

## Medellin and Originalism

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## MEDELLÍN AND ORIGINALISM

D. A. JEREMY TELMAN\*

### ABSTRACT

*In Medellín v. Texas, the Supreme Court permitted Texas to proceed with the execution of a Mexican national who, in violation of the United States' obligations under the Vienna Convention on Consular Relations, had not been given timely notice of his rights of consular notification and consultation. 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, 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 consequence 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*

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\* Associate Professor, Valparaiso University School of Law. I want to thank those who commented on earlier drafts of this Article, as well as those who indulged me in conversation and thereby helped me develop my ideas regarding the *Medellín* case and originalism, including Elizabeth Bruch, Zachary Calo, Stephen Griffin, Richard Stith, and Alan White. Remaining imperfections in the Article are mine alone.

*working with Congress to make certain that federal law compels compliance with the International Court of Justice’s judgment. Furthermore, 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 implementation are in fact implemented so as to avoid placing the United States in violation of its international obligations.*

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INTRODUCTION

*[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 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.<sup>1</sup>*

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

Justice Scalia knows whereof he speaks. In *Medellín v. Texas*,<sup>2</sup> the Supreme Court of the United States found that the State of Texas was entitled to ignore the ruling of the International Court of Justice (“ICJ”) in the *Avena*<sup>3</sup> case as well as a presidential memorandum directing states to comply with that ruling.<sup>4</sup> Thus, the Court permitted Texas, in violation of the United States’ obligations under the Vienna Convention on Consular Relations (“VCCR”),<sup>5</sup> to proceed with the execution of a Mexican national who had not been given timely notice of his rights of consular notification and consultation.

It did so without serious consideration of the Supremacy Clause,<sup>6</sup> 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 United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Con-

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2. 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 Attorney General Alberto R. Gonzales (Feb. 28, 2005) [hereinafter President’s Memorandum]. 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, 21 U.S.T. 77, 596 U.N.T.S. 261; *see id.* at 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 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 (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, cl. 2.

stitution or Laws of any State to the Contrary notwithstanding.<sup>7</sup>

One would think that the Court would put some energy into explaining why a state court must be permitted to allow state procedural laws prohibiting successive habeas petitions to trump a treaty,<sup>8</sup> in this case Article 94 of the United Nations (“U.N.”) Charter,<sup>9</sup> which requires member states to comply with decisions of the ICJ.<sup>10</sup> Its holding, in the end, turns on the doctrine that some treaties are non-self-executing and therefore are not supreme law in the United States unless implemented through congressional legislation.<sup>11</sup> The case marks the first occasion on which the Court has relied on that doctrine to deny a treaty-based claim.<sup>12</sup> In so doing, the Court makes no effort to square the doctrine of self-execution with the original meaning of the Supremacy Clause,<sup>13</sup> and it ignores historical legal scholarship cited by the dissent that suggests that the purpose of the clause was to guarantee that most treaties would be self-executing.<sup>14</sup>

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7. *Id.*

8. *Medellín v. Texas*, 128 S. Ct. 1346, 1356 (2008) (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”).

9. U.N. Charter art. 94, para. 1.

10. *Id.* (requiring member states to “undertake[ ] to comply” with decisions of the ICJ).

11. *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”); *id.* (explaining the distinction between the different types of treaties (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829))).

12. Carlos Manuel Vázquez, *Less Than Zero?*, 102 AM. J. INT’L L. 563, 563 (2008) [hereinafter Vázquez, *Less Than Zero*] (“*Medellín v. Texas* is the first case in which the Supreme Court has denied a treaty-based claim solely on the ground that the treaty relied upon was non-self-executing.”).

13. *See infra* Part III.

14. *See Medellín*, 128 S. Ct. at 1378 (Breyer, J., dissenting) (citing Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995) [hereinafter Vázquez, *Self-Executing Treaties*]). Justice Breyer also includes a “*but see*” citation to John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Globalism and the Constitution*]. *Id.* John Yoo’s writings could have provided an originalist argument in support of the majority’s opinion, were the majority interested in making such arguments. *See, e.g.*, JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* at 215–49 (2005) [hereinafter YOO, *THE POWERS OF WAR AND PEACE*] (arguing that self-execution of treaties is inconsistent with the constitutional design, as it would transfer legislative powers to the executive branch); Yoo, *Globalism and the Constitution, supra*, at 1956–62 (examining the Constitution’s text, structure, and history in support of an argument that treaties are presumptively non-self-executing); John C. Yoo, Rejoinder, *Treaties and Public Lawmaking: A Textual and*

By joining the opinion in *Medellín*, the Supreme Court's two self-proclaimed originalists, Justices Scalia<sup>15</sup> and Thomas,<sup>16</sup> as well as Jus-

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*Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2218–21 (1999) (same). In any event, scholars have rejected Yoo's arguments. See, e.g., Flaherty, *supra*, at 2120–26 (reviewing records of the Constitutional Convention and finding them to support the notion that treaties were to be presumptively self-executing); 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) [hereinafter Ramsey, *Torturing Executive Power*] (characterizing Yoo's position as "in tension with the plain language" of the Supremacy Clause, not "widely endorsed," and having "little judicial support"); D.A. Jeremy Telman, Review Essay, *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); 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 Framers intended for the House of Representatives to have the power to block treaties in force). Additional sources on which the majority could have relied if it were seeking to make an originalist argument include Vasani Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1503–13 (2006) (criticizing both Yoo's and Vazquez's approaches and defending a theory of partial non-self-execution according to which "treaties that conflict with existing federal statutory law do not have the force of domestic law unless and until implemented by Congress"), and Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 449 (2000) ("The inclusion of treaties in the Supremacy Clause, in other words, was designed to enhance the ability of the federal government to compel state compliance with treaties, not to restrict the federal government's flexibility in determining whether and how to comply with international law.").

15. Justices Scalia and Thomas are routinely identified as originalists. See, e.g., Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1193 [hereinafter Griffin, *Rebooting Originalism*] (describing Justices Scalia and Thomas as "conservative originalists"); Mitchell N. Berman, Originalism is Bunk 1 (Dec. 30, 2007) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1078933](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078933)) (identifying Justices Scalia and Thomas as originalists). Justice Scalia's writing has identified him as an originalist in innumerable contexts. See, e.g., *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*, 508 U.S. 366, 379 (1993) (Scalia, J., concurring) ("I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification.").

16. Justice Thomas has expressly embraced originalism. See 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"); Clarence Thomas, *How to Read the Constitution*, WALL ST. J., Oct. 20, 2008, at A19 ("[T]here are really only two ways to interpret the Constitution—try to discern as best we can what the framers intended or make it up."). 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*, 513 U.S. 334, 359 (1995) (Thomas, J., concurring) (concurring in the result but reaching it by means of an inquiry into whether "the phrase 'freedom of speech, or

tice Alito and Chief Justice Roberts, who in their Senate confirmation hearings “evinced considerable sympathy with [the] originalist interpretation,”<sup>17</sup> 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 original intent or original meaning at all, and decide cases in accordance with their own views, with nary a pretense of historical support.<sup>18</sup> In *Medellín*, it was the “living constitutionalists”<sup>19</sup> who, with one exception,<sup>20</sup> joined in

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of the press,’ as originally understood, protected anonymous political leafletting”); *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas & Scalia, JJ., dissenting) (finding, based on the original meaning of “punishment,” that the petitioners cannot 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 JUDICIAL CONSERVATISM* 260 (2004) (characterizing Justice Thomas as making the most extensive originalist case for expanding judicially enforceable limits on congressional power).

17. Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, 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)); see also *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) (stating that, with respect to interpretation of the Constitution, the Court must look at “what the Framers had in mind when they drafted” a particular constitutional provision).

18. Scalia, *supra* note 1, at 852.

19. Justices Stevens, Souter, Ginsburg, and Breyer are often characterized as being in the living constitutionalist camp. See, e.g., Eric R. Claeys, *The Limits of Empirical Political Science and the Possibilities 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); 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”). Justice Breyer has made his commitment to living constitutionalism more or less express in a recent publication. See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (promoting a form of constitutional interpretation that takes greater account of the Constitution’s democratic objectives). 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 (internal quotation marks omitted).

20. Justice Stevens wrote a concurring opinion in *Medellín*, in which he relied 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. See *Medellín v. Texas*, 128 S.

Justice Breyer's dissent.<sup>21</sup> That dissent relied heavily on historical scholarship into the original meaning of the Supremacy Clause<sup>22</sup> 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,<sup>23</sup> and Article 94 of the U.N. Charter,<sup>24</sup> to implement the ICJ's *Avena* decision.<sup>25</sup> Chief Justice Roberts, writing for the majority, did not engage this historical evidence in earnest, and instead relied on his own idiosyncratic and poorly documented version of our constitutional history and judicial precedent<sup>26</sup> in finding that the relevant treaties are all non-self-executing and therefore not enforceable as U.S. law absent congressional implementing legislation.<sup>27</sup>

This Article will explore the paradoxical refusal of the originalist Justices to even acknowledge the strong originalist arguments of the dissenting Justices in *Medellín*. It contributes to the growing literature that exposes the inconsistency of the Court's self-proclaimed originalists.<sup>28</sup> It would be churlish to point out such inconsistency but for the

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Ct. 1346, 1372–73 (2008) (Stevens, J., concurring) (finding the relevant treaties judicially unenforceable in light of the treaties' express provisions).

21. *Id.* at 1375 (Breyer, J., dissenting).

22. *See infra* Part III.B.

23. Vienna Convention on Consular Relations, Optional Protocol concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

24. U.N. Charter art. 94.

25. *See Medellín*, 128 S. Ct. at 1375–77.

26. *See infra* Part III.A.

27. *See Medellín*, 128 S. Ct. at 1356 (majority opinion) (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).

28. *See, e.g.,* KECK, *supra* note 16, at 258 (arguing that the Rehnquist Court's conservative majority relies only sporadically on originalist arguments in "activist" decisions); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 12 (2006) (contending that Justice Scalia simply discards constitutional provisions that do not meet with his approval); Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 Nw. U. L. REV. (forthcoming 2009) (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, *supra* note 17, at 25–26 (contending that Justice Scalia's interpretation of the Due Process Clause is not originalist); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. REV. 1739, 1742 (2008) (pointing out Justice Scalia's willingness to violate his own originalist principles with respect to the Eighth Amendment); Vázquez, *Less Than Zero*, *supra* note 12, at 569 (hoping that the *Medellín* majority will soon clarify that it did not intend to read treaties out of the Supremacy Clause in order to show that they are not "fair-weather textualists (which is to say, not textualists at all)"). Other scholars have questioned Justice Scalia's consistency in interpretive strategies that go beyond constitutional interpretation. *See, e.g.,* William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 671 (1990) (rejecting Justice Scalia's argument in support of "new textualism," finding that

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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.<sup>29</sup> Such hypocrisy ought not to pass without scholarly comment.<sup>30</sup> As Mitchell Berman has recently argued, in at least some of

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“the structure and background of the Constitution” do not support “the new textualism over other theories of statutory interpretation”); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1173–86 (1992) (rejecting Justice Scalia’s argument that public respect for the courts is eroded when courts depart from the textualist approach and inquire into legislative intent); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 321–27 (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 statutory or constitutional interpretation); Miranda Oshige McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation* 10–26 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Research Paper No. 08-015, 2008), available at <http://ssrn.com/abstract=1113541> (arguing that Justice 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 of the ordinary meaning of the statutory language is overcome).

29. See, e.g., Scalia, *supra* note 1, 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”). Justice Scalia often claims that being an originalist is tough. He does not just get to vote however he likes in every case. He illustrated this point with a story about his wife mockingly humming “It’s a Grand Old Flag” for him when he came down for breakfast the morning after joining in an opinion that permitted flag burning. See, e.g., Interview by Nina Totenberg with Antonin Scalia, Supreme Court Justice, in Washington, D.C. (April 28, 2008), <http://www.npr.org/about/press/2008/042808.AntoninScalia.html> (telling the “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”); Katie Gazella, *Scalia Says to Focus on Original Meaning of Constitution*, U. MICH. REC. ONLINE, Nov. 24, 2004, [http://www.ur.umich.edu/0405/Nov22\\_04/13.shtml](http://www.ur.umich.edu/0405/Nov22_04/13.shtml) (reporting on the “Grand Old Flag” story and noting that being an originalist does not always make Justice Scalia popular with conservatives); Brian Whitson, *Justice Antonin Scalia: The Case for “Dead Constitution,”* WM. & MARY NEWS, Mar. 21, 2004, <http://www.wm.edu/news/archive/index.php/?id=3486> (quoting Justice Scalia as contrasting his experience with that of the “living Constitutional judge” and characterizing the latter’s position as “[w]hatever he thinks is good, is in the Constitution”).

30. Another theme invoked by Justice Scalia and other originalists is that originalism is the only coherent approach to constitutional interpretation. See Thomas B. Colby & Peter J. Smith, *Living Originalism* 1–2 & n.n.2, 5, 9, 10 (George Washington Law Sch. Legal Studies Research Paper, Paper No. 393, 2008), available at <http://ssrn.com/abstract=1090282> (summarizing the views of originalists, including Justice Scalia, Michael Stokes Paulsen, Randy Barnett, Robert Bork, Edwin Meese III, and Raoul Berger, all of whom contend that originalism is the only consistent theoretical approach to constitutional interpretation). Colby and Smith argue, however, 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 58 (characterizing originalism as “a staggering array of often inconsistent approaches . . . [which go] a long way towards creating a living constitutionalism”); see also

its forms, originalism is, or can be, pernicious.<sup>31</sup>

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.<sup>32</sup>

For these reasons, it is important to catalogue each occasion on which the self-proclaimed prophets of originalism depart from their own teachings.

This Article does not take the position 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. Still, this Article maintains that, under the Take Care Clause,<sup>33</sup> 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 United States 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 permitted 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) were enforceable in U.S. courts.

After a brief review of the background, facts, and relevant procedural history of *Medellín* in Part I of the Article, Part II reviews the

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Berman, *supra* note 15, at 11–12 (contending that “originalist logical space” can be represented by a matrix “consisting of 72 distinct theses”).

31. Berman, *supra* note 15, at 5.

32. *Id.* at 5–6.

33. U.S. CONST. art. II, § 3.

development of originalist doctrine, with a brief discussion of the commitment to original meaning associated with the positions of Justices Thomas and Scalia. Part III 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 IV offers a model for how the political branches might reconcile a properly historicized approach<sup>34</sup> to the Supremacy Clause with the Take Care Clause regardless of the Court's views of the doctrine of self-execution.<sup>35</sup> 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.

#### I. THE BACKGROUND TO *MEDELLÍN V. TEXAS*

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.<sup>36</sup> Gang members raped the girls for over an hour and then murdered them to prevent them from identifying their attackers.<sup>37</sup> Medellín himself strangled at least one of the girls with her own shoelace.<sup>38</sup> Medellín was arrested five days later.<sup>39</sup> Within hours of his arrest, he signed a written waiver and gave a detailed written confession.<sup>40</sup> Before he made this confession, Medellín was advised of his *Miranda* rights.<sup>41</sup> He was not advised, however, of his rights as a Mexican national under the VCCR<sup>42</sup> to seek legal advice from the Mexican

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34. For a historicist critique of originalism, see STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 164–69 (1996) [hereinafter GRIFFIN, *AMERICAN CONSTITUTIONALISM*]; Griffin, *Rebooting Originalism*, *supra* note 15, at 1213–20.

35. The opinion in *Medellín* also addresses the power of the President to direct state courts to implement a decision of an international tribunal. *See* *Medellín v. Texas*, 128 S. Ct. 1346, 1353 (2008) (setting forth the two legal issues in the case). 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. That part of the opinion will be the subject of a separate article, *Medellín and the State as Unitary Actor in International Legal Theory*.

36. *Medellín*, 128 S. Ct. at 1354.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Vienna Convention on Consular Relations, *supra* note 5, at art. 36(1)(b).

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consulate.<sup>43</sup> 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.<sup>44</sup>

Years later, while Medellín was on death row in Texas and his petition for habeas corpus worked its way through the federal courts,<sup>45</sup> Mexico brought a case in the ICJ against the United States on behalf of Medellín and other Mexican nationals<sup>46</sup> who were convicted in courts within the United States without being given the access to consul for which the VCCR provided.<sup>47</sup> This case, known as *Avena*,<sup>48</sup> 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 had been denied their VCCR rights.<sup>49</sup>

In the first case, 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.<sup>50</sup> In 1996, Paraguay also attempted to use domestic legal mechanisms to have a court declare Breard's conviction and death sentence void and to enjoin Virginia state officials from pursuing a criminal conviction against him in any manner inconsistent with

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43. *Medellín*, 128 S. Ct. at 1354.

44. *Id.* at 1354–55.

45. *Id.* at 1355.

46. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 24–25 (Mar. 31) (listing Medellín (#38) among the Mexican nationals on whose behalf Mexico sought relief).

47. *Id.* at 17, 23. The ICJ had jurisdiction over this case pursuant to the Optional Protocol to the VCCR, which the United States ratified together with the VCCR in 1969, and provides the ICJ with jurisdiction to hear 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. *Id.* at 1354 (citing Letter from Condoleezza Rice, U.S. Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005)).

48. *Avena*, 2004 I.C.J. 12.

49. 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 SUFFOLK TRANSNAT'L L. REV. 247, 253–59 (2008) (recounting the 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).

50. Application of the Republic of Paraguay, Vienna Convention on Consular Relations (Para. v. U.S.) (Apr. 3, 1998), available at <http://www.icj-cij.org/docket/files/99/7183.pdf> (last visited Feb. 13, 2009); see also Jonathan I. Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT'L L. 666, 666–67, 669–70 (1998) (setting forth the underlying facts of Breard's case and discussing Paraguay's proceedings against the United States in the ICJ).

the VCCR.<sup>51</sup> The United States District Court for the Eastern District of Virginia found, however, that it did not have subject-matter jurisdiction over Paraguay's claims.<sup>52</sup> The United States Court of Appeals for the Fourth Circuit affirmed on the same ground,<sup>53</sup> and the Supreme Court refused to review that decision.<sup>54</sup>

On April 9, 1998, the ICJ voted unanimously to indicate provisional measures that directed the United States to ensure that Breard was not executed prior to the ICJ's final decision.<sup>55</sup> The Clinton Administration's response 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.<sup>56</sup> At the same time, the Clinton Administration filed an amicus brief with the Supreme Court, urging the Court to deny both 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.<sup>57</sup> By a six to three vote, the Supreme Court denied Breard's petition for habeas corpus and for certiorari on April 14, 1998.<sup>58</sup> The Governor of Virginia refused to issue a stay of execution,<sup>59</sup> and Breard was executed that same day.<sup>60</sup> Paraguay eventually dropped its suit against the United States in the ICJ.<sup>61</sup>

Within months of Paraguay's withdrawal of its suit, Germany initiated an action against the United States in the ICJ on behalf of two of

51. *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1272 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998).

52. *See id.* at 1272-73 (finding that the Eleventh Amendment divested the court of subject-matter jurisdiction over the relief Paraguay sought because the Virginia officials were no longer in violation of the treaties).

53. *See Republic of Paraguay v. Allen*, 134 F.3d 622, 629 (4th Cir. 1998) (holding that the Eleventh Amendment does not permit federal courts to provide a remedy based on state officials' past violations).

54. *Breard v. Greene*, 523 U.S. 371, 378-79 (1998) (per curiam).

55. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258 (Provisional Measures Order of Apr. 9).

56. *See Charney & Reisman, supra* note 50, at 671-72 (providing an excerpt of the April 13, 1998 letter from then-U.S. Secretary of State Madeleine K. Albright to then-Governor of Virginia James S. Gilmore III requesting that the Governor suspend the execution). R

57. *See id.* at 672-73 (providing an excerpt of the Clinton Administration's amicus brief); *see also* Brief for the United States as Amicus Curiae Supporting Respondents at 49-51, *Breard*, 523 U.S. 371 (Nos. 97-1390 and 97-8214).

58. *Breard*, 523 U.S. at 378-79; *see Charney & Reisman, supra* note 50, at 673 (noting that the Court denied the petitions by a vote of six to three). R

59. *See Charney & Reisman, supra* note 50, at 674-75 (noting the Virginia Governor's refusal to issue a stay and providing an excerpt of the Governor's statements supporting his decision to deny a stay). R

60. Murphy, *supra* note 49, at 257. R

61. *Id.*

its nationals, Walter and Karl LaGrand, who were facing execution for a murder committed in Arizona in 1982.<sup>62</sup> 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.<sup>63</sup> The Supreme Court denied their final habeas appeal in November 1998,<sup>64</sup> after the Ninth Circuit had rejected their VCCR claim as procedurally defaulted.<sup>65</sup> Karl LaGrand was executed on February 23, 1999, one week before Germany initiated its suit in the ICJ.<sup>66</sup>

Germany acted in time to permit the ICJ to issue a provisional measures order to prevent the execution of Walter LaGrand as scheduled on March 3, 1999.<sup>67</sup> Germany also had filed a suit in the Supreme Court, but on the day of the execution, the Court refused to exercise its original jurisdiction in the case.<sup>68</sup> Despite a recommendation from Arizona's Board of Executive Clemency that the Governor should grant a sixty-day reprieve because Germany's ICJ case had just been filed, Arizona Governor Jane Hull ordered the execution to proceed as scheduled,<sup>69</sup> and LaGrand was executed later that evening.<sup>70</sup>

Unlike Paraguay, Germany continued to pursue its case before the ICJ, despite its inability to win a judgment that could benefit the LaGrand brothers.<sup>71</sup> 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.<sup>72</sup> The Court, for the most part, granted Germany the remedy it sought, holding that the United States must provide effective review and reconsideration of the convictions and sentences of foreign nationals who were denied their VCCR rights, so as to guarantee the "effective exer-

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62. 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).

63. *Id.* at 378.

64. *LaGrand v. Stewart*, 525 U.S. 971, 971 (1998) (mem.).

65. *LaGrand v. Stewart*, 133 F.3d 1253, 1261–62 (9th Cir. 1998).

66. Simma & Hoppe, *supra* note 62, at 379–80.

67. See Murphy, *supra* note 49, at 258 (explaining that the ICJ issued a provisional measures order on March 13, 1999, to ensure that Walter LaGrand was not executed).

68. *Federal Republic of Germany v. United States*, 526 U.S. 111, 111–12 (1999) (per curiam).

69. Simma & Hoppe, *supra* note 62, at 380.

70. Murphy, *supra* note 49, at 258.

71. See *id.* at 258–59 (“Unlike Paraguay in the *Breard* case, however, Germany did not withdraw its case from the ICJ.”).

72. *LaGrand (Germany v. U.S.)*, 2001 I.C.J. 466, 474 (June 27).

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cise of the rights” under the VCCR, but the ICJ left the choice of means for so doing up to the United States.<sup>73</sup>

It came as no surprise that the ICJ, in the *Avena* case, found that the United States had violated its obligations under the VCCR,<sup>74</sup> just as it had found in the *LaGrand* case.<sup>75</sup> Mexico requested that the ICJ issue an order directing the United States to vacate the convictions and sentences of the Mexican nationals convicted and sentenced in violation of the VCCR and requiring the suppression of any statements or confessions made by those Mexican nationals prior to notification of their VCCR rights.<sup>76</sup> The ICJ opted for a more lenient penalty, requiring U.S. courts to provide “review and reconsideration” of the convictions and sentences of the affected Mexican nationals.<sup>77</sup> The Supreme Court initially granted certiorari to hear Medellín’s VCCR claim,<sup>78</sup> 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 that the ICJ called for in *Avena*.<sup>79</sup>

This was necessary because, while Medellín’s habeas petition was pending before the Supreme Court, and although the United States disagreed with the *Avena* decision,<sup>80</sup> 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 the ICJ’s decision.<sup>81</sup>

In Medellín’s case, the Texas criminal courts refused to do so. The Texas Court of Criminal Appeals dismissed Medellín’s post-*Avena*

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73. *See id.* at 513, 516 (noting that Germany sought assurances that the United States will comply with its obligations under the VCCR and finding that the United States must permit review of VCCR violations “by means of its own choosing”).

74. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 53–55 (Mar. 31).

75. *See Simma & Hoppe, supra* note 62, 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*.”).

76. *Avena*, 2004 I.C.J. at 21. Mexico also requested an order prohibiting the United States from relying on any procedural penalty or any other domestic law that would deny relief to Mexican nationals affected by the decision. *Id.* at 21–22.

77. *Id.* at 72.

78. *Medellín v. Dretke*, 543 U.S. 1032, 1032 (2004) (mem.).

79. *Medellín v. Dretke*, 544 U.S. 660, 666–67 (2005) (per curiam).

80. *See* Verbatim Record ¶ 6, at 10, *Avena*, 2004 I.C.J. 12 (Remarks of John B. Bellinger III, June 19, 2008), *available at* <http://www.icj-cij.org/docket/files/139/14592.pdf> (last visited Feb. 13, 2009) (“We did not agree with that decision—no losing litigant ever does—but we take our international legal obligations extremely seriously and therefore we respect the Court’s decision.”); Brief for the United States as Amicus Curiae Supporting Petitioner at 9, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984) (stating that the President does not agree with the ICJ’s interpretation of the VCCR in *Avena*).

81. President’s Memorandum, *supra* note 4.

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habeas petition as an abuse of the writ.<sup>82</sup> 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.<sup>83</sup>

In *Medellín v. Texas*,<sup>84</sup> the United States Supreme Court agreed.<sup>85</sup> 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."<sup>86</sup> In so doing, the *Medellín* majority found that the international obligations that might render the *Avena* decision "directly enforceable federal law"—the VCCR's Optional Protocol, and Article 94 of the U.N. Charter—were non-self-executing treaties that had never been implemented through congressional legislation.<sup>87</sup>

That the five conservative members 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 to comply with the President's memorandum.<sup>88</sup> It is surprising that, in reaching that

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82. See *Ex parte Medellín*, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006) (finding no legal basis for the writ of habeas corpus on the ground that the ICJ *Avena* decision and the presidential memorandum do not constitute binding federal law).

83. *Medellín v. Texas*, 128 S. Ct. 1346, 1356 (2008); *Ex parte Medellín*, 223 S.W.3d at 352.

84. 128 S. Ct. 1346.

85. *Id.* at 1353. 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. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006).

86. *Medellín*, 128 S. Ct. at 1353.

87. See *id.* at 1357 ("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.").

88. See Vázquez, *Less Than Zero*, *supra* note 12, at 563 (admitting that he expected that the Court would defer to the President's memorandum); Julian Ku, *Medellín Gets Yet Another Day at the U.S. Supreme Court: This Time He Should Win*, <http://opiniojuris.org/2007/10/10/medellin-gets-yet-another-day-at-the-us-supreme-court-this-time-he-should-win> (last visited Feb. 13, 2009) (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, e.g., Julian G. 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. 683, 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).



conclusion, the majority devoted 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 devoted very little attention to the 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.<sup>89</sup> While the Justices in the majority are free to be unpersuaded by the work of mere academics, it is surprising that they did not even attempt to address the overwhelming evidence of an original meaning of the Supremacy Clause, enforced in dozens of cases listed in an appendix to the dissenting opinion,<sup>90</sup> at odds with the majority's ruling.

## II. 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.<sup>91</sup> However, originalism has evolved rapidly and with great contestation,<sup>92</sup> and debates within originalism

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89. See *Medellín*, 128 S. Ct. at 1378–79 (Breyer, J., dissenting) (citing Flaherty, *supra* note 14; Vázquez, *Self-Executing Treaties*, *supra* note 14; 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 are consistent with the original meaning of the Supremacy Clause. See *id.* at 1378–83. They also point to case law relating to claims settlements in which Presidents used their Article II power pursuant to a ratified treaty to set aside state law. See *id.* at 1390–91 (stating that, while Supreme Court case law on this issue is limited, the Court “has made clear” that the President has authority to implement international claims settlement notwithstanding contrary state law). The majority opinion *does respond* to the dissent's arguments relating to claims settlements. See *id.* at 1371–72 (majority opinion).

90. See *id.* at 1392–93 (Breyer, J., dissenting) (listing twenty-nine Supreme Court cases decided between 1794 and 2004 in which the Court held a treaty to be self-executing, twelve of which involved enforcement of a treaty despite contrary state or territorial law or policy).

91. See, e.g., Griffin, *Rebooting Originalism*, *supra* note 15, at 1194–96 (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 Originalism*, 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”).

92. Griffin, *Rebooting Originalism*, *supra* note 15, at 1188–90 (summarizing the development of new originalism in the 1990s in response to old originalism that arose in the 1960s); Whittington, *supra* note 91, at 599 (describing old originalism as having flourished from the 1960s thorough the mid-1980s, while new originalism has flourished since the early 1990s). For a remarkably concise and authoritative history of originalism, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–13 (1999).

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have become extremely complicated.<sup>93</sup> Generations of scholars have now debated the original meaning of originalism.<sup>94</sup> The history of originalism has been recounted numerous times in recent scholarship.<sup>95</sup> 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.”<sup>96</sup> Originalists and non-originalists alike provide similar definitions.<sup>97</sup> Parsimony is the key advantage of originalism as a theory of constitutional adjudication: The judge’s role is to discover

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93. See Colby & Smith, *supra* note 30, at 4–5 (arguing that originalism is so conflicted as to be incoherent; describing it as “a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label”).

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94. See, e.g., Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 570–71 (1998) (criticizing Justice 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. COMMENT. 77, 79 (1988) (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 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).

95. For excellent, succinct summaries covering the history of originalism, see Barnett, *supra* note 92, at 611–29; Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 530–33 (2008); Whittington, *supra* note 91, at 599–603. Daniel Farber provides a concise narrative account of early originalism in Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

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96. Griffin, *Rebooting Originalism*, *supra* note 15, at 1187.

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97. See, e.g., Berman, *supra* note 15, at 3 (stating that originalism maintains that courts should interpret constitutional provisions *solely* in accordance with some feature of those provisions’ original character); 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”); Farber, *supra* note 95, 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.”); Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 221 (1988) (describing textualists such as Judge Robert Bork as treating “the constitutional text as the sole legitimate source of operative norms of constitutional law”); Scalia, *supra* note 1, 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).

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the original meaning of the Constitution and rule in accordance with that meaning.<sup>98</sup>

Originalism began as a response to the Warren and Burger Courts.<sup>99</sup> Just as romantic conservatism evolved as a response to enlightenment rationalism,<sup>100</sup> and just as modern conservatism in the United States emerged as a response to the perceived excesses of progressive movements from Franklin Roosevelt’s New Deal to Lyndon Johnson’s Great Society,<sup>101</sup> originalism was “a reactive theory”<sup>102</sup> that sought to reign in judicial activism by advocating that judges focus their interpretive energies on giving effect to the original meaning of the Constitution.<sup>103</sup> As such, the old originalism had a clear political agenda,<sup>104</sup> and it assumed that its agenda could be realized if judges respected the wills of legislatures.<sup>105</sup> That assumption now seems oddly misplaced, since originalist Justices have proven themselves at least as willing to strike down legislation as non-originalist Justices.<sup>106</sup>

98. See Colby & Smith, *supra* note 30, at 2 (noting that according to originalist proponents, the “predictability, determinacy, and coherence of the originalist approach both respects law and constrains judges”).

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99. Griffin, *Rebooting Originalism*, *supra* note 15, at 1188; see also Colby & Smith, *supra* note 30, at 6 (explaining that the “sweeping decisions of the Warren Court” led conservatives to insist that “the Constitution be interpreted to give effect to the intent of the framers”).

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100. See H.G. SCHENK, *THE MIND OF THE EUROPEAN ROMANTICS* 3–8 (1966) (characterizing romanticism as a reaction against rationalism).

101. See GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945*, at 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, 1930–1980*, at 243, 243–44 (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).

102. Whittington, *supra* note 91, at 601; see also *id.* (“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.”).

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103. *Id.* at 601.

104. *Id.* at 602, 602–03 n.21 (concluding that old originalists were “primarily concerned with empowering popular majorities,” which also entailed upholding government power).

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

106. See KECK, *supra* note 16, at 40 tbl. 2.1 (indicating that, on an annual basis, between 1995 and 2003, the Rehnquist Court struck down far more federal statutes on constitu-

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In its first iteration, originalism focused on the original intent of the Constitution’s Framers and ratifiers to clarify ambiguous constitutional provisions.<sup>107</sup> But two scholarly criticisms effectively demolished the original intentions approach<sup>108</sup> by demonstrating first, the implausibility of reconstructing the original intentions of the Framers,<sup>109</sup> and second, the Framers’ reluctance to have interpretations of the Constitution depend on claimed knowledge of their original intentions.<sup>110</sup> 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<sup>111</sup>—that is, on the meaning that the text would have for an ordinary eighteenth-century reader. 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.<sup>112</sup>

New originalism has expanded beyond the reactive gestures of old originalism. It no longer seeks to hold the judiciary in check.<sup>113</sup>

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tional 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 DYNAMIC 70, 87 (Earl M. Maltz ed., 2003) (noting that Justice Thomas “exhibits no tendency to defer to local or national legislators”).

107. See Griffin, *Rebooting Originalism*, *supra* note 15, at 1188 (stating that old originalism was committed to following the Framers’ intent “no matter what the result”).

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108. See Barnett, *supra* note 92, at 611–12 (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.”); Colby & Smith, *supra* note 30, at 7 (stating that original intent theory met with “savagely criticism” that exposed its two fundamental weaknesses).

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109. See Brest, *supra* note 97, at 222 (concluding that an “interpreter’s understanding of the original understanding may be so indeterminate as to undermine the rationale for originalism” in the case of many controversial constitutional provisions).

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110. See Powell, *supra* note 94, 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 scribes” appointed to draft an instrument for the people).

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111. Whittington, *supra* note 91, at 609.

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112. See Barnett, *supra* note 28, 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.”); Colby & Smith, *supra* note 30, at 7 (citing Justice Scalia’s “campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning”); Caleb Nelson, *Originalism and Interpretive 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).

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113. See, e.g., KECK, *supra* note 16, at 267–68 (indicating that the Rehnquist Court’s originalists were not averse to activism in support of their originalism); David R. Dow et al., *Judicial Activism on the Rehnquist Court: An Empirical Assessment*, 23 ST. JOHN’S J. LEGAL COMMENT. 35, 71–97 (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

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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.”<sup>114</sup> Moreover, originalism is no longer tethered to a political agenda;<sup>115</sup> it seeks not to criticize an overreaching court but to engage previously unexplored aspects of our constitutional history.<sup>116</sup> New originalism has also developed a body of normative theory to justify reliance on original meaning.<sup>117</sup>

Still, new originalism has much in common with old originalism. Like old originalism, 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.”<sup>118</sup> 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.<sup>119</sup> This claim is not entirely convincing for, as critics of new originalism have pointed out, the sources that

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the majoritarian view ought to rule”); Graber, *supra* note 106, at 71 (noting that Justice Thomas “would overrule a remarkable number of cases, some dating back more than two hundred years, in the name of originalism”); 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 activist and citing numerous scholars who have so argued).

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114. Whittington, *supra* note 91, at 609.

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115. Conservative originalist Steven Calabresi recently welcomed the work of Jack Balkin, like that of Akhil Amar, in what Calabresi calls “the pantheon of liberal originalism.” Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism 2* (Nw. U. Sch. Law Pub. Law & Legal Theory Series, Paper No. 08-38), available at <http://ssrn.com/abstract=1294787>.

116. See Whittington, *supra* note 91, at 608 (noting Randy Barnett’s research into the origins of the commerce clause, Barnett and Don Kates’s research on the origins of the Second Amendment, John Yoo’s originalist approach to war powers, and Steven Calabresi and Christopher Yoo’s article on the historical origins of the concept of a unitary executive).

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117. See KEITH E. 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”); Barnett, *supra* note 92, 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); see generally John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism* (Nw. U. Sch. Law Pub. Law & Legal Theory Series, Research Paper No. 08-05), available at <http://ssrn.com/abstract=1109247> (providing a consequentialist defense of originalism).

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118. Whittington, *supra* note 91, at 599 (stating that old and new originalism share this basic theory).

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119. 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, reconciling the views of Brest and Powell with new originalism, see Barnett, *supra* note 92, at 623–29.

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new originalists use to demonstrate original public meaning tend to be the same sources that old originalists used to demonstrate original intentions.<sup>120</sup> At least some new originalists concede this point.<sup>121</sup>

More generally, scholars have begun to suggest that originalism can be reconciled with its theoretical nemesis,<sup>122</sup> which is variously known as living constitutionalism<sup>123</sup> (my preferred term), non-originalism,<sup>124</sup> pluralism,<sup>125</sup> and developmental theory.<sup>126</sup> We are all originalists to the 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. The Guarantee Clause,<sup>127</sup> for example, refers to “domestic violence.”<sup>128</sup> As Jack

120. See, e.g., SOTIROS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 79 n.1 (2007) (“The distinction between intention and meaning is a refinement that cuts no ice with us.”); 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.”); Nelson, *supra* note 112, at 557 (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); Telman, *supra* note 14, 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).

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121. See, e.g., Barnett, *supra* note 92, at 617 (remarking that the distinction between textualism and originalism is hard to maintain); Whittington, *supra* note 91, at 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).

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122. See, e.g., Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 428 (2007) [hereinafter Balkin, *Original Meaning*] (contending that, unlike nonoriginalists, living constitutionalists and originalists are faithful to the Constitution’s text and its principles); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) [hereinafter Balkin, *Abortion*] (contending that “the debate between originalism and living constitutionalism rests on a false dichotomy”); see also Colby & Smith, *supra* note 30, at 5 (arguing that originalists, in their internal debates, have produced their own version of living constitutionalism).

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123. See Balkin, *Original Meaning*, *supra* note 122, at 428 (identifying himself as both an originalist and a living constitutionalist).

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124. *Id.* (distinguishing non-originalism and living constitutionalism while acknowledging that neither is considered an originalist form of constitutional interpretation); see also Griffin, *Rebooting Originalism*, *supra* note 15, at 1187 (“[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 1191–92 & nn.41–45.

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125. See GRIFFIN, AMERICAN CONSTITUTIONALISM, *supra* note 34, at 143–52 (describing the pluralist theory of constitutional interpretation).

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126. See Griffin, *Rebooting Originalism*, *supra* note 15, at 1188 (describing “developmental theory” as an alternative to originalism).

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127. U.S. CONST. art. IV, § 4.

128. *Id.*

Balkin points out, in the eighteenth century, that phrase meant exclusively “riots or disturbances within a state,” while today we associate the phrase with “assaults and batteries by intimates or by persons living in the same household.”<sup>129</sup> It would be absurd to seek to change our constitutional order simply because of a change in linguistic usage.<sup>130</sup> Similarly, living constitutionalists have not sought to impose a more modern meaning on the Constitution’s requirement that the President be thirty-five years of age,<sup>131</sup> despite the fact that one could argue that the Framers simply intended that the President be a person of mature years.<sup>132</sup> Indeed, there are no scholars who would argue that the original meaning of the Constitution is irrelevant to debates about its contemporary meaning.<sup>133</sup>

Just as there are limits to living constitutionalism, most originalists also acknowledge limits to their own principles of constitutional interpretation.<sup>134</sup> In sum, 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.

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129. Balkin, *Original Meaning*, *supra* note 122, at 430.

130. *See id.* at 429–30 (arguing for a form of originalism, compatible with living constitutionalism, in which legal meaning is preserved).

131. U.S. CONST. art. II, § 1, cl. 5.

132. *See* Balkin, *Abortion*, *supra* note 122, 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”).

133. *See, e.g.*, YOO, THE POWERS OF WAR AND PEACE, *supra* note 14, 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); Farber, *supra* note 95, at 1086 (“Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation.”); Griffin, *Rebooting Originalism*, *supra* note 15, at 1193 (“Scholars today distinguish among forms of originalism, not between originalism and nonoriginalism.”). Eric Posner briefly posed an exception to this general rule. *See* Posting of Eric Posner to Opinio Juris, <http://opiniojuris.org/2007/08/21/the-founders/> (Aug. 21, 2007, 12:01 AM EDT) (“If academics on both sides of the issue could agree to debate the presidency, emergency powers, and the [C]onstitution without mentioning the framers, this alone would count as progress.”). But even Posner cannot resist reference to the Framers as authority. *See* Posting of Eric Posner to Opinio Juris, <http://opiniojuris.org/2007/08/21/the-president-versus-the-presidency/> (Aug. 21, 2007, 11:03 AM EDT) (commenting “oops!” on his own invocation of the founders as authority for his view of presidential power, but invoking them nonetheless).

134. *See, e.g.*, Scalia, *supra* note 1, 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).

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

Neither the majority nor the dissenting opinions in *Medellín* are originalist opinions. As explained in Part III, Chief Justice Roberts's 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.<sup>135</sup> 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.<sup>136</sup> It is not inconsistent for a living constitutionalist to pay close attention to the original meaning of the constitutional text.<sup>137</sup>

As originalism comes in many variations, however, perhaps we should not be too hasty in criticizing the originalist Justices for signing off on Chief Justice Roberts's opinion. Justice Scalia describes himself as a "faint-hearted originalist"<sup>138</sup> and acknowledges that there are problems with originalist methodology.<sup>139</sup> For example, Justice Scalia recognizes that the originalist enterprise really requires training in historical research, a task for which most judges are ill-prepared.<sup>140</sup> Even a professional historian would need more time to undertake the originalist task properly than a judge typically has to decide a case.<sup>141</sup>

In the end, however, Justice Scalia defends his originalism based on Gilbert Chesterton's aphorism that a "thing worth doing is worth

135. See *infra* Part III.A.

136. See *infra* Part III.B.

137. See Berman, *supra* note 15, at 22 (stating that non-originalism regards original meaning as relevant to judicial interpretation but that post-ratification facts can also bear on interpretation).

138. Scalia, *supra* note 1, at 864 ("I hasten to confess that in a crunch I may prove a faint-hearted originalist."). More recently, in explaining that he would not undo all precedents associated with a non-originalist approach to constitutional interpretation, Justice Scalia proclaimed, "I am a textualist. I am an originalist. I am not a nut." National Public Radio, Scalia Vigorously Defends a "Dead" Constitution (Apr. 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=90011526>.

139. See Scalia, *supra* note 1, at 856 (noting that originalism is "not without its warts").

140. See *id.* at 856–57 (acknowledging the difficulty of discovering the "original understanding of an ancient text" and noting that such a task is "better suited to the historian than the lawyer"); see also Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 *YALE L.J.* 1419, 1420 (1990) (criticizing Bork's originalism on the ground that his constitutional vision is "radically ahistorical").

141. See Scalia, *supra* note 1, 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 fashion that a serious historian would consider minimally adequate").

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doing badly.”<sup>142</sup> Justice Scalia neglects to explain the context in which Chesterton wrote. The quotation is from a chapter in Chesterton’s 1910 book, *What’s Wrong with the World*, in which Chesterton advocated separate and decidedly distinct education for women.<sup>143</sup> 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.”<sup>144</sup> He supported an educated amateurism, especially for women,<sup>145</sup> but his advice, quoted by Justice Scalia, was meant to guide people 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.”<sup>146</sup> 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 crucial to being human.<sup>147</sup> However, he did not refuse to recognize any social role for the specialist whatsoever; for example, Chesterton would not have advocated amateurism when it came to playing the organ or serving as Royal Astronomer.<sup>148</sup> In short, Justice Scalia’s adopted motto does not inspire confidence when applied to a brain surgeon, a mechanical engineer, or a federal judge. If one cannot have 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 little difference between his “faint-hearted” originalism and non-originalism.<sup>149</sup> This is a theme on which critics of originalism have picked

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142. *Id.* at 863.

143. GILBERT K. CHESTERTON, *WHAT’S WRONG WITH THE WORLD* 314–20 (Dodd, Mead & Co. 1927) (1910). The passage that Justice Scalia quotes appears on page 320, at the end of the chapter “Folly and Female Education.” *See id.* at 314, 320.

144. *See id.* at 130–31 (citing the “eclipse of comradeship and equality by specialism and domination” as “the peculiar peril of our time”).

145. *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”).

146. The American Chesterton Society, Quotemeister, <http://chesterton.org/qmeister2/doingbadly.htm> (last visited Feb. 13, 2009).

147. *See id.* (explaining that Chesterton believed some of the most important tasks in life should be left to amateurs).

148. *See id.* (observing that “[t]here are things like playing the organ or discovering the North Pole, or being Astronomer Royal,” which Chesterton would “not want a person to do at all unless he does them well”).

149. *See* Scalia, *supra* note 1, 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”).

up.<sup>150</sup> But it is not clear where this leaves Justice Scalia’s originalism. He insists that he remains an originalist.<sup>151</sup> Yet some originalists maintain that he is not.<sup>152</sup> 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 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 Justice Scalia’s professed originalism, “ideological factors influence how Scalia reads what the framers meant or what he claims the framers meant.”<sup>153</sup> 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 event, the majority opinion cannot be reconciled with the stricter originalism espoused by Justice Thomas.<sup>154</sup> A review of Justice Thomas’s voting record, however, suggests that he too is less a consistent originalist than he is a consistent conservative.<sup>155</sup> The foremost commentator on Justice Thomas’s version of originalism contends that Justice Thomas alternates between two versions of originalism

150. 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 nonoriginalist, they are important but not determinative.” Brest, *supra* note 97, at 229.

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151. See National Public Radio, *supra* note 138 (quoting Justice Scalia describing himself as an originalist and a textualist).

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152. See, e.g., Barnett, *supra* note 28, at 13.

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153. DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, *THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA* 41 (Gary J. Jacobsohn & Richard E. Morgan eds., 1996).

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

155. See Graber, *supra* note 106, at 77 (“What unites Thomas’s important concurring and dissenting opinions in constitutional cases is his commitment to conservative or libertarian results rather than a commitment to any particular theory of the judicial function.”); Smith & Lema, *supra* note 154, at 783–84 (characterizing Justice Thomas as one of the most conservative sitting Justices).

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(which yield different results) depending on the nature of the case.<sup>156</sup> It is not at all unusual for the Court's originalists to let their political commitments trump those of originalism.<sup>157</sup> In fact, the Court's self-proclaimed originalists are among the most consistently conservative Supreme Court Justices over the past seventy years.<sup>158</sup>

And so, *Medellin* 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 to be 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.<sup>159</sup> As Steve Charnovitz put it, "[a] Court more respectful of

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

157. See, e.g., Graber, *supra* note 106, at 71 (noting that Justice 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).

158. See William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 46 tbl.3 (Univ. of Chi. Law Sch. John M. Olin Law & Econ. Working Paper, Paper No. 404, 2008), available at <http://ssrn.com/abstract=1126403> (ranking Justice Thomas first and Justice Scalia third among forty-three Justices on the Court from 1937 to 2006 in terms of their tendency to vote with the more conservative justices in non-unanimous cases); see also SCHULTZ & SMITH, *supra* note 153, at xvi (labeling Justice 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).

159. See *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) ("[T]he Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739 (2004) (Scalia, J., concurring) (arguing that the federal judiciary should not have the power to create new causes of action for the violation of norms recognized under customary international law); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (describing the majority's reliance on "foreign views" as meaningless and dangerous dicta); *Foster v. Florida*, 537 U.S. 990, n.\* (2002) (Thomas, J., concurring) ("[T]his Court[ ] . . . should not impose foreign moods, fads, or fashions on Americans." (citation omitted)). More generally, Harold Koh has argued that the current court is divided between transnationalist and nationalist judges:

[W]e are now seeing a Supreme Court that is divided between two judicial camps: the transnationalists and nationalists. . . . What are the key differences between the judicial philosophies of these two groups?

- Transnationalist judges tend to look to U.S. interdependence, whereas nationalist judges tend to look to U.S. autonomy.
- Transnationalist judges think about how U.S. law fits into a framework of transnational law, while nationalists see a rigid foreign and domestic divide.
- Transnationalist judges think that courts can domesticate international law, whereas nationalists think that only the political branches are legally empowered to do so.
- Transnationalist judges look to the development of a global legal system, while nationalists tend to focus more narrowly on the development of a national legal system.

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international law might have started with a presumption in favor of upholding U.S. compliance with ICJ judgments involving U.S. treaty violations by states.”<sup>160</sup> A group of amici encouraged the Court to adopt such a presumption.<sup>161</sup> If the Court had adopted such a standard of review, Charnovitz suggests, the burden would have been placed on Texas to persuade the Court that its interests ought to take priority over the national interests at stake in the case.<sup>162</sup> Instead, the Court supplements the President’s power to decide not to comply with the United States’ international obligations with the power of states to place the United States in violation of such obligations, even if the President has made the choice to comply.<sup>163</sup>

### III. MEDELLÍN AND THE ORIGINAL MEANING OF THE SUPREMACY CLAUSE

Gordon Wood, recognized as “one of the leading historians of the early republic,”<sup>164</sup> suggests that “most of the means by which 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.”<sup>165</sup> One would thus expect originalism to apply, if at all, only in the limited contexts in which the constitutional text in some

- Transnationalist judges believe that executive power can be constrained by comity amongst the courts, while nationalists believe acts of executive discretion enjoy great deference.

Harold Hongju Koh, *A Community of Reason and Rights*, 77 *FORDHAM. L. REV.* 583, 596 (2008).

160. Steve Charnovitz, *Revitalizing the U.S. Compliance Power*, 102 *AM. J. INT’L L.* 551, 554 (2008).

161. *See id.* (citing Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioner at 25, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984)).

162. *Id.*

163. *See id.* at 556 (expressing wonder that the Court did not find room within our constitutional framework for the President to decide either to comply or not to comply).

164. Griffin, *supra* note 15, at 1206; *see also* Flaherty, *supra* note 14, at 2103 n.38 (reporting the results of an unscientific “poll” that found Wood to be the historian most cited in law reviews); Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 *GEO. 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 Text*, 69 *U. CHI. L. REV.* 1639, 1647 (2002) (listing Wood’s *The Creation of the American Republic 1776–1787* (1969) among the leading secondary works on the framing period).

165. GORDON WOOD, *THE FUNDAMENTALISTS AND THE CONSTITUTION* 13 (Va. Comm’n on the Bicentennial of the U.S. Constitution 1988) (1988); *see also* KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 12 tbl.T2 (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).

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 “[a]dvice and [c]onsent,”<sup>166</sup> the Senate has not fulfilled its advisory capacity since the time of President Washington.<sup>167</sup> More strikingly still, although the Constitution provides only one mechanism, the Treaty Clause,<sup>168</sup> through which the United States may enter into international agreements, the political branches frequently bypass the rather onerous Article II requirements of advice and consent by two-thirds of the Senate,<sup>169</sup> choosing instead to commit the United States to international agreements through executive-legislative agreements or through sole executive agreements.<sup>170</sup> In recent decades, nearly ninety percent of the United States’ international obligations have arisen through mechanisms other than Article II treaties.<sup>171</sup> Oona Hathaway has recently suggested that the United States jettisons 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 achieve adherence.<sup>172</sup>

Nonetheless, as the dissenting Justices suggest, the Constitution does provide guidance on the extent to which treaties are supreme law, enforceable in domestic courts.<sup>173</sup> Chief Justice Roberts’s opin-

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166. U.S. CONST. art. II, § 2, cl. 2.

167. See 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’s first administration, understood the Constitution to provide the Senate with advisory power before treaties were finalized); Telman, *supra* note 14, at 282 (noting that President Washington originally thought that the Senate had constitutional power to advise the President on treaty negotiation).

168. U.S. CONST. art. II, § 2 cl. 2.

169. *Id.*

170. Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Law-making 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).

171. *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).

172. *Id.* at 1241 (arguing that “nearly everything that is done through the Treaty Clause can and should be done through congressional-executive agreements”).

173. See *infra* Part III.B.

ion 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 United States' international obligations raises unnecessary barriers to the conduct of foreign relations by the political branches of the federal government.

A. *The Bases for Chief Justice Roberts's Opinion in Medellín*

Chief Justice Roberts's opinion in the *Medellín* case has been widely praised as "careful" and "modest."<sup>174</sup> It is neither. Because the Court could easily have found that the trial court's decision dismissing Medellín's habeas petition *on the merits*<sup>175</sup> complied with the "review and reconsideration" called for in the *Avena* decision,<sup>176</sup> the petition for certiorari was improvidently 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."<sup>177</sup>

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

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174. See Posting of Paul Stephan to Opinio Juris, <http://opiniojuris.org/2008/03/25/medellin-v-texas-modest-and-fairly-careful/> (Mar. 25, 2008, 2:43 PM EDT) (tentatively concluding that "Chief Justice Roberts' opinion for the Court is modest and fairly careful"); see also Posting of Julian Ku to Opinio Juris, <http://opiniojuris.org/2008/03/25/medellin-my-early-thoughts/> (Mar. 25, 2008, 1:04 PM EDT) (calling the majority opinion "fairly sensible and reasonable"); Posting of Richard Samp to SCOTUSblog, <http://www.scotusblog.com/wp/medellin-discussion-board-the-court-defers-to-congress/> (Mar. 25, 2008, 5:09 PM) (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*); Posting of Kent Scheidegger to SCOTUSblog, <http://www.scotusblog.com/wp/medellin-discussion-board-the-ball-is-in-congress-court/#more-6908> (Mar. 27, 2008, 4:00 PM) (finding the holding in *Medellín* "not all that remarkable").

175. See *Medellín v. Texas*, 128 S. Ct. 1346, 1354–55, 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).

176. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 72–73 (Mar. 31).

177. Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994) (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). 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. 2229, 2281–82 (Roberts, C.J., dissenting).

and reconsideration.<sup>178</sup> During oral argument, Justice Kennedy voiced some sympathy for Texas's position on this matter.<sup>179</sup> Although 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.<sup>180</sup>

The opinion is also not modest in that it attempted to resolve constitutional issues far beyond those necessary to address the facts of the case. As Steve Charnovitz has argued, “[t]he Court posed too broad a question”<sup>181</sup> for itself in using *Medellín*'s case to establish blanket rules regarding issues not raised by *Medellín*, including: (1) the status of ICJ judgments as U.S. law, (2) the President's power to refuse to comply with such judgments, and (3) an ICJ decision finding U.S. federal law to violate a treaty.<sup>182</sup> Because it tried to decide hypo-

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178. See Brief for Respondent at 49–50, *Medellín*, 128 S. Ct. 1346 (No. 06-984) (arguing that the questions presented in the case are moot because the Texas courts already provided the required review under *Avena*).

179. See Transcript of Oral Argument at 20, *Medellín*, 128 S. Ct. 1346 (No. 06-984) (“And I have a problem, incidentally, because I think [Medellín] did receive all the hearing that he's entitled to under the judgment anyway.”).

180. *Torres v. State*, 120 P.3d 1184, 1189–90 (Okla. Crim. App. 2005); see Murphy, *supra* note 49, at 261–62 (detailing Oklahoma Governor Brad Henry's commutation of Torres's death sentence and Torres's unsuccessful attempt to gain further relief from the courts).

181. Charnovitz, *supra* note 160, at 552.

182. *Id.* The ambiguity of the majority's approach in this case is nicely illustrated in its attempt, in a footnote, to narrow its holding to the facts of *Medellín*. See *Medellín*, 128 S. Ct. at 1367 n.13 (stating that the Court sought to address only the limited question of whether the President “may unilaterally create federal law by giving effect to the judgment of *this* international tribunal pursuant to *this* non-self-executing treaty, and, if not, whether he may rely on other authority under the Constitution to support the action taken in *this particular case*”) (emphasis added). Carlos Manuel Vázquez likens this passage to the Court's notorious attempt to limit its ruling in *Bush v. Gore* “to the present circumstances.” Vázquez, *Less than Zero*, *supra* note 12, at 564 (citing *Bush v. Gore*, 531 U.S. 98, 109 (2000)). While Curtis Bradley has argued that the *Medellín* opinion is susceptible to a narrower interpretation than most scholars have given it, even he does not view the opinion as limited to its facts, as the majority's footnote suggests. See Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 541 (2008) (preferring a

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thetical situations not before it, Charnovitz maintains, the Court’s “reasoning went astray.”<sup>183</sup> The specific question posed in *Medellín* was whether the *Avena* decision should have been implemented in accordance with the President’s memorandum, and in that regard, Charnovitz suggests, modesty should have led the Court to defer to the President, who is “uniquely qualified to [make] sensitive policy decisions.”<sup>184</sup>

The substantive portion of Chief Justice Roberts’s opinion<sup>185</sup> began by acknowledging that *Medellín* relies on the Supremacy Clause.<sup>186</sup> Without any discussion of the founding documents pertaining to the Supremacy Clause or any of the historical scholarship discussing the original meaning and purpose of the Supremacy Clause, the Chief Justice proceeded directly to a discussion of the distinction between self-executing and non-self-executing treaties.<sup>187</sup> It is hard to see what is “careful” about an opinion that interprets a constitutional provision, the Supremacy Clause, without more than a meager reference to it, its legislative history, or the substantial body of scholarship pertaining to its original meaning. In fact, Chief Justice Roberts’s *Medellín* opinion ignored the plain meaning of the constitutional text, relied on a few Supreme Court cases while ignoring others,<sup>188</sup> as well as dozens of other federal cases that suggest a presumption in favor of self-execution, and then misapplied the few cases on which the opinion purportedly relied.<sup>189</sup>

The doctrine of self-execution is not of constitutional origin.<sup>190</sup>

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narrow interpretation of *Medellín*, according to which non-self-executing treaties are treated as domestic law but are not judicially enforceable).

183. Charnovitz, *supra* note 160, at 552.

184. *Id.* at 556.

185. Part II of the opinion commenced the substantive portion of the opinion in which Chief Justice Roberts began to set out the applicable substantive U.S. law. *Medellín*, 128 S. Ct. at 1356–67. Part I of the opinion introduced the relevant treaty law and recite the facts and procedural history of the case. *Id.* at 1353–56.

186. *Id.* at 1356.

187. *Id.*

188. *See id.* at 1392–93 (Breyer, J., dissenting) (providing an appendix listing Supreme Court cases, most of which were not cited by the majority, in which treaties were held to be self-executing).

189. *See infra* notes 241–256 and accompanying text.

190. *See* Bradley, *supra* note 182, at 540 (asserting that it has been settled since the *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), decision that some treaties are non-self-executing and thus unenforceable unless implemented by Congress); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760 (1988) (arguing that the distinction created in case law between self-executing and non-self-executing treaties “is patently inconsistent with express language” in the Supremacy Clause); Ramsey, *Torturing Executive Power*, *supra* note 14, at 1233 (characterizing the idea of non-self-executing treaties as “judicially created”).

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Rather, it is an invention of the Marshall Court.<sup>191</sup> The authority cited in the majority opinion for the doctrine of self-execution consists of several cases,<sup>192</sup> one passage from *The Federalist Papers*,<sup>193</sup> and the *Restatement (Third) of Foreign Relations Law of the United States*.<sup>194</sup> In explaining its views on the doctrine, the majority noted, in a manner that neither enlightens nor tends to inspire confidence in the strength of the precedent on which the Court purported to rely, that various courts have understood the doctrine of self-execution differently.<sup>195</sup> The majority explained that it understood “self-executing” to

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cording to Paust, the phrase “self-executing” did not appear in a Supreme Court opinion until 1887 in *Bartram v. Robertson*, 122 U.S. 116 (1887). See Paust, *supra*, at 766.

191. See Vázquez, *Self-Executing Treaties*, *supra* note 14, at 700 (explaining that “[t]he distinction between self-executing and non-self-executing treaties was introduced into U.S. jurisprudence by the Supreme Court in *Foster v. Neilson*”).

192. See *Medellín*, 128 S. Ct. at 1356–57 (majority opinion) (citing *Whitney v. Robertson*, 124 U.S. 190 (1888); *The Head Money Cases*, 112 U.S. 580 (1884); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *Igartua-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (en banc)).

193. See *Medellín*, 128 S. Ct. at 1357 (citing THE FEDERALIST NO. 33 (Alexander Hamilton)). The appeal to the authority of *The Federalist Papers* is only for Hamilton’s rather ambiguous comparison between laws that 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.* (quoting THE FEDERALIST NO. 33, at 207 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). Since No. 33 deals with the federal government’s 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. See THE FEDERALIST NO. 33, at 203–08 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In context, it seems that Hamilton’s true purpose is to contrast a law with a mere pact between private parties.

194. See *Medellín*, 128 S. Ct. at 1357 n.3 (citing 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1986)).

195. See *id.* 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-executing or non-self-executing can be found in scholarly literature. As the dissent notes, 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 *id.* at 1379 (Breyer, J., dissenting) (noting the scholarship of Tim Wu); Wu, *supra* note 89, at 573–74 (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 less likely to directly enforce treaties violated by Congress); see also Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT’L L. 627, 635–42 (1986) (summarizing differing positions taken by courts and in legal scholarship on the possible meanings of the doctrine of self-execution); Paust, *supra* note 190, 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 exclusive congressional power); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and Presumption of Self-Execution*, 122 HARV. L. REV. (forthcoming 2009) (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 President’s Memorandum, *supra* note 4, is adequate execution); Vázquez,

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mean that a “treaty has automatic domestic effect as federal law upon ratification,”<sup>196</sup> but it did not ground its understanding of the doctrine in precedent, history, or logic.<sup>197</sup> Instead, relying on a handful of cases decided over a nearly 175-year span, the Court concluded 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.”<sup>198</sup> The Court thus subtly changed 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<sup>199</sup> into a presumption against self-execution absent a contrary provision.<sup>200</sup>

Having established the status of treaties as domestic law without any analysis of the Supremacy Clause, the Chief Justice then pro-

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*Self-Executing Treaties*, *supra* note 14, at 696–97 (identifying four distinct grounds on which a court might conclude that legislative action is necessary before it can enforce a treaty). R

196. *Medellín*, 128 S. Ct. at 1356 n.2 (majority opinion).

197. Curtis Bradley notes that “[t]he opinion leaves unclear . . . whether a non-self-executing treaty is simply judicially unenforceable, or whether it more broadly lacks the status of domestic law.” Bradley, *supra* note 182, at 548. R

198. *Medellín*, 128 S. Ct. at 1357 (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). Justice Breyer pointed 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. *See id.* at 1381, 1383 (Breyer, J., dissenting) (citing the Netherlands as an example of a State that directly incorporates treaties into domestic law without explicit legislative approval); *see also* Bradley, *supra* note 182, at 544 (noting that “self-execution is rarely the subject of negotiation”); Iwasawa, *supra* note 195, at 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—especially a multilateral treaty—that indicates whether it is to be self-executing); Paust, *supra* note 190, at 770–71 (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”); Vázquez, *Self-Executing Treaties*, *supra* note 14, at 709 (“Perhaps because of the diversity of domestic-law rules on the subject, nations negotiating treaties rarely address matters of domestic implementation.”). R

199. *See United States v. Perchemen*, 32 U.S. (7 Pet.) 51, 88–89 (1833) (finding a treaty self-executing where it does not stipulate to the need for some future legislative act).

200. *See* David J. Bederman, *Medellín’s New Paradigm for Treaty Interpretation*, 102 AM. J. INT’L L. 529, 529 (2008) (noting that scholarly attention regarding the *Medellín* opinion had focused on “the Court’s supposed ruling as to the presumptive non-self-execution of international agreements entered into by the United States”); Julian G. Ku, *Medellín’s Clear Statement Rule: A Solution for International Delegations*, 77 FORDHAM L. REV. 609, 615 (2008) (acknowledging that *Medellín* might well be criticized for “departing from existing understandings of the non-self-execution doctrine and imposing a new clear statement requirement”). *But see* Bradley, *supra* note 182, at 541 (suggesting that *Medellín* is best understood as requiring a treaty-by-treaty approach to the question of self-execution without resort to a general presumption); Vázquez, *Less Than Zero*, *supra* note 12, at 570 (noting several statements in the majority opinion suggesting that treaties are presumptively non-self-executing). R

ceeded to a discussion of the treaties at issue. The Optional Protocol, he concluded, is a “bare grant of jurisdiction” which “does not itself commit signatories to comply with an ICJ judgment.”<sup>201</sup> 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.”<sup>202</sup> Chief Justice Roberts reasoned that this provision cannot be self-executing because the “sole remedy for noncompliance” provided by the Charter is “referral to the United Nations Security Council by an aggrieved state.”<sup>203</sup>

The Chief Justice also found some support for this reading of the U.N. Charter in the Senate hearings on the ratification of the Charter, and he treated that evidence as decisive.<sup>204</sup> Reliance on such unilateral statements is not called for under the Supreme Court precedents

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201. *Medellín*, 128 S. Ct. at 1358 (majority opinion).

202. U.N. Charter art. 94, para. 1.

203. *Medellín*, 128 S. Ct. at 1359 (emphasis added) (citing U.N. Charter art. 94, para. 2). Justice Breyer, writing in dissent, made the obvious point that there is nothing in the language of the Charter to suggest that the political remedy is the sole remedy. *See id.* at 1385 (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 SUFFOLK TRANSNAT'L L. REV. 301, 303–04 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.”).

204. The majority opinion first cited to a statement made in the hearings of the Senate Committee on Foreign Relations to the effect that “[i]f 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 (majority opinion) (emphasis added) (quoting *The Charter of the United Nations for the Maintenance of International Peace and Security: Hearings Before the S. Comm. on Foreign Relations*, 79th Cong. 124–25 (1945)). The phrase “may have recourse” hardly suggests an exclusive remedy. The majority opinion then cited to statements of Leo Paslovsky, Special Assistant to the Secretary of State for International Organizations and Security Affairs, *id.*, and Charles Fahy, Legal Advisor to the State Department, *id.* at 1359–60. Paslovsky recognized that a state’s refusal to implement a decision of the ICJ creates a political rather than a legal dispute. *Id.* at 1359. Such a statement is not in the least surprising, since the Security Council is a political body. In the statements quoted by the majority, Paslovsky said nothing about the exclusivity of the remedy. *See id.* Fahy stated 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. *Id.* 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. *Id.* at 1381 (Breyer, J., dissenting).

on which Chief Justice Roberts relied, specifically *Foster v. Neilson*<sup>205</sup> and *U.S. v. Percheman*,<sup>206</sup> as those cases seem to stand for the principle that treaties are considered self-executing unless *the parties* to the treaties intend otherwise.<sup>207</sup>

There is more than a little irony in Chief Justice Roberts's 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 reminded us, is committed by the Constitution to the political departments.<sup>208</sup> 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."<sup>209</sup> But in this case, the President had determined how to comply with the ICJ judgment. He directed state courts to implement the *Avena* decision.<sup>210</sup> The other political branch was silent. The effect of the majority opinion in *Medellín* is to prevent the Executive branch from conducting foreign policy (even where it faces no political opposition at the federal level) 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 III.B., this is precisely the result the Framers sought to avoid through the Supremacy Clause.

Chief Justice Roberts proceeded to defend his interpretive approach as rooted in two cases from the early Republic, *Foster* and *Percheman*.<sup>211</sup> The dissent characterized that approach as "look[ing] for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)."<sup>212</sup> The Chief Justice accepted this characterization,<sup>213</sup> but said little in its defense beyond the paltry citations to authority already

205. 27 U.S. (2 Pet.) 253 (1829).

206. 32 U.S. (7 Pet.) 51 (1833).

207. See Vázquez, *Self-Executing Treaties*, *supra* note 14, at 706–08 (arguing that permitting the United States to determine unilaterally whether a treaty is self-executing is inconsistent with the Supremacy Clause as interpreted in *Foster* and *Percheman*). David Bederman nonetheless sees the *Medellín* opinion as a step in the direction of compliance with international expectations for the proper approach to treaty interpretation. See Bederman, *supra* note 200, at 531 (citing Justice Roberts's opinion as making "a new readiness to accept eclecticism in the selection of materials relevant to a treaty's interpretation").

208. *Medellín*, 128 S. Ct. at 1360 (majority opinion).

209. *Id.*

210. President's Memorandum, *supra* note 4.

211. *Medellín*, 128 S. Ct. at 1362.

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

213. See *id.* at 1362 (majority opinion) ("[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.").

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indicated. Nor did 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.<sup>214</sup> As Justice Stevens's concurring opinion named only one ratified and one un-ratified treaty that would pass the majority's clear statement rule,<sup>215</sup> it is obvious that the majority's clear statement standard has never been the operative test for self-execution under U.S. law.<sup>216</sup> The majority opinion nevertheless rejected the dissent's far more traditional approach to the issue of self-execution on the ground that it was "arrestingly indeterminate."<sup>217</sup>

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<sup>218</sup> before rifling through the relevant ratification history to highlight 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.<sup>219</sup>

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214. *Id.* at 1380–81 (Breyer, J., dissenting) (stating that the majority fails to "point to a single ratified United States treaty that contains the kind of 'clear' or 'plain' textual indication" for which the majority now requires).

215. *See id.* at 1373 & n.1 (Stevens, J., concurring).

216. *See id.* at 1381 (Breyer, J., dissenting) (suggesting that the majority's clear statement requirement cannot be the proper standard given that only a few treaties "actually *do* speak clearly" on the matter of self-execution).

217. *Id.* at 1362 (majority opinion).

218. The majority's approach to treaty interpretation, which paid 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 art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall 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."); *Air France v. Saks*, 470 U.S. 392, 402–03 (1985) (incorporating an analysis of the drafting history of the Warsaw Convention in interpreting the treaty's text). The majority cited to *Air France* for the principle that "[t]he interpretation of a treaty . . . begins with its text" and also noted cases in which the Court had 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 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)). However, the majority included only the most limited discussion of the negotiation and drafting history of the relevant treaties and limited its inquiry into the "postratification understanding" of those treaties to that of the United States. *See id.* at 1357–61 (discussing treaty interpretation). Moreover, Jordan Paust suggests that the majority ignored evidence that the VCCR is self-executing. Paust, *supra* note 203, at 306 n.15 (citing numerous authorities in support of the claim that the United States considers the VCCR self-executing and supreme federal law); *see also* *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (stating that the VCCR is self-executing).

219. Curtis Bradley, in arguing that the opinion does not have the extreme character that its critics allege, suggests that it merely requires a treaty-by-treaty analysis of whether

In fact, the majority opinion may compound indeterminacy with incoherence. On the one hand, the Court seemed to favor a textual approach that decides whether or not a treaty is self-executing based on the language of the treaty and its U.S. ratifiers. On the other hand, it suggested that post-ratification is also relevant.

Logically, the Court cannot have it both ways. Either a U.S. treaty is immutably self-executing (or not) at its birth, or there is a possibility that the status of a treaty can evolve over time . . . . Because the Court acknowledged postratification practice to be relevant to a treaty’s status in U.S. law, one cannot read *Medellín* as saying that the meaning of Article 94(1) [of the U.N. Charter] was frozen by the expectations held by the [P]resident and the Senate in 1945.<sup>220</sup>

The decision calls into doubt the enforceability of innumerable treaties, 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*.<sup>221</sup> Justice Breyer is simply correct to point out that the majority opinion “erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.”<sup>222</sup>

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

Justice Breyer, writing in dissent in *Medellín*, identified 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 our domestic law.”<sup>223</sup> Unlike the majority, Justice Breyer concluded that the issue cannot be answered by looking to the

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the drafters or ratifiers intended it to be self-executing. Bradley, *supra* note 182, at 541. If this is really what *Medellín* stands for, then it is highly indeterminate and provides very little guidance to lower courts. Moreover, Bradley points out that the majority opinion is unclear on its own methodology for determining whether or not a treaty is self-executing. Despite statements indicating that courts should look only to what the United States intended regarding self-execution, *id.* at 544 (citing *Medellín*, 128 S. Ct. at 1364, 1366, 1367), Bradley notes that the Court also seemed willing to consider evidence relating to the intent of all treaty parties, their postratification understandings, and perhaps even the views of the ICJ on self-execution. *Id.* (citing *Medellín*, 128 S. Ct. at 1361 n.9).

220. Charnovitz, *supra* note 160, at 555.

221. The formation of this Task Force was announced in a press release. See Press Release, Am. Soc’y of Int’l Law and Am. Bar Ass’n, Joint Task Force on Treaties in U. S. Law, available at <http://law.anu.edu.au/news/webdocuments/taskforceterms.pdf> (last visited Feb. 13, 2009).

222. *Medellín*, 128 S. Ct. at 1381–82 (Breyer, J., dissenting).

223. *Id.* at 1377.

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language of the treaties at issue.<sup>224</sup> 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.<sup>225</sup> Based on an abbreviated discussion of those cases and guided by the relevant scholarship,<sup>226</sup> Justice Breyer concluded that the ICJ’s *Avena* judgment “is enforceable as a matter of domestic law without further legislation.”<sup>227</sup> That conclusion is less significant to us than is the scholarship on the original meaning of the Supremacy Clause that Justice Breyer summarized and the Chief Justice ignored. 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, informed the majority opinion. Even the dissent provided 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.”<sup>228</sup> This presumption of self-execution, though limited,<sup>229</sup> was in marked contrast, in the Framers’ view, to the laws of England<sup>230</sup> and to the laws of the American colonies under the Arti-

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224. *See id.* (stating that the majority opinion “places too much weight upon treaty language”).

225. *Id.*

226. *See id.* at 1377–80 (discussing Supreme Court case law “stretching back 200 years” to determine the Founders’ original intent in adopting the Supremacy Clause and considering relevant scholarship).

227. *Id.* at 1377.

228. Vázquez, *Self-Executing Treaties*, *supra* note 14, at 696.

229. *See id.* at 696–97 (identifying four grounds on which a court might conclude legitimately that a treaty required legislative action for enforcement).

230. *See* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 275–76 (1796) (explaining that Great Britain requires legislative effectuation of treaty provisions and observing that the British have “constantly observed” this requirement); *see also* *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254 (1829) (contrasting the general rule of international law regarding treaties, whereby treaties are not automatically domestic law, with the “different principle” announced under the Supremacy Clause); Vázquez, *Self-Executing Treaties*, *supra* note 14, 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). 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, *supra* note 14, at 2112.

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cles of Confederation.<sup>231</sup> The Supremacy Clause embodied the Framers’ response to the more general problem of enforcing federal law.<sup>232</sup> 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.<sup>233</sup>

As Justice Breyer noted,<sup>234</sup> 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.<sup>235</sup> Numerous statements by other Framers support Madison’s view of the purpose and meaning of the Supremacy Clause. For example, as early as 1786, John Jay advocated for a rule prohibiting state legislatures from passing acts that would restrain, limit, or counteract the operation or execution of a treaty.<sup>236</sup> James Iredell, a member of the North Carolina ratifying convention<sup>237</sup> and therefore a person whose views a textualist originalist should be interested in,<sup>238</sup> similarly viewed a treaty as “law of the land,” and binding upon the people.<sup>239</sup> In South Carolina,

231. See Vázquez, *Self-Executing Treaties*, *supra* note 14, 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).

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232. See *id.* (calling this problem the “principal reason for the Framers’ decision to draft a new constitution rather than amend the Articles” of Confederation).

233. *Id.* at 698–99.

234. *Medellín v. Texas*, 128 S. Ct. 1346, 1378 (2008) (Breyer, J., dissenting).

235. THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961); see also *Ware*, 3 U.S. (3 Dall.) at 277 (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”).

236. See 1 CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 268–75 n.4 (1902) (excerpting John Jay’s Oct. 13, 1786 report to Congress, which maintained that state legislatures cannot pass laws “interpreting, explaining or construing a national treaty,” or otherwise limiting the operation of a treaty); see also Paust, *supra* note 190, at 760–61, 760 n.3 (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 Supreme Court).

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237. *Medellín*, 128 S. Ct. at 1378.

238. See YOO, THE POWERS OF WAR AND PEACE, *supra* note 14, at 27–28 (arguing that the views of the Constitution’s ratifiers are the most important, since the ratifiers bound the people they represented through their votes and therefore their understanding of the document is the most relevant original meaning).

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239. Paust, *supra* note 190, at 761; see also *id.* at 761 n.9 (noting that Iredell, like Chief Justice Jay, made similar comments after becoming a Justice of the Supreme Court).

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both John Rutledge and Charles Pinckney stated their views that treaties were “paramount” laws.<sup>240</sup> Not surprisingly, these views are consistent with the express language of the Constitution’s Supremacy Clause, which declares treaties to be supreme federal law and operative notwithstanding any contrary state law.<sup>241</sup>

Early Supreme Court decisions are also consistent with the express language of the Supremacy Clause.<sup>242</sup> In *Ware v. Hylton*,<sup>243</sup> for example, a British creditor sought payment of an American citizen’s Revolutionary War debt pursuant to the 1783 Paris Peace Treaty.<sup>244</sup> The debtor claimed that he had paid the debt by paying the money owed into a Virginia state fund in accordance with Virginia law.<sup>245</sup> Each Justice wrote separately in the case, but all agreed that the Virginia statute was invalid.<sup>246</sup> In his *Medellín* dissent, Justice Breyer appropriately focused on the opinion of Justice Iredell,<sup>247</sup> which distinguished between portions of the treaty that had been “executed” and those which were “executory.”<sup>248</sup> Justice Iredell defined “executed” as treaty provisions that “from the nature of them . . . require no further act to be done.”<sup>249</sup> Executory provisions are addressed to a branch of the federal government because “when a nation promises to do a thing, it is to be understood, that this promise is to be carried into execution, in the manner which the [C]onstitution of that nation prescribes.”<sup>250</sup> Justice Iredell therefore suggested that treaties that “prescribe laws to the people for their obedience” must be implemented through legislative action.<sup>251</sup> But Justice Iredell then further explained 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.”<sup>252</sup> In short, Justice Iredell rejected the notion that, after the

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240. *Id.* at 763.

241. U.S. CONST. art. VI, § 2.

242. See Paust, *supra* note 190, at 765 & n.36 (listing ten cases decided between 1794 and 1825 in which “treaty law was accepted as operating . . . as supreme federal law in the face of inconsistent state law”).

243. 3 U.S. (3 Dall.) 199 (1796).

244. *Id.* at 203–04.

245. *Id.* at 220–21.

246. *Id.* at 285.

247. *Medellín v. Texas*, 128 S. Ct. 1346, 1378 (2008) (Breyer, J., dissenting).

248. *Ware*, 3 U.S. (3 Dall.) at 272.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 277.

Supremacy Clause, there can be any talk of non-self-executing treaty provisions.<sup>253</sup>

In its first case expressly addressing the issue, the Marshall Court recognized that, while treaties are generally viewed as a contract between two states requiring execution by the sovereign power of both states, “[i]n 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.”<sup>254</sup> This notion of treaties that operate by themselves is the source of the doctrine of self-execution.<sup>255</sup> But when does a treaty operate of itself? Carlos Vázquez contends that the effect of the “principle” established under the Supremacy Clause is to create a presumption in favor of self-execution, unless the parties make a contrary intent clear through treaty language.<sup>256</sup> Justice Breyer’s dissenting opinion accepts that presumption, providing that a treaty is self-executing “unless it specifically contemplates execution by the legislature and thereby ‘addresses itself to the political, not the judicial department.’”<sup>257</sup> 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 rules under international law for determining the intent of the parties to an international agreement are set forth in the Vienna Convention on the Law of Treaties (“VCLoT”).<sup>258</sup> Although the United States has not ratified the VCLoT, it is generally recognized as

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253. 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 courts must determine whether a treaty addresses itself to the political branches for further action. *Medellín v. Texas*, 128 S. Ct. 1346, 1382 (2008) (Breyer, J., dissenting). Justice Iredell’s position, even 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.

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

255. Vázquez, *Self-Executing Treaties*, *supra* note 14, at 701.

256. *Id.* at 703; *see also id.* (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 through subsequent legislative acts).

257. *Medellín*, 128 S. Ct. at 1379 (quoting *Foster*, 27 U.S. (2 Pet.) at 254). Justice Breyer also noted 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.’” *Id.* at 1379 (quoting *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 388 (1840) (Baldwin, J., concurring)).

258. Vienna Convention on the Law of Treaties, *supra* note 218.

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embodying principles of customary international law,<sup>259</sup> which are binding on the United States.<sup>260</sup> Both the U.S. Department of State<sup>261</sup> and federal courts have recognized that the VCLoT codifies customary international law.<sup>262</sup> Courts have repeatedly recognized its authority as embodying customary international law with respect to treaty interpretation specifically.<sup>263</sup>

The 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.”<sup>264</sup> Included in the VCLoT’s conception of “context” are the text of the treaty, including any preambles or annexes,<sup>265</sup> any related agreements,<sup>266</sup> or related instruments.<sup>267</sup> In addition, in interpreting a treaty, an adjudicatory body must take into account

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259. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 811, 811 n.3 (5th ed. 2003) (citing ICJ cases recognizing VCLoT as reflecting customary international law).

260. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728–29 (2004) (recognizing that violations of customary international law are enforceable in U.S. courts without the need for congressional action); see also *The Paquete Habana*, 175 U.S. 677, 700 (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.”).

261. 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 Rogers’ report to the President, characterizing VCLoT as “the authoritative guide to current treaty law and practice” (quoting Report from William P. Rogers, Sec’y of State, to the President (Oct. 18, 1971), in DEP’T ST. BULL., Dec. 1971, at 685)).

262. See *Avero Belg. Ins. v. Am. 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 & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) (characterizing VCLoT as a restatement of customary rules which 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.”); see also *Weinberger v. Rossi*, 456 U.S. 25, 29 n.5 (1982) (referring to VCLoT as a principle of international law).

263. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191–92 (1993) (Blackmun, J., dissenting) (citing Article 31(1) of VCLoT for the “well settled” proposition that a treaty must be construed according to its ordinary meaning); *Tseng v. El Al Isr. 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*, 525 U.S. 155 (1999); see also SHAW, *supra* note 259, at 811 & n.4 (citing numerous international tribunals that have recognized the authority of VCLoT’s rules for interpretation of treaties).

264. Vienna Convention on the Law of Treaties, *supra* note 218, art. 31(1).

265. *Id.* art. 31(2).

266. *Id.* art. 31(2)(a).

267. *Id.* art. 31(2)(b).

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subsequent agreements<sup>268</sup> and practice,<sup>269</sup> as well as relevant rules of international law.<sup>270</sup> In case the interpretation arrived at through this method is ambiguous or obscure,<sup>271</sup> or manifestly unreasonable,<sup>272</sup> 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.<sup>273</sup>

In *Air France v. Saks*,<sup>274</sup> the Supreme Court interpreted the Warsaw Convention on International Air Transport<sup>275</sup> in a manner consistent with the VCLoT. The Court began with a thorough investigation of the relevant provisions of the Convention in both English<sup>276</sup> and French,<sup>277</sup> the language of their drafting, as required under the VCLoT.<sup>278</sup> The Court then proceeded to a discussion of the negotiating history of the relevant provisions<sup>279</sup> 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.<sup>280</sup> 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.<sup>281</sup> In *Medellín*, neither the majority nor the dissent engage in this sort of careful assessment of the intended meaning of the treaties at issue.

Neither the majority nor the dissenting opinion in *Medellín* are exemplary in terms of their adherence to the generally recognized rules for treaty interpretation.<sup>282</sup> Neither opinion looks at the exten-

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268. *Id.* art. 31(3)(a).

269. *Id.* art. 31(3)(b).

270. *Id.* art. 31(3)(c).

271. *Id.* art. 32(a).

272. *Id.* art. 32(b).

273. *Id.* art. 32.

274. 470 U.S. 392 (1985).

275. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11.

276. *Air France*, 470 U.S. at 397–99.

277. *Id.* at 397–400 & n.2.

278. See Vienna Convention on the Law of Treaties, *supra* note 218, art. 33(1) (stating that “[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language,” unless the treaty provides that a particular language prevails in the event of divergence). R

279. *Air France*, 470 U.S. at 400–03.

280. *Id.* at 403–05.

281. *Id.* at 406–07.

282. See Bradley, *supra* note 182, at 540 (“The Court employed a text-centered approach to self-execution and rejected a multifaceted balancing analysis similar to one that had been adopted by some lower courts.”). David Bederman views the majority opinion in *Medellín* as something of a departure, at least for Justices Scalia and Thomas, from the purely textualist approach to treaty interpretation that they formerly favored as more “con- R

sive *travaux préparatoire* relating to the U.N. Charter.<sup>283</sup> 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 place the United States in violation of an international judgment with which the federal government sought to comply.

IV. WHAT REMAINS

Medellín's case never should have come before the Supreme Court. President Bush intervened in Medellín's case 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 half-measures.<sup>284</sup> The President has a duty to "take

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sistent with those Justices' views about the proper modalities for statutory construction." Bederman, *supra* note 200, at 530. As Bederman sees it, the readiness expressed in Chief Justice Roberts's opinion to consider extra-textual sources as "aids to interpretation," *Medellín v. Texas*, 128 S. Ct. 1346, 1357–58 (2008), establishes something of a consensus on the Court in favor of a more open-ended and inclusive approach to treaty interpretation. *See* Bederman, *supra* note 200, at 530–31 (calling *Medellín* the "final curtain" and "an armistice of sorts" in the Justices' running debate over the past two decades on treaty interpretation). I do not share Bederman's optimism that *Medellín* settles things, especially since, as I have indicated above, *see supra* note 194 and accompanying text, the *Medellín* majority's use of extra-textual sources in construing the relevant treaties is both limited and highly selective. Bederman himself concludes that the *Medellín* majority's approach may be viewed "as a cramped and unreflective version of the VCL[o]T's full-throated recognition of treaty text, not only in the specific context of related treaty provisions, but also in light of the 'object and purpose' of the instrument." Bederman, *supra* note 200, at 534. Moreover, I agree with Bederman that the *Medellín* decision "does relatively little to articulate clear canons of construction" for treaty interpretation. *Id.* at 530. Although Bederman hopes the case resolves a tension in the Court's approach to treaty interpretation, the Justices have left themselves room to backslide into textualism. *See id.* at 539 (noting that *Medellín* might become the "exception that . . . proves the rule").

283. *See* Bederman, *supra* note 200 at 536–37.

284. *See* Swaine, *supra* note 203, at 372 (noting that the Bush Administration "purport[ed] to implement *Avena*" while also claiming that doing so is optional and that the

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Care that the Laws be faithfully executed.”<sup>285</sup> This Part will 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 argued 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.”<sup>286</sup> In its strongest form, this reading of the Take Care Clause would support the view that the President’s memorandum ordering states to implement the *Avena* decision should be given the force of law.<sup>287</sup> One need not go so far. The Court has not ruled on whether the Take Care Clause *empowers* the President to override state law.<sup>288</sup> However, even if the President acting alone could not override state law, the Take Care Clause still gives rise to a constitutional *duty* for the President to work with Congress to override state law that could place the United States in violation of its international obligations.

In the case of the *Avena* judgment, and more generally with respect to the United States’ obligations under the VCCR’s Article 36, successive U.S. Presidents have failed to abide by such a duty. This Part thus concludes with a brief discussion of the U.S. executive’s ongoing failure to take care that the ICJ’s *Avena* decision is implemented

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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 of [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. What’s *not* wrong with this picture?

John Cerone, *Making Sense of the U.S. President’s Intervention in Medellín*, 31 SUFFOLK TRANS-NAT’L L. REV. 279, 279 (2008).

285. U.S. CONST. art. II, § 3.

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

287. 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*, 128 S. Ct. 1346 (2008) (No. 06-984) (“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.”).

288. See *Medellín*, 128 S. Ct. at 1372 (finding that the Take Care Clause “allows the President to execute the laws, not make them”).

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.<sup>289</sup> 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.<sup>290</sup> 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.

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.<sup>291</sup> 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.<sup>292</sup> Whatever the views of the Framers, the Supreme Court has generally taken the position that "the Laws" encompassed within the Take Care Clause include treaties.<sup>293</sup> Specifically, the

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289. See Swaine, *supra* note 203, 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 broad, well-established foreign affairs powers").

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290. See *id.* at 335 (noting that reliance on the Take Care Clause has "fallen out of favor").

291. See MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 203 (1990) (contending that the Take Care Clause only applies to laws enacted by the legislature); Swaine, *supra* note 203, at 343 (conceding that the question of treaties' statuses under the Take Care Clause are "not free from doubt").

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292. See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 *CORNELL L. REV.* 97, 154–60 (2004) (explaining that the Take Care Clause entails a presidential duty to execute treaties); Ramsey, *Torturing Executive Power*, *supra* note 14, at 1232 (finding no textual or historical basis for the claim that the Take Care Clause applies only to statutes); Swaine, *supra* note 203, at 343–46 (assembling key statements from the Framers expressing the view that the President's Take Care duties include a duty to execute treaties).

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293. Swaine, *supra* note 203, at 347.

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Court endorsed this view in *In re Neagle*<sup>294</sup> and again in *United States v. Midwest Oil Co.*<sup>295</sup> Indeed, even the boldest advocates of unilateral executive authority concede that the President may not refuse to enforce a treaty in force because to do so would violate the Take Care Clause.<sup>296</sup>

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.<sup>297</sup> Rather, non-self-executing treaties are to be executed by Congress, thus relieving the President of his take care duties.<sup>298</sup> The claim is a peculiar one, given the widely acknowledged confusion regarding what constitutes a non-self-executing treaty.<sup>299</sup> Moreover, since the distinction between self-executing and non-self-executing treaties is not of constitutional origin,<sup>300</sup> 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 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.<sup>301</sup> This is an

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294. See 135 U.S. 1, 64 (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”).

295. See 236 U.S. 459, 505 (1915) (Day, McKenna, and Van Devanter, JJ., dissenting) (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” (citation and internal quotation marks omitted)).

296. See 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 4–5 (Jan. 14, 2002), available at <http://www.cartoonbank.com/newyorker/slideshows/02YooTaft.pdf> (“While it might be convenient for the President to decide to enforce parts of a treaty but not others, it would not be fully in keeping with his constitutional responsibilities.”).

297. 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.”).

298. Ramsey, *Torturing Executive Power*, *supra* note 14, at 1232.

299. See *supra* note 195.

300. See *supra* note 190.

301. Ramsey, *Torturing Executive Power*, *supra* note 14, at 1233.



elegant solution, but it turns on agreement on the meaning of “non-self-executing,” and no such agreement exists.<sup>302</sup>

These objections are not huge impediments to this Article’s argument. Those who take issue with the President’s power to take care that a non-self-executing treaty is faithfully executed have in mind a positive *power* to execute the laws.<sup>303</sup> 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 whatever legal or political measures are needed to effectuate such treaties as domestic law. As a prudential matter, it makes no sense for the executive to enter into international obligations on behalf of the United States and then undertake no measures to insure U.S. compliance with those obligations.

The Take Care Clause is not a grant of additional enforcement or execution powers to the President. Rather, as Joseph Story put it, “[t]he 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.”<sup>304</sup> The point is that the President may not choose to enforce some laws and ignore others.<sup>305</sup> 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.<sup>306</sup>

### 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 memoran-

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302. See *supra* note 195.

303. See Swaine, *supra* note 203, at 362 (contending that the Supreme Court has recognized that the Take Care Clause entails executive powers as well as duties).

304. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 292, at 178 (Lawbook Exchange 1999) (1840); see also MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN 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.”).

305. See Swaine, *supra* note 203, at 360 (arguing that the Take Care Clause imposes an affirmative duty on the President to enforce the law).

306. *Id.* at 370.

dum is insufficient to override state law.<sup>307</sup> If the President is serious about implementing the *Avena* decision, the State of Texas itself, in its *Medellín* merits brief, made clear what the executive needs to do: It needs to coordinate with Congress or the States.<sup>308</sup> Texas first suggested 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.<sup>309</sup> Texas next recommended that the President could simply enter into a bilateral agreement with Mexico requiring federal judicial review of the cases addressed in *Avena*.<sup>310</sup> Finally, Texas proposed an executive panel to provide the “review and reconsideration” required under *Avena*.<sup>311</sup> 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.”<sup>312</sup>

Of these options, only the first has any meaningful likelihood 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.<sup>313</sup> 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.<sup>314</sup> Nor was the State of Texas moved by Justice Stevens’s 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.<sup>315</sup> Notwithstanding this request, Texas executed *Medellín* on August 5, 2008, after the

307. *Medellín v. Texas*, 128 S. Ct. 1346, 1371–72 (2008).

308. Brief for Respondent, *supra* note 178, at 46.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 46–47.

313. *Id.* at 47 n.32.

314. *See supra* notes 56–60 and accompanying text.

315. *Medellín v. Texas*, 128 S. Ct. 1346, 1374–75 (2008) (Stevens, J., concurring).

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Supreme Court, in a 5–4 decision, refused to order a stay of execution.<sup>316</sup>

The Bush Administration contended that it intervened most forcefully on behalf of the *Avena* defendants. The President’s memorandum was, in and of itself, “extraordinary.”<sup>317</sup> 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.<sup>318</sup> In addition, after the Court’s ruling in *Medellín*, the Bush Administration continued to attempt to persuade Texas to grant review and reconsideration of Medellín’s case,<sup>319</sup> until Medellín’s execution.

Although Medellín’s case ended with his death, the *Avena* case continues. On June 5, 2008, Mexico filed with the ICJ a Request for Interpretation of Judgment in the *Avena* case and a request for provisional measures.<sup>320</sup> In that context, it is striking that the Bush Administration took no steps to work with Congress towards implementing the *Avena* decision, as that is precisely the course of action prescribed by the *Medellín* majority.<sup>321</sup> 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:

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.<sup>322</sup>

True enough, but one of those factors is whether or not the executive branch is pressuring members of Congress to pass a particular

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316. James C. McKinley Jr., *Texas Executes Mexican Despite Objections From Bush and International Court*, N.Y. TIMES, Aug. 6, 2008, at A19.

317. Verbatim Record, *supra* note 80, ¶ 9, at 11.

318. *Id.* ¶ 10, at 11–12, ¶¶ 13–14, at 12–13.

319. *Id.* ¶ 21, at 16.

320. Request for Interpretation of the Judgment of 31 March 2004 in *Avena* and Other Mexican Nationals (June 5, 2008), available at <http://www.icj-cij.org/docket/files/139/14582.pdf> (last visited Feb. 13, 2009).

321. See Charnovitz, *supra* note 160, at 559 (reading *Medellín* as permitting Congress to implement the *Avena* judgment through legislation, even if such legislation would reach “‘deep into the heart of the State’s police powers’” (quoting *Medellín*, 128 S. Ct. at 1372)).

322. See Verbatim Record, *supra* note 80, ¶ 17, at 12.

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piece of legislation. That did not happen under the Bush Administration.<sup>323</sup>

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.<sup>324</sup> 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.<sup>325</sup> By declaring these provisions to 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.<sup>326</sup> Likewise, 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,<sup>327</sup> released a general comment in which it stated that Article 2 of the Covenant “requires that States Parties take the necessary steps to give

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323. 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.” *Id.* ¶ 26, at 17.

324. 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) (internal quotation marks omitted).

325. *See, e.g.*, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”); International Covenant on Civil and Political Rights, art. 2, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“[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 give effect to the rights recognized in the present Covenant.”).

326. *See* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 *COLUM. L. REV.* 628, 639 (2007) (explaining that United States courts “have been virtually unanimous in the view that human rights treaty provisions are unenforceable absent implementing legislation”); *see also* Sloss, *supra* note 324, at 197–203 (summarizing judicial decisions that have dismissed individual claims brought under human rights treaties).

327. *See* ICCPR, *supra* note 325, at art. 28 (establishing the Human Rights Committee and setting forth its functions).

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effect to the Covenant rights in the domestic order.”<sup>328</sup> When one considers the Senate’s declaration that substantive provisions of the Covenant are not self-executing, coupled with Congress’s failure to execute the relevant provisions, in light of the the Human Rights Committee’s comment, it is hard to avoid the conclusion that that the United States is currently in violation of its obligations under the Covenant.

On July 16, 2008, by a vote of seven to five, 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.<sup>329</sup> 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.<sup>330</sup> 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.<sup>331</sup> Happily, this is beginning to occur.<sup>332</sup>

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328. U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 13, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

329. Request for Interpretation of the Judgment of 31 March 2004 in *Avena and Other Mexican National* (Order of July 16, 2008) at ¶ 80, at 19, available at <http://www.icj-cij.org/docket/files/139/14639.pdf> (last visited Feb. 13, 2009).

330. Ramsey, *Torturing Executive Power*, *supra* note 14, at 1233.

331. On July 17, 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 United States lives up to its binding international legal obligations under the [VCCR] and the United Nations Charter.” Letter from Lucy Reed, President of Am. Soc’y of Int’l Law et al., to Harry Reid, Senate Majority Leader et al. (July 17, 2008), available at <http://www.asil.org/pdfs/presidentsletter.pdf> (last visited Feb. 13, 2009).

332. The Senate acted with remarkable alacrity to clarify the status of scores of treaties. Between September 23 and September 26, 2008, the Senate gave its advice and consent to nearly eighty treaties. In so doing, the Senate was careful to specify whether or not the treaties were to be given direct effect as domestic law and whether they would give rise to a private right of action. *See* 154 Cong. Rec. S9850 (daily ed. Sept. 26, 2008) (granting advice and consent to two treaties); 154 Cong. Rec. S9554–S9557 (daily ed. Sept. 25, 2008) (granting advice and consent to nine treaties); 154 Cong. Rec. S9328–S9335 (daily ed. Sept. 23, 2008) (granting advice and consent to sixty-seven treaties).

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## V. CONCLUSION

It is 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' 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.