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A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law

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A MONIST SUPREMACY CLAUSE AND A DUALISTIC SUPREME COURT: THE STATUS OF TREATY LAW AS U.S. LAW

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Abstract

Hans Kelsen identified three possible relationships between the international and domestic legal orders. Dualism understands the international and domestic legal orders as separate and independent. Monism describes a single and comprehensive legal order but can operate with either domestic law or international law as a higher order law. Like many domestic legal orders, that of the United States has never fully worked out which of these three options specifies the status of international law in its domestic legal order. While the text of the United States Constitution suggests a form of monism in which international law is automatically part of the domestic legal order, the structure of the Constitution does not permit such automatic incorporation. In a 2008 decision, the U.S. Supreme Court articulated a theory that borders on dualism. The Court's decision makes sense of some recent U.S. practice, but it cannot be reconciled with either the text or the structure of the U.S. Constitution. Moreover, as a consequence of the Supreme Court's decision, the United States is in danger of re-enacting the de facto *primacy of domestic law that the Constitution's Framers sought to address by according constitutional supremacy to treaty law.*

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I. INTRODUCTION

The status of international law in the domestic order varies dramatically from state to state.[1] Hans Kelsen identified three basic theoretical possibilities that might describe the relationship between international and domestic law.[2] Kelsen promoted what has come to be called "monism"; that is, the view that there is only one legal order of which international and domestic legal systems comprise parts. Within monism, Kelsen entertained two options: either international law or domestic law could be at the top of the hierarchy of legal norms.[3] Kelsen associated the primacy of domestic law with the ideology of imperialism and that of international law with the ideology of pacifism.[4] Although Kelsen himself claimed not to prefer one form of monism over the other, Kelsen scholars have identified international supremacy as a hallmark of his theory of international law.[5] Only a few states

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1 Two recent English-language volumes provide a comparative perspective on the problem of the domestic application of international law: *See* 44 VAL. U. L. REV. 759–956 (2010); THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009) [hereinafter ROLE OF DOMESTIC COURTS].

2 HANS KELSEN, PURE THEORY OF LAW 328–47 (Max Knight trans., 2d ed., 1967).

3 *Id*. at 332–44.

4 *Id*. at 346–47.

5 *See* JOCHEN VON BERNSTOFF, THE PUBLIC INTERNATIONAL LAW THEORY OF HANS KELSEN: BELIEVING IN INTERNATIONAL LAW 93 (Thomas Dunlap trans., 2010) (describing the thesis of international primacy as the central project of a Kelsenian "school" of international law).

have fully embraced international law primacy by providing mechanisms to automatically incorporate international legal norms into the domestic legal order.[6]

In a dualist model, the international and domestic legal orders are independent of one another. Kelsen regarded such a relationship between the international and domestic legal orders to be "untenable," because in his view that would produce a world in which behavior that would be permissible in one legal order would be impermissible in another.[7] That is, there would be categories of conduct which, no matter what an actor chose to do, would put that actor in violation of some legal norm. This is not to say that Kelsen believed that domestic legal orders would always enforce international legal norms, but he was comfortable with the notion that legal norms could exist even if they were not enforced—or even if it took a long time for the proper authority to identify a violation and provide a remedy. A legislature may pass an unconstitutional statute, and that statute creates a legal norm until it is rendered ineffective by a court or a supervening legislative or executive act. Similarly, the fact that a state may adopt legal rules that are at odds with international legal norms is a temporary anomaly and does not, for Kelsen, give rise to a dualist system.[8]

Most domestic systems are complex hybrids rather than instantiations of one of the available theoretical options.[9] The United Kingdom is often described as having a dualist system, because Parliament must approve domestic implementing legislation before treaties and rules of customary international law can be introduced in the domestic legal order. This model has been adopted in many of Britain's former colonies, such as

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6 *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 183–87 (2d ed., 2007) (discussing states with monist systems) (discussing variants on monism in five European states and Russia).

7 KELSEN, *supra* note 2, at 328, 329.

8 *Id*. at 330–31.

9 David Sloss, *Treaty Enforcement in Domestic Courts: A Comparative Analysis*, 1, 6–7, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009).

Canada, Australia, India, and Israel as well.[10] But the fact that there is a mechanism for domestic implementation of treaty norms does not necessarily suggest a dualist system, so long as there is an assumption that international norms will be incorporated into and recognized as binding within the domestic legal order.

At the time the U.S. Constitution was drafted, the Framers were well aware of the dangers of dualism. During the so-called "Critical Period," between the successful Revolutionary War and the ratification of the Constitution, the ability of the national government to operate under the Articles of Confederation was stymied in significant part because the states did not consider themselves bound by the national government's international agreements, including the Treaty of Paris that was intended to effect a comprehensive post-war settlement with England.[11] But the United States system is neither monist nor dualist; rather, the U.S. Constitution and U.S. constitutional history suggest ambivalence about the status of international law as domestic law.

Part II of this Article begins with a discussion of the U.S. constitutional design with respect to the incorporation of treaty obligations into the domestic legal order. Although the Framers of the U.S. Constitution clearly attempted to provide that treaties would have direct effect, with a status akin to that of acts of the national legislature, they did not come to terms with the difficulties such a monist design posed for the constitutional scheme, which envisioned both a federal system and a separation of executive and legislative powers. Part III then addresses the development of the

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[10] *Id*. at 7.

[11] *See* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 43–45 (2007) (describing difficulties under the Articles of Confederation in enforcing both treaties and the law of Nations); David L. Sloss et al., *International Law in the Supreme Court to 1860* 7, 9–12, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss, et al. eds., 2011) (noting that under the Articles of Confederation, responsible treaty enforcement fell to the states, which often failed to comply with treaties); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 559, 616–19 (2008) [hereinafter Vázquez, *Treaties as Law*] (citing discussions at the Constitutional Convention and the ratification debates).

doctrine of self-executing and non-self-executing treaties, culminating in the U.S. Supreme Court's 2008 decision in *Medellín v. Texas*,[12] in which the Court seems to have adopted a view on the status of treaty law that significantly diminishes its efficacy as domestic law. The Article concludes by contending that *Medellín* has left us with a rule on treaty law that cannot be reconciled either with the text or the structure of the U.S. Constitution. It neither gives treaties the status they ought to have under the Supremacy Clause nor does it adequately protect the constitutional separation of powers because, according to *Medellín*, either the executive branch or the Senate can give domestic effect to an international agreement merely by stating an intention to do so. This bypasses the House of Representatives' role in passing domestic legislation. In addition, the *Medellín* decision makes the United States a *de facto* dualist state and could potentially give rise to the very situation that Kelsen described as "untenable." Conduct that is required under domestic law places the United States in violation of its international legal obligations.

The discussion here focuses on treaty law and will address only briefly the status of customary international law and international agreements other than treaties as part of the domestic legal order. In short, for prudential reasons, U.S. courts determined during the first half of the twentieth century that international agreements that are not treaties have the same domestic legal status as treaties.[13] The constitutional status of customary international law has become much more open to question in the past decade. Until recently, there was a scholarly consensus, now known as the "modern position," that customary international law is binding federal law.[14] That view has been challenged by a group of

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[12] 552 U.S. 491 (2008).

[13] United States v. Pink, 315 U.S. 203 (1942) (upholding assignment of property to the United States through executive agreement over objection grounded in New York state law); United States v. Belmont, 301 U.S. 324 (1937) (same). *See generally* RAMSEY, *supra* note 11, at 174–93 (focusing on courts' treatment of sole executive agreements as preempting state law).

[14] *See* Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1501 (2011) (defending the

revisionist scholars. In *Erie v. Tompkins*,[15] the U.S. Supreme Court recognized that there is no general federal common law. Revisionists argue that, following *Erie*, federal courts no longer have the power to recognize substantive rights that sound in customary international law.[16] Faced with an opportunity to decide the issue in 2004, the Supreme Court refused to do so.[17]

II. TENSION IN THE CONSTITUTIONAL DESIGN

Any discussion of the status of international law as U.S. law must begin with the Supremacy Clause, which states that all "Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land" and must be enforced notwithstanding any state law to the contrary.[18] This constitutional provision, taken on its own, seems to suggest a monist constitutional design. Indeed, in his discussion of monism, Hans Kelsen provides a useful gloss on the purpose of constitutional provisions like the Supremacy Clause within a monist system:

> [The] primacy of international law is compatible with the fact that the constitution of a state contains a provision to the effect that general international law is valid as a part of national law. If we start from the validity of international law which does not require recognition by the state, then the mentioned constitutional provision does not mean

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modern position and characterizing it as the view that "customary international law binds State actors and thus preempts State law applicable to State officials and private parties").

15 304 U.S. 64 (1938).

16 *See* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

17 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). Numerous scholarly essays on the topic are gathered in *International Law in the U.S. Supreme Court: Continuity and Change* (David L. Sloss, et al. eds., 2011).

18 U.S. CONST. art. VI, ¶ 2.

> that it puts into force international law for the state concerned, but merely that international law—by a general clause—is transformed into national law. Such transformation is needed, if the organs of the state, especially its tribunals are authorized (by the constitution) to apply national law; they can, therefore, apply international law only if its content has assumed the form of national law . . . .[19]

However, when the Supremacy Clause is considered in the context of the Constitution as a whole, neither the Constitution nor U.S. constitutional history provides unequivocal support for a monistic interpretation of the domestic legal order.

The Supremacy Clause raises problems from the perspectives of both federalism, that is, the allocation of powers between the federal government and several states, and the separation of powers among the three branches of the federal government. While the Framers clearly wanted to resolve the federalism issues in favor of a federal government empowered to bind the states through treaties, they did not establish clear mechanisms for doing so and would have had difficulty doing so because the issue was so explosive. Still, after a few controversies during the Early Republic, the issue did not arise in earnest until the late twentieth century.[20] The separations of powers implications of the Supremacy Clause are far more vexing. If treaty law automatically became incorporated into the U.S. domestic legal order, the executive branch rather than the legislature could be the source of domestic law. U.S. courts still struggle to specify how treaty obligations can have domestic legal effect without federal implementing legislation and to identify the mechanisms that provide private rights of action in domestic courts where obligations arising under international law have been violated.

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[19] KELSEN, *supra* note 2, at 336–37.

[20] *See* Michael P. Van Alstine, *Treaties in the Supreme Court, 1901–1945*, *in* SLOSS ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 191, 194–206 (detailing how the Supreme Court routinely enforced the United States' international commitments of domestic law in the first half of the twentieth century).

A. The Supremacy Clause and Monism

The Framers of the U.S. Constitution intended to incorporate treaties into domestic law with something like direct effect. 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."[21] The Framers viewed this presumption of "self-execution," as it came to be called, as a marked departure from the laws of England and to American practice under the Articles of Confederation.[22] As Justice Breyer noted in his dissent in *Medellín*,[23] the Framers thought 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 in the 1780s.[24]

Although the drafters of the U.S. Constitution debated the matter and reached a clear consensus that treaties should have direct effect as domestic law, they did not specify how that result would be achieved.[25] While James Madison hinted vaguely at a role for the House of Representatives in implementing at least some treaties, John Jay thought it acceptable if treaties were made binding without the approval of the legislature. He did not view legislatures as the exclusive source of law, because courts can also make law. Nor did he think it appropriate that the legislature have a power to repeal treaties, because treaties are a pact between two

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[21] Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 98 AM. J. INT'L L. 695, 696 (1995) [hereinafter Vázquez, *The Four Doctrines*].

[22] John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM. INT'L L.J. 1209, 1217–18 (2009); Vázquez, *The Four Doctrines*, *supra* note 21, at 698.

[23] Medellín v. Texas, 552 U.S. 491, 543–44 (Breyer, J., dissenting, 2008).

[24] *See* THE FEDERALIST NO. 42, at 270 (Edward Mead Earle ed., 1937) (J. Madison) (noting that the power of the federal government to enter into treaties was "frustrated by regulations of the states" under the Articles of Confederation).

[25] *See* Parry, *supra* note 22, at 1223–27 (concluding that while the Constitutional Convention reached an agreement about treaties, "it failed to explore the implications of that agreement").

states and one party should not be permitted unilaterally to cancel such a bargain.[26]

The issues that the Framers failed to resolve at the Constitutional Convention gave rise to lively debates in the state ratification assemblies. During the ratification debates, the supporters of the Constitution, known as Federalists, took a number of positions. Nearly all agreed that treaties would be supreme law, overriding inconsistent state law. Some went further and argued that all treaties would be self-executing and would trump federal statutes. But leading Federalists, including Alexander Hamilton and Madison, acknowledged that, whether or not treaties were law, they could only be implemented effectively through action by both Houses of Congress. Anti-Federalist positions mirrored those of the Federalists and were at least as divergent. Not surprisingly, among Federalists, Madison seems to have had the greatest appreciation for the dangers self-executing treaties posed for the constitutional doctrine of separation of powers. Unfortunately, Madison reached no clear conclusions.[27]

B. Structural Constitutional Elements Suggesting Dualism

In the decades that followed, constitutional tensions between the Supremacy Clause and both federalism and separation of powers doctrines became a source of political contestation. The states were reluctant to accept the supremacy of treaty law over their sovereign power. At the same time, the House of Representatives sought a greater role in the approval and implementation of legal norms arising from treaty obligations. The federalism issue was settled quite quickly and largely remained settled in favor of the federal government until the end of the

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[26] *Compare* THE FEDERALIST NO. 53, at 351–52 (J. Madison) (observing that treaty implementation will "sometimes demand particular legislative sanction and cooperation") *with* THE FEDERALIST NO. 64, at 421 (J. Jay) (describing treaties as binding and "beyond the reach of legislative acts").

[27] Parry, *supra* note 22, at 1228–64 (reviewing relevant debates in the states' ratification assemblies).

twentieth century.[28] Early in the nineteenth century, Chief Justice John Marshall introduced the distinction between self-executing and non-self-executing treaties in order to address separation of powers concerns. [29]

The U.S. Constitution provides that treaties are ratified by the President with the "advice and consent" of two-thirds of the Senate.[30] The House of Representatives has no formal role in the approval of treaties, nor do the states, although because Senators are elected on a state-wide basis, they are supposed to represent the state interests in the federal government.[31] If the President and the Senate can pass supreme law with direct domestic effect, they can bypass the House of Representatives and thus leave out of the legislative process one of the two houses of the legislature. Because Representatives are elected every two years,[32] the House is the most democratically accountable branch of the U.S. government. If the Framers' purpose was to establish a representative government responsive to the wills of the electorate, it would be especially problematic if Congress's legislative primacy could be bypassed through the treaty power. Moreover, permitting the President and the Senate to bypass the House of Representatives through the treaty power would be politically

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[28] *See* Lori F. Damrosch, Medellín *and* Sanchez-Llamas: *Treaties from John Jay to John Roberts*, *in* SLOSS ET AL., INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 451, 457–58 (noting that *Medellín* and other, similar cases rejecting the enforceability of treaty rights in favor of state procedural rules "arguably invert the priority established by the Supremacy Clause" and intimating that the Supreme Court would not have considered doing so until recently).

[29] *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (finding a treaty between the United States and Spain to be non-self-executing). *But see* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (reviewing the Spanish text of the same treaty and finding the treaty to be self-executing).

[30] U.S. CONST. art. II, § 2, cl. 2. 6.

[31] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551–53 (1985) (citing authorities on the ways in which the federal government is designed to be responsive to the interests of the states); RAMSEY, *supra* note 11, at 300–17 (noting that the treaty power was not originally viewed as a threat to the states because state legislatures controlled election to the Senate).

[32] U.S. CONST. art. I, § 2, cl. 1.

hazardous, because all appropriations bills must begin in the House.[33] The executive branch could, with the blessing of the Senate, commit the United States to international obligations that Congress could prevent it from fulfilling. The result would be an untenable dualism.

Madison recognized this problem during the ratification debates. Although he viewed treaties as supreme law,[34] he acknowledged that commercial treaties might require "particular legislative sanction and cooperation."[35] Hamilton also recognized that some treaties could not be implemented fully without congressional participation. At times, however, Madison suggested that the participation of the Senate alone was enough, and Hamilton concluded that Congress had a duty to implement obligations entered into through treaty.[36]

The Framers thus transformed the legal question into a political question, and that is where things have remained to this day. While the House of Representatives has no formal, constitutional role in treaty making, treaties with domestic consequences require House approval for implementation. If the United States were to enter into a treaty without first securing congressional support, it would likely take on an international obligation that it could not fulfill due to domestic impediments, thus putting the government in violation of its international obligations and negating any substantive or foreign policy benefits that might derive from participation in the treaty regime.

III. INTERNATIONAL LAW DUALISM IN CONSTITUTIONAL PRACTICE

Because the Framers of the U.S. Constitution did not resolve the tensions between the Supremacy Clause and two structural elements of the Constitution, federalism and the separation of powers, the status of international law in the U.S. domestic order has been far more a product of U.S. constitutional history than it

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33 U.S. CONST. art. I, § 7, cl. 1.
34 THE FEDERALIST NO. 44, at 295–96 (J. Madison).
35 THE FEDERALIST NO. 53, 352 (J. Madison).
36 THE FEDERALIST NO. 75, at 486 (A. Hamilton).

has been determined by the text of the Constitution. The separation of powers issue was resolved in part through political mechanisms and in part through the doctrine of non-self-execution. The federalism issue seemed resolved early in U.S. history in favor of treaty supremacy. The U.S. Supreme Court's decision in *Medellín* calls that resolution into question.

The tension between the Supremacy Clause and the doctrine of separation of powers led almost immediately to a constitutional crisis over the implementation of the Jay Treaty with Britain of 1794.[37] The Jay Treaty was in part a commercial treaty, and as the Constitution allocates powers over international commerce to Congress, leaders of what would become the Jeffersonian Republican Party in the House of Representatives, including James Madison and Albert Gallatin (Jefferson's Treasury Secretary), insisted on a congressional role in implementing the Jay Treaty.[38] Federalists sought to insist that treaties were supreme and that the House of Representatives had a duty to pass laws necessary to implement them.[39] In the end, the House of Representatives narrowly approved appropriations to implement the treaty but refused to acknowledge its duty to do so.[40]

Republicans in the House similarly objected to the surrender of a criminal suspect pursuant to extradition provisions of the Jay Treaty that had never been implemented through congressional legislation.[41] Republican insistence on a role for the House of Representatives in the treaty process diminished markedly during Thomas Jefferson's administration when it became necessary to bring negotiations with France over the Louisiana Purchase to a

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[37] Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and The United States of America, 8 Stat. 116 (1794).

[38] 5 ANNALS OF CONGRESS 437 (1796).

[39] *Id.* at 722. Hamilton made similar arguments in the press. *See* 20 THE PAPERS OF ALEXANDER HAMILTON 3 ff. (Harold R. Syrett ed., 1974).

[40] 5 ANNALS OF CONGRESS 1291 (___).

[41] *See* Parry, *supra* note 22, at 1295–1303 (summarizing congressional debates from 1800).

timely conclusion.[42] Nonetheless, Gallatin still insisted on the importance of the House's role in treaty implementation.[43]

These debates arose anew when President James Madison called upon Congress to implement provisions of the Treaty of Ghent, which ended the War of 1812 and which Madison ratified in December 1815.[44] After lengthy debates in both Houses of Congress, the House and the Senate agreed on a compromise that left basic constitutional controversies unresolved but recognized two general principles that informed future treatments of the status of treaties as domestic law. First, Congress developed the last-in-time rule, according to which treaties could trump prior legislative enactments but Congress could also override a treaty through a legislative act.[45] Second, Congress recognized that, while some treaties could have direct effect as domestic law and thus were self-executing, others required implementing legislation.[46]

A. The Doctrine of Non-Self-Execution

As discussed above, the Supremacy Clause and its legislative history suggest that the Framers intended for treaties to have direct effect as domestic law. Evidence from the first decades of U.S. history enhances the sense that the Framers and their contemporaries assumed that treaties would be given direct effect as domestic law. In the first case in which it weighed in on the issue, *Ware v. Hylton*, the U.S. Supreme Court recognized the right of a British creditor to seek relief in a U.S. court under the 1783

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[42] Although Jefferson at first insisted that a constitutional amendment was necessary before the President could double the size of the United States through a treaty, he ultimately bowed to expediency and advised Gallatin that the less said about the legal basis for the treaty, the better. Matthew S. Warshauer, *Constitution of the United States*, *in* THE LOUISIANA PURCHASE: A HISTORICAL AND GEOGRAPHICAL ENCYCLOPEDIA 83, 84 (Junius P. Rodriguez ed., 2002)

[43] Parry, *supra* note 22, at 1294.

[44] *Id*. at 1304–16.

[45] The U.S. Supreme Court recognized this doctrine in *Whitney v. Robertson*, 124 U.S. 190, 195 (1888) and *Chae Chan Ping v. United States* (The Chinese Exclusion Cases), 130 U.S. 581, 600 (1889).

[46] Parry, *supra* note 22, at 1316.

peace treaty that ended the Revolutionary War.[47] *Ware* may well have put to rest federalist challenges to the efficacy of the Supremacy Clause,[48] but it did not resolve separation of powers questions relating to categories of treaties that called for congressional implementation.

Confronted with this constitutional conundrum in 1829, Chief Justice John Marshall determined that treaties intended to have domestic effect cannot do so without some sort of legislative intervention: "[W]hen the parties engaged to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[49] Marshall thus articulated what eventually became known as the doctrine of self-execution.[50] A self-executing treaty is one that has "automatic domestic effect as federal law upon ratification."[51] Generally speaking, if a treaty is self-executing it creates a domestic legal obligation without the need for a congressional enactment.

For much of U.S. constitutional history, treaties were largely assumed to be self-executing, and treaties that created private rights were assumed to give individuals standing to sue to vindicate those rights. Justice Marshall himself embraced this notion as early as 1809, when he noted that treaties "stipulate something respecting the citizens of the two nations, and gives them rights." Marshall regarded it as a duty of courts to protect such treaty rights against all contrary laws and judicial decisions of

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47 3 U.S. (3 Dall). 199, 239 (1796).

48 Throughout the nineteenth century, the U.S. Supreme Court continued to embrace the doctrine of treaty supremacy over state law that it adopted in *Ware*. Duncan B. Hollis, *Treaties in the Supreme Court, 1861–1900*, *in*, INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 55, 56 (Sloss et al. eds., 2011) [hereinafter Hollis, *Treaties in the Supreme Court*].

49 Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

50 *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) (explaining that non-self-executing treaty provisions "can only be enforced pursuant to legislation" and that such legislation is subject to congressional modification and repeal).

51 Medellín v. Texas, 552 U.S. 491 at 502 n.2 (2008).

states.[52] So the doctrine remained throughout the nineteenth century. As Justice Miller put it in 1884,

> A treaty, then, is a law of the land, as an act of Congress is whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.[53]

However, this presumption in favor of the applicability of treaties as domestic law was largely theoretical as, before World War II, the United States was a party to very few treaties that created private rights.[54] In the second half of the twentieth century, when the United States' treaties obligations exponentially increased, courts became more skeptical of the presumption in favor of self-execution and they de-coupled the finding that a treaty was self-executing from a finding that it gave rise to a private right of action.[55]

B. The U.S. Supreme Court's Decision in Medellín v. Texas

In *Medellín*, the U.S. Supreme Court provided a method for establishing when treaties are to be treated as self-executing. Medellín was a Mexican national who was on death row in Texas, having been convicted on murder charges.[56] Medellín brought a habeas challenge to his conviction and sentence, contending that he had been denied his rights of consular access and consultation in violation of the Vienna Convention on Consular Relations

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[52] Owings v. Norwood's Lessee, 9 U.S. 344, 348 (1809).

[53] Head Money Cases, 112 U.S. 580, 598–99 (1884); *see also* Hollis, *Treaties in the Supreme Court*, *supra* note 48, at 66–67 (noting that the Supreme Court "regularly applied treaties as law for individuals," allowing them to invoke treaties directly and to affording them both rights and remedies).

[54] Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 53 (2012) [hereinafter Hathaway et al., *International Law*].

[55] *Id*. at 63–68.

[56] *Medellín*, 552 U.S. at 501.

(VCCR).[57] In *Avena and Other Mexican Nationals* (*Avena*),[58] the International Court of Justice (ICJ) had found that the United States had violated its international obligations under the VCCR with respect to certain Mexican nationals in criminal custody in the United States.[59] The ICJ ordered the United States to provide "review and reconsideration" of each challenged conviction and sentence to determine whether the Mexican nationals, including Medellín, had been prejudiced by the violation of their rights of consular consultation.[60]

Although the United States disagreed with the *Avena* decision, President Bush issued a memorandum to the Attorney General, stating that the United States would comply with the *Avena* judgment by directing state courts to implement that judgment.[61] 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. 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.[62]

In *Medellín*, the U.S. Supreme Court agreed. 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."[63] As the *Medellín* majority put it, while treaties "may comprise international commitments . . . they are not domestic law unless Congress has either enacted

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[57] *See* Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. no. 6820 (providing that foreign nationals in penal custody must be permitted to communicate with representatives of their consulate).

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

[59] *Id*. at 53–55.

[60] *Id*. at 72.

[61] Memorandum from President George W. Bush to Alberto R. Gonzales, U.S. Att'y Gen. (Feb. 28, 2005).

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

[63] Medellín v. Texas, 552 U.S. 491, 498–99 (2008).

implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."[64] There was no implementing legislation for either the VCCR or the U.N. Charter provision calling on member states to comply with decisions of the ICJ. Therefore, in order for the ICJ's decision in *Avena* to bind the state courts that were to provide the review and reconsideration called for in *Avena*, the U.S. Supreme Court reasoned, the decision would have to bind the United States with the sort of direct effect derived from a self-executing treaty.

The only treaty that came into question as potentially self-executing was the U.N. Charter, Article 94(1) of which provides that member states are to "undertake to comply" with the decision of the ICJ.[65] In order to determine whether or not Article 94(1) was self-executing, the *Medellín* majority had to specify the nature of the inquiry used to determine when treaties are to be treated as self-executing. Its effort to do so was not entirely successful.

Prior to *Medellín*, lower courts had largely relied on a multifactor balancing analysis to determine whether or not a treaty should be given domestic effect.[66] The *Medellín* majority rejected the position of the *Restatement (Third) of The Foreign Relations Law of the United States*, which favored a presumption in favor of treating treaties as self-executing.[67] Rather, the *Medellín* majority held that a treaty is self-executing only if it "contains stipulations which are self-executing, that is, that require no legislation to make them operative."[68] The Court thus subtly changed Justice Marshall's rule that, consistent with the Supremacy Clause, rejected a presumption against self-execution.[69] The rule laid

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[64] *Id*. at 505 (citing Igartua–De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)).

[65] Charter of the United Nations art. 94(1), June 26, 1945, 59 Stat. 1031, TS No. 993, 3 Bevans 1153.

[66] *See* Curtis A. Bradley, *Intent, Presumptions and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 540 (2008).

[67] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, Reporter's Note 5 (1987).

[68] *Medellín*, 552 U.S. at 505–06 (citing Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

[69] Vázquez, *Treaties as Law*, *supra* note 11, at 629.

down in *United States v. Percheman* was that treaties would be treated as self-executing unless the treaty itself "stipulat[es] for some future legislative act."[70] The *Medellín* majority invented a requirement that there be some language, either in the treaty itself or provided by the President or the Senate, indicating self-execution if a treaty is to be directly effective as domestic law. The *Medellín* dissent faults the *Medellín* majority for looking for "the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)."[71] The majority accepts this characterization of its approach.[72]

The majority's textual approach has a certain common sense appeal. It seems reasonable to expect that, if the parties to a treaty expected that instrument to be self-executing, they would so state. However, as the *Medellín* dissent pointed out, the majority named no treaty that contains express language specifying that it is to be self-executing. That is not surprising because international agreements generally do not reference the mechanics of domestic implementation beyond the occasional statement of an expectation that parties will take whatever steps are necessary to incorporate treaty obligations into domestic law.[73] But the majority did not require such an express statement, as it repeatedly indicated that either the President or the Senate could at any point during the ratification process, express intent to have a treaty be self-executing: "Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect."[74]

In order to make sense of this approach to treaty interpretation, we need to review the way the United States takes on treaty obligations. Treaty ratification is a three-step process in the United States. First, a representative of the executive branch signs the

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70 United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833).
71 Medellín v. Texas, 552 U.S. 491, 562 (2008) (Breyer, J., dissenting).
72 *Id*. at 514.
73 *Id.* at 547–48 (Breyer, J., dissenting).
74 *Id.* at 521.

treaty.[75] Next, the Senate provides its advice and consent,[76] and at that time the Senate may attach reservations, understandings, and declarations.[77] For example, in providing advice and consent to various human rights instruments, the Senate has attached declarations that the substantive provisions of such treaties are non-self-executing.[78] Finally, the executive ratifies the treaty, and in so doing the President may make some statement about the domestic status of the instrument, although the constitutional status of such a statement is indeterminate, and *Medellín* did not make it any less so.[79] After all, the *Medellín* majority did not think the President's Memorandum directing states to implement the *Avena* decision was sufficient to render a treaty self-executing.[80] A presidential statement made in connection with the deposit of an instrument of ratification should not be entitled to any different treatment.

The *Medellín* majority held that Article 94(1) of the Charter could not be self-executing, because the language "undertakes to comply" suggests that some additional action by the state is required in order to give effect to an ICJ judgment.[81] Indeed, the Charter contemplates the possibility that a state will not comply with an ICJ judgment and provides for a *political* remedy in

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[75] RICHARD F. GRIMMETT, CONG. RESEARCH SERV. S. PRT. 106–17, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENAT*e* 6–7 (2001) [hereinafter CRS, TREATIES].

[76] U.S. CONST. art II, § 2.

[77] CRS, TREATIES, *supra* note 75, at 7–12.

[78] *See* 140 CONG. REC. S7634 (1994) (recording reservations to the Convention on the Elimination of all forms of Racial Discrimination); 138 CONG. REC. 8068 (1992) (recording the Senate's reservations, declarations, and understanding relevant to the International Covenant on Civil and Political Rights); 136 CONG. REC. 36192 (1990) (recording Senate reservations to the U.N. Convention against Torture); 132 CONG. REC. 2326 (1986) (recording Senate reservations to the Genocide Convention).

[79] *See* Hathaway et al., *International Law*, *supra* note 54, at 99–100 (acknowledging criticisms of presidential signing statements, but contending that presidential statements in connection with transmittal of treaty ratifications might require different treatment).

[80] *Id*. at 527–28.

[81] Medellín v. Texas, 552 U.S. 491, 508 (2008).

Article 94(2) through recourse to the U.N. Security Council.[82] Finding that neither the U.N. Charter nor the VCCR provided a ground for treating the ICJ's *Avena* decision as a rule of decision binding on the Texas courts, the *Medellín* majority affirmed the judgment of the Texas Court of Criminal Appeals,[83] and Texas proceeded with the execution.[84]

At least with respect to non-self-executing treaties, the United States is thus returned to the condition it was in during the Critical Period. The federal government has taken on a treaty obligation with which it cannot comply because the states refuse to recognize that obligations of the United States are also obligations of the several states. Ironically, the self-proclaimed originalist Justices joined the majority and embraced an interpretation of the Supremacy Clause clearly at odds with the Framers' understanding of that clause.[85]

The *Medellín* opinion leaves room for considerable uncertainty as to what consequences derive from a determination that a treaty is non-self-executing. As Duncan Hollis points out, calling a treaty non-self-executing may mean that: (1) private litigants cannot rely on it as a source legally cognizable rights; (2) such rights are not justiciable in any domestic court; or (3) that non-self-executing treaties do not have any force as domestic law.[86] The Court also inserted in a footnote a rather troublesome bit of dicta, announcing its endorsement of a presumption that even self-executing treaties do not give rise to a private right of action,[87] thus reversing a

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82 *Id*. at 509–11.

83 *Id*. at 532.

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

85 *See* D.A. Jeremy Telman, Medellín *and Originalism*, 68 MD L. REV. 377 (2009) (contending that the majority's ruling in *Medellín* cannot be reconciled with the types of originalism embraced by Justices Scalia and Thomas).

86 *See* Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 PROC. AM. SOC'Y INT'L L. 1, 2 (2008); *see also* Bradley, *supra* note 66, at 548 ("The opinion leaves unclear . . . whether a non-self-executing treaty is simply judicially unenforceable, or whether it more broadly lacks the status of domestic law.").

87 *See* Medellín v. Texas, 552 U.S. 491, 506 n.3 (2008) ("Even when treaties are self-executing in the sense that they create federal law, the background

presumption that had long been part of U.S. law that self-executing treaties that created private rights also created a means of vindicating those rights.[88] Recent research suggests that lower courts are interpreting *Medellín* to further reduce the domestic enforceability of international agreements, applying dicta from *Medellín* to prevent individual litigants from relying on treaties that were clearly intended to protect their rights.[89]

C. Continued Tension Between Constitutional Design and Constitutional Practice

The *Medellín* Court's solution does not resolve the continuing tensions in the U.S. constitutional design regarding treaties. On the contrary, it revives tensions sounding in federalism that had been put to rest in the Early Republic and exacerbates tensions sounding in separation of powers. However, while the decision likely precludes the development of a satisfying legal theory that reconciles the Supremacy Clause with U.S. constitutional design and history, there are political remedies that can push legal uncertainties into the background.

1. The Revival of Federalism Concerns

Medellín revives the tensions between the Supremacy Clause and the principle of federalism that had lain dormant since the early nineteenth century. The issue in *Medellín* was whether Texas could execute a murderer without granting him the review and reconsideration that even the *Medellín* Court acknowledged was required as a matter of international law.[90] Although the Supremacy Clause states that courts must enforce treaty law notwithstanding state law to the contrary, the *Medellín* majority

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presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.").

88 Hathaway et al., *International Law*, *supra* note 54, at 53.

89 *Id*. at 70–76.

90 *Medellín*, 552 U.S. at 504 ("No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an international law obligation on the part of the United States.").

effectively limited the efficacy of the Supremacy Clause to self-executing treaties, a category that it defined in a way that would rule out treating almost all treaties then in existence as self-executing.

This aspect of the *Medellín* decision raises the specter of a new dualism, akin to that which plagued the country during the Critical Period. *Medellín* is only the most recent case in which the Supreme Court effectively threw up its hands and declared itself incapable of requiring the states to comply with obligations of the United States arising under the VCCR.[91] It is now clear that, notwithstanding the Supremacy Clause, courts are not in fact empowered to enforce treaties in the face of contrary state law. Seen in this light, *Medellín* effects a partial reversal to the nineteenth-century resolution of the tension between treaty supremacy and federalism. Where federal treaty law once prevailed over contrary state law, state law now prevails over a treaty unless it is expressly self-executing (and very few are) or is implemented by Congress. Because the Supremacy Clause clearly provides that congressional enactments supersede state law, the holding almost completely eliminates the efficacy of the Supremacy Clause's reference to treaties.

2. Persistent Separation of Powers Concerns

The *Medellín* majority effectively masked the unprecedented federalism consequences of its decision by treating the case as posing separation of powers issues. The Court reasoned that the power to implement non-self-executing treaties resides exclusively with Congress.[92] The Court refused to construe as acquiescence Congress's failure to either act or to object to the President's memorandum directing states to comply with the ICJ's *Avena*

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[91] *See* LaGrand v. Stewart, 525 U.S. 971 (1998) (denying habeas petition of two German nationals challenging their convictions and sentences on the ground that their VCCR rights had been violated); Breard v. Greene, 523 U.S. 371 (1998) (denying habeas petition of Paraguayan national subject to death penalty while Paraguay pursued a claim in the ICJ against the United States for violating Breard's VCCR rights).

[92] *Medellín*, 552 U.S. at 527.

decision.[93] This part of the decision seems like a resolution of the tension between the separation of powers doctrine and the Supremacy Clause by subordinating the constitutional text to the structural principle. But *Medellín* does not do that either.

James Madison and other Framers recognized that, in order to reconcile the principle of treaty supremacy with the separation of powers, certain treaties could not be effective as domestic law without congressional implementation. Madison suggested that the category of such non-self-executing treaties might encompass all treaties containing subject matter that overlaps with Congress's powers enumerated in Article I, Section 8 of the Constitution. The *Medellín* majority articulates no such principled delineation of which treaties require congressional implementation. Whether or not the President, with the approval of two-thirds of the Senate can make domestic law through a treaty turns, for the *Medellín* majority, on whether or not they state an intention that the treaty be self-executing as domestic law.

Neither the Court nor subsequent commentators have identified a principled reason for giving the President and the Senate such unilateral power to override the House of Representative's legislative powers. Nor does the Court identify any constitutional reason why a treaty provision, like U.N. Charter's Article 94(1), requires congressional implementation. That is, the Court identifies no provision of the U.S. Constitution's Article I, which enumerates legislative powers, that indicates that only Congress is empowered to enact legislation necessary to bring the United States into compliance with the judgments of international tribunals.

Worse still, although the Court's opinion is not a model of clarity on the point,[94] the Court suggests that a statement by either the President *or* the Senate, or even by other parties to the treaty, before *or after* ratification may suffice to make a treaty self-

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93 *Id*. at 528 & n.14.

94 *See* Bradley, *supra* note 66, at 544 (acknowledging that the opinion is "somewhat unclear" about whose intent a court should consult in determining whether a treaty is self-executing).

executing.[95] Thus, for example, the President could state his understanding that a treaty would be self-executing after receiving the Senate's advice and consent and without communicating that understanding to the Senate in advance of its consideration of the treaty. Similarly, the Senate could make a treaty self-executing by stating its intention to do so during its treaty deliberations. Following *Medellín*, such a statement could be effective if the President is silent on the subject of self-execution.

3. Political Solutions

While the specter of an untenable international law dualism haunts the U.S. legal order, political mechanisms exist that can minimize the consequences of the current law's incoherence. In the space remaining, this Article addresses three such political options.

First and perhaps most importantly, the political branches frequently bypass the rather onerous Article II requirements of advice and consent by two-thirds of the Senate, choosing instead to commit the United States to international agreements through executive-legislative agreements or through sole executive agreements.[96] In recent decades, nearly ninety percent of the United States' international obligations have arisen through mechanisms other than Article II treaties.[97] Executive-legislative agreements require the approval of simple majorities in both Houses of Congress; that is, they are international agreements that are made binding as domestic law through the same process that applies to federal statutes.[98] Sole executive agreements are mostly

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[95] *See id*. (noting that the *Medellín* majority found its determination confirmed by the post-ratification understandings of other treaty parties).

[96] Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1238 (2008) [hereinafter Hathaway, *Treaties End*] (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).

[97] *Id*. at 1258 tbl.1, 1260 tbl.2 (listing by category 375 treaties and 2744 congressional-executive agreements entered into by the United States between 1980 and 2000).

[98] CRS, TREATIES, *supra* note 75, at 5.

used to bind the United States in its foreign relations and rarely have domestic consequences. They bind the United States without any congressional participation. [99]

Under current law, there is no principled reasoning that determines when our government enters into international obligations through one method or the other.[100] Oona Hathaway has argued that the United States could jettison entirely the cumbersome and constitutionally problematic treaty mechanism. Because they accord with our constitutional legislative processes, executive-legislative agreements have greater normative legitimacy and are more likely to achieve adherence.[101] The use of executive-legislative agreements eliminates any separation of powers concerns because Congress implements the agreement as soon as it is entered into. There are no federalism concerns with respect to such international agreements because there is no controversy regarding the supremacy of congressional enactments over state law.

Most sole executive agreements do not raise federalism issues. Courts have for the most part recognized their supremacy over state law pursuant to the Presidents foreign affairs powers.[102]

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[99] *See* Dames & Moore v. Regan, 453 U.S. 654, 682 (1981) (taking note of congressional acquiescence in the practice of sole executive agreements and also of court precedent recognizing "that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate").

[100] *See* Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999) (upholding the validity of a "surrender agreement" between the United States and the International Criminal Tribunal for Rwanda despite the fact that the agreement took the form of a congressional-executive agreement and there was no precedent for such an agreement, which was akin to an extradition agreement, taking the form of anything but an Article II treaty).

[101] Hathaway, *Treaties' End*, *supra* note 96, at 1241 (arguing that "nearly everything that is done through the Treaty Clause can and should be done through congressional-executive agreements").

[102] *See* RAMSEY, *supra* note 11, 283–299 (discussing *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).) In *Garamendi*, the U.S. Supreme Court struck down, by a 5–4 vote, a California insurance regulation act on the ground that it interfered with the President's ability to conduct foreign relations).

However, their relationship to federal statutes remains unsettled.[103] The problem is not particularly troubling because the executive utilizes this form of international agreement primarily to govern relations between the United States and other states or international entities, and the authority of the President to do so as the "sole organ" of U.S. foreign relations is widely acknowledged.[104]

Second, given the need for congressional cooperation on the implementation of treaties that have domestic consequences, the President simply ought not to ratify treaties unless and until he has lined up support for the required implementing legislation. To the extent that the domestic implementation of a treaty regime costs money, this is true whether the treaty is self-executing or non-self-executing. Either way, if the treaty is to have domestic efficacy, Congress must appropriate money, and so there is no point in entering into a treaty regime without first securing support for that regime in both Houses of Congress. Indeed, because the Constitution requires the President to "take care" that the laws are faithfully executed,[105] the President may have a constitutional duty to ensure such support and such implementation. To the extent that treaties are laws, the President has a constitutional duty to ensure that Congress implements substantive treaty provisions.[106]

Finally, if all else fails and the United States is unable to abide by its international obligations by incorporating treaty norms into the domestic legal order, the President should give appropriate notice and lawfully withdraw the United States from the treaty regime.[107] This solution is obviously not optimal, but it at least

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[103] CRS, TREATIES, *supra* note 75, at 5.

[104] United States v. Curtiss-Wright, 299 U.S. 304, 319 (1936) .

[105] U.S. CONST. art. II, § 3 .

[106] 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); Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 343–46 (2008) (assembling key statements from the Framers expressing the view that the President's Take Care duties includes a duty to execute treaties).

[107] *See* Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf.39/27, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), arts. 54–64 (providing mechanisms for lawful withdrawal from treaty obligations).

prevents any U.S. violation of its treaty obligations from being long-standing.

IV. CONCLUSION

While the U.S. Constitution's Supremacy Clause contemplates a monist system in which treaty obligations would automatically become a part of the U.S. domestic legal order, structural, constitutional impediments, sounding in principles of federalism and separation of powers, present challenges to automatic treaty supremacy. The Supreme Court's decision in *Medellín* further complicates these structural impediments to monism and in fact puts the United States on a path towards a dualist model that could negatively affect U.S. foreign relations. The United States has thus far been able to exploit its economic, diplomatic, and military strength to avoid any legal penalties that have arisen from its violation of its international treaty obligations. As a result, its current practice more resembles a dualist system, in which the federal government makes certain international commitments that it is unable to incorporate into the domestic legal order. There being no readily identifiable legal penalties for the resulting breaches, there really are two distinct legal orders; one pertaining to the United States in the conduct of its foreign affairs, and another pertaining to the United States in the conduct of its domestic affairs.

Should the United States relinquish its status as the world's lone remaining superpower, it may be forced to confront the consequences of this dualism. There may be, from a legal perspective, no way to reconcile the Supremacy Clause's monism with federalism and separation of powers principles. It thus falls to the political branches to work out a political solution so as to avoid repeated lapses in the United States' fulfillment of its treaty obligations.

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