

**SELLING *MEDELLÍN*: THE ENTOURAGE OF  
LITIGATION SURROUNDING THE VIENNA  
CONVENTION ON CONSULAR RELATIONS  
AND THE WEIGHT OF INTERNATIONAL  
COURT OF JUSTICE OPINIONS IN THE  
DOMESTIC SPHERE**

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## INTRODUCTION

Stunned commentators frantically responded to the Supreme Court's ruling in *Medellin v. Texas* in the hours following the opinion's release on March 25, 2008.<sup>1</sup> In the coming years, experts will debate extensively the significance of *Medellin* and what it means for treaty interpretation.<sup>2</sup> Although the Supreme Court created

1. See Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/states-win-over-president-on-criminal-law-issue/> (Mar. 25, 2008, 10:10 EST) (providing an initial forum for responses to the Court's controversial decision); Posting of Steve Vladeck to Opinio Juris, <http://www.opiniojuris.org/posts/1206467533.shtml> (Mar. 25, 2008, 13:52 EST) (expressing consternation at an interpretation of treaties that seems "thoroughly at odds" with the traditional reading of the Supremacy Clause).

2. See *Medellin v. Texas*, No. 06-984, slip op. at 13 (U.S. Mar. 25, 2008) (Breyer, J., dissenting) (worrying that the Supreme Court has set up irrevocable

a myriad of questions in its decision, it is safe to conclude that it avoided the truly interesting question before it.

Article 36 of the Vienna Convention on Consular Relations (“VCCR”), a treaty signed by the United States, requires that a country hosting a foreign national who is arrested give the prisoner the option to inform his or her own country of the arrest.<sup>3</sup> The Optional Protocol to the VCCR, also entered into by the United States, provides for compulsory jurisdiction of all disputes arising out of the VCCR in the International Court of Justice (“ICJ”).<sup>4</sup> The 2004 ICJ decision in *Avena and Other Mexican Nationals*, requiring review and reconsideration of fifty-one Mexican nationals who were deprived of their Article 36 rights, came into stark conflict with *Sanchez-Llamas v. Oregon*, a 2006 Supreme Court case rejecting the abandonment of rules of procedural default to repair Article 36 violations and thus depriving the petitioner of his chance at review and reconsideration.<sup>5</sup> The Court in *Medellin* could have resolved the conflict between the two cases, but instead Chief Justice Roberts rested his decision for the majority on Article 94(1) of the U.N. Charter, declaring it non-self-executing and removing the need to reach the subsequent question.<sup>6</sup>

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hurdles barring the domestic application of treaties previously presumed to be self-executing).

3. See Vienna Convention on Consular Relations art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR] (dictating that authorities of the receiving nation inform an arrested individual “without delay” of rights arising out of the VCCR to contact and communicate with the consular officials of the sending state).

4. See Vienna Convention on Consular Relations, Optional Protocol Concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 21 U.S.T. 77, 169, 596 U.N.T.S. 487, 488 [hereinafter Optional Protocol] (providing for the compulsory jurisdiction of all disputes arising out of the interpretation and application of the VCCR in the ICJ).

5. Compare *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128, ¶ 121 (Mar. 31) (concluding that the United States must “permit review and reconsideration” of cases involving authorities’ wrongful acts of failing to notify foreign nationals of their consular notification rights), with *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) (emphasizing that ICJ decisions have no binding force on subsequent ICJ cases, let alone on American courts).

6. See *Medellin*, slip op. at 12 (majority opinion) (reading the phrase “undertakes to comply” with ICJ decisions, the language of the U.N. Charter, as merely a future commitment by signatory states to take action to ensure compliance).

Though the Supreme Court avoided the conflict between *Sanchez-Llamas* and *Avena*, it did not resolve it. The question of how U.S. courts should consider an ICJ opinion that renders judgment in accordance with a self-executing or congressionally implemented treaty remains undecided. *Medellin* itself implicitly acknowledges three circumstances that could, and probably will, create a conflict that requires the resolution of this question. First, Congress could implement the U.N. Charter's Article 94(1) through legislation.<sup>7</sup> Second, the presumption against non-self-executing treaties asserted in *Medellin* could prove unworkable to future courts, forcing the Supreme Court to reverse its holding.<sup>8</sup> Finally, a different treaty, employing language more explicit than that contained in the U.N. Charter, could create a presumption of self-execution and thus bind U.S. courts to ICJ decisions with respect to that treaty.<sup>9</sup>

Since the Court in *Medellin* never addressed the appropriate weight for ICJ decisions when a treaty is self-executing or congressionally implemented, this Comment uses *Medellin* as a lens and framework to argue that the Supreme Court still needs a test by which to analyze binding ICJ decisions or decisions by other binding international tribunals.<sup>10</sup> While the Court in *Medellin* rendered this question moot with respect to the VCCR, the VCCR continues to provide the best opportunity to analyze the way in which the Court

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7. See *id.* at 24 (inviting Congress to take action and implement any treaties, including Article 94(1) of the U.N. Charter, to give them domestic effect).

8. See *id.* at 2 (Stevens, J., concurring) (admitting that Article 94(1) does not contain explicit language foreclosing the possibility of self-execution like some other treaties requiring implementing measures).

9. See *id.* at 24 (majority opinion) (acknowledging the continuing existence of both self-executing and non-self-executing treaties); *id.* at 8 (Breyer, J., dissenting) (referring the reader to Appendix A of his dissenting opinion, which sets out twenty-nine instances of the Court holding or assuming that a treaty is self-executing); see also *All Change?*, THE ECONOMIST, Mar. 29, 2008, at 17 (suggesting that a new President could usher in such foreign policy changes as the United States joining the International Criminal Court); David Scheffer, *For Love of Country and International Criminal Law: Further Reflections*, 24 AM. U. INT'L L. REV. (forthcoming 2008) (pleading for the United States to have the courage to join the host of other nations submitting to the jurisdiction of the International Criminal Court).

10. See generally Julian Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 24-41 (2006) (suggesting that due to the growing number of international tribunal judgments, a decision regarding their enforceability seems inevitable).

should resolve this issue precisely because it has been interpreted by both the ICJ in *Avena* and by the Supreme Court in *Sanchez-Llamas*. This Comment thus uses the VCCR to argue that when the Supreme Court has an opportunity to revisit this issue, it should acknowledge that ICJ decisions have binding effect insofar as they analyze and interpret a particular treaty, but that the ICJ in *Avena* departed from its authority when it contemplated changes in state procedural rules. Part I summarizes the recent ICJ decisions concerning the VCCR and Supreme Court cases that have considered their weight. Part II argues that ICJ decisions, when given authority under a binding treaty, are controlling on U.S. courts as to their interpretation of that treaty. Part III recommends that the Supreme Court adopt an international *Erie* doctrine, whereby supranational courts have binding authority only regarding limited questions of international substantive law, but not as to procedural impacts in the United States.

## I. BACKGROUND

The VCCR is a multi-lateral treaty, entered into by 170 countries,<sup>11</sup> intended to govern the consular relations among those countries.<sup>12</sup> Article 36, relating to consular notification, has given rise to contentious litigation in the United States.<sup>13</sup> The following discussion outlines Article 36 and the subsequent cases, both in the ICJ and the U.S. Supreme Court. It also introduces *Erie R.R. Co. v. Tompkins* in order to lay the groundwork for a discussion more fully developed in Parts II and III.

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11. Michael E. Keasler, *Criminal Procedure: Confessions, Searches, and Seizures*, 59 SMU L. REV. 1167, 1173 (2006).

12. See VCCR, *supra* note 3, pmbl. (stating that a goal of the treaty is to ensure that countries observe privileges and immunities in order to improve relations among the sovereign countries).

13. See Sarah M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 Cal. L. Rev. 1729, 1736-37 (2003) (tracing the history of claims brought in U.S. courts due to alleged violations of the VCCR and asserting that courts have not adequately addressed the substantive issues of plaintiffs with Article 36 claims).

A. ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR  
RELATIONS AND THE OPTIONAL PROTOCOL

The VCCR concerns nations' respective rights with other nations.<sup>14</sup> In 1969, the Senate ratified the VCCR by a two-thirds majority and presumably incorporated it into federal law through the Supremacy Clause.<sup>15</sup> The decision in *Medellin* did not directly address the matter of self-execution of the VCCR; instead it declared that the U.N. Charter, which requires that member states undertake to comply with ICJ decisions, was not self-executing.<sup>16</sup> Until *Medellin*, most authorities regarded the VCCR as a self-executing treaty, meaning that Congress did not need to take implementing measures.<sup>17</sup> Because of the unexpected ruling in *Medellin* on Article 94(1), the status of other treaties that scholars assumed were self-executing, such as the VCCR, is now in doubt.<sup>18</sup> *Medellin* also left

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14. See VCCR, *supra* note 3, pmb. (opening the treaty by underscoring the importance and necessity of promoting "friendly relations among nations" and creating a community of interaction).

15. *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001) ("Ratified treaties become the law of the land on an equal footing with federal statutes." (citing U.S. CONST. art. VI, cl. 2)).

16. See *Medellin*, slip op. at 12 (majority opinion) (premising its rejection of *Medellin*'s request for rehearing on the interpretation that the U.N. Charter made no binding promises about the enforceability of ICJ decisions).

17. See *Breard v. Pruett*, 134 F.3d 615, 621 (4th Cir. 1998) (Butzner, J. concurring) (stating that the treaty is a self-executing treaty because it confers "rights to individuals rather than merely setting out the obligations of signatories"); *Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (noting that both parties to the litigation agree that the VCCR is self-executing in the sense that it does not require any implementing legislation to become federal law); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 588 n.147 (1997) (citing governmental officials' statements referring to the VCCR as "entirely self-executive"); Howard S. Schiffman, *Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT'L & COMP. L. 27, 40-42 (2000) (citing several cases concluding that Article 36 conferred judicially enforceable rights and commenting that this conclusion appears logical since the construction of Article 36 sets out not merely the obligations of the signatories, but also mandatory, unequivocal recognition of the importance of consular access to those detained by foreign governments).

18. See *Medellin*, slip op. at 5-10 (Breyer, J., dissenting) (tracing the history of the understanding of treaties' incorporation into federal law through the Supremacy Clause and exhibiting confusion over the Court's majority opinion declaring Article 94(1) as non-self-executing).

open the question of whether an individual can actually bring a VCCR claim.<sup>19</sup>

Though the treaty touches on many international relations issues, Article 36 embodies the controversial elements of the treaty.<sup>20</sup> Article 36 provides that when a state arrests a foreign national, it has an obligation to notify the consular authorities of the prisoner's state.<sup>21</sup> The treaty requires notification "without delay," but neglects to define exactly how much time may pass before the receiving state must notify the sending state.<sup>22</sup> Because of the ambiguity of the term, this issue has been the subject of litigation itself, specifically as a sub-issue within the *Avena* case.<sup>23</sup> Despite the VCCR's assurances, almost no foreign nationals arrested in the United States actually receive notification of their VCCR rights.<sup>24</sup> These violations by the

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19. See *id.* at 10 n.4 (majority opinion) (continuing the *Sanchez-Llamas* assumption that the VCCR provides an individual right of action).

20. See, e.g., Adrienne M. Tranel, Comment, *The Ruling of International Court of Justice in Avena and Other Mexican Nationals: Enforcing the Right to Consular Assistance in U.S. Jurisprudence*, 20 AM. U. INT'L L. REV. 403, 414-30 (2005) (outlining the cases, both in the ICJ and in domestic courts, concerning Article 36 rights and displaying the breadth of litigation on the issue); see also Jehanne Henry, Comment, *Overcoming Federalism in Internationalized Death Penalty Cases*, 35 TEX. INT'L L.J. 459, 460 (2000) (pointing out the prevalence of Article 36 litigation and noting that "at least two-thirds of foreign nationals executed since reinstatement of the death penalty in 1976 unsuccessfully raised [Article 36 violations]").

21. See VCCR, *supra* note 3, art. 36(1)(b) (asserting that, in order for the sending state to perform consular functions, the receiving state must notify the authorities of the sending state "without delay").

22. See *generally id.* art. 1 (defining various terms for the Convention).

23. See *Avena*, 2004 I.C.J. 128, ¶¶ 87-88 (determining that "without delay" does not necessarily mean immediately, but rather as soon as the arresting party realizes, or has grounds to realize, that the arrested individual is a foreign national).

24. See Susan McClelland, *Human Rights Violations in the United States: Amnesty International Reports on Unfair Trial Procedures and Mistreatments of Inmates in the American Prison System*, PEACE MAG., Mar.-Apr. 1999, at 23, available at <http://archive.peacemagazine.org/v15n2p23a.htm> (noting that Amnesty International officials say that in "virtually every instance," foreign nationals on death row have had their Article 36 rights denied). *But see* U.S. State Department, Consular Notification and Access: Instructions for Federal, State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Right of Consular Officials to Assist Them, [http://travel.state.gov/law/consular/consular\\_636.html](http://travel.state.gov/law/consular/consular_636.html) (last visited May 15, 2008) (showing efforts by the federal government to increase the compliance with U.S. obligations under the VCCR by informing state and local law enforcement of their duties under the treaty).

United States have led to the recent glut of VCCR litigation, both in U.S. courts and in the ICJ.<sup>25</sup>

The Optional Protocol to the VCCR assigns jurisdiction over disputes arising under the VCCR to the ICJ.<sup>26</sup> This grant of adjudicatory power has created conflicts between Supreme Court precedent and ICJ decisions.<sup>27</sup> It is unclear at this early date whether Congress or a future Court will decide to recognize Article 94(1) of the U.N. Charter as a part of federal law, and thus invoke the ICJ as a binding tribunal. If either Congress or the Court, however, remove this impediment, the issues discussed below will resurface. Partly because of this conflict, the United States has subsequently withdrawn from the Optional Protocol.<sup>28</sup>

B. THE ICJ EXAMINES U.S. APPLICATION OF ARTICLE 36:  
THE *BREARD* AND *LAGRAND* CASES

Prior to *Avena*, the ICJ examined two cases involving United States violations of Article 36.<sup>29</sup> Paraguay's Article 36 claim in the Case Concerning the Vienna Convention on Consular Relations

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25. See, e.g., *Valdez v. State*, 46 P.3d 703, 709 (Okla. Crim. App. 2002) (addressing the petitioner's contentions of a VCCR violation and following *Breard* as relevant precedent to deny the petitioner's appeal to the court to ignore the rule of procedural default); see also *infra* notes 29-67 and accompanying text (relating the facts and legal issues in the landmark VCCR cases and Article 36 litigation in the United States and abroad).

26. See Optional Protocol, *supra* note 4, art. 1; see also Camille Cancio, Comment, *The United States' International Obligations and the Impact on Federalism: Medellín v. Dretke and the Force of Avena in American Courts*, 27 WHITTIER L. REV. 1047, 1052 (2006) (noting that, in the past, the United States argued for the binding effect of ICJ decisions and in fact, was the first to invoke the Optional Protocol to use the ICJ as a forum for the resolution of the Iranian hostage crisis).

27. Compare *Sanchez-Llamas*, 126 S. Ct. at 2674 (holding that the VCCR does not require suppression or review of a case as a remedy for a violation), with *Avena*, 2004 I.C.J. 128, ¶ 143 (holding that the clemency process did not, as the United States contended, constitute compliance with the ICJ decision in *LaGrand*).

28. See Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1.

29. See Memorial of the Republic of Paraguay, Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99, ¶¶ 2.31-2.33 (Oct. 9) (seeking order of provisional measures for the violation of a Paraguayan citizen's Article 36 rights); *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 104, ¶ 12 (June 27) (continuing the ICJ litigation against the United States even though the United States executed the *LaGrand* brothers before the ICJ had an opportunity to announce its opinion).

(Paraguay v. United States) arose from an incident in Virginia in which the state charged Angel Breard with capital murder and sentenced him to death.<sup>30</sup> Police never informed Breard of his right to consular notification.<sup>31</sup> Breard finally raised the issue of the Article 36 violation in his habeas corpus petition—four years after his arrest.<sup>32</sup> Shortly before Breard's scheduled execution, when his habeas relief seemed doubtful, Paraguay instituted an action against the United States in the ICJ.<sup>33</sup> The ICJ, acting in only six days, issued a provisional measure, unanimously deciding that the United States must do everything in its power to stay Breard's execution.<sup>34</sup>

In a per curiam decision, the Supreme Court decided that the ICJ's provisional measure did not trump a forum state's procedural rules.<sup>35</sup>

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30. See *Breard v. Greene*, 523 U.S. 371, 373 (1998) (summarizing the procedural and factual history, in which the State presented overwhelming evidence that Breard committed the murder, a fact that he later confessed to during trial).

31. See *id.* at 376-77 (assuming that the United States violated the VCCR); see also Henry, *supra* note 20, at 464 (noting that the United States, throughout the litigation, admitted that authorities violated the VCCR by not informing Breard of his rights); Press Statement, James P. Rubin, Spokesman, U.S. Department of State (Nov. 4, 1998), available at <http://www3.sympatico.ca/aiwarren/editorials.htm> (admitting to the failure to notify Breard of his right to contact the Paraguayan government, recognizing the obligation owed by the United States to Paraguay, and apologizing for the violation of the obligation).

32. See *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) (explaining that Breard could not raise the issue of an Article 36 violation at this point in the trial because the procedural default rule barred him from presenting that claim in state court proceedings).

33. See Application of the Republic of Paraguay, Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426, ¶ 25 (Apr. 9), available at <http://www.icj-cij.org/docket/files/99/7183.pdf> (requesting, among other things, that the ICJ decide that the United States void any criminal liability imposed on Breard).

34. See Request for the Indication of Provisional Measures, Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, ¶ 41 (Apr. 9), available at <http://www.icj-cij.org/docket/files/99/7599.pdf> (indicating that, given Paraguay's showing of a United States violation, the only way to properly resolve the issues presented was to order provisional measures to stay the execution of Breard); see also Declaration of President Schwebel, available at <http://www.icj-cij.org/docket/files/99/7603.pdf> (announcing the decision of the President of the ICJ, an American, to vote for the provisional measure of April 9, 1998, despite his belief that an issue of such great importance should be decided on its merits).

35. See *Breard*, 523 U.S. at 375 (explaining that the only way in which a treaty may trump state procedural rules is by a clear and express statement of intention in the treaty).

Justice Stevens and Justice Breyer argued in dissent that the Supreme Court should grant a stay, allow the ICJ deliberations to progress, and consider the case after giving the ICJ more time to fully consider it.<sup>36</sup> The Supreme Court, however, held that ICJ provisional measures are not binding.<sup>37</sup>

In the *LaGrand* case, Arizona convicted two German brothers, Walter and Karl LaGrand, for the death of a bank employee during a bank robbery.<sup>38</sup> Once again, as in *Breard*, no one informed the brothers of their Article 36 rights.<sup>39</sup> Germany unsuccessfully attempted to stave off the impending execution through diplomatic channels.<sup>40</sup>

When the ICJ considered the case, it emphasized that the United States had a duty to abide by the binding decisions of the ICJ.<sup>41</sup> Though the execution of the LaGrand brothers had already been carried out, Germany, unlike Paraguay in *Breard*, did not withdraw

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36. See *id.* at 379 (Stevens, J., dissenting) (noting that the normal rules of procedure for reviewing a habeas petition would give the Supreme Court substantially more time, except in this case Virginia deprived the Court of that time); *id.* at 380-81 (Breyer, J., dissenting) (arguing that several issues, because of their novelty and difficulty, “warrant less speedy consideration”).

37. See *id.* at 375 (explaining that while the Court would give “respectful consideration” to an ICJ interpretation of a treaty, that interpretation would not carry binding force).

38. See *LaGrand v. Stewart*, 133 F.3d 1253, 1257-61 (9th Cir. 1998) (summarizing the facts and procedure surrounding the botched bank robbery by the LaGrands).

39. See *id.* at 1261 (“It is undisputed that the State of Arizona did not notify the LaGrands of their rights under the [VCCR].”).

40. See Daniel A. McFaul, Jr., *Recent Decisions*, Germany v. United States, 2001 *I.C.J.* 104, 15 N.Y. INT'L L. REV. 119, 121 (2002) (describing the various rejected appeals for clemency made by Germany to the State of Arizona followed by proceedings in the Supreme Court by both Germany and Walter LaGrand in which the Supreme Court ruled negatively for both parties).

41. See Tranel, *supra* note 20, at 419 (describing the three relevant holdings of the ICJ in *LaGrand* as “(1) the duty to comply with the individual rights enumerated in Article 36; (2) the duty to carry out those rights in a meaningful way; and (3) the duty to abide by the binding decisions and provisional measures of the ICJ”); see also Note, *Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654, 2654 (2003) (describing the ICJ’s decision in *LaGrand* as particularly noteworthy because of its announcement that parties must submit to provisional orders, despite their similarities to mere preliminary injunctions).

its request for a decision, allowing ICJ to rule on the merits.<sup>42</sup> In its decision, the ICJ ruled that the United States must grant “review and reconsideration” to those defendants uninformed of their Article 36 rights.<sup>43</sup>

### C. AVENA AND MEDELLÍN

In the wake of *Breard* and *LaGrand*, Mexico brought suit against the United States in the ICJ, alleging violations of the VCCR.<sup>44</sup> In *Avena*, Mexico sought, among other things, to have the convictions partially or totally annulled,<sup>45</sup> to receive a declaration from the ICJ that the rights the VCCR constitute “human right[s],”<sup>46</sup> and to prevent the United States from applying rules of procedural default

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42. See *LaGrand*, 2001 I.C.J. 104, ¶ 128 (addressing each of the issues before the court, including the violation by the United States against the LaGrand brothers and the United States’ duty to, in the future, grant review and reconsideration).

43. See *id.* ¶ 125 (deciding to impose a “review and reconsideration” requirement, but explicitly leaving the means of implementation up to the United States); see also Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT’L L. 427, 432 (2002) (discussing the ICJ’s decision to leave “review and reconsideration” broad in order to allow the United States, and other nations applying the principal, room to tailor the method used). But see Jeremy White, *A New Remedy Stresses the Need for International Education: The Impact of the LaGrand Case on a Domestic Court’s Violation of a Foreign National’s Consular Relations Right Under the Vienna Convention*, 2 WASH. U. GLOBAL STUD. L. REV. 295, 309-12 (2003) (explaining that, though the United States has room to adopt appropriate implementing measures, it nevertheless must undertake to comply, especially in light of its increasingly poor reputation in international compliance).

44. See *Application of Mexico to Institute Proceedings (Mex. v. U.S.)*, 2003 I.C.J. 128, ¶ 1 (Jan. 9), available at <http://www.icj-cij.org/docket/files/128/1913.pdf> (accusing the United States of detaining, convicting, and sentencing to death fifty-four Mexican nationals all without any notification of their Article 36 rights).

45. See *Avena*, 2004 I.C.J. 128, ¶¶ 116-117 (arguing that *restitutio in integrum* is the proper remedy for “an internationally wrongful act”).

46. See *id.* ¶ 124 (summarizing Mexico’s contention that the right to consular notification is a fundamental right such that its infringement calls into question the entire subsequent judicial process); see also Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-Am. Ct. H.R. (ser. A) No. 16 ¶ 141 (1999) (advising that Article 36 is a human right).

in cases where the application might preclude review of possible violations of the VCCR.<sup>47</sup>

In February of 2003, the ICJ issued a provisional order mandating that the United States take all action necessary to prevent the execution of the fifty-one Mexican nationals.<sup>48</sup> In its final action, Mexico requested that the ICJ expand on its *LaGrand* decision, which required merely “review and reconsideration,” and instead sought an ICJ judgment for a stronger, more decisive remedy.<sup>49</sup> In its final judgment, the ICJ balked at this step, but enunciated that the United States could not achieve review and reconsideration through the clemency process,<sup>50</sup> nor could it employ rules of procedural default to bar such review and reconsideration.<sup>51</sup>

In 2001, Medellín, one of the fifty-one Mexican nationals at issue in *Avena*, filed a writ of habeas corpus to protest the Article 36 violation.<sup>52</sup> In 2006, the Texas Court of Criminal Appeals heard and dismissed Medellín’s claim of an Article 36 violation as procedurally barred.<sup>53</sup> On appeal, the Supreme Court found that Article 94(1) of

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47. Cf. Curtis A. Bradley, *International Decision*, Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 100 AM. J. INT’L L. 882, 887 (2006) (explaining that despite *Avena*’s ruling, the Court has made clear that international law must still conform to state procedural and remedial doctrines).

48. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2003 I.C.J. 128, Request for the Indication of Provisional Measures Order of Feb. 5, 2003, ¶¶ 36, 59 (mirroring the findings of the prior *LaGrand* case in ordering that the United States abstain from action).

49. See Tranel, *supra* note 20, at 425, 426 n.100 (highlighting the request of Mexico for *restitutio in integrum* as opposed to the United States’ position of maintaining the *LaGrand* decision and only requiring review and reconsideration).

50. See *Avena*, 2004 I.C.J. 128, ¶ 143 (noting the insufficiency of the clemency process to meet the requirements of review and reconsideration laid out by *LaGrand*).

51. See *id.* ¶ 112 (explaining the difference between the procedural default rule as a general rule of law, which does not contravene the requirements of the VCCR, and the procedural default rule as applied to the cases in *Avena*, in which it does violate the VCCR).

52. See *Ex Parte Medellín*, 223 S.W.3d 315, 321 (Tex. Crim. App. 2006) (explaining that Medellín had raised his VCCR Article 36 claim for the first time in his application for a writ of habeas corpus).

53. See *id.* at 332 (determining that the Texas Court of Criminal Appeals is bound by the precedent set by the Supreme Court in *Breard* and *Sanchez-Llamas*). The Texas Court of Criminal Appeals also determined that a memorandum from President Bush to the Attorney General ordering Texas to give effect to *Avena* exceeded his power. *Id.* at 348.

the U.N. Charter merely embodied a promise to take future action, not an immediately domestically enforceable commitment, and affirmed the Texas court's opinion.<sup>54</sup>

D. *SANCHEZ-LLAMAS* AND THE CURRENT SUPREME COURT  
ATTITUDE TOWARDS THE ICJ

For purposes of this Comment's analysis, *Sanchez-Llamas* provides further background because it examines the implications of a treaty if it were self-executing.<sup>55</sup> The Supreme Court decided *Sanchez-Llamas*, a case in which neither of the defendants were beneficiaries of the ICJ's decision, in the wake of the *Avena* decision.<sup>56</sup> The case actually combined two lower court cases that barred remedies for Article 36 violations; one of the petitioners—Bustillo—requested that courts bar the application of procedural default as contemplated in *Avena*, the other—Sanchez-Llamas—attempted to convince the Court that it should adopt suppression of evidence as a remedy for Article 36 violations.<sup>57</sup> The Supreme Court found no reason to think that any signatory country to the VCCR contemplated that the suppression of evidence would serve as a remedy and rejected his contention.<sup>58</sup> However, the ICJ did not discuss suppression as an appropriate remedy in its various Article 36 cases, so the Supreme Court did not confront the issue of

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54. *Medellín*, slip op. at 12 (majority opinion).

55. *See Sanchez-Llamas*, 126 S. Ct. at 2680 (assuming that the VCCR is self-executing and thus asserting that, had it provided for an appropriate remedy, a U.S. court would have no trouble in enforcing that remedy). *But see Medellín*, slip op. at 12 (majority opinion) (declaring the U.N. Charter unenforceable domestically because of its non-self-execution).

56. *See* Linda Greenhouse, *Treaty Doesn't Give Foreign Defendants Special Status in U.S. Courts, Justices Rule*, N.Y. TIMES, June 29, 2006, at A22 (discussing relevance of *Sanchez-Llamas* and the struggle the Supreme Court has faced as the ICJ has increased its role in asserting individual rights to consular notification).

57. *See generally Sanchez-Llamas*, 126 S. Ct. at 2674-77 (describing the facts surrounding both petitioners Sanchez-Llamas' and Bustillo's cases).

58. *See id.* at 2678 n.3 (explaining that the only country that regularly excluded evidence obtained absent consular notification was Brazil, a country which found that its constitution, and not just the VCCR, conferred the right to consular notification); *see also*, Keasler, *supra* note 11, at 1174 (arguing that since failing to inform a foreign national of his or her consular rights rarely elicits a faulty confession or benefits police, suppression as a remedy would be vastly disproportionate to the violation).

precedential weight afforded ICJ decisions with regard to Sanchez-Llamas' claim.<sup>59</sup>

Bustillo, on the other hand, claimed that the United States violated his rights under the VCCR via the application of the procedural default rule, just as the fifty-one Mexican nationals in *Avena* did.<sup>60</sup> As the Supreme Court pointed out, *Sanchez-Llamas* did not present the first case of someone attempting to set aside rules of procedural default in an Article 36 violation case.<sup>61</sup> Bustillo attempted to persuade the Court to modify its prior holding in *Breard* by presenting the recent decisions of the ICJ in *LaGrand* and *Avena* as subsequent precedent.<sup>62</sup> Those supporting Bustillo argued that "the United States is obligated to comply with the [VCCR], as interpreted by the ICJ."<sup>63</sup>

Ultimately, the Supreme Court rejected this contention for three reasons. First, the Supreme Court has ultimate power to "say what the law is."<sup>64</sup> Second, the Optional Protocol expressly limits the binding force of ICJ decisions to parties before the tribunal.<sup>65</sup> The Supreme Court noted that the primary purpose of the ICJ is simply to "arbitrate particular disputes."<sup>66</sup> Finally, the Supreme Court found the ICJ decision contrary to the United States' adversarial system,

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59. See *Sanchez-Llamas*, 126 S. Ct. at 2678-82 (discussing only interpretations of Article 36's effect regarding possible remedies rather than discussing any ICJ ruling).

60. See *id.* at 2682 (outlining the general rule which bars a defendant from raising a claim on collateral appeal if the defendant failed to raise that claim on direct appeal).

61. See *id.* (citing *Breard* and its attempt to analogize potential VCCR rights to sacredly protected constitutional rights, which the Supreme Court points out are also subject to procedural default).

62. See *id.* at 2683 (acknowledging the complicated issues associated with using *LaGrand* and *Avena* as subsequent precedent).

63. Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners at 11, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 04-10566, 05-51), available at <http://www.debevoise.com/publications/pdf/ICJExpertsAmicusBrief.pdf>.

64. See *Sanchez-Llamas*, 126 S. Ct. at 2684 (invoking *Marbury v. Madison* as authority to ignore any contrary ICJ ruling).

65. See *id.* (noting that cases in the ICJ do not even serve as binding precedent on subsequent ICJ decisions, let alone U.S. courts).

66. See *id.* (arguing that the ICJ by its very nature "contemplates quintessentially international remedies," and by extension not domestic remedies, impliedly precluding the ICJ's intrusion into state proceedings).

impermissibly contradicting not only procedural fixtures such as the procedural default rule, but also other procedural mandates in U.S. courts.<sup>67</sup>

#### E. *ERIE* AND ITS EFFECT ON AMERICAN JURISPRUDENCE

At first blush, *Erie R.R. Co. v. Tompkins* appears to bear little relation to *Medellín* or provide little possibility for insight into analyzing the effect of ICJ decisions on domestic cases. However, analysts of *Erie* have acknowledged that pre-*Erie* federal courts' application of federal general common law bears resemblances to modern federal courts' application of customary international law.<sup>68</sup> This Comment employs similar analyses used by the *Erie* Court in the context of international decisions, and thus review of *Erie* and its landmark significance will provide helpful background.

*Erie* involved a diversity suit by Tompkins, a citizen of Pennsylvania, brought against a railroad company based in New York, for an injury that Tompkins sustained by a passing train that hit him while he walked along a railroad track.<sup>69</sup> Before *Erie*, *Swift v. Tyson* allowed federal courts hearing diversity cases to apply federal general common law if the state had no applicable statutory provision governing the situation.<sup>70</sup> *Erie* overturned *Swift* and established a new framework, commanding federal courts to abandon federal general common law, and instead apply the applicable state common law.<sup>71</sup> *Erie* itself illustrates the problem with the *Swift*

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67. See *id.* at 2686 (concluding that the ICJ interpretation “sweeps too broadly”). The Court also notes that to allow such an interpretation would mean that giving the VCCR “full effect” essentially precludes any requirement that that full effect be in conformity with the laws of the receiving State, a mandate also prescribed by the VCCR. *Id.*

68. Phillip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939) (examining *Erie*'s applicability to international law).

69. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 69 (1938).

70. See *Swift v. Tyson*, 41 U.S. 1, 18-19 (1842) (interpreting the Rules of Decision Act to command federal courts to apply state statutory law and interpretations of that law, but that “[i]t never has been supposed by us, that the [Rules of Decision Act] did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes . . .”).

71. *Erie*, 304 U.S. at 79-80 (overruling *Swift* as an “unconstitutional assumption of powers” by federal courts to decide questions of substantive state law).

doctrine: under *Swift*, if Tompkins brought his suit in Pennsylvania state court, he would have lost, but by bringing it in New York federal court, he had a chance (which proved successful at the trial level) to recover damages if that court adopted a different rule than the Pennsylvania Supreme Court.<sup>72</sup>

Concurring in *Erie*, Justice Reed famously noted that “[t]he line between procedural and substantive law is hazy but no one doubts federal power over procedure.”<sup>73</sup> Though this comment proved true, in the years that followed the Court grappled with defining the substance-procedure distinction precisely.<sup>74</sup> Delving into the intricacies of this distinction is beyond this Comment’s scope, but the *Erie* doctrine nevertheless illustrates that a substance-procedure distinction is a workable basis for establishing what rules of law a court must follow in the international arena.

## II. ANALYSIS

Prior to the Court’s decision in *Medellín*, legal scholars speculated as to how the Supreme Court should handle the case.<sup>75</sup> Many writers did not seem completely satisfied with the prospect of a ruling either for *Medellín* or for rejection of a remedy on his behalf.<sup>76</sup> By deciding

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72. See *id.* at 74-75 (discussing several problems associated with the *Swift* doctrine, including the reality that the non-citizens, bringing a diversity suit, had the privilege of choosing different, unwritten laws by virtue of their option of where to bring a suit); see also Armistead Dobie, *Seven Implications of Swift v. Tyson*, 35 COM. L. LEAGUE J. 329, 329 (1930) (entreating that someday *Swift* “may also find itself in the Wordsworthian limbo of ‘old unhappy far off things, And battles long ago’”).

73. 304 U.S. at 92 (Reed, J., concurring).

74. See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945) (agreeing, in principle, that federal courts have power over procedure, but explaining that substance and procedure are not separated by any “great divide”); see also *Hanna v. Plumer*, 380 U.S. 460, 468-71 (1965) (discussing situations in which a Federal Rule of Procedure may have an outcome-determinative effect, and deciding that as long as a Rule is a legitimate extension of the Enabling Act and the Constitution, it still regulates procedure regardless of the outcome-determinative effect).

75. See Glenn Harlan Reynolds, *Looking Ahead: October Term 2007*, CATO SUP. CT. REV. 2006-2007, at 335, 342 (describing the nature of the legal questions in *Medellín* and the likelihood of a multitude of opinions from the justices).

76. See Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/uncategorized/analysis-how-to-say-no-to-the-president/> (Oct. 10, 2007, 14:19 EST) (providing a forum for others to discuss their thoughts on the *Medellín* oral arguments, viewed by some people as leading to two equally

the case on a theory of non-self-execution, the Court temporarily avoided reconciling these concerns. The discomfort that scholars exhibited prior to the decision in *Medellín*, however, goes towards a deeper concern over how to treat decisions by the ICJ and similar courts when those decisions appear to dictate certain domestic behavior.<sup>77</sup>

A. HISTORICALLY, THE U.S. SUPREME COURT HAS ACCORDED ICJ DECISIONS SOME WEIGHT, DESPITE THE COURT'S PORTRAYAL OF ITS PRIOR TREATMENT IN *SANCHEZ-LLAMAS*

The Supreme Court's precedent establishes that U.S. courts should give "respectful consideration" to ICJ decisions.<sup>78</sup> In both *Breard* and *Sanchez-Llamas*, however, the Supreme Court has, after very little consideration, completely ignored ICJ interpretation.<sup>79</sup> The Court

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troubling possibilities: a foreign court has supremacy over the Supreme Court or, if the Supreme Court rules the other way, the Supreme Court's possible stripping of the President's and Congress' powers to make effective and binding treaties).

77. See John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 FORDHAM INT'L L.J. 552, 564 (2006) (observing that domestic VCCR litigation frequently raises the issue of a proper remedy for violation of treaty rights); see also Michael Franck, Note, *The Future of Judicial Internationalism: Charming Betsy, Medellín v. Dretke, and the Consular Right Dispute*, 86 B.U.L. REV. 515, 519 (2006) (hoping incorrectly that part of the importance of *Medellín* would lie in its confrontation of the contentiousness of foreign precedent application in domestic law); discussion *infra* Part II.B (explaining the significance of prior interpretations of foreign law as applied to binding foreign precedent and discussing the correct application of the Supremacy Clause as it relates to treaties).

78. See *Breard*, 523 U.S. at 375 (positing the notion that "while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State"); see also *Sanchez-Llamas*, 126 S. Ct. at 2683 (agreeing that while "respectful consideration" is the appropriate degree of deference for an ICJ decision, that does not compel a particular result nor, in this case, require a revision of the Supreme Court's interpretation of the VCCR under *Breard*); *Medellín*, slip op. at 17 n.9 (majority opinion) (affirming that the decision in *Medellín* does not disrupt the "respectful consideration" standard first articulated in *Breard*).

79. See *Breard*, 523 U.S. at 375 (analyzing the VCCR provision, which allows a signatory country to implement all obligations in conformity with its laws, and determining that the provision supersedes any ICJ interpretation).

only briefly considered “respectful consideration” in *Medellin*.<sup>80</sup> Justice Breyer’s dissent in *Sanchez-Llamas* emphasizes that, though the Supreme Court apparently regards the use of ICJ decisions as persuasive precedent with disdain,<sup>81</sup> in fact the Supreme Court and lower courts frequently turn to ICJ decisions for guidance.<sup>82</sup> This section analyzes the Supreme Court’s prior treatment of international law generally and ICJ decisions specifically before proceeding to analyze how the Supreme Court ignored these practices in *Sanchez-Llamas*.

1. *The Supreme Court Has Cited and Followed Several Foreign Court and ICJ Decisions*

The Supreme Court most famously relied on international precedent in *Lawrence v. Texas*<sup>83</sup> and *Atkins v. Virginia*.<sup>84</sup> However, the Supreme Court’s citations to ICJ decisions are more applicable to this discussion.<sup>85</sup> The Supreme Court has in the past cited to several ICJ opinions, both to resolve territorial disputes,<sup>86</sup> as well as to

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80. See *Medellin*, slip op. at 17 n.9 (majority opinion) (explaining that since “nothing suggests that the ICJ views its judgments as automatically enforceable in the domestic courts . . .,” there does not seem to be any need to afford respectful consideration when determining the enforceability of ICJ decisions).

81. See *Sanchez-Llamas*, 126 S. Ct. at 2702 (Breyer, J., dissenting) (inferring from the majority in *Sanchez-Llamas* that it overlooked the opinion of the ICJ by viewing the interpretation as “clearly wrong”).

82. See *id.* at 2701-02 (Breyer, J., dissenting) (presenting an impressive list of Supreme Court and lower court decisions citing ICJ decisions as authority).

83. See 539 U.S. 558, 573 (2003) (explaining the deficiencies of *Bowers v. Hardwick* by comparing it to a foreign case with similar facts where the domestic law was considered invalid under the European Convention on Human Rights).

84. See 536 U.S. 304, 316 n.21 (2002) (turning to foreign jurisdictions, as well as the expert opinions of medical professionals, to examine whether the execution of the mentally retarded qualifies as cruel and unusual for purposes of the Eighth Amendment).

85. See *Sanchez-Llamas*, 126 S. Ct. at 2700 (arguing that the proposed weight given to ICJ decisions, one of “respectful consideration,” acknowledges the fact that the ICJ judges are respected experts in issues of treaty interpretation); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 103 cmt. b (1986) (proposing that since the ICJ gives significant weight to prior decisions, though they are not bound by them, domestic courts can view its decisions as representative of the state of international law and, accordingly, “[t]he judgments and opinions of the International Court of Justice are accorded great weight”).

86. See *United States v. Maine*, 475 U.S. 89, 99 (1986) (approving the method used by the ICJ in determining coastal boundary issues); *United States v.*

evaluate the common international understanding of a legal term in the context of a treaty.<sup>87</sup> This growing wealth of citations by the Supreme Court to international court decisions supports the notion that the Court increasingly looks beyond the territorial boundaries of the United States for guidance, especially when the Court confronts issues pertaining to matters of international law.<sup>88</sup>

Many scholars, including some Supreme Court Justices, vehemently oppose the use of foreign precedent.<sup>89</sup> Noted international law expert John Yoo, who argues fervently against anything but “ornamental” use of international court decisions to bolster domestic holdings, would likely argue that the Optional Protocol itself, because of its usurpation of domestic judicial power, violates the Constitution.<sup>90</sup> However, looking to foreign countries’

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Louisiana, 470 U.S. 93, 107 n.10 (1985) (describing the same ICJ case as “noteworthy”); *see also infra* notes 91-101 and accompanying text (discussing the charge of the *Sanchez-Llamas* majority that courts, with limited exceptions, only cite to ICJ opinions concerning technical border disputes).

87. *See Reid v. Covert*, 354 U.S. 1, 61 (1957) (using an ICJ decision as guidance for what constitutes a “dispute” under international law). Significantly, the Supreme Court in this case looked to the ICJ opinion to analyze how to interpret a term within a treaty, just as the Supreme Court in *Sanchez-Llamas* looked at, and subsequently ignored in *Medellín*, the definition of giving “full effect” to a person’s Article 36 rights. *Id.*

88. *See* Timothy K. Kuhner, *The Foreign Source Doctrine: Explaining the Role of Foreign and International Law in Interpreting the Constitution*, 75 U. CIN. L. REV. 1389, 1392 (2007) (expressing a positive view towards the application of international law in domestic courts, at least in the narrow analysis of cruel and unusual punishment cases). *But see* John Yoo, *Peeking Abroad?: The Supreme Court’s Use of Foreign Precedents in Constitutional Cases*, 26 HAWAII L. REV. 385, 392 (2004) (arguing that deference to an international court in any way amounts to the transfer of judicial power in a manner that violates the Constitution and separation of powers doctrine). Mr. Yoo also argues that allowing this deference forfeits any opportunity to retain accountability through the American democratic process. *Id.*

89. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (criticizing the majority for looking to foreign precedent and arguing for the total abandonment of the idea that the United States should conform to the laws of other countries). *But see* Charles Lane, *Scalia Tells Congress to Mind its Own Business*, WASH. POST, May 19, 2006, at A19 (explaining Scalia’s position that, while he rejects the use of foreign precedent in U.S. decisions, the Supreme Court should be free to do so if it chooses).

90. *See* Yoo, *supra* note 88, at 392 (noting that just as Congressional delegation of duties to a coordinate branch of government is unconstitutional, so too is delegation of judicial authority to an international adjudicatory body).

established domestic law for guidance on American domestic law, a practice U.S. courts already employ, is more radical than deferring to the ICJ in certain circumstances given the ICJ's expertise in international law.<sup>91</sup>

2. *The Supreme Court's Treatment of the ICJ's Decision in Avena Is Perfunctory and At Odds with Its Prior Practice*

The language of the majority in *Sanchez-Llamas* seems fearful of the concept of foreign influence in domestic jurisprudence.<sup>92</sup> Furthermore, the majority in *Sanchez-Llamas* attempts to dismiss the significance of Justice Breyer's list of court cases relying on ICJ decisions.<sup>93</sup> The majority has two main arguments to rebut Justice Breyer's statement that the Court frequently relies on ICJ decisions: first, that most of the decisions merely cite ICJ decisions, along with law review articles, for general propositions about international law;<sup>94</sup> and second, that almost all of Justice Breyer's cites concern ICJ references for only technical boundary issues.<sup>95</sup>

Both of these criticisms are less impressive than they initially appear. First, Justice Breyer does not contradict the majority's conclusion that the ICJ opinion in *Avena* is not binding, but instead argues that ICJ interpretation of the VCCR, a document that the Optional Protocol grants the ICJ jurisdiction over, be accorded some

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91. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (referencing the ideas of an international scholar, Philip Jessup, and acknowledging his subsequent position as an ICJ judge to implicitly give more credence to his opinions regarding international law).

92. See *Sanchez-Llamas*, 126 S. Ct. at 2683 n.4 (concluding with the comment that the "'respectful consideration' of precedent should begin at home"); see also *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (describing the majority's opinion and discourse on foreign precedent as "dangerous dicta," because of its potential to impose "foreign moods, fads, or fashions on Americans"). Justice Scalia joined in the majority of *Sanchez-Llamas*. 126 S. Ct. at 2673.

93. See *Sanchez-Llamas*, 126 S. Ct. at 2685 n.5 (observing that the dissent's list "is less impressive than [it] first appears" because many of the opinions cited in the dissent do not rely on ICJ decisions but merely cite them, and also observing that all but two of the cited decisions concern only "technical issues of boundary demarcation").

94. See *id.*; see also Yoo, *supra* note 88, at 387 (arguing that the citations of international precedent by the Supreme Court may be merely "ornaments" designed to make an opinion look more supported, when in fact such citations have no impact on the outcome of a case).

95. See *Sanchez-Llamas*, 126 S. Ct. at 2685 n.5.

deference in U.S. courts.<sup>96</sup> Thus, when decisions cite ICJ opinions with approval, regardless of whether the citation appears near citations to law review articles, courts have explicitly acknowledged the persuasive weight of relevant ICJ decisions.<sup>97</sup> In fact, as the *Sanchez-Llamas* majority points out, ICJ opinions only bind the litigants before the court in the specific dispute.<sup>98</sup>

In boundary dispute cases, the deciding court must make parallels between the facts of the ICJ case and draw analogies to the case at hand.<sup>99</sup> By contrast, since the facts in *Sanchez-Llamas* mirror the facts of the various ICJ decisions ruling on consular notification, including *Avena*, the Court need not draw such analogies or make such parallels.<sup>100</sup> Second, the criticism fails to note that many ICJ decisions, by their very nature, most frequently arbitrate technical boundary disputes.<sup>101</sup> Justice Breyer merely suggests, in cases involving non-binding ICJ decisions that provide persuasive authority, that the Supreme Court accord such decisions actual as

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96. See *id.* at 2696 (clarifying the holding of the ICJ in *Avena* in order to show that the Court in *Sanchez-Llamas* could have granted the purported “respectful consideration” while still maintaining the validity of its prior holding in *Breard*).

97. See, e.g., *Maine*, 475 U.S. at 99-100 (approving of ICJ rationale); see also *supra* notes 86-87 and accompanying text (discussing several cases in which the Supreme Court relied on, to at least some degree, decisions by the ICJ).

98. See *Sanchez-Llamas*, 126 S. Ct. at 2684 (admitting that the ICJ statute makes ICJ decisions binding only on the particular parties in a particular case to support the proposition that *Avena* was not binding on the parties currently before the Supreme Court); *Medellín*, slip op. at 22 (Breyer, J., dissenting) (asserting that the holding in *Sanchez-Llamas* has no relevance in this case because this case involves a party whose case Mexico specifically advocated for in front of the ICJ, and “[i]t is in respect to these individuals that the United States has promised the ICJ decision will have binding force”).

99. See *Maine*, 475 U.S. at 99-100 (drawing an explicit comparison between the method of boundary demarcation used in an ICJ case, an Indian case, and the case at hand between Massachusetts and Maine).

100. See *Sanchez-Llamas*, 126 S. Ct. at 2677-78 (discussing the procedural history relating to Bustillo’s claim of an Article 36 violation).

101. See Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT’L L. 434, 436-56 (2004) (reporting on many of the ICJ cases in the last two decades, the vast majority of which concern some form of border or territorial dispute); see also 2007 ICJ Docket, <http://www.uni.edu/ihsmun/resources/docket2007.pdf> (displaying the cases under consideration before the ICJ in 2007, all but one of which concern territorial disputes).

opposed to perfunctory consideration, and the above factors make this approach more persuasive.<sup>102</sup>

While the majority in *Sanchez-Llamas* attempts to dismiss ICJ decisions almost without a second thought,<sup>103</sup> the Supreme Court actually does a disservice to the precedent by doing so.<sup>104</sup> First, the Supreme Court has already relied on foreign court decisions to guide its consideration of important constitutional issues.<sup>105</sup> Second, though the Supreme Court attempts to note the limited use of ICJ decisions in past Supreme Court jurisprudence such prior usage required the Court to draw more inferences than in VCCR cases such as *Medellín*.

B. THE ICJ DECISION IN *AVENA* REPRESENTS A BINDING DECISION WITH RESPECT TO ITS INTERPRETATION OF INTERNATIONAL SUBSTANTIVE LAW

Despite indications that the Supreme Court, by deciding *Medellín*, would resolve the conflict between *Sanchez-Llamas* and *Avena*, the Court avoided answering the questions facing it: whether the VCCR provides an individual right of action and how to reconcile any

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102. See *Sanchez-Llamas*, 126 S. Ct. at 2702 (Breyer, J., dissenting) (indicating that the Supreme Court could give the ICJ decision its proper weight, but instead the majority “overlooks what the ICJ actually said, overstates what it actually meant, and is inconsistent with what it actually did”).

103. See *id.* at 2703 (Breyer, J., dissenting) (asking how the Supreme Court can purport to give an ICJ decision “respectful consideration,” when, in fact, it misreads the ICJ decision and implies an “extreme rule of law.”). But see Margaret McGuinness, *Sanchez-Llamas, American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47, 58-59 (2007) (suggesting that because the Supreme Court stopped short of denying an individual right stemming from the VCCR, Justice Roberts’ opinion was not such an “extreme rebuke of internationalism” as many observers believe).

104. See *Sanchez-Llamas*, 126 S. Ct. at 2703 (Breyer, J., dissenting) (suggesting that to show the appropriate respect to an ICJ decision, the Supreme Court must “read the opinions in light of the Convention's underlying language and purposes and ask whether, or to what extent, they require modification of a State's ordinary procedural rules”).

105. See Yoo, *supra* note 88, at 386 (pointing out with disappointment that Supreme Court citations to foreign court decisions may not be purely ornamental because such ornamentation would not warrant the open hostility of those justices opposed to the citations and because of the growing movement in academic communities encouraging the Court to engage in a dialogue with foreign nations’ judicial systems).

future, binding ICJ opinions with conflicting domestic law.<sup>106</sup> The ICJ decision in *Avena*, and to a lesser extent its decision in *LaGrand*, directly contradict the Supreme Court's holding in *Sanchez-Llamas*.<sup>107</sup> Only the Supreme Court, at some point in the future, can resolve this contradiction by overruling its decision in *Sanchez-Llamas*, recasting its explicit holding, or ignoring the decision of the ICJ completely.<sup>108</sup>

In fact, the Court could resolve this conflict by adhering to the precedent it established under *Sanchez-Llamas* while at the same time remaining faithful to the United States' commitments under both the VCCR and the Optional Protocol.<sup>109</sup> Because the Supreme Court has historically recognized the authority of international bodies, the Court's own precedent dictates that it should not entirely turn its back on the international community when, in the future, it faces self-executing or congressionally implemented treaties.<sup>110</sup> Rather, to maintain consistency with its own precedent in this emerging body of case law, the Court could formulate its

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106. See *Medellín v. Dretke*, 544 U.S. 660, 672 (2005) (Ginsburg, J. concurring) (foreseeing that the Supreme Court would eventually revisit *Medellín* after further review by the Texas court); see also *Sanchez-Llamas*, 126 S. Ct. at 2677 (asserting that because the Court could decide the case on other grounds, it should refrain from answering the question of whether the VCCR grants individually enforceable rights).

107. See *Sanchez-Llamas*, 126 S. Ct. at 2687 (concluding that rules of procedural default may bar a petitioner from raising a VCCR claim); see also *Avena*, 2004 I.C.J. 128, ¶ 113 (deciding that in certain cases the rule of procedural default directly prevents the United States from giving full effect to the VCCR, thus placing the United States in violation of its treaty commitments); *LaGrand*, 2001 I.C.J. 104, ¶ 125 (maintaining that the United States must grant review and reconsideration in a manner of its own choosing); Ray, *supra* note 13, at 1741 (acknowledging that, in all the past VCCR litigation, courts were reluctant to provide suppression of evidence as a remedy stemming from an Article 36 violation); Keasler, *supra* note 11, at 1174 (eschewing suppression as a "vastly disproportionate remedy" (quoting *Sanchez-Llamas*, 126 S. Ct. at 2681)).

108. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 450 (1998) (arguing that the Supreme Court should radically limit the treaty power and the extent to which it can create federal law).

109. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (discussing the advantages of *stare decisis* and the relevant inquiry when deciding whether to adhere to prior case law, provided that the prior rule of law proves workable).

110. See *Sanchez-Llamas*, 126 S. Ct. at 2692-93 (Breyer, J., dissenting) (counseling the Court to give effect to a decision that, while not binding in the instant case, involved very similar facts to a case previously adjudicated by the ICJ, which has recognized expertise in and authority over the VCCR).

international tribunal jurisprudence and grant the ICJ, or other international tribunals, the power to review the narrow issues arising directly from the treaty over which that tribunal has review power.<sup>111</sup> Though the Optional Protocol does allow for ICJ review of application of the VCCR, that grant does not automatically confer broad oversight power,<sup>112</sup> something the Court, rightfully, seems extremely fearful of.<sup>113</sup>

1. *The ICJ Has Authority to Conclusively Rule on Interpretation of the VCCR Itself*

Article 36 calls for countries to inform arrested foreign nationals “without delay” of their consular rights, creating the need for implementing measures.<sup>114</sup> These implementing measures would exist even after Congressional implementation of Article 94(1) or a reversal from the Court on the matter of self-execution. The future need for this implementation poses the problem, because Article 36 necessarily requires state action—the treaty itself requires a state to perform a function to accomplish the treaty’s purpose.<sup>115</sup>

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111. See Optional Protocol, *supra* note 4, art. 1 (providing that states ratifying the VCCR thereby consent to jurisdiction for “[d]isputes arising out of the interpretation or application of the Convention”). Though “application” could be read as a broad grant of power to review all issues arising under the VCCR, signing countries of the Optional Protocol would likely not have conceded such far-reaching power to the ICJ. *Id.*

112. See Martin Rogoff, *Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice*, 58 ME. L. REV. 406, 406 (2006) (discussing that although domestic enforcement of treaty obligations is mandatory, the method for that enforcement is traditionally left up to the state); see also *infra* notes 141-52 (outlining an analogy to *Erie* and discussing the notion that the Optional Protocol conferred some limited authority to the ICJ).

113. See *infra* note 124 and accompanying text (discussing the United States’ fear that a supranational court could operate as a court of criminal appeals with final, unreviewable say on important legal issues).

114. See Cyril Emery, *Treaty Solutions from the Land Down Under: Reconciling American Federalism and International Law*, 24 PENN ST. INT’L L. REV. 115, 134 (2005) (explaining that because Article 36 requires officials to notify foreign nationals of their right to consular assistance, the treaty requires some level of implementation); see also Reynolds, *supra* note 75, at 342 (criticizing the absence of legislation to address the duties of state and federal courts in cases involving arrested foreign nationals).

115. See *Medellin*, slip op. at 4 (Stevens, J., concurring) (imposing on the states the responsibility to uphold American treaty commitments); Emery, *supra* note

The conflict between the ICJ and the Supreme Court in *Sanchez-Llamas* (but not *Medellín*, as the Court does not reach the issue of interpreting the VCCR and thus avoids the conflict altogether) arises out of a difference in point of view. Since the VCCR requires both full effect and conformity with local laws and regulations (subject to the condition that local laws and regulations may not prevent that full effect), implementing Article 36 rights almost inevitably conflicts, on some occasions, with a forum state's laws.<sup>116</sup> Depending on the point of view, one could emphasize the "full effect" clause or the "in conformity with the laws" of the United States clause.<sup>117</sup> United States rules of procedural default do not, by themselves, contravene Article 36 of the treaty.<sup>118</sup> However, the ICJ does at times "tacitly disfavor" basic U.S. procedural methods.<sup>119</sup>

Additionally, *Sanchez-Llamas* did not address the two aspects of the ICJ's decision that constitute the sum total of *Avena's* VCCR analysis: the length of "without delay" and whether an individual receives a right of action stemming from Article 36 violations.<sup>120</sup> The remainder of *Avena* discusses application of the VCCR in U.S.

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114, at 133 (arguing that in light of recent Supreme Court cases, treaties requiring state implementation may run afoul of the anti-commandeering doctrine of *New York v. United States* and *Printz v. United States*).

116. See VCCR, *supra* note 3, art. 36(2) (subordinating the clause that permits countries to exercise their obligations in conformity with state laws and regulations to a separate proviso which mandates that those laws and regulations must enable full effect).

117. Compare *Avena*, 2004 I.C.J. 128, ¶ 139 (emphasizing that regardless of the standard due process rights in the United States, the United States must grant review and reconsideration to VCCR violations), with *Sanchez-Llamas*, 126 S. Ct. at 2686 (disagreeing with the ICJ interpretation, declaring it swept "too broadly," and essentially supplanting the VCCR's requirement that rights "shall be exercised in conformity with the laws and regulations of the receiving state").

118. See *LaGrand*, 2001 I.C.J. 104, ¶ 90 (explaining that the problem is not inherent in the rule of procedural default itself, but only when the rule does not allow detained individuals the opportunity to challenge a conviction because officials at no point informed him or her of Article 36 rights).

119. See *Ray*, *supra* note 13, at 1748 (commenting on the ICJ's proposition that it was immaterial whether a violation of Article 36 actually prejudiced the case, a finding that a domestic court would normally require prior to the institution of any remedy).

120. See *Sanchez-Llamas*, 126 S. Ct. at 2677 (finding it "unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights" because the petitioners would not be entitled to relief on any of the claims they raised regardless of the issue of enforceable rights).

courts.<sup>121</sup> *Medellin*, of course, made these considerations temporarily moot.

Claiming, as the ICJ has, that it can essentially review domestic court rulings in light of international law oversteps its mandate.<sup>122</sup> However, the Optional Protocol's grant of authority certainly allows the ICJ some room for interpretation of the treaty's provisions.<sup>123</sup> The Optional Protocol's grant of power to the ICJ, should U.S. courts be constrained by that grant, confines the ICJ to interpret only international substantive law; the grant of power does not allow the ICJ to act as an international court of criminal appeal.<sup>124</sup>

*Avena* contained three primary holdings.<sup>125</sup> Since two of these holdings interpret the language, purpose and effect of the VCCR, the ICJ has authoritative power to adjudicate those issues.<sup>126</sup> First, the ICJ ruled on the meaning of "without delay" in the VCCR.<sup>127</sup> The exact meaning of "without delay" in the VCCR is not defined, so the

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121. See *Avena*, 2004 I.C.J. 128, ¶¶ 111-112 (discussing the United States' rule of procedural default).

122. See *id.* ¶ 37 (noting the United States' objection that the ICJ could essentially operate as a court of criminal appeal if it found for Mexico). *But see* *Bulacio* Case, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 116-117 (Sept. 18, 2003) (marking an example of a foreign, international court superseding the procedural rules of a sovereign nation and preempting the effect of those procedures). In *Bulacio*, the Inter-American Court of Human Rights overruled a national court's decision to dismiss a criminal trial, on statute of limitation grounds, brought against authorities who had severely beaten a child. *Id.* ¶¶ 3(24)-(25). The logic of the Inter-American Court bears similarities to the ICJ's logic in *Avena*, that in some cases the nation's procedural rules did not enable a treaty to have full effect. See *id.* ¶¶ 162(4)-(5) (deciding that the state must enforce the terms of the treaty despite certain procedural bars, just as the ICJ found in *Avena* that the United States must enforce the VCCR in spite of the Mexican nationals' procedural default).

123. See Optional Protocol, *supra* note 4 (explaining the ICJ's power to interpret the VCCR).

124. Compare *LaGrand*, 2001 I.C.J. 104, ¶ 125 (requiring that the United States merely adopt some measure of review and reconsideration and thus limiting the scope of the ICJ's ruling to merely interpreting the effect of a VCCR term), with *Avena*, 2004 I.C.J. 128, ¶¶ 140-141 (mandating that the judicial branch conduct the review and reconsideration, and therefore expanding significantly the scope of the ICJ's requirement in *LaGrand*).

125. See Tranel, *supra* note 20, at 426-28.

126. See Optional Protocol, *supra* note 4.

127. See *Avena*, 2004 I.C.J. 128, ¶ 63 (finding that the term "without delay" means that authorities shall inform a foreign national of his or her rights under the VCCR as soon as they realize, or should have realized, the prisoner's citizenship).

ICJ, charged with interpretation of the treaty under the Optional Protocol, has authoritative interpretive power.<sup>128</sup> Second, the ICJ reiterated that the VCCR provides an individual cause of action in the courts of signatory states.<sup>129</sup> Again, the ICJ interpreted a term of the VCCR and reached a conclusion regarding exactly what rights the treaty conveyed.<sup>130</sup> Finally, the ICJ ruled that the United States must abandon rules of procedural default in order to provide adequate review and reconsideration.<sup>131</sup> This final decision impermissibly hijacks U.S. procedure,<sup>132</sup> and therefore exceeds the scope of the ICJ's power.<sup>133</sup>

2. *Although the Supreme Court Has Power to Interpret the Optional Protocol, It Does Not Have the Power to Interpret, and Thus Effectively Overrule, an ICJ Opinion Because ICJ Opinions Are Not Federal Law*

If the Supreme Court or Congress takes action to make the Optional Protocol and VCCR, or other like treaties, federal law under the Supremacy Clause, the Optional Protocol gives the ICJ binding authority to interpret the VCCR.<sup>134</sup> However, would that imply that

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128. *See id.* ¶ 30 (pronouncing that it is the ICJ's role to make findings on "question[s] of interpretation of the obligations imposed by the Vienna Convention").

129. *See id.* ¶ 40 (noting the United States' continual refusal to recognize an individual right stemming from the VCCR despite the ICJ's decision in *LaGrand*); *see also, LaGrand*, 2001 I.C.J. 104, ¶ 77 (concluding that the wording of Article 36, stating that a detained foreign national will be informed of "his rights," establishes that the drafters of the VCCR intended to create individual rights).

130. *See Cancio, supra* note 26, at 1071-72 nn.221-22 (noting that this would not be the first time the Supreme Court has recognized individual rights arising out of treaties).

131. *See supra* note 50 and accompanying text (relating the fact that the ICJ ruled that clemency proceedings instituted by the United States did not meet the requirements of the review and reconsideration mandated in *LaGrand*).

132. *See Sanchez-Llamas*, 126 S. Ct. at 2686. *But see LaGrand*, 2001 I.C.J. 104, ¶ 52 (disagreeing with the United States' claim that providing a remedy for Germany's claim would impermissibly implicate rules of domestic procedure).

133. *See Statute of the International Court of Justice* art. 36(2), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (defining the scope of the ICJ as one of interpretation of treaties at issue and of international law).

134. *Compare Sanchez-Llamas*, 126 S. Ct. at 2684 (invoking the famous *Marbury v. Madison* to assert the Supreme Court's power to "say what the law is" regarding enforceability and interpretation to bolster the point that the Supreme Court interprets federal law, which includes treaties), *with* Optional Protocol,

an ICJ opinion is also federal law, given that the ICJ's power to decide cases arises from a federal law itself?<sup>135</sup> If ICJ opinions were federal law, the Supreme Court could reinterpret, or declare unconstitutional, what the ICJ said in *Avena*, thus eviscerating any power the ICJ had.<sup>136</sup>

The ICJ, on the other hand, claims with an equally strong argument that the Optional Protocol itself gives it authoritative power to decide and enforce as binding its interpretations of the VCCR.<sup>137</sup> If the Optional Protocol, or a treaty granting similar jurisdiction to the ICJ or another international court, becomes federal law through the Constitution's Supremacy Clause, that treaty's drafters could not have intended the Supremacy Clause to totally subsume the power given to the ICJ. Adopting such a framework would render any such treaty meaningless.<sup>138</sup> Given that under such a treaty scheme, both courts would have a role to play in adjudicating questions arising under the VCCR,<sup>139</sup> both courts must concede some ground to maintain the envisioned equilibrium.<sup>140</sup>

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*supra* note 4, art. 1 (providing the ICJ with jurisdiction over disputes arising out of the interpretation of the VCCR).

135. See Transcript of Oral Argument at 19, *Medellín v. Texas*, 127 S. Ct. 2129 (2007) (No. 06-984) (questioning whether the Court has the authority to question an ICJ ruling, or is merely obligated to enforce it).

136. See *id.* at 20 (implying that the agreement of the United States is to enforce the judgments of the ICJ and to interpret judgments to clarify ambiguities).

137. See *Avena*, 2004 I.C.J. 128, ¶ 28 (claiming that since the Optional Protocol granted jurisdiction to "determine the nature and extent of the obligations undertaken" in the VCCR, the ICJ necessarily has to examine domestic courts' compliance with international law).

138. See Optional Protocol, *supra* note 4, art. 1 (assigning to the ICJ the power to decide "[d]isputes arising out of the interpretation or application of the [VCCR]," a power which the Supreme Court seems to have stripped entirely).

139. See *Sanchez-Llamas*, 126 S. Ct. at 2684 (pointing out that ICJ decisions are binding only to the parties involved and in respect to their particular case); see also *id.* at 2700 (Breyer, J., dissenting) ("I will assume that the ICJ's interpretation does not bind this Court in *this* case.") (emphasis added). The majority in *Sanchez-Llamas* reiterates that ICJ decisions are accorded "respectful consideration" and then subsequently seems to completely ignore every aspect of its holding. See *supra* notes 81-82, 92-105 and accompanying text. At the very least, however, the majority recognizes that current precedent accords at least some weight to ICJ opinions, even if the ICJ has not decided a case regarding the parties before the Supreme Court. *Sanchez-Llamas*, 126 S. Ct. at 2683.

140. See Cancio, *supra* note 26, at 1066 (noting that the United States, in the Tehran hostage case, became the first country to invoke the binding effect of ICJ judgments).

An analogy can be drawn, discussed more fully below, to the decision in *Erie* and its interpretation of the Rules of Decision Act.<sup>141</sup> In *Erie*, the Supreme Court decided that the Rules of Decision Act precluded the Supreme Court from reviewing court made common law.<sup>142</sup> In other words, the Supreme Court interpreted a federal law to mean that state-made law was unreviewable by any federal court, including the nation's highest Court.<sup>143</sup> The logic for this lies in the fact that state courts are better suited to determine their own law than a federal court would be.<sup>144</sup> If Congress elects to implement the Optional Protocol, or a similar treaty, a faithful interpretation of it reveals that Congress' enactment has, in effect, deferred the interpretation of international law to a supranational adjudicatory body, namely the ICJ, in certain circumstances.<sup>145</sup>

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141. See *Erie*, 304 U.S. at 78 (deciding that federal courts must apply all state law, whether statutorily enacted or judicially derived).

142. See *id.* at 80 (observing that the courts have invaded too far into the rights reserved for the states).

143. See Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 875-77 (2007) [hereinafter *The Continuing Relevance of Erie*] (discussing how under *Swift v. Tyson*, a federal court could disregard a state court's application of state law, but after *Erie*, federal general common law ceased to exist and federal courts had no power to declare "substantive rules of common law applicable in a [s]tate").

144. See *Erie*, 304 U.S. at 92 (stating that no one doubts the right of the federal courts to assert their own procedure).

145. Compare Rules of Decision Act, 28 U.S.C. § 1652 (1948) (requiring that state laws, interpreted by *Erie* to mean the common law in addition to statutory law, "shall be regarded as rules of decision . . ." and thus referring federal courts to judge made state common law), with Optional Protocol, *supra* note 4, art. 1 (mandating that "[d]isputes arising out of the interpretation . . . of the [VCCR] shall lie within the compulsory jurisdiction of the [ICJ] . . ." and therefore implicitly requiring that those decisions will be honored in each jurisdiction) (emphasis added). See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 103 cmt. b (1986) (emphasizing the expertise of the ICJ in international matters, the great weight accorded its opinions, and, perhaps most importantly, the general absence of "national interest or bias" in ICJ opinions because of its supranational character).

### III. THE SUPREME COURT SHOULD ADOPT AN INTERNATIONAL *ERIE* DOCTRINE TO EVALUATE PURPORTEDLY BINDING DECISIONS BY INTERNATIONAL TRIBUNALS SUCH AS THE ICJ

Scholars have written about *Erie* almost ad nauseam, to the point where it seems difficult to add anything new.<sup>146</sup> However, no one has yet connected the framework used in *Erie*, binding federal courts to state common law, to establish a similar framework for international law.<sup>147</sup> This Comment has, in essence, already argued for an International *Erie* doctrine to govern analysis of ICJ decisions, and possibly future international adjudicatory bodies' decisions that have presumptively binding authority. Though characterizing the relational authority of the ICJ vis-à-vis the United States in terms of an "International *Erie*" theory may seem radical, in truth, it offers a method to harmonize current case law in the Supreme Court with the understanding of international legal scholars.<sup>148</sup> This section explores the Supreme Court's option of providing a workable framework for courts to consider future international bodies' dispositions of cases by asserting an International *Erie* doctrine.

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146. See The Continuing Relevance of *Erie*, *supra* note 143, at 874 (introducing the concepts of *Erie* and noting that issues in *Erie* have been "widely discussed").

147. See *id.* at 872 (suggesting that *Erie* has implications for what courts may do with international law in a domestic setting, in terms of providing federal question jurisdiction or authority to overturn state law, but not addressing the issue of whether foreign courts may have binding effect, through an *Erie* analogy, to have authoritative force on customary international law).

148. See *id.* at 879 (explaining the current understanding of *Erie* still allows for the application of federal common law in cases such as *Banco Nacional de Cuba*, in which the Court derived its power to apply the act of state doctrine because its ruling concerned an historically federal sphere: foreign affairs); see also *Banco Nacional de Cuba*, 376 U.S. at 425 (referring to the opinion of then-Professor Jessup in order to legitimize its federal common law analysis); Susan L. Karamanian, *Briefly Resuscitating the Great Writ: The International Court of Justice and the U.S. Death Penalty*, 69 ALB. L. REV. 745, 747 (2006) (suggesting that the uproar and controversy over international law in United States courts may be much ado about nothing); Kevin M. Clermont, *Federal Courts, Practice & Procedure: Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 18 (2006) (hypothesizing that in fact the principles of *Erie* have given way in the context of international disputes, which by extension would allow room for clarification of the relation to *Erie* in the international context).

Even post-*Medellín*, the Supreme Court faces a conflict between its current holdings and ICJ decisions which will at some point likely have binding effect on the Supreme Court. The primary holding of *Sanchez-Llamas* is that U.S. courts do not need to adapt their procedure to comply with ICJ decisions.<sup>149</sup> Expounding a theory of International *Erie* would retain the essential holding of *Sanchez-Llamas* while still maintaining room to give effect to what the Supreme Court can characterize as the essential holding of *Avena*. Though the Mexican nationals themselves would likely argue that the primary holding of the ICJ in *Avena* was that the United States may not apply rules of procedural default, the Supreme Court may instead describe the essential holding as concerning solely an individual's right of action under the VCCR and the meaning of "without delay."<sup>150</sup>

Looking at the ICJ decision after announcing the concept of an International *Erie*, its application would have been, and still may one day be, easy. The Supreme Court could simply say that the ICJ exercises a valid power when it interprets the substantive international law provisions of a treaty. However, just as in *Erie*, federal courts retain the power to employ their own federal rules of procedure, so both state and federal courts retain the power to employ local rules of procedure, even in the international context.<sup>151</sup> Thus, the Supreme Court may ignore the ICJ's interpretation of

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149. See *Sanchez-Llamas*, 126 S. Ct. at 2687 (holding that procedural default rules apply with the same force and effect to Article 36 claims as they do to any other federal-law claims).

150. See *Avena*, 2004 I.C.J. 128, ¶ 122 (reaffirming that the case before the ICJ concerns not the guilt or innocence of any of the parties, but rather interpretation of Article 36 claims). The ICJ notes that its "task is to determine what would be adequate reparation." *Id.* ¶ 121. However, given that any such reparation must be in accordance with the laws and regulations of the receiving state, the extent to which the ICJ can mandate reparations is limited. *Id.*

151. See John B. Corr, *Thoughts on the Vitality of Erie*, 41 AM. U. L. REV. 1087, 1105 (1992) (explaining that while major cases interpreting *Erie* theoretically establish a utilitarian method of applying the substantive law and procedural law distinction, significant uncertainty persists regarding the applicability of various procedural rules in individual cases).

proper “review and reconsideration” because that aspect of the holding infringes on domestic procedural law.<sup>152</sup>

## CONCLUSION

While *Medellin* threw the role of the treaty in domestic law into upheaval, even members of the majority recognized the continuing importance of U.S. international commitments in domestic law.<sup>153</sup> Undeniably, the progression of ICJ cases from *Breard* through *LaGrand* and finally to *Avena* increased the tension between domestic courts’ interpretation and the ICJ’s interpretation of the VCCR, and thus the tension between the United States’ international commitments and domestic enforcement. The International *Erie* doctrine explored in this Comment would provide the Court with workable approach to maintain domestic authority over issues of international law while still incorporating the binding and valid interpretation of that law by international tribunals. While, the Supreme Court avoided resolving this tension in *Medellin*, thus leaving the difficult issue for a future Court, the recurring nature of this issue makes it unlikely that *Medellin* permanently put the matter to rest. The Court should consider the International *Erie* doctrine as a theory that could finally allow for the settlement of this issue conclusively.

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152. *Cf. Erie*, 304 U.S. at 92 (asserting the federal courts’ supreme right over procedural law, even when bound by the Constitution to apply a different substantive law).

153. *See Medellin*, slip op. at 6 (Stevens, J., concurring) (labeling the issue at stake in *Medellin* as “the honor of the Nation” and advising Texas to seriously consider fulfilling American obligations as the ICJ enunciated).