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CASENOTE

MEDELLÍN V. TEXAS: THE TREATIES THAT BIND

I. INTRODUCTION

Determining the domestic effect of international treaties has long provided fodder for scholarly debate. Recently, that debate grew into a legal and international relations nightmare for the United States. The Supremacy Clause states, "[A]ll 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."[1] Unfortunately for lawyers and foreign nations alike, simplicity in text does not lead to comprehensibility in practice.[2] The United States' system of checks and balances and the separation of powers doctrine greatly complicate who may give domestic effect to treaties and exactly what that effect will be.[3] Recently, in *Case Concerning Avena and Other Mexican Nationals*, the International Court of Justice ("ICJ") asked the United States to review and reconsider the state court cases of several Mexican nationals whose Vienna Convention rights had been violated.[4] In a memorandum, President Bush directed state courts to "give effect to the decision."[5] These events

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1. U.S. CONST. art. VI, cl. 2.

2. *See* Penny J. White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)*, 71 U. CIN. L. REV. 937, 937 (2003).

3. *See id.* at 938–40.

4. *Case* Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 14, 72 (Mar. 31).

5. Memorandum for the Attorney General on Compliance with the Decision of the International Court of Justice in Avena (Feb. 28, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050228–18.html [hereinafter President's Memorandum]; *see also* Petition for Writ of Certiorari at app. 187a, Medellín v. Texas, 128 S. Ct.

created a "perfect storm" that tested the limits of federalism, executive power, preemption, and international treaty obligations.[6]

In *Medellín v. Texas*, the Supreme Court of the United States attempted to untangle this web of legal doctrines, finding that neither an ICJ judgment nor a presidential directive could overrule state procedure.[7] Part II of this note addresses the many complex issues involved in *Medellín*, including the breadth of executive power, the nature of the Vienna Convention, and courts' interpretations of the United States' obligations under that agreement. Part III reviews the posture of the *Medellín* decision. Part IV analyzes the majority, concurring, and dissenting opinions in this case. Part V discusses Medellín's case after the Supreme Court decision and his ultimate execution by the State of Texas. Finally, Part VI addresses the potential effects of *Medellín* and the questions the decision left unanswered.

II. HISTORY

A. *The Executives' Treaty Enforcement Power*

Any analysis of executive power must begin with Justice Jackson's "tripartite scheme" from *Youngstown Sheet & Tube Co. v. Sawyer*.[8] According to Justice Jackson, executive power falls into three categories, from the most certain grants of presidential power to the least—when the President acts under express Congressional authorization,[9] when the President acts using his own independent powers,[10] and when he acts in direct conflict with

1346 (2008) (No. 06-984).

6. Indeed, "*Medellín v. Texas* could be a law-school exam unto itself. It touches on the separation of powers and the supremacy clause, international treaties and state criminal codes, federalism and the reach of the president's diplomatic authority, all wrapped up in fundamental questions about the scope of judicial review." Dahlia Lithwick, *Texas Holds Him: Leave It to Texas to Put a Stop to Executive Overreaching*, SLATE, Oct. 10, 2007, http://www.slate.com/id/2175648.

7. *Medellín*, 128 S. Ct. at 1353 (2008).

8. *See id.* at 1368 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring)).

9. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

10. *Id.* at 637 ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone

the will of Congress.[11] Regarding the President's power in foreign affairs, the President certainly may "make treaties."[12] In addition, Article II of the Constitution also gives the President the power to "take Care that the Laws be faithfully executed."[13] However, whether these Article II powers imply a power to domestically enforce such treaties is much less certain.[14]

B. *Supremacy Clause and Development of the Self-Executing/ Non-Self-Executing Treaty*

The framers wrestled with what effect treaties should have upon domestic law and who should have the power to enter into and execute international agreements.[15] Federalists urged that the Supremacy Clause was necessary for the United States to act as one with respect to other nations.[16] Internal strife, they argued, would deter nations from entering into treaties with the United States.[17] Anti-Federalists criticized the Supremacy Clause as an unchecked authorization of power.[18] These critics

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of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.").

11. *Id.* at 637–38 ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . . Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.").

12. U.S. CONST. art. II, § 2.

13. *Id.* art. II, § 3.

14. *Compare* Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 340 (2006) ("From its text, context, and foundational principles, the Constitution refutes any claim of an inherent, discretionary executive power to enforce international law."), *with* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 402 (2008) ("[T]he Constitution's Take Care Clause confers limited authority on the President as a function of his duty to enforce treaty obligations.").

15. *See* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2040 (1999).

16. *See* Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 39 (2005) (quoting THE FEDERALIST No. 42, at 260 (James Madison) (Clinton Rossiter ed., 1961)); *see also* Ryan D. Newman, Note, *Treaty Rights and Remedies: The Virtues of a Clear Statement Rule*, 11 TEX. REV. L. & POL. 419, 433–34 (2007) ("After all, if treaties do not act directly on individuals, do not have compulsive force beyond diplomacy or war, and are not enforceable in domestic courts, then how can governments ensure treaty compliance within their borders?").

17. Glashausser, *supra* note 16, at 39 (citing THE FEDERALIST 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

18. Yoo, *supra* note 15, at 2042 (citing Letter IV from Federal Farmer (Oct. 12, 1787), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 43–44 (John P. Kaminski & Gaspare J. Saladino eds., 1983)).

also warned of the danger of combining the power to legislate and the power to make treaties.[19] As a check on this feared, unbounded power, George Mason proposed that for any treaty to have domestic effect, legislation was required.[20] Though scholars disagree on the significance of such a proposal, such debates laid the foundation for the controversy over the domestic effect of international agreements.[21]

The distinction between self-executing and non-self-executing treaties appeared early in our nation's history. In *Foster v. Neilson*, Chief Justice Marshall famously stated that a treaty is

> equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[22]

The first treaty Justice Marshall describes is a self-executing treaty.[23] The latter description refers to a non-self-executing treaty.[24] In order to determine how to classify a particular treaty, courts look to both the treaty itself and the circumstances of its ratification.[25] Though this appears to be a straightforward model for the domestic enforcement of treaties, recent jurisprudence regarding the Vienna Convention on Consular Relations ("Vienna Convention") proves domestic treaty enforcement is anything but simple.

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19. *Id.* at 2043.

20. *Id.*

21. *Compare id.* at 2074 ("While the Supremacy Clause declared the superiority of treaties to state law, the Framers did not understand it to override the separation of powers principle that treaties that sought to have a domestic, legislative effect could not take effect without congressional implementation."), *with* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. Rev. 2095, 2152 (1999) ("The ratification debates reveal Antifederalist nervousness . . . yet this opposition was neither strong, united, nor sophisticated.").

22. 27 U.S. (2 Pet.) 253, 314 (1829). The case involved a title dispute over land originally ceded to the United States in a treaty between France and Spain. *Id.* at 254–55.

23. *See* Medellín v. Texas, 128 S. Ct. 1346, 1356 (2008) (citing *Foster*, 27 U.S. at 314).

24. *Id.* ("When, in contrast, '[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.'") (alteration in original) (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

25. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111(3)–(4) (1987); *see also* Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 579 (2007) ("[C]ourts have created multiple-part tests designed to tell the difference between a treaty intended to be self-executing and its non-self-executing brethren.").

C. *The Vienna Convention and Discerning the Limits of a Treaty's Domestic Effect*

The United States ratified the Vienna Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention ("Optional Protocol") in 1969.[26] Delineating duties, privileges, and immunities of consulates in foreign nations, the Vienna Convention serves to facilitate relationships among nations, "irrespective of their differing constitutional and social systems."[27] Article 36(1)(b) of the Vienna Convention states that the treaty parties must timely inform a person's consulate should that person be detained in a foreign country and must "inform the [detainee] without delay of his rights" to request assistance from the consul of his own state.[28] In addition, parties to the Optional Protocol agreed that disputes arising from the Vienna Convention "shall lie within the compulsory jurisdiction of the International Court of Justice."[29] The United States, by signing the Optional Protocol, assented to the specific jurisdiction of the ICJ for claims arising under the Vienna Convention.[30]

The ICJ and Article 36's effect on domestic criminal procedure gave rise to *Breard v. Greene*.[31] There, the Court held Breard had procedurally defaulted on his Vienna Convention claim because he did not raise the claim during his initial criminal proceeding.[32] While the Court noted it "should give respectful consideration" to

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26. *Medellín*, 128 S. Ct. at 1353.

27. Vienna Convention on Consular Relations, Apr. 24, 1963 21 U.S.T. 77, 79, 596 U.N.T.S. 261, 262 [hereinafter Vienna Convention].

28. Vienna Convention, *supra* note 27, art. 36(1)(b).

29. Vienna Convention on Consular Relations, Optional Protocol concerning the Compulsory Settlement of Disputes, art. I., Apr. 24, 1963, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488.

30. *Medellín*, 128 S. Ct. at 1354. However, in 2005, the United States withdrew from the Optional Protocol, after the ICJ's decision in *Avena*. *Id.*

31. 523 U.S. 371 (1998). Breard, a citizen of Paraguay, was convicted in Virginia of attempted rape and murder and sentenced to death. *Id.* at 372–73. In his petition for habeas relief, Breard claimed his Vienna Convention rights had been violated as he had not been notified of his right to inform his consulate. *Id.* at 373. Paraguay brought the case before the ICJ, where the ICJ "request[ed] that the United States 'take all measures at is disposal to ensure that . . . Breard is not executed pending the final decision in these proceedings.'" *Id.* at 374.

32. *Id.* at 375. As the Court noted, "[i]t is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas." *Id.* (citing Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).

the ICJ's ruling, the United States' rules of procedure dictate the implementation of the Vienna Convention unless there is "a clear and express statement to the contrary."[33] Further, the Court implied that to allow Breard to raise his Vienna Convention claim at this stage in his proceedings would give him more rights than a United States citizen.[34] Even if Breard could raise such a claim, the Court found it unlikely he would be able to prove he was prejudiced because of a violation of his Vienna Convention rights.[35] Thus, while the Court looked unfavorably upon Virginia's decision to proceed swiftly with Breard's execution, the courts noted "nothing in . . . existing case law allows us to make that [decision for Virginia]."[36]

In the years following *Breard,* the ICJ issued two opinions regarding procedural default and the raising of Vienna Convention claims. As explained in *Sanchez-Llamas v. Oregon*, the ICJ held in the *LaGrand Case* that the procedural default rule "'prevented [courts] from attaching any legal significance' to the fact that the violation of Article 36 kept the foreign governments from assisting in their nationals' defense."[37] Based on this opinion, the ICJ issued its decision in *Avena*, requesting that the United States review and reconsider the cases of several Mexican citizens who were neither informed nor timely notified of their Vienna Convention rights.[38]

In *Sanchez-Llamas*, the Court ruled that these ICJ decisions did not "compel [it] to reconsider [its] understanding of the Convention in *Breard*."[39] Relying heavily on *Breard*, the Court stated that ICJ judgments cannot dictate domestic court opinions and noted the importance of procedural default rules in the United States' judicial system.[40] The Court again emphasized that such rules apply to all American citizens, and "[i]t is no slight to the

33. *Id.*

34. *See id.* at 376 ("[A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply.").

35. *Id.* at 377.

36. *Id.* at 378.

37. Sanchez-Llamas v. Oregon, 548 U.S. 331, 353 (2006) (alteration in original) (quoting *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 497 (June 27)).

38. Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 72 (Mar. 31).

39. *Sanchez-Llamas*, 548 U.S. at 353.

40. *Id.* at 354–57.

Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself."[41]

III. BACKGROUND OF THE *MEDELLÍN* CASE

In the most recent Vienna Convention case before the Supreme Court, José Ernesto Medellín, a Mexican national, claimed the United States violated his rights under the Vienna Convention in the course of his capital murder conviction.[42] During his arrest, police officers did not inform Medellín of his right to notify his consulate of his incarceration.[43] In his original trial, Medellín failed to raise this claim; instead, he initially raised it in his first application for relief—*after* his sentencing.[44] He exhausted his state and federal appeals, with all courts reaching the same conclusion: by failing to raise his Vienna Convention claim at trial, Medellín procedurally defaulted and therefore could not raise this claim in post-conviction or appellate proceedings.[45]

During the Medellín trial, the ICJ handed down its opinion in *Avena*, requesting that the United States review and reconsider the cases of fifty Mexican nationals who had not been properly informed of their Vienna Convention rights.[46] Following the ICJ decision, President George W. Bush issued a memorandum ("President's Memorandum"), stating that "the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity."[47] Medellín then filed a second habeas corpus petition in the Texas Court of Criminal Appeals, which held that the *Avena*

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41. *Id.* at 360.

42. *Medellín v. Texas*, 128 S. Ct. 1346, 1354 (2008).

43. *Ex parte* Medellín, 223 S.W.3d 315, 321 (Tex. Crim. App. 2006).

44. *See id.*

45. *See* Medellín v. Cockrell, No. H-01-4078, 2003 WL 25321243, at *11 (S.D. Tex., June 25, 2003); *id.* at *1 (summarizing prior decisions of the Texas Court of Criminal Appeals).

46. *Medellín*, 128 S. Ct. at 1355 (citing *Avena*, 2004 I.C.J. at 53–57, 72).

47. President's Memorandum, *supra* note 5. Interestingly, in *Sanchez-Llamas v. Oregon*, the Court noted the President's Memorandum did not take "the view that the ICJ's interpretation of Article 36 is binding on [United States's] courts." 548 U.S. 331, 355 (2006).

decision by the ICJ and the President's Memorandum did not create "binding federal law."[48]

In a six-three decision, the Supreme Court of the United Sates affirmed the Texas Court of Criminal Appeals' judgment.[49] Examining the relevant treaties and prior case law, the Court found nothing to suggest the *Avena* judgment was binding upon state courts.[50] The majority also held that the Executive could not unilaterally make such a judgment binding.[51] The dissent, however, viewed *Avena* as binding upon state courts because of the nature of the treaties from which such a judgment originated, as well as the possible international repercussions of failure to comply with an ICJ judgment.[52] In light of this view, dissenting Justice Breyer determined that analyzing the effect of the President's Memorandum was unnecessary.[53]

IV. ANALYSIS OF THE COURT'S DECISION

A. *Majority Opinion*

1. *Avena* Does Not Automatically Preempt State Law

Chief Justice Roberts drew a distinction between international legal obligations and binding federal law.[54] Noting the classification scheme for self-executing and non-self-executing treaties established by precedent, the majority noted that "while treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.'"[55] For the Court, the is-

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48. *Ex parte* Medellín, 223 S.W.3d at 352.

49. *Medellín*, 128 S. Ct. at 1372.

50. *Id.* at 1353.

51. *Id.* at 1371.

52. *Id.* at 1377, 1390–91 (Breyer, J., dissenting).

53. *Id.* at 1390–91.

54. *Id.* at 1356 (majority opinion).

55. *Id.* (quoting Igartúa-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)). As Justice Roberts noted, many definitions for "self-executing" and "non-self-executing" exist. For the purposes of this opinion, a "self-executing' [treaty] . . . has automatic domestic effect as federal law upon ratification. . . . Conversely, "a 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law. . . .

sue was not whether the Vienna Convention and its Optional Protocol create binding federal law (i.e. whether the treaty is self-executing), but rather whether the *Avena* judgment itself, through the United States's treaty obligations, has a binding effect upon the United States.[56] Without the requisite legislation to bind the United States to comply with the Optional Protocol, United Nations Charter, and ICJ Statute, the Court held, the judgment cannot automatically bind domestic courts.[57]

The Court consulted both the text and relevant drafting history to interpret the pertinent treaties.[58] When the United States signed the Optional Protocol and consented to ICJ jurisdiction for Vienna Convention disputes, it did not "agree to be bound" by such judgments.[59] Indeed, the Court noted that the Protocol does not specify the domestic repercussions of an ICJ decision, nor does it provide an enforcement mechanism for such judgments.[60] Instead, this obligation lies in Article 94 of the United Nations Charter ("U.N. Charter").[61]

Article 94(1) states that "[e]ach member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party."[62] Focusing on the language "undertakes to comply," the Court classified the U.N. Charter as a non-self-executing provision because "undertakes" connotes anticipated future action by the parties.[63] Indeed, if ICJ decisions automatically bound domestic courts, Article 94(2), which specifies remedies for noncompliance,[64] would be rendered superfluous.[65] The legislative history indicated the United States signed the U.N. Charter with this understanding in mind and therefore would never have expected ICJ judgments to be automatically enforcea-

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[and] depends upon implementing legislation passed by Congress" to have domestic effect. *Id.* at 1356–57 n.2.

56. *Id.* at 1357 n.4.

57. *Id.* at 1357.

58. *Id.*

59. *Id.* at 1358.

60. *Id.*

61. *Id.*

62. U.N. Charter, art. 94, § 1.

63. *Medellín*, 128 S. Ct. at 1358–59.

64. U.N Charter, art. 94, § 2. ("If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.").

65. *See Medellín*, 128 S. Ct. at 1359–60.

ble and thus binding on state and federal courts through the Supremacy Clause.[66] Article 94(2) "fatally undermine[d]" Medellín's case.[67]

The ICJ Statute sounded the final death knell for Medellín's automatic enforceability argument.[68] Article 59 of the statute stipulates that "'the decision of the [ICJ] has no binding force except between the parties and in respect of that particular case."[69] The United States and Mexico, not Medellín, were parties to the *Avena* case.[70] Therefore, the Court reasoned, *Avena* cannot dictate the outcome of Medellín's individual case.[71] Because none of these treaties require enforcing ICJ judgments in domestic courts, the United States is not bound by *Avena*.[72]

In reviewing the post-ratification understanding of the Vienna Convention, the Court focused on what the Convention parties did *not* understand at the time of signing.[73] The majority concluded that no signatory nation to the Vienna Convention viewed ICJ judgments as domestically binding, and nothing suggested that these nations would reciprocate should the United States in fact treat such judgments as binding.[74] In addition, precedent dictated 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.'"[75] No statement in the relevant agreements suggested, let alone expressed, that the parties intended for ICJ judgments to override state procedure.[76] The Court noted that if ICJ judgments were automatically binding upon the United States, as Medellín contended, such decisions would not be appealable.[77] The possible ramifications for

66. *Id.* at 1359.

67. *Id.* at 1360.

68. *Id.*

69. U.N. Charter art. 59.

70. *See Medellín*, 128 S. Ct. at 1360.

71. *Id.* at 1360–61. Reviewing *Avena*, the Court noted the ICJ's instruction to the United States to review the affected cases however it deems appropriate. *Id.* at 1361 n.9 (quoting Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 72 (Mar. 31)). Indeed, "[t]his language . . . confirm[s] that domestic enforceability in court is not part and parcel of an ICJ judgment." *Id.*

72. *Id.* at 1361 (quoting Sanchez-Llamas v. Oregon 548 U.S. 331, 347 (2006)).

73. *Id.* at 1363–64.

74. *Id.* at 1363.

75. *Id.* (quoting *Sanchez-Llamas*, 548 U.S. at 351 (citation omitted)).

76. *Id.* at 1364.

77. *Id.*

the ruling Medellín sought, the Court stated, "give pause."[78] Such a holding would lead to "the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections.'"[79]

2. The President Cannot Unilaterally Cause *Avena* To Bind State Courts

The Court agreed with the United States that the President is best suited to further foreign policy interests.[80] However, this consideration alone does not guarantee an absolute and unchecked right to create binding law from non-self-executing treaties.[81] The President must act within the limits placed on his constitutional power, as specified in Justice Jackson's concurring opinion in *Youngstown*.[82] Using the *Youngstown* analysis, the Court dismissed the notion that President Bush's actions were an implied or expressed authorization of Congress.[83] Indeed, "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."[84] To convert a non-self-executing treaty into binding domestic law requires nothing less than passing law, a power that solely lies within Congress's authority.[85] Because President Bush did not have congressional authorization for his actions, the Court had to find another justification to hold that the President's Memorandum transformed *Avena* into a domestically binding judgment.[86]

The second category of Justice Jackson's *Youngstown* presidential power scheme—pervasive congressional acquiescence may imply presidential power[87]—similarly failed to support President

78. *Id.*
79. *Id.* at 1367 (quoting *Sanchez-Llamas*, 548 U.S. at 360).
80. *Id.* (citing Brief for United States as Amicus Curiae Supporting Petitioner at 11–12, Medellín v. Texas, 128 S. Ct. 1346) (2008) (No. 06-984)).
81. *See id.* at 1368.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 1368–69.
86. *Id.* at 1371.
87. *Id.* at 1368.

Bush's actions.[88] Simply put, Congress cannot previously have acquiesced to something the United States itself has demonstrated is "unprecedented."[89] As such, President Bush's power "cannot stretch so far as to support the current Presidential Memorandum."[90]

The Court also rejected the Petitioner's third argument, that President Bush's actions were within his "Take Care" power.[91] Although not expressly stated, the Court seemed to place this in Jackson's third category of analysis, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[92] Because the President cannot unilaterally make *Avena* domestic law, the President cannot use the "Take Care" power to "execute" a judgment, in effect, to make *Avena* law.[93] To hold otherwise, the Court implied, would be incompatible with Congress's sole power to create laws.[94]

B. *Concurring Opinion*

In his concurring opinion, Justice Stevens agreed with the majority's reading of "undertakes to comply" in Article 94(1) of the U.N. Charter—the inclusion of such words points to an understanding of "future action by the political branches."[95] However, Justice Stevens disagreed with the majority as to the effect of these words. While the majority interpreted "undertakes to comply" to refer simply to legislation necessary to effectuate a non-self-executing treaty as binding domestic law,[96] Justice Stevens interpreted the words more broadly.[97] In his view, "undertak[ing] to comply" goes beyond legislation; it speaks to the U.N. Charter signatories' promise to act in good faith with the U.N. Charter

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88. *Id.* at 1368, 1371–72.

89. *Id.* at 1372. To support its argument, the government could not point to any prior Congressional acquiescence to a "Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers. . . ." *Id.*

90. *Id.*

91. *Id.*; *see* Brief for Petitioner at 28–29, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984).

92. *See Medellín*, 128 S. Ct. at 1372; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

93. *Medellín*, 128 S. Ct. at 1372.

94. *See id.*

95. *Id.* at 1373 (Stevens, J., concurring).

96. *See id.* at 1358–59 (majority opinion).

97. *See id.* at 1373 (Stevens, J., concurring).

and ICJ judgments.[98] Because the cost of complying with the *Avena* judgment would be low compared to the high cost of damaging the United States' international reputation, "Texas would do well to recognize that more is at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation."[99] While the *Avena* judgment may not compel Texas to review and reconsider Medellín's case, Justice Stevens believed Texas should nevertheless do so.[100]

C. *Dissenting Opinion*

In his dissent, Justice Breyer focused on whether the treaties laying the foundation for the *Avena* decision are self-executing, rather than on whether *Avena* itself is self-executing.[101] Because of the Supremacy Clause and the self-executing nature of the agreements relevant to this case, the dissent concluded that *Avena* requires no further legislation to become binding domestic law.[102] To support his argument, Justice Breyer relied on precedent to demonstrate that the Supreme Court has held several treaties to be self-executing.[103] Justice Breyer argued that no precedent, however, clearly answered whether a particular treaty *provision* is self-executing with the level of "textual clarity" the majority required.[104] Indeed, if treaties explicitly stated which provisions were self-executing, Justice Breyer posited, many nations would not enter into such treaties.[105] The fact that a treaty does not instruct as to whether a provision will be self-executing was of no consequence to the dissent.[106]

Instead, the dissent relied on both the treaty's subject matter and seven "context-specific criteria" to determine that the United

98. *See id.* at 1373–74.

99. *Id.* at 1375.

100. *See id.* This mirrors Justice Stevens's call for caution in *Breard v. Greene,* where he dissented "from the decision to act hastily rather than with the deliberation that is appropriate in a case of this character." 523 U.S. 371, 380 (1998) (Stevens, J., dissenting).

101. *See Medellín*, 128 S. Ct. at 1376 (2008) (Breyer, J., dissenting).

102. *See id.* at 1377.

103. *Id.* at 1377–79.

104. *See id.* at 1381.

105. *Id.*

106. *Id.* at 1381–82.

States is bound by the ICJ judgment in the *Avena* case.[107] The factors used by Justice Breyer to reach this conclusion include the language of the treaty and the practical implications if the treaty is not domestically enforceable.[108] Regarding the language of the U.N. Charter, the dissent interpreted "undertake to comply" more narrowly than the majority—the language creates "a present obligation to execute, without any tentativeness of the sort [found by the majority]."[109] Justice Breyer also cautioned that not enforcing the *Avena* judgment would "undermine longstanding efforts . . . to create an effective international system."[110]

Though the dissent did not elaborate on the constitutionality of the President's Memorandum, it did not agree with the majority's opinion on the matter.[111] Justice Breyer placed the President's foreign affairs authority in the second category of *Youngstown*'s taxonomy—Congress has neither sanctioned nor prohibited the exercise of such power.[112] In conclusion, the dissent stated that the majority's opinion causes the United States to "break its word even though the President seeks to live up to that word and Congress has done nothing to suggest the contrary."[113]

V. THE FATE OF MEDELLÍN

Medellín's story does not end with this landmark Supreme Court opinion. After the Supreme Court affirmed the Texas Court of Criminal Appeals' dismissal of his writ of habeas corpus,[114] Medellín filed a subsequent writ of habeas corpus, a motion in the alternative for leave to file the application as an original writ of habeas corpus, and a motion for stay of execution in the Texas Court of Criminal Appeals based on "new developments."[115]

107. *Id.* at 1382.
108. *Id.* at 1383, 1387.
109. *Id.* at 1384.
110. *Id.* at 1387–88.
111. *Id.* at 1390–91.
112. *Id.* at 1390.
113. *Id.* at 1392.
114. *Id.* at 1372 (majority opinion).
115. *Ex parte* Medellín, No. WR–50191–03, 2008 WL 2952485, at *1 (Tex. Crim. App. Jul. 31, 2008).

These "new developments," however, did not persuade the Texas court to grant any of Medellín's motions.[116]

According to Medellín, these new developments included:

> (1) the United States Supreme Court's decision in *Medellín v. Texas*, affirming and clarifying this Court's opinion in applicant's case; (2) the fact that a bill has been introduced in the United States House of Representatives which, if passed into law, would grant applicant a right to the judicial process required by *Avena*; (3) the indication by a Texas Senator that he will introduce similar legislation in the Texas Legislature in the 2009 session; and (4) the fact that the Inter-American Commission on Human Rights, allegedly 'the only body to have reviewed *all* of the evidence pertaining to [applicant's] Vienna Convention violation under the standard required by the ICJ,' on July 24, 2008, issued its preliminary findings concluding that applicant was prejudiced by the violation of his Vienna Convention rights.[117]

Regarding the applicability of the Supreme Court's decision to his case before the Texas Court of Criminal Appeals, Medellín warned that Mexico had instituted a subsequent proceeding in the ICJ to clarify that court's *Avena* decision and argued that the Texas court should wait until the ICJ decided that new proceeding.[118] The court issued a per curiam order denying Medellín's motions and dismissing his case.[119] In a concurring statement, Justice Tom Price, joined by two other justices, said the court's 2006 decision in *Ex Parte Medellín* foreclosed the need to wait for any subsequent ICJ decision on this matter.[120] Based on the same reasoning, the concurring justices stated that the Inter-American Commission on Human Rights' decision cannot interject in the United States' judicial machinery.[121]

Nor did the justices find the pending federal or state legislation persuasive.[122] While they noted such legislation may have an impact on Medellín's case should it be enacted, speculation does not

116. *Id.* at *2.

117. *Id.* at *2 (internal citations omitted) (alterations in original).

118. *Id.* at *2; *see also* Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Req. for Advisory Op.) (Order of July 16, 2008) *available at* http://www.icj-cij.org/docket/files/139/14639.pdf [hereinafter Request for Avena Interpretation].

119. *Ex Parte* Medellín, 2008 WL 2952485, at *1–2.

120. *Id.* at *3 (Price, J., concurring).

121. *See id.*

122. *Id.*

require the court to overturn his sentence.[123] Indeed, "[u]ntil such a statute is passed, the *Avena* decision is not binding; and if *Avena* is not binding, the applicant cannot predicate a due process claim upon it."[124] The federal legislation in question, the Avena Case Implementation Act of 2008,[125] remains in the House Judiciary Committee at the time of this article's publication.[126]

After the Texas Court of Criminal Appeals dismissed Medellín's motions, Medellín petitioned the Supreme Court of the United States for writ of certiorari, for a stay of execution, and for writ of habeas corpus.[127] Just like the Texas court, the Supreme Court found the prospect of the pending federal legislation or the introduction of Texas legislation impacting Medellín's case "too remote to justify an order from this Court staying the sentence imposed by the Texas courts."[128]

Four justices—Stevens, Souter, Ginsburg, and Breyer—dissented.[129] Justice Stevens reiterated his concerns about the decision's impact upon the United States' international reputation, because "[b]alancing the honor of the Nation against the modest burden of a short delay to ensure that the breach is unavoidable convince[d] [him] that the application for a stay should be granted."[130] Both Justices Ginsburg and Souter argued a stay of execution should be granted until the Court heard the United

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123. *Id.*

124. *Id.*

125. H.R. 6481, 110th Cong. (2d Sess. 2008). Section 2 of the bill reads:

> (a) Civil Action.—Any person whose rights are infringed by a violation by any nonforeign governmental authority of article 36 of the Vienna Convention on Consular Relations may in a civil action obtain appropriate relief.
> (b) Nature of Relief.—Appropriate relief for the purpose of this section means—
> (1) any declaratory or equitable relief necessary to secure the rights; and
> (2) in any case where the plaintiff is convicted of a criminal offense where the violation occurs during and in relation to the investigation or prosecution of that offense, any relief required to remedy the harm done by the violation, including the vitiation of the conviction or sentence where appropriate.
> (c) Application—This Act applies with respect to violations occurring before, on, or after the date of the enactment of this Act.

Id.

126. *See* Library of Congress, THOMAS, H.R. 6481, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.06481: (last visited Nov. 00, 2008).

127. *See* Medellín v. Texas, Nos. 06-984, 08-5573, 08-5574, 2008 WL 3821478, at *1 (U.S. Aug. 5, 2008) (per curiam).

128. *Id.* at *1.

129. *Id.* at *1–4.

130. *Id.* at *1–2 (Stevens, J., dissenting).

States' clarification of its statements made before the ICJ in *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals.*[131] In that proceeding, the United States represented to the ICJ that the United States did not believe it needed to make "further efforts to implement this Court's *Avena* Judgment, and . . . would 'continue to work to give that Judgment full effect, including in the case of Mr. Medellín.'"[132] Justice Breyer and his fellow dissenting justices agreed, but also explicitly stated that Medellín's execution placed the United States in violation of international law.[133]

After Governor Rick Perry refused pleas from President Bush, Mexico, and the United Nations' Secretary General to stay Medellín's execution,[134] José Ernesto Medellín was executed by the State of Texas on August 5, 2008 and pronounced dead at 9:57 p.m. that evening.[135] The mounting international pressure ultimately did not sway Texas's position on the matter:

> Although we accord the greatest respect to, and admiration for, the [ICJ] and its judgments, we, like the Supreme Court, cannot trample on our fundamental laws in deference to its judgment. . . . [I]f we cut down our laws to suit another sovereign that operates under a different system of justice, we could not stand upright in the lawless winds that would then blow. If we violate our state and federal procedural rules for this particular applicant, we should violate then for all American defendants as well. And then we would have no rules and no law at all.
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> . . . .

131. *Id.* at *2 (Souter , J., dissenting); *id.* (Ginsburg, J., dissenting).

132. *Id.* (Ginsburg, J., dissenting) (quoting Request For Avena Interpretation, *supra* note 118, at ¶ 37).

133. *Id.* at *3–4 (Breyer, J., dissenting).

134. James C. McKinley, Jr., *Texas Executes Mexican Despite Objections, From Bush and International Court,* N.Y. TIMES, Aug. 6, 2008, at A19; *Mexican Family Grieves After Execution,* AGENCE-FRANCE PRESSE, Aug. 6, 2008, http://afp.google.com/article/ALeqM5iqUisxP3AGvOxrDajJGxiBskyeug (last visited __). Governor Perry pointed to the brutality of the murders as reason to proceed with the execution. McKinley, *supra.*

135. Allan Turner et al., *Medellín Put to Death After One Last Appeal,* HOUSTON CHRON., Aug. 6, 2008, at A1, *available at* http://www.chron.com/CDA/archives/archive.mpl?id=2008_4607142. Two days later, Texas executed a Honduran national, Heliburto Chi, for the murder of his former boss during a robbery. David Stout, *Texas Executes Inmate After Court Steps Aside,* N.Y. TIMES, Aug. 8, 2008, *available at* http://www.nytimes.com/2008/08/08/us/08texas.html?ref=us. Based on the Supreme Court's action in *Medellin,* Chi's counsel noted their argument based on the Vienna Convention was foreclosed and instead relied on a 1927 consular rights treaty between the United States and Honduras. Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/new-treaty-based-challenge-to-execution/ (Aug. 7, 2008, 13:24 EST).

> Some societies may judge our death penalty barbaric. Most Texans, however, consider death a just penalty in certain rare circumstances. Many Europeans may disagree. So be it.[136]

VI. POTENTIAL IMPACTS OF *MEDELLÍN*

A. *Negative Effect on the United States' International Relationships*

Both the majority and dissent warned of the potentially harmful impact the other's approach to *Medellín* will have on the United States' international relationships.[137] Justice Roberts stated that the dissent "risks the United States' involvement in international agreements,"[138] while Justice Breyer warned that the majority's approach calls the enforceability of all ICJ judgments into question.[139] On a macro level, some warn *Medellín* signals to the world that "America's word isn't what it was in the world community."[140] Others would argue that not complying with the ICJ judgment risks the reciprocal safety and rights of American citizens abroad.[141] The mixed reaction to Medellín's execution in Mexico further complicates predictions as to how this case will affect the United States' reputation.[142] However, such fears seem to

136. *Ex Parte* Medellín, No. WR-50191-03, 2008 WL 2952485, at *6, *8 (Tex. Crim. App. Jul. 31, 2008) (Cochran, J., concurring).

137. *See* Posting of Jeremy Telman to ContractsProf Blog, http://lawprofessors.typepad.com/contractsprof_blog/2008/week15/index.html (Apr. 7, 2008).

138. Medellín v. Texas, 128 S. Ct. 1346, 1362 (2008).

139. *Id.* at 1387–88 (Breyer, J., dissenting).

140. Editorial, *Texas and a Treaty: America's Word Cannot be Taken at Face Value*, PITTSBURGH POST-GAZETTE, Mar. 28, 2008, at B6, *available at* http://www.post-gazette.com/pg/08088/868545-35.stm.

141. *See* Heather M. Heath, *Non-Compliance with the Vienna Convention on Consular Relations and Its Effect on Reciprocity for United States Citizens Abroad*, 17 N.Y. INT'L L. REV. 1, 50 (2004) ("[N]on-compliance with the Vienna Convention carries possibly serious consequences abroad . . . ."); Editorial, *Split Decision: The High Court Properly Rebuked Bush, but It Should Have Given a Mexican Man His Day in Court*, L.A. TIMES, Mar. 26, 2008, at 20 [hereinafter *Split Decision*] ("[T]he majority's refusal to apply the Vienna Convention in this case will have consequences for U.S. diplomacy and for the way Americans are treated abroad.").

142. Michael Graczyk, *Killer from Mexico Executed in Texas*, S.F. CHRON., Aug. 6, 2008, at A2, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/06/MNGU125L87.DTL ("[A] small group of [Medellín's] relatives condemned his execution"); *Medellín Execution Draws Little Attention in Mexico*, DALLAS MORNING NEWS, Aug. 6, 2008, *available at* http://www.dallasnews.com/sharedcontent/dws/news/world/mexico/stories/080608dnintmedellinmexico.1df0681e.html (noting that in a speech the day after Medellín's execution,

be grounded in more than just compliance with an ICJ judgment—those warning against such ramifications also assert that the reputation of the United States has already been damaged through its anti-terrorism policies, and military tribunals in particular.[143] Further, as the Court pointed out, nothing indicates that other Vienna Convention parties would reciprocate the United States' blind adherence to ICJ judgments.[144] Some international experts note that *Medellín* demonstrates a flaw in the enforceability of international law; however, a government should nevertheless follow ICJ judgments to further a nation's policy interests.[145] Though certainly not bolstering the United States' reputation in the international community, *Medellín* will not be the sole cause of the demise of the United States' international relationships.

B. *Treaty Language*

As *Medellín* demonstrated, treaties tend to reflect the eye of the interpreter.[146] Both the majority and the dissent correctly focused upon the text of the U.N. Charter, but reached very different conclusions regarding the self-executing nature of the ICJ judgment.[147] In light of this, those entering into treaties with the

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President Felipe Calderon of Mexico made no mention of Medellín's execution and Mexican newspapers contained only "small mentions [of Medellín's execution] lower down on the front pages—and in some cases, [his execution] wasn't on the front page at all"); Turner et al., *supra* note 135 (noting that, while small protests occurred throughout Mexico, many Mexicans supported Medellín's execution). Much of this mixed reaction, however, may be attributed to Mexican news agencies' focus being diverted to the kidnapping and murder of a 14-year-old boy. *See Medellin Execution Draws Little Attention in Mexico, supra*; *see also* Mark Stevenson, *Crime-weary Mexico Barely Focuses on U.S. Execution*, Boston.com, Aug. 6, 2008, *available at* http://www.boston.com/news/world/latinamerica/articles/2008/08/06/crime_weary_mexico_barely_focuses_on_us_execution/.

143. Heath, *supra* note 141, at 47–50.

144. *See* Medellín v. Texas, 128 S. Ct. 1346, 1363 (2008).

145. Mariette le Roux, *Medellin Execution Highlights Flaw in International Law*, AGENCE-FRANCE PRESSE, Aug. 7, 2008, *available at* http://afp.google.com/article/AleqM5jB4nm0sNPN3-lAhMrew_WS0A8zlA ("'International law cannot bind a state against its will, simply because we don't have a world government, a world legislature, or a world judicial system,' said Jann Kleffner, international law professor at the University of Amsterdam.").

146. Glashausser, *supra* note 16, at 26–27. Indeed, "if there is any type of legal document that legitimately can be interpreted in contradictory ways, it is treaties." *Id.* at 26.

147. *See Medellín*, 128 S. Ct. at 1358 (reasoning "undertakes to comply" means the U.N. Charter is non-self-executing); *id.* at 1384 (Breyer, J., dissenting) (reasoning "undertakes to comply" means the U.N. Charter is self-executing). To complicate matters further, Justice Stevens found "undertakes to comply" to refer to a general good faith obligation. *See id.* at 1373 (Stevens, J., concurring).

United States may use more strict and explicit language, which may deter the United States and, for that matter, other countries, from entering into such treaties.[148] Some, however, would argue that no such language is needed, as the text of the Constitution provides the explicit language that both sides of the Court seem to require.[149] At first blush, the Supremacy Clause makes the domestic enforcement of treaties appear straightforward; the practical implications of such text, however, have never been clear. Those criticizing *Medellín* even note that this nation's early jurisprudence required more to determine a treaty's domestic effect.[150] While the text of the Constitution places treaties on the same footing as domestic laws, judicial review determines whether treaties shall have such an effect. To persuade courts to give such an interpretation, treaty authors likely will move toward more explicit language.[151]

C. *Presidential Power*

The Supreme Court took relatively little time in concluding that the President's Memorandum was not an authorized act of executive power.[152] Significant time, however, was not necessary, as such a matter speaks directly to the heart of both separation and division of powers so inherent in American government.[153]

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148. *See id.* at 1381–82 (Breyer, J., dissenting) (noting specific self-executing language "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").

149. *See* Posting of David Sloss to Opinio Juris, http://opiniojuris.org/2008/03/25/medellin-and-the-perversion-of-legal-realism/ (Mar. 25, 2008, 18:20 EST) ("The question whether the U.N. Charter is federal law is a question about U.S. constitutional law. Accordingly, the answer is to be found in the text of the Constitution . . . . By deciding that the U.N. Charter is not federal law, the Court has effectively rewritten the text of the Supremacy Clause to say that treaties are the Law of the Land unless we, the Supreme Court, decide otherwise.").

150. *See id.* ("[E]xecutory treaty provisions require some further action by the U.S. government . . . [though] legislative action is [not] always necessary to execute an executory treaty provision.").

151. *See* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/wp/commentary-medellin/ (Aug. 6, 2008, 07:53 EST) (noting the role of the treaty's silence in Medellin's case and concluding Congress had not acquiesced to make the ICJ judgment binding domestic law).

152. *See* Posting of Julian Ku to Opinio Juris, http://.opiniojuris.org/2008/03/25/medellin-my-early-thoughts/ (Mar. 25, 2008, 13:04 EST).

153. *See Split Decision, supra* note 141 ("In our system, state courts (as well as federal courts) are not supposed to take their orders from the president."); Posting of Ilya Shapiro to Cato@Liberty, http://www.cato-at-liberty.org/2008/03/26/supreme-court-to-president-bush-don't-mess-with-texas/ (Mar. 26, 2008, 08:35 EST) ("Telling state courts how to do their

The framers worried that unfettered executive power over treaties would lead to a repeat of the tyrannical British government they so despised.[154] Because of the nature of the United States government, a President simply cannot have such unilateral authority.[155]

The Court, however, left open the broader issue as to what the President may do to ensure that treaties properly effectuated by the legislature are domestically enforced.[156] Some scholars note precedents indicate a President could have such a power.[157] With the recent claims of executive power, this issue will undoubtedly arise again.[158]

But perhaps federal and state executives have all the power they need for those cases involving the execution of foreign citizens of countries with which the United States has a treaty. For those foreign nationals committing *federal* crimes and facing the death penalty, the President could utilize his constitutional power to pardon that foreign national should he or she believe the international interests of the United States outweigh such a severe conviction.[159] Likewise, Governor Perry had the opportunity to use his clemency power to stay Medellín's execution, but did not do so.[160] In this regard, the President's "Take Care" power includes his "pardon power." Of course, as *Medellín* demonstrates,

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jobs is simply not among the powers of the nation's chief executive.").

154. Yoo, *supra* note 15, at 2042 ("An effort to subsume the legislative power into the treaty power would have recalled, particularly in Anti-Federalist minds, the corruption of Parliament by the Crown.").

155. *See* Medellín v. Texas, 128 S. Ct. 1346, 1371 (2008).

156. *Id.* at 1367 n.13 ("The dissent . . . finds it 'difficult to believe that in the exercise of his Article II powers pursuant to a ratified treaty, the President can *never* take action that would result in setting aside state law.' We agree. The questions here are the far more limited ones . . . . ") (quoting *id.* at 1390 (Breyer, J., dissenting)).

157. *See, e.g.*, Posting of Julian Ku to Opinio Juris, *supra* note 152 (discussing Dames & Moore v. Regan, 453 U.S. 654, 688 (1981) ("[W]here, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.")).

158. *See* Van Alstine, *supra* note 14, at 339 ("This reasoning is at the foundation of a whole range of powers claimed by the present administration . . . , [which] has defended unilateral presidential action in a variety of contexts as an exercise of the national executive's implied or inherent powers in foreign affairs.").

159. *See* U.S. CONST. art II, § 2 ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

160. *See supra* note 134 and accompanying text.

the President cannot use his "Take Care" power to compel the states to follow ICJ decisions or treaties.[161]

D. *States as Treaty Players: Should* Erie *Go International?*

Because treaties increasingly regulate individual conduct, "[s]tates . . . are becoming substantially important foreign policy players."[162] Professor Philip C. Jessup, echoing the sentiments of our framers and invoking the specter of the *Erie* Doctrine, noted that treaties should not be left to the states' discretionary implementation.[163] To some, the Court's opinion in *Medellín* demonstrates a "muddled analytical approach."[164] Perhaps, then, an analytical regime similar to *Erie* is warranted for the implementation of international treaties and their related ICJ judgments.[165]

The details for such a proposal go beyond the scope of the subject matter for this casenote, but a basic principle for such a scheme speaks to the heart of the controversy in *Medellín*. One important aspect of the *Erie* pantheon, the outcome determinative test and its federal interest balancing corollary,[166] could be

161. *See* Medellín v. Texas, 128 S. Ct. 1349, 1372 ("This authority allows the President to execute the laws, not make them. . . . [T]he *Avena* judgment is not domestic law; accordingly, the President cannot rely on his Take Care powers here."). *But see* Jordon J. Paust, Medellín, Avena, *the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 311 & n.37, 312–15 (2008) (arguing the Supreme Court did not sufficiently defer to the president's "Take Care" power in construing the President's Memorandum in *Medellín* as an "executive directive").

162. Posting of Julian Ku to Opinio Juris, *supra* note 152.

163. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 n.3 (1986) (noting Jessup "recognized the potential dangers were Erie extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations." (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964))).

164. *See* Posting of David Sloss to Opinio Juris, *supra* note 149 (arguing that the Court did not distinguish between the questions of whether provisions of the U.N. Charter are federal law and how to enforce the United States's obligations under the U.N. Charter).

165. For another policy proposal involving narrowly construed Congressional legislation, see Posting of Jason Harrow to SCOTUSblog, http://www.scotusblog.com/wp/medellin-discussion-board-the-ball-is-in-congresss-court/ (Mar. 27, 2008, 16:00 EST).

166. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958) ("[T]he inquiry here is whether the federal policy . . . should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court."); Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) ("[T]he intent of [Erie] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.").

modified and used in adjudicating a state's implementation of treaties. Such a rule could provide that where a state's procedural rules conflict with the provisions of a treaty, those state rules should be followed if ignoring them would substantially affect the outcome of that litigation. If, however, federal interests outweigh such a state procedural rule, the federal law (i.e., the treaty) should be followed.

E. *Does* Erie *Even Need To Go International?*

But is such a procedural rubric even necessary? *Osagiede v. United States*, a case decided after *Medellín*, allowed Osagiede, a Nigerian national, to bring an ineffective assistance of counsel claim when his counsel failed to seek a remedy for the government's failure to notify Osagiede of his right to consular assistance under the Vienna Convention.[167] Making a point to note that "foreign nationals within the territory of the United States are protected by the Sixth Amendment,"[168] the court stated that Osagiede sought relief under the Constitution, not the Convention, even though his Sixth Amendment claim involved his Vienna Convention right to consular assistance.[169] Therefore, his ineffective assistance claim was properly before the court.[170]

The Seventh Circuit then proceeded with the ordinary ineffective assistance analysis set forth in *Strickland v. Washington*.[171] To prove ineffective assistance of counsel, Osagiede had to show that "(1) his counsel's performance fell below an objective standard of reasonableness when measured against 'prevailing professional norms,' and (2) but for the deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different."[172] Regarding the first prong of the *Strickland* analysis, the court found Osagiede's counsel's performance was deficient, as "the Article 36 violation should have rung a bell with a reasonable attorney."[173] In order to satisfy the second prong of the *Strickland* analysis, Osagiede had to show what assistance he might have received from his consulate had he

167. No. 07-1131, 2008 WL 4140630, at *1, *5–6 (7th Cir. Sept. 9, 2008).

168. *Id.* at *5 (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896)).

169. *Id.* (citing Sanchez-Llamas v. Oregon, 548 U.S. 331, 363–64 & n.3 (2006) (Ginsburg, J., concurring)).

170. *Id.* at *6.

171. 466 U.S. 668 (1984).

172. *Id.* (citing *Strickland*, 466 U.S. at 687–96).

173. *Id.* at *8–9.

been informed of his Vienna Convention right.[174] Osagiede proffered that his consulate may have assisted in interpreting tape recordings at issue in his case.[175] Thus, the court held that the record did not "'conclusively show[ ]' that Osagiede is not entitled to relief on his Sixth Amendment claim" and granted his habeas petition.[176] As this analysis is much more straightforward than determining the domestic reach of an international treaty, it may be the future of foreign nationals' claims of violations of their right to consular assistance.[177] At least for ineffective consular assistance claims, specifically consulting the treaty was not necessary. Whether state law can offer relief for all questions that intersect with treaty provisions remains to be seen.

VII. CONCLUSION

Medellín held that neither *Avena* alone nor the President may compel a state to act in compliance with the Vienna Convention.[178] To some, such a holding seems counterintuitive.[179] To others, the holding presented a victory for federalism.[180] One thing, however, is clear: the perfect storm regarding the domestic enforcement and effect of treaties is far from over.[181]

Mary D. Hallerman

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174. *Id.* at *10.

175. *Id.*

176. *Id.* at *11.

177. *See* Posting of Roger Alford to Opinio Juris, http://opiniojuris.org/2008/09/24/the-vccr-and-ineffective-assistance-of-counsel-2/ (Sept. 24, 2008, 11:53 EST) ("It looks like this is where we are headed with the [Vienna Convention]. Criminal convictions may not be thrown out using straightforward arguments of [Vienna Convention] violations, but the ineffective assistance of counsel argument may just have legs.").

178. Medellín v. Texas,128 S. Ct. 1349, 1363, 1368 (2008).

179. *See* Posting of Julian Ku to Opinio Juris, *supra* note 152 ("My instinct has always been that somewhere, somehow, someone in the federal government has the power to vindicate [an] ICJ judgment . . . .").

180. *See* Posting of Ilya Shapiro to Cato@Liberty, *supra* note 153 ("The Supreme Court has thus protected America's carefully calibrated system of federalism and checks and balances.").

181. *See, e.g.*, Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES MAGAZINE, Sept. 25, 2008, at MM50, *available at* http://www.nytimes.com/2008/09/28/magazine/28law-t.html?_r=1&oref=slogin ("There are going to be many more opportunities in the coming years for the court to take a position on the Constitution and the international order.").