 57 U. CIN. L. REV. at 856 (noting that originalism is "not without its warts").

[128] *Id*. at 856-57. *See also* Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L. J. 1419, 1420 (1999) (criticizing Bork's originalism on the ground that his constitutional vision is "radically ahistorical").

[129] *See id*. at 860 (noting that it might take a longer time and more pages than are usually available to a judge to flesh out even a minor point "in a fasion that a serious historian would consider minimally adequate").

[130] *Id.* at 863.

[131] GILBERT CHESTERTON, WHAT'S WRONG WITH THE WORLD 314-320 (1910). The passage that Justice Scalia quotes appears on page 320, at the end of the chapter "Folly and Female Education."

[132] *See id*. at 130-31 (citing as "the peculiar period of our time" the "eclipse of comradeship and equality by specialism and domination").

[133] *See id*. at 319-20 (describing the product of his preferred, old-fashioned education as "maintaining the bold equilibrium of inferiorities which is the most mysterious of superiorities and perhaps the most unattainable").

in their pursuit of hobbies, not in their professional lives. As one Chesterton authority put it, Chesterton's advice was intended to apply to activities such as writing one's own love letters and blowing one's own nose.[134] More generally, Chesterton urged people to engage in all sorts of amateurism, as he believed that an energetic engagement in hobbies and leisure activities were the crucial to human being. However, he did not refuse to recognize any social role for the specialist whatsoever. He did not advocate amateurism when it came to playing the organ or serving as Royal Astronomer.[135] In short, Justice Scalia's motto does not inspire confidence when applied to a brain surgeon, a mechanical engineer or a federal judge. If one cannot have any confidence that judges can do a good job of discerning original meaning, there is no reason to base constitutional interpretation on that hopeless endeavor.

Moreover, Justice Scalia acknowledges that there really is much less difference between his "faint-hearted" originalism and non-originalism.[136] This is indeed a theme on which critics of originalism have picked up.[137] But it is not clear where this leaves Scalia's originalism. He insists that he remains an originalist.[138]

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[134] Quotemeister, The American Chesterton Society, available at http://chesterton.org/qmeister2/doingbadly.htm (last visited August 7, 2008).

[135] *See id*. ("There are things like playing the organ or discovering the North Pole, or being Astronomer Royal, which we do not want a person to do at all unless he does them well.").

[136] *See* Scalia, *The Lesser Evil*, 57 U. CIN. L. REV. at 862 (acknowledging that "there is really no difference between the faint-hearted originalist and the moderate nonoriginalist" and that "most originalists are faint-hearted and most nonoriginalists are moderate.").

[137] Paul Brest, one of the earliest and most effective critics of originalism, echoes Justice Scalia:

> The only difference between moderate originalism and nonoriginalist adjudication is one of attitude toward the text and original understanding. For the moderate originalist, these sources are conclusive when they speak clearly. For the nonoriginalists, they are important but not determinative.

Brest, *The Misconceived Quest*, 60 B.U. L. REV. at 229.

[138] *See* National Public Radio, *Interviews: Scalia Defends a "Dead" Constitution*, http://www.npr.org/templates/story/story.php?storyId=90011526

Yet some originalists maintain that he is not.[139] He certainly invokes originalism when criticizing his fellow Justices' handling of a particular case, but in *Medellín*, he blithely signed off on an opinion that was not merely non-originalist but anti-originalist – that is, an opinion willfully blind to the meaning of the Supremacy Clause.

Justice Scalia's "faint-hearted" version of originalism might permit of the type of reasoning followed by the *Medellín* dissent, but because the Majority opinion ignores the strong originalist arguments of the dissenting Justices, it is hard to see the Majority opinion as anything other than a renunciation of originalism as an approach to the Supremacy Clause. David Schulz and Christopher Smith argue that, despite Scalia's professed originalism, "ideological factors influence how Scalia reads what the framers meant or what he claims the framers meant."[140] This would seem to be the case in *Medellín*, as the Majority opinion cannot be reconciled with even a faint-hearted version of originalism.

In any case, the Majority opinion cannot be reconciled with the stricter originalism espoused by Justice Thomas.[141] However, a review of Justice Thomas's voting record suggests that he is less a consistent originalist than he is a consistent conservative.[142] The foremost commentator on Justice Thomas's version of originalism contends that Thomas alternates between two versions of originalism (which yield different results) depending on the nature

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(Apr. 28, 2008) (last visited June 12, 2008) (quoting Scalia describing himself as an originalist and a textualist).

[139] Barnett, *Scalia's Infidelity*, 75 U. CIN. L. REV. at 13 (concluding that Justice Scalia is not an originalist)

[140] DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 41 (1996).

[141] *See* Christopher E. Smith & Cheryl D. Lema, *Justice Clarence Thomas and Incommunicado Detention: Justifications and Risks*: 39 VAL. L. REV. 783, 792 (2005) ("More so than any other contemporary justice, Thomas consistently advocates the strict application of key tools for interpreting the constitution: its text and history.") (internal quotation and citation omitted).

[142] *See id.* at 784 (characterizing Thomas as the most conservative sitting Justice).

of the case.[143] It is not at all unusual for the Court's originalists to let their political commitments trump those of originalism.[144] Indeed, the Court's self-proclaimed originalists are among the most consistently conservative Supreme Court Justices over the past 70 years.[145]

And so, *Medellín* is best understood as a political decision rather than one grounded in either the original meaning of the Supremacy Clause or even in the meaning of that Clause as reflected in subsequent legal precedent. Indeed, it seems a decision that simply accords with the Majority's skeptical views regarding the extent to which the United States should be bound by its international commitments.

IV. *MEDELLÍN* AND THE ORIGINAL MEANING OF THE SUPREMACY CLAUSE

Gordon Wood, recognized as "one of the leading historians of the early republic,"[146] suggests that "most of the means by which

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[143] *See* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 193 (1999) (summarizing Thomas's jurisprudence as liberal originalism with respect civil rights and conservative originalism on civil liberties and federalism).

[144] *See, e.g.*, Graber, *Clarence Thomas and the Perils of Amateur History*, at 71 (noting that Thomas always sides with conservative historians whenever there is a disagreement among historians and that he jettisons originalism entirely when doing so serves conservative interests).

[145] *See* William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126403 (April 2008) (last visited July 13, 2008), manuscript at 46 (ranking Justice Thomas first and Scalia third among 43 Justices on the Court from 1937-2006 in terms of their tendency to vote with the more conservative justices in non-unanimous cases); *see also* SCHULTZ & SMITH, JURISPRUDENTIAL VISION, at xvi (labeling Scalia a "consistent conservative" based on empirical studies of his voting behavior while also noting a handful of cases in which Scalia surprised observers by siding with the more liberal Justices).

[146] Griffin, *Originalism Rebooted*, at 26. *See also* Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 GEORGE WASH. L. REV. 354, 365 (2003) (heralding Wood as one of two leading intellectual historians of the early national period); John C. Yoo, *War and the Constitutional*

we carry on our governmental business" such as the cabinet, administrative agencies, the political parties and judicial review, are "unmentioned in the Constitution and are the products of historical experience."[147] One would thus expect originalism to apply, if at all, only in the limited contexts in which the constitutional text in some way establishes or at least delimits the boundaries of our political institutions. From this perspective, originalism may make less (or *even less*) sense in the realm of treaty law than it does in other realms of constitutional law.

Very few aspects of the constitutional design with respect to treaties have been realized in our practice. For example, although the Constitution provides that the President may make a treaty "by and with" the Senate's "advice and consent,"[148] the Senate has not fulfilled its advisory capacity since the time of President Washington.[149] More strikingly still, although the Constitution provides only one mechanism, the Treaty Clause, through which the United States may enter into international agreements, the political branches frequently bypass the rather onerous Article II

Text, 69 U. CHI. L. REV. 1639, 1646-47 (2002) (listing Wood's *Creation of the American Republic* among the leading secondary works on the framing period); Flaherty, *History Right?*, 99 COLUM. L. REV. at 2103, n. 38 (reporting the results of an unscientific "poll" that found Wood to be the historian most cited in law reviews).

147 Gordon S. Wood, *The Fundamentalists and the Constitution,* N.Y. REV. OF BOOKS, 33, 39-40 (Feb. 18, 1988). *See also* Keith E. Whittington, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 12 (1999) (listing 87 examples of "constitutional constructions," that is processes whereby our constitutional systems evolves, develops or takes practical effect through governing structures and policies without formal amendment judicial constitutional interpretation).

148 U.S. Const., art. II, §2, ¶ 2.

149 *See* Telman, *The Foreign Affairs Power*, 80 TEMP. L. REV. at 282 (noting that President Washington originally thought that the Senate had constitutional power to advise the President on treaty negotiation); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 631, 634 (2004) (noting that the Framers as well as both the Senate and the President during Washington first administration understood the Constitution to provide the Senate with advisory power before treaties were finalized).

requirements of advise and consent by two-thirds of the Senate,[150] choosing instead to commit the United States to international agreements through executive-legislative agreements or through sole executive agreements.[151] Indeed, in recent decades, nearly 90% of the United States' international obligations arise through mechanisms other than Article II treaties.[152] Oona Hathaway has recently suggested that the United States jettison treaties entirely (or nearly entirely) in favor of the extra-constitutional alternatives, as there is no principled reason for why our government enters into international obligations through one method or the other and congressional-executive agreements are more likely to be adhered to.[153]

Nonetheless, as the dissenting Justices suggest, the Constitution does provide guidance on the extent to which treaties are supreme law, enforceable in domestic courts. Chief Justice Roberts' opinion proceeds as if the Constitution were silent on this issue, but as the concluding section of this Part will show, the original meaning of the Supremacy Clause strongly favors a presumption in favor of according treaties the status of supreme, self-executing federal law. The Majority's decision to ignore original meaning in this instance and to favor state law over the international obligations of the United States raises unnecessary barriers to the conduct of foreign relations by the political branches of the federal government.

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[150] U.S. const. Art. II, § 2 ¶ 2.

[151] Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1238 (2008) (noting that the United States makes binding international agreements through two separate processes, one of which is laid out in the Constitution and one that is not).

[152] *Id*. at 1258, 1260 (listing by category 375 treaties and 2744 congressional-executive agreements entered into by the United States between 1980 and 2000).

[153] *Id*. at 1241 (stating that "nearly everything that is done through the Treaty Clause can and should be done through congressional-executive agreements").

A. The Sources of Chief Justice Roberts' Opinion in Medellín

Chief Justice Roberts' opinion in the *Medellín* case has been widely praised as "careful" and "modest."[154] It is neither. Because the Court could easily have found that the trial court's decision dismissing Medellín's habeas petition *on the merits*[155] complied with the "review and reconsideration" called for in the *Avena* decision,[156] the petition for certiorari was inprovidently granted. The *Medellín* opinion was thus offered in violation of the "last resort rule," according to which "a federal court should refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis."[157]

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[154] *See, e.g.*, Kent Scheidegger, Medellín *Discussion Board: The Ball Is in Congress's Court*, SCOTUSBlog (Mar. 27, 2008), http://www.scotusblog.com/wp/medellin-discussion-board-the-ball-is-in-congresss-court/#more-6908, last visited May 27, 2008 (finding the holding in *Medellín* "not all that remarkable."); Richard Samp, Medellín *Discussion Board: The Court Defers to Congress*, SCOTUSBlog (Mar. 25,2008), http://www.scotusblog.com/wp/medellin-discussion-board-the-court-defers-to-congress/, last visited May 27, 2008 (discerning a show of humility in the Majority's expressed willingness to defer to Congress if it were to pass legislation calling for the implementation of *Avena*); Paul Stephan, Medellín v. Texas*: "Modest and Fairly Careful,"* Opinio Juris Blog (Mar. 25, 2008) http://www.opiniojuris.org/posts/1206470637.shtml, last visited May 27, 2008 (tentatively concluding that "Chief Justice Roberts' opinion for the Court is modest and fairly careful"); Julian Ku, Medellín: *My Early Thoughts*, Opinio Juris Blog (Mar. 25, 2008), http://www.opiniojuris.org/posts/1206464651.shtml, last visited May 27, 2008 (calling the Majority opinion "fairly sensible and reasonable").

[155] *See* Medellín, 128 S.Ct. at 1355, n.1 (noting the trial court's finding that Medellín had not been prejudiced by the United States' failure to grant him his consular consultation rights under the VCCR because the VCCR only requires notice of such rights within three days of arrest and Medellín had confessed within three hours).

[156] 2004 ICJ Rep. at 72.

[157] Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994). Chief Justice Roberts himself recently invoked the doctrine, calling it a "fundamental rule of judicial restraint" and noting that "[o]ur precedents have long counseled us to avoid deciding . . . hypothetical questions of constitutional law" unless such questions are unavoidable. Boumediene v. Bush, 128 S.Ct. at 2281-82 (Roberts, C.J., dissenting).

In its brief for the Court, the State of Texas urged the Court to dismiss the case on the basis that the trial court's finding that Medellín had not been prejudiced satisfied the ICJ's requirement of review and reconsideration.[158] During oral argument, Justice Kennedy voiced some sympathy for Texas's position on this matter.[159] Athough the ruling of the Texas court is patently absurd, if the Court agreed that Texas had already granted the necessary review and reconsideration, it should have ruled on that sub-constitutional basis. If it disagreed, the Court should have taken the opportunity to point out that while a criminal defendant who confesses to the police is unlikely to be acquitted, that confession in no way precludes a well-counseled defendant from presenting mitigating evidence that would make the imposition of the death penalty unlikely. Thus, for example, the Oklahoma Court of Criminal Appeals recognized that Osbaldo Torres, another Mexican national whose interests were at issue in the *Avena* case, suffered prejudice with respect to his capital sentence even though he was not prejudiced with regard to his conviction for first-degree murder.[160]

The substantive portion[161] of Chief Justice Roberts' opinion begins by acknowledging that Medellín relies on the Supremacy Clause.[162] Without any discussion of the founding documents pertaining to the Supremacy Clause or of any of the historical

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[158] Brief for Respondent, at 49-50, Medellín v. Texas, 128 S.Ct. 1346 (2008) (No. 06-984), 2007 WL 2428387.

[159] *See* Transcript of Oral Argument, at 20, Medellín v. Texas, 128 S.Ct. 1346 (2008) (No. 06-984), 2007 WL 2945736 ("And I have a problem, incidentally, because I think Medellin did receive all the hearing that he's entitled to under the judgment anyway.").

[160] Torres v. State, 120 P.3d 1184, 1189 (Okla. Crim 2005). *See* John F. Murphy, Medellín v. Texas: *Implications of the Supreme Court's Decision for the United States and the Rule of Law in International Affairs*, 31 SUFF. TRANSNAT'L L. REV. 247, 260-61 (detailing the commutation of Torres' death sentence by Oklahoma Governor Brad Henry and Torres' unsuccessful attempt to gain further relief from the courts).

[161] Part I of the opinion introduces the relevant treaty law and recites the facts and procedural history of the case. Medellín, 128 S.Ct at 1353-56. Only in Part II does Justice Roberts begin to set out the applicable substantive U.S. law.

[162] *Id*. at 1356

scholarship discussing the original meaning and purpose of the Supremacy Clause, the Chief Justice proceeds directly to a discussion of the distinction between self-executing and non-self-executing treaties.[163] It is hard to see what is "careful" about an opinion that interprets a constitutional provision, the Supremacy Clause, without more that a meager reference to it, its legislative history, or the substantial body of scholarship pertaining to its original meaning. In fact, Chief Justice Roberts' *Medellín* opinion ignores the plain meaning of the constitutional text, relies on a few Supreme Court cases while ignoring others, [164] as well as dozens of other federal cases that suggest a presumption in favor of self-execution, and then mis-applies the few cases on which he purportedly relies.

The doctrine of self-execution is not of constitutional origin.[165] Rather it is an invention of the Marshall Court.[166] The authority cited in the Majority opinion for the doctrine of self-execution consists of several cases,[167] one of which cites to one passage from *The Federalist Papers*,[168] and the Restatement (3d) of U.S. Foreign

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[163] *Id*.

[164] *See* Medellín, 128 S.Ct. at 1392-93 (Breyer, J., dissenting) (providing an appendix listing Supreme Court cases, most of which are not cited by the Majority, in which treaties were held to be self-executing).

[165] Jordan J. Paust, *Self-Executing Treaties*, 82 AM J. INT'L L. 760, 760 (1988) (arguing that the distinction created in caselaw between self-executing and non-self-executing treaties "is patently inconsistent with the express language" of the Supremacy Clause); Ramsey, *Torturing Executive Power*, 93 GEO. L. J. at 1233 (characterizing the idea of non-self-executing treaties as "judicially created"). According to Paust, the phrase "self-executing" did not appear in a U.S. Supreme Court opinion until 1887 in *Bartram v. Robertson*. Paust, *Self-Executing Treaties*, 82 AM J. INT'L L. at 766.

[166] *See* Vázquez, *Four Doctrines*, 89 Am. J. Int'l L. at 700 ("The distinction between self-executing and non-self-executing treaties was introduced into U.S. jurisprudence by the Supreme Court in *Foster v. Neilson*.").

[167] *See* Medellín, at 1356-57 (citing, in order of citation: Foster v. Neilson, 2 Pet. 253 (1829), *overruled on other grounds*, United States v. Percheman, 7 Pet. 51 (1833); Whitney v. Robertson, 124 U.S. 190 (1888); Igartúa-De La Rosa v. United States, 417 F.3d 145 (1st Cir. 2005) (en banc); and the Head Money Cases, 112 U.S. 580 (1884).

[168] Medellín, 128 S.Ct. at 1357. The appeal to the authority of *The Federalist Papers* is only for Hamilton's rather ambiguous comparison between laws that

Relations Law.[169] In explaining its views on the doctrine, the Majority notes, in a manner that is neither enlightening nor tending to inspire confidence in the strength of the precedent on which the Court purports to be relying, that various courts have understood the doctrine of self execution differently.[170] The Majority explains that it understands "self-execution" to mean that a "treaty has

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individuals are "bound to observe" as "the supreme law of the land" and a "mere treaty, dependent on the good faith of the parties." *Id*., *citing* THE FEDERALIST No. 33, 207 (Jacob E. Cooke, ed., 1961). Since Federalist No. 33 deals with the taxing power and the meaning of the Necessary and Proper Clause, it is unclear that it has any relevance to the doctrine of self-execution at all. In context, it seems that Hamilton's true purpose is to contrast a law with a mere pact between private parties.

[169] Medellín, 128 S.Ct. at 1357, n. 3, *citing* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1986)

[170] *See* Medellín, 128 S.Ct. at 1356, n.2 ("The label 'self-executing' has on occasion been used to convey different meanings."). A more interesting discussion of federal courts' problematic handling of what it means to call a treaty self-execution or non-self-executing can be found in the scholarly literature. As the dissent notes (128 S.Ct. at 1379 (Breyer, J., dissenting), at least one scholar has argued that the doctrine of self-execution is not the best way to explain case law on the judicial enforcement of treaties. *See* Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 573-74 (2007) (arguing that the best guide to whether a court will enforce a treaty is the identity of the entity alleged to have violated the treaty and concluding that courts are most likely to enforce treaties violated by state governments and more likely to defer to decisions of the political branches of the federal government to violate a treaty). *See also* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and Presumption of Self-Execution*, forthcoming in 121 HARV. L. REV. (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118063 (last visited July 14, 2008), manuscript at 3, n. 8 (noting that "self-executing" can mean that a treaty is "addressed to" the legislature, although it could also mean "addressed to" the executive, and in that case the Presidents Memorandum (*see supra*, note 4) is adequate execution); Vázquez, *Four Doctrines*, 89 AM. J. INT'L L. at 696-97 (identifying four distinct grounds on which a court might conclude that legislative action is necessary before it can enforce a treaty); Paust, *Self-Executing Treaties*, 82 AM J. INT'L L. at 775-81 (criticizing courts for straying from the original meaning and from Justice Marshall's method of treaty interpretation in positing that some treaties must be non-self-executing if their implementation requires an exercise of congressional power); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States*, 26 VA. J. INT'L L. 627, 635-42 (1986) (summarizing differing positions staked out by courts and in legal scholarship on the possible meanings of the doctrine of self execution).

automatic domestic effect as federal law upon ratification,"[171] but it does not ground its understanding of the doctrine in precedent, history or logic. Instead, relying on a handful of cases decided over a nearly 175-year span, the Court concludes that a treaty is only self-executing – that is, that a treaty has domestic effect as federal law upon ratification – only if it "contains stipulations which are self-executing, that is, require no legislation to make them operative."[172] The Court thus subtly changes the rule laid down by Justice Marshall which, consistent with the Supremacy Clause, provided that treaties are presumed to be self-executing unless the parties to the treaty stipulate otherwise[173] into a presumption against self-execution absent a contrary provision.

Having established the status of treaties as domestic law without any analysis of the Supremacy Clause, the Chief Justice then proceeds to a discussion of the treaties at issue. The Optional Protocol, he concludes, is a "bare grant of jurisdiction" which "does not itself commit signatories to comply with an ICJ judgment."[174] The key language of the U.N. Charter provides that each Member "undertakes to comply with the decision of the [ICJ] in any case to which it is a party."[175] Chief Justice Roberts reasons that this provision cannot be self-executing because the "*sole*

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[171] Medellín, 128 S.Ct. at 1356, n.2.

[172] *Id*. at 1357, *citing* Whitney v. Robertson, 124 U.S. at 194. Justice Breyer points out in dissent that it is absurd to expect a multilateral treaty to address the issue of self-execution, as some states automatically incorporate treaties into domestic law. Medellín, 128 S.Ct. at 1381, 1383 (Breyer, J., dissenting). *See also* Vázquez, *Four Doctrines*, 89 AM. J. INT'L L. at 709 ("Perhaps because of the diversity of domestic-law rules on the subject, nations negotiating treaties rarely address matters of domestic implementation."); Paust, *Self-Executing Treaties*, 82 AM J. INT'L L. at 771 (criticizing Justice Marshall's approach to the question of the domestic effect of treaties given that parties to a treaty "rarely concern themselves with the details of domestic implementation"); Iwasawa, *Self-Executing Treaties*, 26 VA. J. INT'L L. 627at 654 (noting that parties negotiating a treaty rarely concern themselves with the treaty's domestic validity and thus it is "very rare" to find a treaty that indicates whether a treaty – especially a multilateral treaty – is to be self-executing).

[173] *See* United States v. Perchemen, 7 Pet. at 88-89 (finding a treaty self-executing where it does not stipulate to the need for some future legislative act).

[174] Medellín, 128 S.Ct. at 1358.

[175] U.N. CHARTER, Art. 94(1).

remedy for noncompliance"[176] provided by the Charter is "referral to the United Nations Security Council by an aggrieved state."[177] The Chief Justice also finds some support for this reading of the U.N. Charter in the Senate hearings on the ratification of the Charter, and he treats that evidence as decisive.[178] Reliance on

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[176] Medellín, 128 S.Ct. at 1359 (emphasis added).

[177] *Id.*, *quoting* U.N.CHARTER, Art. 94(2). Justice Breyer, writing in dissent, makes the obvious point that there is nothing in the language of the Charter to suggest that the political remedy is the sole remedy. *Id*. at 1383-85 (Breyer, J., dissenting). On the contrary, the political remedy is an extraordinary remedy, since it was the expectation of the framers of the Charter that states would comply with ICJ decisions, and that expectation has been largely realized. *See* Jordan J. Paust, Medellín, Avena, *the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFF. TRANSNAT'L L. REV. 299, 301-02, n.7 (2008) (describing Article 94(2) of the U.N. Charter as creating an additional enforcement option, which has never been used and which in any case does not render an ICJ judgment any less binding); Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 378 (2008) ("[W]hile Article 94(2) also provides for possible referral to the Security Council in the event of noncompliance, this scarcely detracts from the international legal obligation to comply.").

[178] The Majority opinion first cites to a statement made in the hearings of the Senate Committee on Foreign Relations to the effect that "if a state fails to perform its obligations under a judgment of the [ICJ], the other party *may have recourse* to the Security Council." Medellín, 128 S.Ct. at 1359, *citing* Senate Committee on Foreign Relations, 79th Cong., 1st Sess., 124-25 (1945) (emphasis added). The phrase "may have recourse" hardly suggests an exclusive remedy. The Majority opinion then cites to statements of Leo Paslovsky, Special Assistant to the Secretary of State for International Organizations and Security Affairs, and Charles Fahy, Legal Advisor to the State Department. Medellín, 128 S.Ct. at 1359. Paslovsky recognizes that a state's refusal to implement a decision of the ICJ creates a political rather than a legal dispute. Such a statement is not in the least surprising, since the Security Council is a political body. Paslovsky said nothing about the exclusivity of the remedy. Fahy stated only that parties accepting ICJ jurisdiction have a moral obligation to comply with ICJ decisions and that Article 94(2) provides the exclusive means of enforcement of such decisions. Medellín, 128 S.Ct. at 1359-60. There is no disputing the accuracy of Fahy's statement as a matter of international law. It is very difficult to see why it is relevant to the question of whether ICJ decisions are enforceable as domestic law. As Justice Breyer points out, one would not expect the U.N. Charter, or any international agreement, to specify the status of its provisions as a matter of domestic law. Medellín, 128 S.Ct. at 1381 (Breyer, J., dissenting).

such unilateral statements is not called for under the Supreme Court precedents on which Chief Justice Roberts relies, *Foster v. Neilson* and *Perchemen*, as those cases seem to stand for the principle that treaties are to be considered self-executing unless *the parties* to the treaties intend otherwise.[179]

There is more than a little irony in Chief Justice Roberts' argument that the U.N. Charter cannot be treated as self-executing absent clearer language in the treaty or the legislative history behind its ratification. Foreign relations, the Chief Justice reminds us, is committed by the Constitution to the political departments.[180] If we were to treat the Charter as self-executing, that "would eliminate the option of non-compliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment."[181] But in this case, the President has determined how to comply with the ICJ judgment. He directed state courts to implement the *Avena* decision.[182] The other political branch was silent. The effect of the Majority opinion is to prevent the Executive branch from conducting foreign policy (even where it faces no political opposition) by complying with an international court's decision and to entrust control over U.S. foreign relations to the courts of the State of Texas. As we shall see in Part IV. B., *infra*, this is pretty much exactly the result the Framers sought to avoid through the Supremacy Clause.

Chief Justice Roberts proceeds to defend his interpretive approach as rooted in two cases from the early Republic, *Foster* and *Percheman*.[183] The dissent characterizes that approach as "look[ing] for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong

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[179] *See* Vázquez, *Four Doctrines*, 89 AM. J. INT'L L. at 706-08 (arguing that permitting the U.S. to determine unilaterally whether a treaty is self-executing is inconsistent with the Supremacy Clause as interpreted in *Foster* and *Perchemen*).

[180] Medellín, 128 S.Ct. at 1360.

[181] *Id*.

[182] *See* President's Memorandum, *supra* note 4.

[183] Medellín, 128 S.Ct. at 1362.

place (the treaty language)."[184] The Chief Justice accepts this characterization,[185] but says little in its defense beyond the paltry citations to authority already indicated. Nor does the Majority respond to the dissent's arguments that courts have routinely found treaties to be self-executing despite the lack of a clear statement that no further legislative action was required.[186] Indeed, as Justice Stevens' concurring opinion can only name one ratified and one un-ratified treaty that would pass the Majority's clear statement rule[187] it is obvious that the Majority's clear statement standard has never been the operative test for self-execution under U.S. law.[188] The Majority opinion nevertheless rejects the dissent's far more traditional approach to the issue of self-execution on the ground that it is "arrestingly indeterminate."[189]

This is a baffling verdict. The Majority opinion is completely untethered to any constitutional authority; it meanders across two centuries of legal opinions and plucks out a handful of cases that do not even support its interpretive approach, and then it briefly visits the relevant treaty texts[190] before rifling through the relevant

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184 *Id*. at 1389 (Breyer, J., dissenting).

185 *See id*. at 1362 ("[W]e have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue.").

186 *Id*. at 1380-81 (Breyer, J., dissenting).

187 *Id*. at 1373 and n.1 (Stevens, J., concurring).

188 *Id*. at 1381 (Breyer, J., dissenting).

189 *Id*. at 1362.

190 The Majority's approach to treaty interpretation, which pays no attention to the object and purpose of the treaty or to its drafting history, is inconsistent with both international and domestic law. *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/27, 8 I.L.M. 679 (1968), Art. 31(1); *Air France v. Saks*, 105 S.Ct. 1338 (1985). The Majority cites to *Air France* for the principle that "the interpretation of a treaty . . . begins with its text" and also notes cases in which the Court has also considered "the negotiation and drafting history of the treaty as well as the 'postratification understanding' of signatory nations." Medellín, 128 S.Ct. at 1357. However, the Majority includes only the most limited discussion of the negotiation and drafting history of the relevant treaties and limits its inquiry into the "postratification understanding" of those treaties to that of the United States. Indeed, Jordan Paust suggests that the Majority ignores evidence that the VCCR is self-executing. Paust, Medellín, Avena, 31 SUFF. TRANSNAT'L L. REV. at 304, n. 15 (citing numerous authorities in support of the claim that the United States

ratification history to pluck out a few perhaps helpful quotations. How this approach is any more determinate than the dissent's traditional deference to the Supremacy Clause is hard to fathom. Indeed, the decision calls the enforceability of innumerable treaties into doubt, as evidenced by a decision of the American Bar Association and the American Society of International Law to form a joint task force to evaluate the efficacy of U.S. treaties as a matter of domestic law in the aftermath of *Medellín*.[191] Justice Breyer is simply correct to point out that the Majority opinion "erects legal hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones."[192]

B. The Supremacy Clause and the Doctrine of Self-Execution

Justice Breyer, writing in dissent in *Medellín*, identifies the issue in that case as whether or not "an ICJ judgment rendered pursuant to the parties' consent to compulsory ICJ jurisdiction . . . automatically become[s] part of domestic law."[193] Unlike the Majority, Justice Breyer concludes that the issue cannot be answered by looking to the language of the treaties at issue. Rather, the issue must be resolved as a matter of domestic law, with reference to early cases, decided by "Justices well aware of the Founders' original intent" in adopting the Supremacy Clause.[194] Based on a very abbreviated discussion of those cases, guided by the relevant scholarship,[195] Justice Breyer concludes that the ICJ's *Avena* judgment "is enforceable as a matter of domestic law without further legislation."[196] That conclusion is of less significance to us than is the scholarship on the original meaning

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considers the VCCR self-executing and supreme federal law). *See also*, Republic of Paraguay v. Allen, 116 F.3d at 622 (Butzner, J., concurring) (stating that the VCCR is self-executing).

[191] E-mail from Elizabeth Anderson, Executive Director of the American Society of International Law (July 2, 2008) (listing members of the Task Force) (on file with author).

[192] Medellín, 128 S.Ct. at 1381-82 (Breyer, J., dissenting).

[193] *Id*. at 1377.

[194] *Id*.

[195] *Id*. at 1377-80.

[196] *Id*. at 1377.

of the Supremacy Clause that Justice Breyer summarizes and the Chief Justice ignores. What follows is an expanded summary of the scholarship invoked by the dissenting Justices, supplemented with additional scholarship not referenced in the *Medellín* opinions. It is striking that none of this background, relevant to the original meaning of the Supremacy Clause, informs the Majority opinion. Indeed, even the dissent provides only a hint of the vast evidence suggesting that the original intent and meaning of the Supremacy Clause was to create a presumption in favor of self-execution.

The purpose of the Supremacy Clause was to prevent U.S. treaty violations "by empowering the courts to enforce treaties at the behest of affected individuals without awaiting authorization from state or federal legislatures."[197] This presumption of self-execution, though limited,[198] was in marked contrast, in the Framers' view, to the laws of England[199] and in the American colonies under the Articles of Confederation.[200] Indeed, the Supremacy Clause embodied the Framers' response to the more

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[197] Vázquez, *Four Doctrines*, 89 AM. J. INT'L L. at 696.

[198] *See* Vázquez, *Four Doctrines*, 89 AM. J. INT'L L. at 696-97 (identifying four grounds on which a court might conclude legitimately that a treaty required legislative action for enforcement).

[199] *See id.* at 697 & n. 12 (stating that under the fundamental law of Great Britain, treaties were non-self-executing except that admiralty and prize courts were empowered to give direct effect to the laws of nations, including treaties). *See, e.g.*, Foster v. Neilson, 2 Pet. 253, 254 (1829) (contrasting the general rule of international law regarding treaties, whereby they are not automatically domestic law with the "different principle" announced under the Supremacy Clause); Ware v. Hylton, 3 Dall. 199, 276 (1796) (opinion of J. Iredell) (calling the British practice of requiring legislative effectuation of treaty provisions "constantly observed"). Martin Flaherty points out that the Framers may have been incorrect in their assumption that treaties were presumptively non-self-executing under the laws of England. Flaherty, *History Right*, 99 COLUM. L. REV. at 2112.

[200] *See* Vázquez, *Four Doctrines*, 89 AM. J. INT'L L. at 698 (noting the "widespread understanding" that treaties concluded by the Continental Congress were not enforceable in state courts in the face of conflicting legislation and the federal government's lack of a mechanism for making state courts enforce treaties).

general problem of enforcing federal law.[201] The Framers adopted the more radical language of the New Jersey plan, declaring treaties to be "the supreme Law of the Land," rather than giving Congress the power to "negative" state legislation as proposed in the rival Virginia Plan, thus incorporating U.S. treaties into domestic law with no requirement for congressional implementation.[202]

As Justice Breyer notes,[203] James Madison explained that the Supremacy Clause was necessary to prevent the federal government from being embarrassed by state regulation that substantially frustrated the government's ability to comply with treaty obligations, as had occurred under the Articles of Confederation.[204] Numerous statements by other significant Framers support this view of the purpose and meaning of the Supremacy Clause. As early as 1786, John Jay advocated for a rule prohibiting the legislatures of the several states from passing any act that could in any way restrain, limit or counteract the operation or execution of a treaty.[205] James Iredell, a member of the North Carolina ratifying convention[206] and thus precisely the sort of person in whose views a textualist originalist ought to take an interest,[207] similarly viewed a treaty as "law of the land,"

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[201] *See id*. (calling this problem the "principal reason for the Framers' decision to draft a new constitution rather than amend the Articles" of Confederation.).

[202] *Id.* at 698-99.

[203] Medellín, 128 S.Ct. at 1378 (Breyer, J., dissenting)

[204] THE FEDERALIST, No. 42, 264 (C. Rossiter, ed., 1961) (J. Madison). *See also* Ware v. Hylton, 3 Dall. at 277 (opinion of J. Irdedell) (noting that the Supremacy Clause was passed to prevent states from ignoring treaty obligations, a "difficulty which every one knows had been the means of greatly distressing the union, and injuring its public credit").

[205] Jay, report to congress, Oct. 13, 1786, *quoted in* 1 CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 268, 274, n. 4 (1902). *See also* Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. at 760-61 (remarking that Congress unanimously adopted Jay's report, reflecting the expectation that treaties would be supreme law, and that Jay made similar remarks after becoming Chief Justice of the U.S. Supreme Court).

[206] Medellín, 128 S.Ct. at 1378.

[207] *See* YOO, POWERS OF WAR AND PEACE, at 27-28 (arguing that the views of the ratifiers of the Constitution are the most important, since the ratifiers bound

binding upon the people.[208] In South Carolina, both John Rutledge and Charles Pinckney stated their views that treaties were "paramount" laws.[209] Not surprisingly, these views are consistent with the express language of the Constitution's Supremacy Clause,[210] which declares treaties supreme federal law, operative notwithstanding any contrary state law.

Early Supreme Court decisions are also consistent with the express language of the Supremacy Clause.[211] In *Ware v. Hylton*,[212] for example, a British creditor sought payment of an American's Revolutionary War debt pursuant to the 1783 Paris Peace Treaty.[213] The debtor claimed that he had paid the debt by paying the money owed into a Virginia state fund in accordance with Virginia law.[214] Each Justice wrote separately in the case, but all agreed that the Virginia statute was invalid.[215] In his *Medellín* dissent, Justice Breyer appropriately focused on the opinion of Justice Iredell,[216] which distinguished between portions of the treaty that had been "executed" and those which were "executory."[217] Justice Iredell defined "executed" as treaty provisions that "from the nature of them . . . require no further act to be done."[218] Executory provisions are addressed to a branch of the federal government because "when a nation promises to d o a

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the people they represented through their votes and therefore their understanding of the document is the most relevant original meaning).

[208] *See* Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. at 761 and n. 9 (noting that Iredell, like Jay, made similar comments after becoming a Justice of the U.S. Supreme Court).

[209] *Id*. at 763.

[210] U.S. Const. art. VI, ¶ 2.

[211] *See* Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. at 765 and n. 36 (listing ten cases decided between 1796 and 1825 in which "treaty law was accepted as operating as supreme federal law in the face of inconsistent state law").

[212] 3 Dall. 199 (1796).

[213] *Id*. at 203-04.

[214] *Id*. at 220-21 (opinion of Chase, J).

[215] *Id*. at 285.

[216] Medellín, 128 S.Ct. at 1378 (Breyer, J., dissenting).

[217] Ware, 3 Dall. at 272.

[218] *Id*.

thing, it is to be understood that this promise is to be carried into execution, in the manner which the Constitution of that nation prescribes."[219] Iredell thus suggests that treaties that "prescribe laws to the people for their obedience" must be implemented through legislative action.[220] But Iredell then goes on to explain that after the passage of the Constitution, if a treaty is constitutional, "it is also by the vigor of its own authority to be executed in fact." [221] In short, Iredell rejects the notion that after the Supremacy Clause there can be any talk of non-self-executing treaty provisions.[222]

In its first case expressly addressing the issue, the Marshall Court recognized that, while treaties are generally viewed as contract between two states that require execution by the sovereign power of the respective states, in the United States a "different principle" is established, according to which treaties are to be regarded as equivalent to acts of the legislature, so long as the treaty can "operate of itself, without the aid of any legislative provision."[223] This notion of treaties that operate by themselves is the source of the doctrine of self-execution.[224] But when does a treaty operate of itself? Carlos Vázquez contends that the effect of the "different principle" under U.S. law is to create a presumption of self-execution, unless the parties make clear through treaty language a contrary intent.[225] Justice Breyer's dissenting opinion accepts that presumption, providing that a treaty is self-executing

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[219] *Id*.

[220] *Id*.

[221] *Id*. at 277.

[222] Justice Breyer's dissenting opinion loses sight of this dynamic in Justice Iredell's *Ware* opinion when Justice Breyer relies on that opinion to suggest that treaties that address certain subject matters address themselves to the political branches. Medellín, 128 S.Ct. at 1382 (Breyer, J., dissenting). Iredell's position, as Justice Breyer himself presents it, is that the question of whether or not a treaty addresses itself to a particular department of the government is rendered moot by the Supremacy Clause.

[223] Foster v. Neilson, 27 U.S. (Pet.) 253, 314 (1829).

[224] Vázquez, *Four Doctrines*, 89 AM. J. INT'L L. at 701.

[225] *Id*. at 703 (suggesting that parties can alter the rule in favor of self-execution by providing in the treaty that rights and liabilities of individuals arising from the treaty will be established though subsequent legislative acts).

"unless it specifically contemplates execution by the legislature and thereby 'addresses itself to the political, not the judicial department.'"[226] This suggests that, contrary to the Majority's approach, the question of whether or not a treaty requires legislative action before it can be binding domestic law enforceable in U.S. courts should turn on the intent of the parties to the treaty.

The approved method for determining the intent of the parties to an international agreement is set forth in the Vienna Convention on the Law of Treaties (VCLoT). Although the United States has not ratified VCLoT, it is generally recognized as embodying principles of customary international law[227] which are binding on the United States.[228] Both the U.S. Department of State,[229] and federal courts have recognized that VCLoT codifies customary international law.[230] Courts have repeatedly recognized its

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[226] Medellín, 128 S.Ct. at 1379 (Breyer, J., dissenting) (quoting *Foster*, 2 Pet. at 314). Justice Breyer also notes Justice Baldwin's remark that "'it would be a bold proposition' to assert 'that an act of Congress must be first passed' in order to give a treaty effect as 'a supreme law of the land.'" Medellín, 128 S.Ct. at 1379 (Breyer, J., dissenting) (quoting *Lessee of Pollared's Heirs v. Kibbe*, 14 Pet. 353, 388 (1840) (Baldwin, J., concurring)).

[227] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 811 & n. 3 (5th ed., 2003) (citing ICJ cases recognizing VCLoT as relecting customary international law).

[228] *See* Sosa v. Alvarez-Machain, 124 S.Ct. 2739, 2764 (2004) (recognizing that violations of customary international law are enforceable in U.S. courts without the need for congressional action); The *Paquete Habana*, 20 S.Ct. 290, 299 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

[229] *See* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 298 (1988) (citing Robert Dalton, Assistant Legal Advisor for Treaty affairs within the Department of State, who said that the U.S. relied on VCLoT for dealing with many day-to-day treaty problems, and Secretary of State Roger's report to the President, characterizing VCLoT as "the authoritative guide to current treaty law and practice").

[230] *See* Avero Belgium Ins. v. American Airlines, Inc., 423 F.3d 73, 79 (2d Cir. 2005) (relying on VCLoT as an "authoritative guide" to the customary international law of treaties); Chubb & Sons v. Asiana Airlines, 215 F.3d 301, 308 (2000) (characterizing VCLoT as a restatement of customary rules which

authority as embodying customary international law with respect to treaty interpretation specifically.[231]

VCLoT provides that a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[232] Included in VCLoT's conception of "context" are the text of the treaty, including any preambles or annexes,[233] any related agreements,[234] or related instruments.[235] In addition, in interpreting a treaty, an adjudicatory body must take into account subsequent agreements[236] and practice,[237] as well as relevant rules of international law.[238] In case the interpretation arrived at through this method is ambiguous or obscure[239] or manifestly unreasonable,[240] that interpretation may be confirmed, or the meaning may be determined through the use of supplementary materials, including the preparatory work of the treaty and the circumstances of its drafting.[241]

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bind states whether or not they are parties to the treaty); Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1296 n. 40 (11th Cir.1999) ("Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.") (citations omitted). More specifically, *see* Weinberger v. Rossi, 102 S.Ct. 1510, 1514, n. 5 (1982) (citing Article 2(1)(a) as codifying customary international law).

[231] *See* Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549, 2569 (1993) (Blackmun, J., dissenting) (citing Article 31.1. as a codification of custom); Tseng v. El Al Israel Airlines, Ltd., 122 F.3d 99, 104-05 (2d Cir.1997) (citing Articles 31 and 32 as embodying customary international law), *rev'd on other grounds,* 119 S.Ct. 662 (1999). *See also* SHAW, INTERNATIONAL LAW 811 & n. 4 (citing numerous international tribunals that have recognized the authority of VCLoT's rules for interpretation of treaties).

[232] VCLoT, Art. 31(1).

[233] *Id*., Art. 31(2).

[234] *Id*. Art. 31(2)(a).

[235] *Id*., Art. 31(2)(b).

[236] *Id*., Art. 31(3)(a).

[237] *Id*., Art. 31(3)(b).

[238] *Id*., Art. 31(3)(c).

[239] *Id*., Art. 32(a).

[240] *Id*., Art. 32(b).

[241] *Id*., Art. 32.

In *Air France v. Saks*,[242] the U.S. Supreme Court interpreted the Warsaw Convention on International Air Transport in a manner consistent with VCLoT. The Court began with a thorough investigation of the relevant provisions of the Convention in both English[243] and in French,[244] the language of their drafting, as required under VCLoT.[245] The Court then proceeded to a discussion of the negotiating history of the relevant provisions[246] and the conduct of the parties to the Convention with respect to those provisions, which also entailed a discussion of the parties' subsequent interpretations of the provisions. [247] Finally, the Court consulted subsequent agreements among the parties to determine if those agreements indicated an intention to depart from the original meaning of the Convention.[248] Neither the Majority nor the dissent engage in this sort of careful assessment of the intended meaning of the treaties at issue in *Medellín*.

Neither the Majority nor the dissenting opinion in *Medellín* are exemplary in terms of their adherence to the generally recognized rules for treaty interpretation. Indeed, perhaps conceding that this is the sort of activity worth doing only if it can be done well, none of the Justices make much of an effort to discern the object and purpose of the relevant treaties. Still, the dissent does a far better job of considering the original meaning of the relevant constitutional provision and its role in our constitutional history. Although the Justices who joined the Majority opinion prefer to ride under the banners of originalism and judicial restraint, the *Medellín* Majority's position betrays both of those causes. The Majority pays no attention to the original meaning of the Supremacy Clause, and it frustrates the federal executive by thwarting its attempt to comply with an international obligation. Instead, the Majority permits the courts of the State of Texas to

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242 105 S.Ct. 1339 (1985)
243 *Id*. at 1341-42
244 *Id*. at 1342-43
245 VCLoT, Art. 33.
246 *Air France*, 105 S.Ct. at 1343-44
247 *Id*. at 1344-45.
248 *Id*. at 1346.

place the United States in violation of an international judgment with which the federal government sought to comply.

V. WHAT REMAINS

Medellín's case never should have come before the Supreme Court. President Bush intervened in Medellín's case through the President's Memorandum in what turned out to be a failed attempt to comply with an international judgment, in keeping with the United States' international obligations and the President's understanding of his constitutional authority over foreign affairs. This Part argues that the President's efforts were unsuccessful because they were insincere.[249] The President has a duty to take Care that the Laws be faithfully executed.[250] This Part will first develop an argument for how the President, pursuant to the obligations attendant to the Take Care Clause, can take effective action to prevent cases such as *Medellín* from arising.

Some have arged that the Take Care Clause mandates that "[t]he President should be able to do what is necessary to execute the supreme law of the land by overriding a state law or procedure that, if carried out, would cause the United States to violate the treaty."[251] In its strongest form, this reading of the Take Care

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[249] *See* Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. at 372 (noting that the Bush administration "purports to implement *Avena*" while also claiming that doing so is optional and that the ICJ decision misreads the VCCR). John Cerone has neatly expressed the peculiarity of the Bush administration's actions:

> U.S. President George W. Bush has intervened (1) on behalf of a (non-white-collar) criminal defendant, (2) in a death penalty case, (3) in Texas, (4) invoking principles of comity, (5) with reference to an international legal obligation o[f] the United States, (6) as determined by an international court, (7) in a judgment that penetrates deeply into the domestic criminal justice system, (8) of Texas.
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> What's *not* wrong with this picture?

Cerone, *Making Sense of the U.S. President's Intervention in* Medellín, 31 SUFF. TRANSNAT'L L. REV. 277, 277 (2008).

[250] U.S. Const. art. II, § 3.

[251] Frederic L. Kirgis, *International Law in the American Courts - The United States Supreme Court Declines to Enforce the I.C.J.'S* Avena *Judgment Relating*

Clause would support the view that the President's Memorandum ordering states to implement the *Avena* decision should be given the force of law.[252] One need not go so far. The Court has not held that the Take Care Clause does not *empower* the President to override state law.[253] But the Take Care Clause still gives rise to a constitutional *duty* to work with Congress to override state law. This Part concludes with a brief discussion of the U.S. executive's on-going failure to Take Care that the ICJ's *Avena* decision is implemented as required under both international and domestic law pursuant to Article 94 of the U.N. Charter.

A. Implementing Treaties through the Take Care Clause

Medellín and his amici were loathe to rely on the Take Care Clause in arguing that President Bush had constitutional power to direct state courts to implement the *Avena* judgment.[254] That was likely an appropriate decision for litigation purposes, since the powers associated with the Take Care Clause have not been well established in the case law.[255] But there are relatively simple measures that the President can take, in accordance with the executive's constitutional powers, to ensure U.S. compliance with its treaty obligations.

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to a U.S. Obligation under the Convention on Consular Relations, 9 GERM. L. J. 619, 631 (2008).

[252] Not surprisingly, Medellín's attorneys made this argument in their opening brief in the Supreme Court. *See* Brief for Petitioner, at 17, Medellín v. Texas, No. 06-984 (U.S. June 28 2007) ("Both historical practice and this Court's decisions make clear that this authority affords the President discretion to determine the means of enforcement of statutes and treaties to the extent not specified by Congress or the treaty, and to take such other steps as may be necessary to ensure that the powers that the Constitution gives to the federal government can be carried into effect.").

[253] *See* Medellín v. Texas, 128 S.Ct. at 1372 (finding that the Take Care Clause "allows the President to execute laws, not make them).

[254] *See* Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. at 341 (noting that the Take Care Clause plays a "bit part in debates over presidential authority" and that Medellín considered reliance on the Take Care Clause unnecessary "in light of the President's well-established foreign affairs powers").

[255] *See* id. at 335 (noting that reliance on the Take Care clause has fallen out of favor).

Quite simply, the President's duty under the Take Care Clause requires that the executive branch draft whatever legislation is necessary to implement all treaty obligations to the extent that those obligations are not self-executing. Before elaborating on this thesis, however, we must first entertain a few objections to this reading of the Take Care Clause.

First, there is some controversy over whether the Take Care Clause, which refers to "the Laws" and does not mention treaties, entails a duty of the President to faithfully execute treaties.[256] Still, the overwhelming majority of scholars who have touched on the issue have concluded that the Framers intended to include both congressional laws and treaties in the "Laws" to be executed under the Take Care Clause.[257] Whatever the views of the Framers, courts have generally adopted the view that "the Laws" encompassed within the Take Care Clause include treaties.[258] The Supreme Court endorsed this view in *In re Neagle*[259] and again in *United States v. Midwest Oil Co.*[260] Indeed, even the boldest advocates of unilateral executive authority concede that the

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[256] *See id*. at 343 (conceding that the question of treaties' status under the Take Care clause is not "free from doubt").

[257] *See id*. at 343-46 (assembling key statements from the Framers expressing the view that the President's Take Care duties includes a duty to execute treaties); Ramsey, *Torturing Executive Power*, 93 GEO. L. J. at 1232 (finding no textual or historical basis for the claim that the Take Care Clause applies only to statutes); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?* 90 CORNELL L. REV. 97 (2004) (concluding that the Take Care Clause entails a presidential duty to execute treaties). *But see* MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 203 (1990) (contending that the Take Care Clause only applies to laws enacted by the legislature).

[258] Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. at 347.

[259] 10 S.Ct. 658, 668 (1890) (implying through a rhetorical question that the duties arising from the Take Care Clause entail "the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution").

[260] 35 S.Ct. 309, 325 (1915) (stating that the President's duties under the Take Care Clause entail "'the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution'") (quoting *Neagle*).

President may not refuse to enforce a treaty in force because to do so would violate the Take Care Clause.[261]

Next, some have argued that because non-self-executing treaties are not Supreme Law, they are excluded from the ambit of the Take Care Clause.[262] Rather, non-self executing treaties are to be executed by Congress, thus relieving the President of his Take Care duties.[263] The claim is a peculiar one, given the widely-acknowledged confusion regarding what constitutes a non-self-executing treaty.[264] Moreover, since the distinction between self-executing and non-self-executing treaties is not of constitutional origin,[265] it is hard to use that distinction as a means of specifying the ambit of the Take Care Clause. One way to reconcile the constitutional text, which states that all treaties are supreme law, with our practice, in which non-self-executing treaties are not given that effect as supreme law, is to characterize non-self-executing treaties as non-justiciable – that is, supreme law but, until executed, not a source of judicially-enforceable rights.[266] This is an elegant solution, but it turns on agreement on the meaning of "non-self-executing," and no such agreement exists.[267]

The objection is not a huge impediment to the argument of this Article. Those who take issue with the President's power to take

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[261] Memorandum from John Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to Hon. William H. Taft, IV, Legal Adviser, U.S. Dep't of State 4 (Jan. 14, 2002), *available at* http://www.cartoonbank.com/newyorker/slideshows/02YooTaft.pdf (last visited July 16, 2008).

[262] *See, e.g.*, Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L. J. 1230, 1261 (2007) (contending that the President has no duty to take care that non-self-executing treaties are faithfully executed); Michael P. van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 334 (2006) ("If a particular treaty does not create of its own force a directly cognizable federal law right, obligation, or power, there is nothing – at least not yet – for the president to 'execute' under the Take Care Clause").

[263] Ramsey, *Torturing Executive Power*, 93 GEO. L. J. at 1232.

[264] *See supra* note 170.

[265] *See supra* note 165.

[266] Ramsey, *Torturing Executive Power*, 93 GEO. L. J. at 1233.

[267] *See supra* note 170.

care that a non-self-executing treaty is faithfully executed have in mind a positive *power* to execute the laws.[268] Here, we are only concerned with a presidential *duty* to take care that the laws are faithfully executed. For our purposes, there is no need to show that the President could, through the exercise of some variety of Article II power, give domestic effect to a non-self-executing treaty. It is enough if the Take Care Clause mandates that the President undertake legal or political measures to effectuate such treaties as domestic law.

The Take Care Clause is not a grant of additional enforcement or execution powers to the President. Rather, as Joseph Story put it, "the true interpretation of the clause is, that the President is to use all such means as the Constitution and laws have placed at his disposal to enforce the due execution of the laws."[269] The point is that the President may not choose to enforce some laws and not others.[270] In addition, although the Take Care Clause is not a source of new presidential powers not otherwise delegated in Article II, it is an exhortation to the President to promote full compliance with the law, not only by the executive branch but by all arms of the government.[271]

B. Avena, Medellín *and the Way Forward*

In at least some respects, the *Medellín* opinion provides clear guidance. The Supreme Court has clearly found that the treaties at issue in the case are non-self-executing and that the President's Memorandum is insufficient to override state law. If the President is serious about implementing the *Avena* decision, the State of

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[268] *See* Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. at 362 (contending that the Supreme Court has recognized that the Take Care Clause entails executive powers as well as duties).

[269] JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 292, 178 (1854). *See also* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IF FOREIGN AFFAIRS 124 (2007) ("[T]he take –care clause . . . is phrased as a duty, not a power; it does not give the President authority to enforce the law but only imposes the obligation to use other presidential powers to that end.").

[270] Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. at 360.

[271] *Id*. at 370.

Texas itself, in its *Medellín* merits brief, made clear what the executive needs to do: it needs to coordinate with Congress or the States.[272] Texas first suggests that the President could work with Congress to create a federal exception to the state procedural rule that bars successive habeas petitions in cases involving violations of the VCCR.[273] Texas next recommends that the President could simply enter into a bilateral agreement with Mexico requiring federal judicial review of the cases addressed in *Avena*.[274] Finally, Texas proposes an executive panel to provide the "review and reconsideration" require under *Avena*. Any findings of actual prejudice could be communicated to state pardon and parole boards along with a presidential request that the panel's recommendation "be given great weight in state clemency proceedings."[275]

Of these options, only the first has any meaningful opportunity of rendering *Avena* enforceable in U.S. courts. A bilateral agreement with Mexico would be no more self-executing than the U.N. Charter. In connection with its proposal that the President establish an executive panel to provide review and reconsideration of cases like Medellín's, Texas has stated that it would be willing to "accord considerable weight" to executive findings of prejudice.[276] This assertion is hard to credit, given that past requests from branches of the federal government in the context of VCCR litigation have gone unheeded. For example, the Governor of Virginia proceeded with the execution of Angel Francisco Breard, despite Secretary of State Madeleine Albright's request urging him to await a ruling by the ICJ.[277] Nor has the State of Texas been moved by Justice Stevens' arguments that the Court's *Medellín* judgment does nothing to foreclose Texas from assuming the minimal costs involved in granting Medellín the review and reconsideration required by the *Avena* decision.[278] Indeed, on

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272 Brief for Respondent, at 46, Medellín v. Texas, No. 06-984 (Aug. 2007)
273 *Id*.
274 *Id*.
275 *Id*. at 46-47.
276 *Id*. at 47, n.32.
277 *See supra* note 50.
278 Medellín, 128 S.Ct. at 1374-75 (Stevens, J., concurring).

August 5, 2008, Texas executed Medellín, after the Supreme Court, in a 5-4 decision, refused to order a stay of execution.[279]

The Bush administration contends that it has intervened most forcefully on behalf of the *Avena* defendants. The President's Memorandum was, in and of itself, extraordinary.[280] In both state court proceedings and in the federal courts, the Bush administration also filed amicus briefs on behalf of Medellín and other *Avena* defendants.[281] In addition, since the Court's ruling in *Medellín*, the Bush administration continued to attempt to persuade Texas to grant review and reconsideration of Medellín's case,[282] until Medellín's execution.

Although Medellín's case ended with is life, the *Avena* case continues. On June 5, 2008, Mexico filed with the ICJ a Request for Interpretation of Judgment in the *Avena* Case[283] and a request for provisional measures.[284] In that context, it is striking that the Bush Administration has taken no steps to work with Congress towards implementing the *Avena* decision, as that is precisely the course of action prescribed by the *Medellín* Majority. During oral proceedings in the most recent ICJ case, Judge Bennouna asked the State Department's Legal Advisor, John Bellinger, about the views of the United States Congress on the *Avena* judgment. Mr. Bellinger responded as follows:

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[279] James C. McKinley, Jr., *Texas Executes Mexican Despite Objections*, N. Y. TIMES (Aug. 6, 2008).

[280] *See* Verbatim Record, Oral Proceedings in the Case Concerning the Request for Interpretation of the Judgment of 31 March 2004 in the *Case Concerning Avena and Other Mexican Nationals* (United Mexican States v. United States of America) (Remarks of John Bellinger, June 19, 2008), ¶ 9, at 11.

[281] *See id.*, ¶¶ 10, 13-14, at 11-13.

[282] *See id.*, ¶ 21, at 16.

[283] Request for the Interpretation of the Judgment of March 31 2004 in the *Case Concerning Avena and Other Mexican Nationals* (United Mexican States v. United States of America), *available at* http://www.icj-cij.org/docket/files/139/14582.pdf (last visited July 17, 2008).

[284] *Available at* http://www.icj-cij.org/docket/files/139/14582.pdf (last visited July 17, 2008).

> Congress has not in fact adopted legislation on this issue, so there is no real way for me to represent to you the view of our "Congress" as such…. It is worth noting though that – even assuming a large number of individual Members of Congress might agree that the *Avena* decision is binding as a matter of international law – it does not necessarily mean that Congress would adopt legislation on the point. Congress is a political body, and the actions of Members of Congress can be affected by a wide range of factors.[285]

True enough, but one of those factors is whether or not the executive branch is pressuring Members of Congress to pass a particular piece of legislation. That is not happening under the current administration.[286]

The treaties at issue in *Medellín* are not the only ones that are in need of domestic implementation. The United States routinely attaches "Reservations, Understandings and Declarations" to the human rights treaties it ratifies declaring them to be non-self-executing.[287] There is nothing wrong with this practice in and of itself, but some human rights treaties specify that signatories must take all measures necessary to implement their substantive provisions as domestic law. [288] By declaring these provisions to

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[285] *See* Verbatim Record, Oral Proceedings in the Case Concerning the Request for Interpretation of the Judgment of 31 March 2004 in the *Case Concerning Avena and Other Mexican Nationals* (United Mexican States v. United States of America) (Remarks of John Bellinger, June 20, 2008), 12 at ¶ 17 .

[286] Bellinger explains the government's inaction as follows: "Given the short legislative calendar for our Congress this year, it would not be possible for both houses of our Congress to pass legislation to give the President authority to implement the *Avena* decision. There is simply not enough time. Verbatim Record, ¶ 26, at 17 (Remarks of John Bellinger, June 19, 2008).

[287] David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 139-42 (1999).

[288] *See*, *e.g.*, The International Convenant on Civil and Political Rights, Art. 2(2), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) ("[E]ach 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 legislative or other measures as may be necessary to effect to the rights recognized in the present Covenant."); The United Nations Convention

be non-self executing and then not executing them, the United States effectively renders its participation in the treaty regime meaningless for domestic purposes, since domestic courts dismiss individual claims brought under such human rights treaties on the basis that the treaties at issue are not self- executing and/or do not create a private right of action.[289] U.S. Presidents' failure to abide by their take care duties places the United States in on-going violation of multiple treaty duties.

For example, the Human Rights Committee, tasked with interpreting and enforcing the International Covenant on Civil and Political Rights, released a general comment in which it stated that Article 2 of the Covenant "requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order."[290] Given the United States declaration that substantive provisions of the Covenant are not self-executing, coupled with its failure to execute the relevant provisions, the Human Rights Committee's comment indicates that the United States is currently in violation of its obligations under the Covenant.

On July 16, 2008, by a vote of 7-5, the ICJ ordered the United States to take "all measures necessary to ensure" that five Mexican nationals, including Medellín are not executed pending judgment on Mexico's Request for Interpretation, unless they are accorded the review and reconsideration called for in the *Avena* judgment.[291]

Agaisnt Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2.1, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984) ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction").

[289] Melissa A. Waters, *Creeping Monism: The Judicial Trend Towards Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 639 (2007). *See also* Sloss, *The Domestication of International Human Rights,* 24 YALE J. INT'L L. at 197-203 (summarizing judicial decisions).

[290] Human Rights Committee, *General Comment No. 31 on Article 3 of the Covenant: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 13, CCPR/C/74/CRP.4Rev.6 (Apr. 21, 2004).

[291] Order, Request for the Indication of Provision Measures (Mex. v. U.S.) ¶ 80II.(a), p. 19, *available at* http://www.icj-cij.org/docket/files/139/14639.pdf (last visited July 17, 2008).

This new order accords the executive a compelling opportunity to approach Congress to find a way out of this international impasse. The Take Care Clause is unlikely to provide the basis for any legal claim that the President has failed in his constitutional duties. Rather, the mechanisms for the enforcement of the Take Care Clause are political: the impeachment process and the ballot box.[292] And so, the best way to encourage the executive to abide by its Take Care duties may be organizing at the grass roots level and through professional organizations, such as the American Bar Association and the American Society of International Law, that can put pressure on the United States Department of State to make the full implementation of treaties a domestic priority.[293]

CONCLUSION

It's always bad when the Supreme Court makes an unreasoned decision. From that perspective, *Medellín* is no better or worse than other decisions in which the Court's self-proclaimed originalists have departed from their allegiance to the Constitution in favor of their own agendas. But *Medellín* is uniquely important because it is the first Supreme Court decision that proclaims that there are to be no domestic consequences when the U.S. violates its international obligations. The case sends a strong message to the United States's trading partners that it cannot be counted on. This regrettable decision may nonetheless result in a public good. It provides the opportunity for a new administration, in reliance on its Take Care Clause duties, to work aggressively with a new Congress to promote the United States' full participation in and compliance with the treaties that it has ratified.

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[292] Ramsey, *Torturing Executive Power*, 93 GEO. L. J. at 1233.

[293] On July 18, 2008, the current and past presidents of the American Society of International Law sent letters to the U.S. Congress urging action to "ensure that the Untied States lives up to its binding international legal obligations under the [VCCR] and the United Nations Charter." A copy of the letter is available at www.asil.org/presidentsltr (last visited August 7, 2008).