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Intent Matters: Assessing Sovereign Immunity for Tribal Entities

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INTERNATIONAL DELEGATIONS AND THE NEW WORLD COURT ORDER

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Abstract: In *Medellin v. Dretke*, the U.S. Supreme Court squarely considered the domestic judicial enforceability of a judgment by the International Court of Justice for the first time. Although the Court ultimately dismissed the case due to President George W. Bush's intervention, the issue that won the Court's attention—the domestic legal status of international tribunal judgments—will almost certainly return to the Court in the near future. When it does, the Court will be faced with calls from leading scholars to enforce the judgments of international courts and tribunals as part of a "new world court order," characterized by cooperation between international and domestic courts. This Article takes issue with that stream of scholarship by laying out the first comprehensive constitutional critique of judicial enforcement of international tribunal judgments. U.S. constitutional doctrine and practice with respect to the enforcement of international law obligations confirms that domestic courts have no independent authority to implement international tribunal judgments. Indeed, independent judicial enforcement of international tribunal judgments of the kind sought by the petitioners in *Medellin* would result in potentially excessive delegations of the U.S. foreign affairs power. To avoid this constitutional problem, this Article recommends that courts treat all such international tribunal judgments as non-self-executing absent a clear statement in the treaty that judicial enforcement is permitted.

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INTRODUCTION

In December 2004, the United States Supreme Court granted a petition for certiorari to consider whether a judgment of the International Court of Justice (ICJ) is binding on U.S. courts.[1] In *Medellin v. Dretke*,[2] a Mexican national facing execution by the State of Texas sued to enforce the ICJ's ruling that U.S. courts must reconsider his claim for relief under the Vienna Convention on Consular Relations (VCCR).[3] The Court thus agreed to consider the important but unsettled question of an international tribunal judgment's status within U.S. law. Although the U.S. has participated in forms of international adjudication from its earliest history,[4] the Supreme Court had never before directly considered the domestic legal significance of judgments issued by any international tribunal.

The question of the domestic enforceability of international tribunal judgments, however, remains unsettled. The Court dismissed the case without deciding the issues it had planned to consider due in large part to President George W. Bush's intervention.[5] At least four members of the Court appear ready to grant certiorari in a future case that raises the

1. Medellin v. Dretke (*Medellin II*), ___ U.S. ___ (Dec. 10, 2004), 125 S. Ct. 686, 686 (2004), *cert. dismissed*, ___ U.S. ___ (May 23, 2005), 125 S. Ct. 2088 (2005) (per curiam).

2. Medellin v. Dretke (*Medellin III*), ___ U.S. ___ (May 23, 2005), 125 S. Ct. 2088 (2005) (per curiam).

3. *Id.* at 2089.

4. *See, e.g.*, Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. VI, Nov. 19, 1794, 8 Stat. 116 (appointing five commissioners who were empowered to settle claims arising out of the U.S. Revolutionary War).

5. *Medellin III*, 125 S. Ct. at 2090 (dismissing the writ of certiorari as improvidently granted). During the briefing for the case, President Bush released a memorandum determining that the United States would comply with the ICJ's decision through state court proceedings. *See id.* (citing Brief for United States as Amici Curiae in Support of Respondent at app. 2, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 504490 (George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005))). This intervention convinced five members of the Court to remand the case to Texas courts rather than reach a final decision on the merits. *Id.* at 2092.

same question.[6]

Moreover, the issue of the domestic enforceability of an international court's judgment will not go away. Litigants are increasingly asking U.S. courts to enforce judgments by international tribunals and courts. Not only has the U.S. government been the subject of three adverse judgments issued by the ICJ in the last eight years,[7] but the U.S. has also suffered a number of adverse judgments before the dispute resolution panels of the World Trade Organization[8] and the North American Free Trade Agreement.[9] Moreover, the U.S. is party to hundreds of treaties and executive agreements binding it to dispute resolution by a variety of international tribunals and courts.[10] Increasingly, litigants before international tribunals will, like José Medellín, seek to enforce their judgments directly in U.S. courts.

Many, if not most, legal scholars have welcomed the rise of international tribunals and the increasing frequency and importance of their interaction with domestic courts.[11] Indeed, leading scholars have theorized that interaction between international tribunals and domestic courts forms a central component of an international order characterized by respect for and submission to international law and international institutions.[12]

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6. *See id.* at 2093 (Ginsburg, J., joined by Scalia, J., concurring); *id.* at 2096 (O'Connor, J., joined by Stevens, Souter, & Breyer, JJ., dissenting).

7. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27); Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Provisional Measures Order of Apr. 9).

8. *See, e.g.*, Appellate Body Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Dec. 15, 2003) (finding U.S. duties on steel in violation of World Trade Organization (WTO) and General Agreement on Tariffs and Trade (GATT) agreements); Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations"—Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW (Jan. 14, 2002) (finding U.S. tax code provisions on foreign sales corporations to be in violation of WTO and GATT agreements); Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DSF8/R, WT/DS58/R, (May 15, 1998) (finding legislation prohibiting importation of shrimp from countries using technology that endangers sea turtles to be in violation of WTO and GATT agreements).

9. *See, e.g.*, In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03 (Dec. 1, 2004) (finding U.S. duties on Canadian softwood lumber to be in violation of the North American Free Trade Agreement (NAFTA)).

10. *See infra* Part II.B.

11. *See infra* Part II.C.

12. The two leading proponents of this approach are Dean Anne-Marie Slaughter of the Woodrow Wilson School of Public and International Affairs at Princeton University and Dean Harold Hongju

The briefing before the Supreme Court in *Medellin* reflected arguments advanced by these scholars. The petitioner and various amici asked the Court to treat ICJ interpretations of U.S. treaty obligations as judgments binding on all domestic U.S. courts, including the U.S. Supreme Court.[13] In this way, the *Medellin* case represents an important first step in bringing a "new world court order" to the U.S.[14]

This Article argues that permitting U.S. courts to give domestic effect to international tribunal judgments would create serious difficulties as a matter of U.S. constitutional law. While some have suggested that enforcement of international tribunal judgments threatens the federal courts' judicial power under Article III of the U.S. Constitution,[15] I offer a different constitutional critique. In my view, the power to enforce international tribunal judgments is properly understood to fall within the foreign affairs powers granted to Congress and the President under Article I and Article II. The power is not granted to the federal courts pursuant to Article III. As such, Congress and the President are the only institutions constitutionally authorized to determine how or whether to implement an international tribunal judgment as a matter of domestic law.

Retaining political branch control over compliance with international tribunal judgments is best understood as a mechanism for avoiding an

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Koh of the Yale Law School. *See, e.g.*, ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–100 (2004) [hereinafter A NEW WORLD ORDER]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) and THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)). A new generation of scholars has also expanded this approach in recent important articles. *See, e.g.*, Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2086–123 (2004); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 460–77 (2003).

13. *See, e.g.*, Brief Amicus Curiae of the Government of the United Mexican States in Support of Petitioner Jose Ernesto Medellin at 4, *Medellin III*, ___ U.S. ___ (May 23, 2005), 125 S. Ct. 2088 (2005) (per curiam) (No. 04-5928), 2004 WL 2381136; Brief of Foreign Sovereigns as Amici Curiae in Support of Petitioner Jose Ernesto Medellin at 18, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 176450; Brief of International Law Experts and Former Diplomats as Amici Curiae in Support of Petitioner at 16–17, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2004 WL 2381135.

14. *See infra* Part II. I use the phrase "new world court order" to describe the intersection of two phenomena: the growth and importance of international tribunals and the effort to enforce the judgments of international tribunals in domestic courts.

15. *See, e.g.*, A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 893–901 (2000) (arguing that international review of U.S. court judgments may violate Article III of the U.S. Constitution's allocation of judicial power to federal courts).

impermissible delegation of the U.S. foreign affairs power to international tribunals. This does not mean that the Constitution prohibits international tribunals from interpreting U.S. obligations under international law. Rather, my argument is that such international tribunal judgments should not be enforced as a matter of U.S. domestic law without clear authorization by either the President or Congress.

To be sure, even in the domestic sphere, the "nondelegation" doctrine is better known for its underenforcement than as a serious constitutional constraint. The nondelegation doctrine has remained so dormant that leading scholars have recently attempted to bury it once and for all.[16] Meanwhile, the Supreme Court has continued to avoid applying the doctrine to legislative delegations to administrative agencies.[17]

This Article maintains that, at least with respect to U.S. enforcement of international tribunal judgments, applying the nondelegation doctrine is the best way to ensure the constitutionality of U.S. participation in international adjudication.[18] Unlike delegations to domestic institutions, international delegations involve transfers of legal authority to international institutions where the politically accountable branches of the federal government have fewer mechanisms of control. This understanding of delegation limitations on the foreign affairs power is consistent with U.S. practice.

While the U.S. is party to hundreds of international agreements committing it to binding dispute resolution before international tribunals, many of those agreements are enforced by the political branches, e.g., either Congress or the President.[19] The pattern of U.S. practice has relied heavily on the President, and to a lesser extent Congress and the states, to determine how or whether to comply with adverse international tribunal judgments. Absent executive order or specific authorization by Congress, none of these agreements authorize domestic courts to enforce international tribunal judgments.

This pattern of practice suggests that the most likely practical manifestation of the nondelegation doctrine in the international context will be as a rule of treaty interpretation. Although the Supreme Court has not struck down a federal statute under the nondelegation doctrine for

16. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1733–36, 1743–54 (2002).

17. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 476 (2001).

18. *See infra* Part V.

19. *See infra* Part II.B.

over seventy years,[20] the modern Court continues to employ the nondelegation doctrine as a "super-strong clear statement rule" in statutory interpretation.[21] In other words, the Supreme Court has interpreted the nondelegation doctrine to require "clear statements" in federal statutes before interpreting those statutes to delegate legislative authority to administrative agencies.[22]

The same "super-strong clear statement" approach can be employed by domestic courts to limit delegations of the U.S. government's foreign affairs power to international tribunals.[23] Before a U.S. court gives an international tribunal's interpretation of a treaty obligation self-executing domestic effect, that court should identify a clear statement in the treaty that the tribunal's interpretations are intended to have such self-executing domestic effect in the U.S. Such a clear statement requiring judicial enforcement can be expressly provided by the treaty.[24] Alternatively, a clear statement might be found in congressional legislation implementing the treaty, or in an executive order made by the President.[25]

Applying the nondelegation doctrine does not preclude U.S. compliance with international tribunal judgments. Rather, it sharply limits, but does not eliminate, the independent role of domestic courts in

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20. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541 (1935) (finding that a federal program was an unconstitutional delegation of federal power).

21. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992).

22. *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980) (noting that without a "clear mandate" in the Occupational Safety and Health Act (OSHA), it was unreasonable to assume that Congress unconstitutionally delegated its legislative power to the Secretary of OSHA). The Court does not invoke a "clear statement" rule but its approach was later described by Professors Eskridge and Frickey as a clear statement requirement. *See* Eskridge & Frickey, *supra* note 21.

23. *See* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587–95 (2003). This Article builds on Professor Bradley's "non-self-executing" approach to international delegations and offers a comprehensive doctrinal and functional basis for this approach to treaty interpretation.

24. *See, e.g.*, United Nations Convention on the Law of the Sea, Annex VI, art. 39, Dec. 10, 1982, 1833 U.N.T.S. 397, 570 [hereinafter UNCLOS] ("[D]ecisions of the [Seabed Disputes] Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.").

25. *See, e.g.*, 22 U.S.C. § 1650a(a) (2000) ("An award of an arbitral tribunal rendered pursuant to chapter IV of the [International Centre for Settlement of Investment Disputes (ICSID)] convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.").

deciding how and whether to comply with international tribunal judgments. Under this approach, the responsibility for determining how and whether to comply with international tribunal judgments remains with the political branches of the U.S. government. This allocation of authority is fully consistent with the structure of foreign affairs powers in the Constitution and historical U.S. practice.

Given the dormancy of the modern nondelegation doctrine, this result is hardly required. For this reason, I will offer three functional justifications for requiring a super-strong clear statement before recognizing treaty delegations to international tribunals. First, a super-strong clear statement rule would operate as an accountability-forcing rule that would require the U.S. political branches to take responsibility for complying with international tribunal judgments.[26] Second, a super-strong clear statement rule would bolster the domestic political legitimacy of international tribunal judgments. International tribunals, like other international organizations, are likely to suffer from a "legitimacy" deficit when their decisions encroach upon matters previously governed purely by domestic law and institutions.[27] Third, a super-strong clear statement rule would also favor allocation of authority to the institutions most competent in assessing whether and how to comply with that international tribunal judgment.[28]

Part I reviews the U.S. Supreme Court's first consideration of judicial enforcement of international tribunal judgments in the recently dismissed case of *Medellin*. Part II places *Medellin* in a broader context by describing the arrival of a "new world court order" characterized by a proliferation of international tribunals whose judgments may be enforced by domestic courts. Part III argues that the power to comply with international tribunal judgments is best understood as part of the foreign affairs power of the U.S. government held by either the President or Congress. Part IV explains that giving domestic effect to an international tribunal judgment constitutes a potentially unconstitutional delegation of the foreign affairs power. Part V then fleshes out how courts might use the nondelegation doctrine to require treaties or other international agreements to contain a super-strong clear statement authorizing domestic judicial enforceability. Part V also offers functional justifications for using the nondelegation doctrine to police the U.S.

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26. *See infra* Part V.D.1.

27. *See infra* Part V.D.2.

28. *See infra* Part V.D.3.

relationship with international tribunals.

I. *MEDELLIN V. DRETKE*: THE DOMESTIC ENFORCEABILITY OF INTERNATIONAL TRIBUNAL JUDGMENTS

In *Medellin*, the Supreme Court confronted the judicial enforceability of an international tribunal judgment for the first time. In this Part, I first review the international legal background of the case and the cases that led to it. Then I analyze the complex web of constitutional and international law issues that spurred the Court to grant certiorari. Finally, I consider the issues left unresolved by the President's intervention and the Supreme Court's dismissal of the case. As this discussion reveals, the status of international tribunal judgments is hotly contested by leading scholars and advocates, as well as within the Court itself.

A. The ICJ VCCR Litigation

Since 1998, the U.S. has been the subject of three separate lawsuits at the ICJ alleging U.S. violations of the Vienna Convention on Consular Relations (VCCR).[29] The VCCR was ratified by the U.S. in 1969.[30] The VCCR represents the culmination of years of negotiation between most of the world's countries about the rights and obligations of consular officials.[31] Prior to acceptance of the VCCR by most of the world's countries in the 1960s, the rights and duties of consuls were governed by a combination of customary international law and bilateral agreements.[32]

The VCCR contains two provisions regarding communication and contact between consulates and nationals of foreign states. First, paragraph 1 of article 36 creates new rights for consular officials to be informed when a foreign national is arrested.[33] This right, and the related obligation of the host government to notify the foreign national of the consular right, was not broadly recognized in customary international law prior to the adoption of the VCCR.[34] Second, paragraph 2 of article

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

30. *Id.*

31. *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 23–26 (2d ed. 1991).

32. *Id.* at 17–18.

33. VCCR, *supra* note 29, art. 36(1)(b).

34. *See id.*; *see also* LEE, *supra* note 31, at 107 & n.4. Article 36 provides in full:

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the

36 obliges states to ensure their domestic laws conform to these requirements.[35] Article 36(2) provides that:

> The rights [to receive notification] . . . shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.[36]

This provision became the central focus of litigation against the U.S. in the ICJ.

Additionally, while disputes over consular relations had been traditionally handled via bilateral diplomacy, the VCCR offered state-parties an international dispute resolution mechanism.[37] Pursuant to the Optional Protocol to the VCCR (Optional Protocol), "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice . . . ."[38] This provision gives the ICJ jurisdiction to resolve disputes between states under the VCCR, including the U.S.,[39] which ratified the Optional Protocol at the same time that it ratified the VCCR.

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sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

VCCR, *supra* note 29, art. 36.

35. *See* VCCR, *supra* note 29, art. 36(2).

36. *Id.*

37. *See id.*, Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), art. I.

38. *Id.*

39. *Id.*

The VCCR lay dormant for a decade after its ratification.[40] The federal government took measures to implement the treaty with respect to its immigration regulations,[41] but there was no additional legislation at either the federal or state level. In the mid-1990s, however, the VCCR's role in U.S. law took a sharp turn when the government of Paraguay filed a complaint in federal district court seeking to vindicate its rights under the treaty.[42] Since 1998, the U.S. has been the defendant in three separate lawsuits at the ICJ alleging U.S. violations of the VCCR.

1. The Breard *Case*

In *Vienna Convention on Consular Relations (Breard)*,[43] Paraguay alleged that the U.S. had violated article 36 of the VCCR by failing to notify Paraguay's consulate of a Paraguayan national's arrest, conviction, and sentence of capital punishment.[44] After U.S. courts rejected its claims,[45] Paraguay invoked the Optional Protocol and applied to the ICJ for a judgment against the U.S. for violating the VCCR.[46] In particular, Paraguay sought a judgment blocking the impending execution of one of its nationals, Angel Breard, by the State of Virginia.[47] The ICJ did not rule on the question of whether the VCCR required suspension of the execution, but it did issue a provisional measures order suspending the execution so that the ICJ could consider the arguments on the merits.[48] Both Paraguay and Breard returned to

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40. The first case to consider article 36 of the VCCR occurred in 1979 in the context of immigration service regulations. *See* United States v. Calderon-Medina, 591 F.2d 529, 531 n.6 (9th Cir. 1979).

41. *See* Apprehension, Custody, and Detention, 8 C.F.R. § 236.1(e) (2005). Another example of the change in federal law appeared in U.S. Department of Justice arrest procedures, which state that an officer arresting a foreign national must inform him of his right to notify his consul. *See* Notification of Consular Officers Upon the Arrest of Foreign Nationals, 28 C.F.R. § 50.5(a)(1) (2005).

42. *See* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1271–72 (E.D. Va. 1996) (reviewing complaint).

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

44. *Id.* at 249.

45. *Allen*, 949 F. Supp. at 1271.

46. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 249–50 (Provisional Measures Order of Apr. 9).

47. *Id.* at 251–52.

48. *Id.* at 258; *see* William J. Aceves, *International Decisions: Application of the Vienna Convention on Consular Relations (Paraguay v. United States)*, 92 AM. J. INT'L L. 517, 518 (1998).

U.S. courts and, citing the ICJ order, asked the U.S. Supreme Court to suspend Breard's execution.[49]

In a hurried per curiam opinion,[50] the Court refused to suspend the execution.[51] It noted that the ICJ's provisional measures order was probably not a binding obligation under international law.[52] The Court also ruled that even if the Vienna Convention provided judicially enforceable relief for violations of its notification provisions, such relief was precluded by a 1996 federal statute limiting the jurisdiction of federal courts to give such relief in habeas proceedings.[53] Specifically, the Court held that the federal statute prevented federal courts from taking jurisdiction over claims that would have been "procedurally defaulted" under state law because defendants had failed to raise such claims in their original trial and appeal.[54] In other words, the Court held that the federal statute denied jurisdiction to federal courts over Breard's claim because Breard had failed to raise his VCCR claim at his state court trial and appeal.

At the same time that the U.S. Supreme Court refused to intervene, the U.S. Secretary of State sent a letter to the Governor of Virginia asking him to consider the ICJ order when determining whether to allow the Breard execution to go forward.[55] The Governor duly announced that he had considered the order but that he was not bound by it.[56] Breard was then executed.[57] Paraguay and the U.S. subsequently reached a diplomatic settlement resulting in Paraguay's termination of its case before the ICJ reached final judgment.[58] The ICJ did not get an

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49. Breard v. Greene, 523 U.S. 371, 373–75 (1998) (per curiam) (discussing the procedural history and separate claims raised by Angel Breard and the Republic of Paraguay).

50. *See id.* at 372–74. The opinion was issued on April 14, eleven days after Paraguay's application, five days after the ICJ's order, and hours before Breard's scheduled execution.

51. *Id.* at 378–79.

52. *Id.* at 375 (noting that procedural rules of the forum state govern a treaty's implementation absent a clear statement to the contrary).

53. *Id.* at 376–77 (noting that Breard's failure to comply with the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 18 and 28 U.S.C.), barred his habeas claim).

54. *Id.* at 375–77.

55. *See* Brief for the United States as Amicus Curiae at 51, app. F (Letter from Madeline K. Albright, U.S. Secretary of State, to James Gilmore, Governor of Virginia (Apr. 13, 1998)), Breard v. Greene, 523 U.S. 371 (1998) (No. 97-8214 (A-732)).

56. Asha Rangappa, *The Power to Pardon, the Power to Gain*, N.Y. TIMES, Feb. 3, 2001, at A13.

57. *Id.*

58. *See* Case Concerning the Vienna Convention on Consular Relations (Para v. U.S.), 1998 I.C.J. 99 (Nov. 10). For a detailed overview of the *Breard* case, see Curtis A. Bradley, Breard, *Our*

opportunity to rule on the merits of the foreign nationals' VCCR claims until nearly two years later when Germany brought an ICJ application nearly identical to Paraguay's.

2. *The* LaGrand *Case*

In *LaGrand Case*,[59] Germany sought to suspend the execution of Walter LaGrand, a German national who had been sentenced to death by the State of Arizona. Like Paraguay, Germany won a provisional measures order from the ICJ ordering the suspension of the execution pending the ICJ's consideration of the merits,[60] but neither Arizona nor the U.S. Supreme Court treated this order as binding.[61] LaGrand was then executed.[62] Unlike Paraguay, Germany continued to litigate the case in the ICJ and, after a year, brought the U.S. to a full scale hearing on the merits.[63]

In *LaGrand*, the ICJ ruled that the right to notification guaranteed by the VCCR required the host state to provide review and reconsideration of convictions resulting in prolonged detention or severe punishment that were obtained in violation of this treaty obligation.[64] Its decision relied in part on its reading of paragraph 2 of article 36,[65] which provided that a host state's domestic laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this [a]rticle are intended."[66] The U.S. had argued that its violation

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Dualist Constitution, and the Internationalist Conception, 51 STAN. L. REV. 529, 532–38 (1999).

59. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

60. LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 9 (Provisional Measures Order of Mar. 3).

61. Germany invoked the original jurisdiction of the U.S. Supreme Court in seeking enforcement of the ICJ order, but was denied. Fed. Republic of Germany v. United States, 526 U.S. 111, 111–12 (1999). Walter LaGrand also raised the ICJ order in his habeas petition. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 477 (June 27). The Governor of Arizona rejected the ICJ's order and Arizona executed Walter LaGrand. *Id.* at 479–80. For a discussion of the *LaGrand* provisional measures order, see William J. Aceves, *International Decisions: Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)*, 93 AM. J. INT'L L. 924 (1999).

62. William J. Aceves, *International Decisions: LaGrand (Germany v. United States)*, 96 AM. J. INT'L L. 210, 212 (2002).

63. *Id.*

64. *See* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 513–14 (June 27); William J. Aceves, *International Decisions: LaGrand (Germany v. United States)*, 96 AM. J. INT'L L. 210, 215–16 (2002).

65. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 497–98 (June 27) (finding that application of the procedural default rule violated VCCR article 36(2)).

66. VCCR, *supra* note 29, art. 36(2).

of the provision did not require it to provide judicial relief to remedy such violations.[67] Rather, the U.S. argued, a treaty violation required only apologies by the U.S.[68] The ICJ rejected this view, but it left the means of how to provide review and reconsideration of such violations to the host state.[69]

The U.S. has never disputed that it is subject to the jurisdiction of the ICJ pursuant to the VCCR's Optional Protocol, nor has it disputed that U.S. officials violated the notification obligations of article 36. Rather, as *LaGrand* made clear, the dispute between the U.S. and the ICJ boils down to a disagreement over whether U.S. treaty obligations under the VCCR can supersede otherwise valid U.S. domestic law concerning criminal punishment and sentencing.

The *LaGrand* decision did not alter U.S. court treatment of VCCR claims. Both before and after *LaGrand*, U.S. courts have consistently refused to provide judicial relief for VCCR violations. The courts have held that the VCCR either did not create judicially enforceable rights,[70] or if raised in habeas proceedings, that those claims of treaty violations were barred by the doctrine of procedural default.[71] Moreover, courts have ruled that even if the VCCR did create such rights, violation of those rights did not prejudice the defendants' trial and sentence.[72]

Such rulings were made in conformity with the views of the federal government on the proper interpretation of the VCCR.[73] Additionally, after *LaGrand*, the U.S. government took the position that the "review

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67. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 497–98 (June 27).

68. *Id.* at 488–89, 511.

69. *Id.* at 512, 514.

70. *See, e.g.*, United States v. Jimenez-Nava, 243 F.3d 192, 196–98 (5th Cir. 2001) (holding that the VCCR creates no private enforceable right of action). The Supreme Court has recently agreed to consider whether the VCCR does in fact create an individual right, and if so, whether a violation of a VCCR right requires the suppression of evidence in a criminal proceeding. *See* Sanchez-Llamas v. Oregon, ___ U.S. ___ (Nov. 7, 2005), 126 S. Ct. 620 (2005) (mem.), *granting cert. to* 108 P.3d 573 (Or. 2005).

71. *See, e.g.*, Medellin v. Dretke (*Medellin I*), 371 F.3d 270, 279–80 (5th Cir. 2004), *cert. dismissed*, ___ U.S. ___ (May 23, 2005), 125 S. Ct. 2088 (2005) (per curiam); LaGrand v. Stewart, 170 F.3d 1158, 1161 (9th Cir. 1999); Murphy v. Netherland, 116 F.3d 97, 99–100 (4th Cir. 1997); *see also* Memorial Submitted by the Federal Republic of Germany, LaGrand (F.R.G. v. U.S.), paras. 4.36–.47 (Sept. 16, 1999), *available at* http://www.icj-cij.org/icjwww/idocket/igus/iguspleadings/iGUS_ipleading_Memorial_Germany_19990916_Complete.htm.

72. *See, e.g.*, United States v. Ore-Irawa, 78 F. Supp. 2d 610, 613 (E.D. Mich. 1999).

73. *See, e.g.*, Counter-Memorial Submitted by the United States of America, LaGrand (F.R.G. v. U.S.), para. 76 (Mar. 27, 2000), *available at* http://www.icj-cij.org/icjwww/idocket/igus/iguspleadings/iGUS_ipleading_CounterMemorial_US_20000327.htm.

and reconsideration" mandated by the *LaGrand* decision could be satisfied through executive clemency procedures.[74] In other words, the U.S. maintained that no judicial action was required to comply with the U.S.'s treaty obligations as interpreted by the ICJ.

3. *The* Avena *Case*

The position taken by the Court in *LaGrand* sparked a third round of ICJ litigation in 2002 when Mexico applied to the ICJ on behalf of all Mexican nationals facing execution in the U.S.[75] Mexico essentially asked the ICJ to revisit its ruling in *LaGrand* and require a judicial remedy for defendants convicted and sentenced in violation of VCCR treaty rights.[76] In *Avena and Other Mexican Nationals* (*Avena*),[77] the ICJ ruled in favor of Mexico and held that the VCCR required a host state to "permit review and reconsideration of [the Mexican] nationals' cases by the U.S. courts" to determine whether the violations "caused actual prejudice."[78] This meant more than simply providing executive clemency review and meant that procedural default rules should not bar such review.[79]

Thus, although the ICJ had held in *LaGrand* that the "review and reconsideration" required by the VCCR was left to the means chosen by the U.S., in *Avena* the ICJ explained that this choice was limited to judicial (as opposed to administrative) review.[80] Additionally, the ICJ went out of its way to hold that the application of the procedural default doctrine violated U.S. obligations under the VCCR.[81] It extended this ruling to apply to all VCCR claims by foreign nationals in U.S. courts, including nationals from countries that had not brought challenges under

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74. *See, e.g.*, Verbatim Record, Avena (Mex. v. U.S.), I.C.J. Doc. CR 2003/2, para. 3.10 (Jan. 21, 2003) (statement of Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus_icr2003-01_20030121.PDF.

75. *See* Memorial Submitted by Mexico, Avena (Mex. v. U.S.), paras. 347–54 (June 20, 2003), http://www.icj-cij.org/icjwww/idocket/imus/imuspleadings/imus_ipleadings_20030620_memorial_06.pdf [hereinafter Avena Memorial].

76. *Id.* paras. 364–73.

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

78. *Id.* at 59–60.

79. *Id.* at 65–66.

80. *Id.* at 66 (explaining that the judicial process fulfills the review and reconsideration requirement while the executive clemency process does not).

81. *See id.* at 65.

the ICJ.[82]

In sum, the ICJ's first two judgments in *Breard* and *LaGrand* were not directly enforced by U.S. courts. But the domestic legal status of the ICJ's judgment was not settled by the failure of U.S. courts in those cases to give them judicial effect. In *Breard*, the Supreme Court assumed that the ICJ's provisional measures order was non-binding as a matter of international law; in *LaGrand*, the Court did not reach the question. The *Avena* decision presented the first opportunity for U.S. courts to squarely consider the domestic enforceability of an ICJ order whose binding force under international law was uncontested.

B. Medellin*: The Judicial Enforceability of ICJ Judgments*

The ICJ's judgment in *Avena* applied to all Mexican nationals facing capital sentences in the U.S. Attorneys for those Mexican nationals immediately moved to test the impact of the *Avena* judgment in domestic litigation. The first test occurred in Oklahoma state courts with an inconclusive result. The second test occurred in federal courts hearing petitions from José Medellín, a Mexican national facing execution by Texas. The Texas case proved to be the road to eventual Supreme Court consideration of the *Avena* decision.

1. Oklahoma: An Inconclusive Test of the Avena *Court's Implications*

Before the ICJ had issued its final judgment in *Avena*, lawyers for the first Mexican facing an execution, Osbaldo Torres, unsuccessfully petitioned the U.S. Supreme Court to suspend the execution pending the ICJ's final judgment.[83] As in the cases involving *Breard* and *LaGrand*, the U.S. Supreme Court denied, over the objections of Justices Stephen Breyer and John Paul Stevens,[84] Torres' petition for certiorari seeking a stay of his execution to allow the ICJ to consider the merits of Mexico's case.[85] Torres' execution date was set for May 18, 2004.[86]

After the ICJ's final judgment in *Avena*, the Oklahoma court stayed Torres' execution with little explanation outside of a concurring

82. *Id.* at 57.

83. *See* Torres v. Mullin, 540 U.S. 1035, 1035 (2003) (mem.) (denying certiorari).

84. *See id.* at 1035 (Stevens, J., concurring); *id.* at 1037 (Breyer, J., dissenting).

85. *Id.* at 1035.

86. Torres v. Oklahoma, No. PCD-04-442, 43 I.L.M. 1227, 1227 (Okla. Crim. App. May 13, 2004).

opinion.[87] Despite the importance of its decision, the Oklahoma court as a whole offered no reasons for reversing its decision. The only reasoning offered for the decision was provided in a special concurrence signed by only two out of the three judges in the majority.[88] According to Justice Charles Chapel, who penned the concurrence, "the issue of whether this Court must abide by [the ICJ's] opinion in Torres's case is not ours to determine."[89] That decision, the reasoning went, had been made for the Court by the federal government's ratification of the VCCR and the Optional Protocol submitting the U.S. to the compulsory jurisdiction of the ICJ. Because treaties are "supreme law" under the Constitution, Oklahoma was bound to abide by the ICJ's interpretation of U.S. treaty obligations.[90]

Justice Chapel's concurring opinion is puzzling. He acknowledged that the U.S. State Department had consistently argued that the VCCR did not provide judicial remedies in domestic U.S. courts.[91] The State Department's view, as he recognized, also had been adopted by every U.S. court decision interpreting the VCCR.[92] Despite this unanimity of opinion, he nonetheless concluded that the ICJ's judgment, which clearly specifies some sort of judicial remedy, has some different kind of status because the State Department had also relied on the ICJ to make binding resolutions under the treaty.[93] For these reasons, he wrote, the court was bound by the ICJ's decision, even if the court would not ordinarily enforce the treaty.[94] Thus, the court vacated Torres' sentence and ordered a new hearing to assess the effect of the VCCR violation.[95]

It is important to note that the Oklahoma litigation did not occur in a political and diplomatic vacuum. The federal government sent a letter to the Governor as well as the state's board for pardons.[96] Just hours after the Court of Criminal Appeals issued its second order vacating Torres'

87. *Id.*

88. *Id.* at 1229–32 (Chapel, J., concurring).

89. *Id.* at 1229.

90. *Id.*

91. *Id.*

92. *Id.* at 1229 & n.17.

93. *Id.* at 1229.

94. *Id.*

95. *Id.* at 1227 (majority opinion).

96. *See* Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law: Implementation of Avena Decision by Oklahoma Court*, 98 AM. J. INT'L L. 581, 582 (2004).

sentence, the Governor of Oklahoma announced that he had commuted Torres' sentence out of deference to the ICJ's judgment.[97] Thus, barely one week before his scheduled execution, Torres found himself spared by two out of the three branches of the Oklahoma government. The difference was undoubtedly the intervening judgment by the ICJ.

2. *Testing Texas:* Medellin *Addresses the Ambiguities Left by* Torres

Although *Avena* made a difference in Torres' case, the odd posture of the *Torres* decision did not create a clear precedent on how or why the ICJ order should be enforced. The concurrence failed to lay out a clear theory for why the court should follow the ICJ order; in any event, it was merely a special concurrence attracting the votes of two out of the five justices. The next court to consider the effect of the ICJ's decision provided a clearer, although different, analysis.

a. Medellin*: The Lower Court Decisions*

The next Mexican national facing execution in the U.S. was José Medellín, who had been sentenced to death by the State of Texas.[98] At the time of the ICJ's final judgment in *Avena*, Medellín had already exhausted his state appeals and lost his first petition for habeas corpus relief in federal district court.[99] In particular, the district court rejected Medellín's habeas claim based on violations of the VCCR on the theory that his VCCR claim had been "procedurally defaulted" under Texas law.[100] Relying on the same federal statute invoked by the Supreme Court in *Breard*, the federal district court also denied Medellín's request for a certificate of appealability (COA) that would permit him to challenge the district court's decision in appellate court.[101]

While Medellín challenged the denial of his request for a COA in the U.S. Court of Appeals for the Fifth Circuit,[102] the ICJ announced its

97. *See* Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), *available at* http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1 ("Under agreements entered into by the United States, the ruling of the ICJ is binding on U.S. courts.").

98. *See Medellin I*, 371 F.3d 270, 273–74 (5th Cir. 2004) (describing the background and posture of the case), *cert. dismissed*, ___ U.S. ___ (May 23, 2005), 125 S. Ct. 2088 (2005) (per curiam).

99. *See id.* at 274.

100. *See id.* at 279 (noting that the petitioner conceded that his claim was procedurally defaulted under Texas law).

101. *See id.* at 274–75 (relying on provisions of AEDPA).

102. *See id.* at 279–80 (noting the ICJ's judgment in *Avena*).

intervening final judgment in *Avena*.[103] Medellín argued that *LaGrand* required U.S. courts to give him review and reconsideration for his VCCR claim in spite of the procedural default doctrine.[104] The court noted that the *Avena* judgment had reaffirmed the *LaGrand* holding.[105] By refusing to grant him a hearing and denying him a COA to challenge his state convictions, he argued, the district court had failed to comply with the VCCR as interpreted by the ICJ.[106]

The Fifth Circuit rejected Medellín's argument on two grounds. First, it continued to hold that Medellín's petition for relief under the VCCR was procedurally defaulted.[107] Second, it held that even if his claim was not defaulted, the VCCR itself provided no individually enforceable rights for which the court could grant relief.[108]

The first ground proved to be the most important. Acknowledging that the ICJ found the procedural default doctrine a violation of the VCCR in both *LaGrand* and *Avena*, the court nonetheless refused to follow those ICJ holdings.[109] The court explained:

> Though *Avena* and *LaGrand* were decided after *Breard*, and contradict *Breard*, we may not disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims. . . . That is, only the Supreme Court may overrule a Supreme Court decision. The Supreme Court has not overruled *Breard.* We are bound to follow the precedent until taught otherwise by the Supreme Court.[110]

Thus, the Fifth Circuit refused to give effect to the ICJ's judgments on the grounds that it lacked the authority to reverse Supreme Court precedent, even pursuant to an international court judgment.

b. The Supreme Court's Grant of Certiorari

A number of factors made future litigation on the question of the ICJ judgment's effect in courts almost inevitable. Unintentionally or not, the Fifth Circuit's reliance on the Supreme Court's decision in *Breard*, and

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103. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 12 (Mar. 31).

104. *See Medellin I*, 371 F.3d at 279.

105. *Id.*

106. *See id.*

107. *See id.* at 279–80.

108. *See id.* at 280.

109. *Id.*

110. *Id.*

on the Supreme Court's exclusive authority to reverse its decision in *Breard*, made the Supreme Court's intervention more likely. Additionally, the Oklahoma court's decision in *Torres* raised the possibility of a split between federal and state courts on the effect of the ICJ judgment. Moreover, Mexico's application to the ICJ sought relief for all Mexicans facing execution in the U.S.; the ICJ went further and extended the scope of its judgment to all foreign nationals facing execution in the U.S.

In December 2004, the Court granted Medellín's petition for a writ of certiorari.[111] The Court's writ extended to two questions. First, the Court agreed to consider whether the ICJ ruling that U.S. courts must "reconsider petitioner José Medellín's claim for relief under the [VCCR], without regard to procedural default doctrines" is binding on federal courts.[112] Second, the Court agreed to consider whether federal courts "should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment."[113]

3. *Three Views on Judicial Enforceability of the ICJ's Judgment*

The Court's questions elicited sharp disagreement over the judicial enforceability of international tribunal judgments and the proper role of domestic courts in enforcing these judgments. Medellín advocated a strict internationalist approach giving the ICJ order direct enforceability in U.S. courts. Texas argued that the ICJ order was not directly enforceable at all by the Court. Meanwhile the U.S. government put forward a somewhat surprising third view: the ICJ order was enforceable, but only by the federal executive branch and not by the federal courts.

a. *The Internationalist View: Judicial Enforceability of the ICJ*

Medellín, the petitioner, argued that the Supreme Court was obligated to give effect to the ICJ's interpretation of the VCCR. He argued that the legal obligation stemmed from three U.S. treaties: the VCCR itself, the Optional Protocol to the VCCR granting the ICJ jurisdiction over the case, and the U.N. Charter's provision obligating member states to

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111. *Medellin II*, ___ U.S. ___ (Dec. 10, 2004), 125 S. Ct. 686, 686 (2004) (mem.) (granting certiorari), *cert. dismissed*, ___ U.S. ___ (May 23, 2005), 125 S. Ct. 2088 (2005) (per curiam).

112. *Medellin III*, ___ U.S. ___ (May 23, 2005), 125 S. Ct. 2088, 2089 (2005) (per curiam).

113. *Id.*

comply with judgments of the ICJ.[114] According to Medellín, the three treaties were the "law of the land" pursuant to the Supremacy Clause of the U.S. Constitution and therefore binding on the Court.[115] Moreover, the VCCR and the Optional Protocol were both "self-executing" obligations that could and must be enforced by the Court.[116] These obligations thus overrode any inconsistent state law, such as the procedural default doctrine.[117] Consequently, he argued, courts should not apply federal habeas laws incorporating such state law doctrines in the face of the ICJ's judgment.[118]

A dizzying array of non-governmental organizations, international legal academics, governments, and international organizations filed briefs in support of Medellín. All of these petitions emphasized the importance of complying with international tribunal judgments.[119] A number of prominent international law experts argued that "this Court has not only the authority but the responsibility to conclude that the correct interpretation of an international treaty is the one settled through an authoritative and binding process of dispute settlement, even if the executive branch previously advanced a different position unsuccessfully in the international litigation."[120] In this view, the Court should act to fulfill the U.S. foreign policy goal of compliance with international law by implementing the ICJ's judgment, whether or not the executive branch had instructed the Court to do so.

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114. *See* Brief for Petitioner at 14–15, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 176452.

115. *See id.* at 14.

116. *See id.* at 15.

117. *See id.* at 16–17.

118. *Id.* at 39–42.

119. *See, e.g.*, Brief Amicus Curiae of NAFSA: Association of International Educators et al., in Support of Petitioner at 16–17, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 166592; Brief Amicus Curiae of Ambassador L. Bruce Laingen and Lieutenant Colonel John J. Swift et al., in Support of Petitioner at 9–15, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 166593; Brief of Amici Curiae Bar Ass'ns et al., in Support of Petitioner at 12–16, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 166594; Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner at 13–22, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 176425; Brief of Foreign Sovereigns as Amici Curiae in Support of Petitioner Jose Ernesto Medellin, *supra* note 13, at 15–18; Brief of the American Bar Ass'n as Amicus Curiae in Support of Petitioner at 22–25, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 176451; Brief of International Law Experts as Amici Curiae in Support of Petitioner at 14–28, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 176453.

120. Brief of International Law Experts as Amici Curiae in Support of Petitioner, *supra* note 119, at 29.

b. Texas' View: No Enforceability of the ICJ Order

Texas' response to the internationalist arguments fell along two main lines. First, Texas argued that the VCCR did not grant defendants like Medellín individually enforceable rights.[121] Similarly, Texas argued that the Optional Protocol granting the ICJ compulsory jurisdiction did not give the ICJ's judgments self-executing effect either.[122] Indeed, as some amici argued, if the Optional Protocol did grant the ICJ's judgments self-executing effect, the Optional Protocol would have violated principles of constitutional separation of powers.[123]

Texas also argued that even if the VCCR did create individually enforceable rights, such rights could not be the basis for federal appellate jurisdiction under federal habeas statutes.[124] Such statutes, enacted in 1996, limited federal appellate jurisdiction to claims of a denial of a constitutional right. No such jurisdiction could be invoked for claims of statutory or treaty violations. Because the federal statute in question was enacted later in time than the VCCR, that statute trumped any obligations imposed by that treaty, if such obligations existed.

On this view, no federal or state court had the power to implement the ICJ's order. Texas suggested that only the President or Congress, as well as Texas itself, had the power to bring the U.S. into compliance with the ICJ judgment. If none of these institutions chose to act, the courts could not properly enforce the ICJ's order.

c. The Presidentialist View: Executive Enforceability

Texas' response was overshadowed by a remarkable brief filed by the U.S. Solicitor General on behalf of the U.S. While the U.S. agreed with Texas' arguments on the non-enforceability of the ICJ judgments in federal courts, the U.S. position went further. In addition to arguing that the Supreme Court lacked the authority to enforce ICJ judgments,[125] the U.S. also argued that the President held the exclusive authority to do

121. Respondent's Brief at 25–32, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 497765.

122. *Id.* at 32–37.

123. *See* Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as Amici Curiae in Support of Respondent at 8–20, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 497763.

124. *See* Respondent's Brief, *supra* note 121, at 8–11.

125. Brief for the United States as Amicus Curiae Supporting Respondent at 38, *Medellin III*, 125 S. Ct. 2088 (No. 04-5928), 2005 WL 504490.

so.[126] Indeed, the U.S. explained that the President had exercised this authority in this case in the form of the following memorandum:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)* by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[127]

Thus, the President, and not the Supreme Court, had the duty and authority to carry out the U.S. government's international obligations. In this case, the President would require state courts to grant hearings for Mexican nationals to "review and reconsider" the effect of treaty violations on their convictions and sentences out of comity principles.[128]

The Supreme Court was thus presented with three views of the proper status of the ICJ's judgment in domestic U.S. law. Medellín, supported by internationalist scholars, argued for direct judicial enforcement of the ICJ's order. Texas rejected this view and argued that no state or federal court had the authority to implement the ICJ's order. Finally, the U.S. suggested that the President alone was authorized to implement the ICJ's judgment and his intervention directing Texas courts to give effect to the ICJ order was a proper exercise of his executive powers.

4. The Supreme Court's Decision

The President's unusual intervention upended the Court's consideration of the case. Medellín immediately filed a motion for a stay of the case pending his return to Texas courts to implement the President's order.[129] Texas successfully opposed this motion and asked the Court to reach the merits of the case by holding that federal courts held no appellate jurisdiction in allegations of treaty violations.[130]

Instead of reaching the merits, the Court dismissed the writ of

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126. *See id.* at 38–40.

127. *Id.* app. 2A ("Memorandum to the Attorney General of the United States, Appendix to the Brief of the United States Amicus Curiae") (citations omitted).

128. *See id.*

129. *See Medellin III*, 125 S. Ct. at 2093 (Ginsburg, J., concurring) (discussing motion for stay).

130. *Id.*

certiorari as improvidently granted.[131] The President's intervention, the Court noted, may have resulted in giving Medellín the very "review and reconsideration" that he had been seeking.[132] Moreover, the numerous procedural obstacles to Medellín's claim in federal court could be avoided by dismissing the writ.[133]

The Court's five-four decision was deeply divided. Four justices argued that the case should have been remanded to the Fifth Circuit with instructions to grant a COA to Medellín. While not reaching the merits, Justice Sandra Day O'Connor simply noted that "[r]easonable jurists can vigorously disagree about whether and what legal effect ICJ decisions have in our domestic courts . . . ."[134] Other justices suggested that they would have voted to grant the stay Medellín requested.[135] In any case, the Court made clear that it would continue to retain appellate jurisdiction over any subsequent decision in the Texas courts as to the enforceability of the President's memorandum requiring compliance with the ICJ's order.[136]

In sum, the VCCR litigation arising out of the ICJ's judgment in *Avena* led the Supreme Court to consider, for the first time, the domestic effect of the ICJ's interpretations of U.S. treaty obligations under the VCCR. Although the Court's consideration of these issues was aborted due to the President's intervention, the Court's deep divisions on how to dispose of the case demonstrate that it plainly remains interested in considering these issues again. Moreover, as Part II explains, the growing significance of international tribunals likely means that resolving questions about the domestic effect of international tribunal judgments like *Avena* will become unavoidable.

II. A NEW WORLD COURT ORDER

One of the most important developments in contemporary international relations is the rise in number and importance of

131. *Id.* at 2089 (per curiam).

132. *Id.* at 2090.

133. *See id.* at 2089.

134. *Id.* at 2102 (O'Connor, J., dissenting).

135. *See id.* at 2106 (Souter, J., dissenting).

136. *See id.* at 2090 n.1 (per curiam) ("Of course Medellín, or the State of Texas, can seek certiorari in this Court from the Texas courts' disposition of the state habeas corpus application. In that instance, this Court would in all likelihood have an opportunity to review the Texas courts' treatment of the President's memorandum and *Case Concerning Avena and other Mexican Nationals* . . . .").

international tribunals. This phenomenon, which I call "a new world court order," has two distinctive characteristics, both of which were present in the *Medellin* case. The first characteristic is the proliferation of independent international tribunals authorized to issue interpretations of international treaty obligations binding on individual nation-states. The second characteristic is domestic courts giving the judgments of these increasingly ubiquitous international tribunals direct or self-executing legal effect.

A. The Rise of International Tribunals

One of the more distinctive characteristics of the post-war, and especially the post-Cold War, system of international relations has been the proliferation of international tribunals.[137] By one count, there are over 100 international tribunals and institutions operating today.[138] Almost all of these tribunals have been established since the end of World War II.[139]

For my purposes, the term "international tribunal" refers to any international institution holding the authority to impose binding obligations on nations arising out of a dispute over the requirements of international law. The term "international tribunal," which is the term used in federal statutory law,[140] includes a variety of international adjudicatory bodies, some of which might call themselves "courts." My discussion excludes from this category international organizations that issue non-binding recommendations such as the United Nations General Assembly[141] or the United Nations Human Rights Commission.[142] I also

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137. *See* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 3 (2005); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 729 (1999).

138. *See* PROJECT ON INT'L COURTS & TRIBUNALS, THE INTERNATIONAL JUDICIARY IN CONTEXT: A SYNOPTIC CHART (2004), http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf (identifying 125 international bodies that have international dispute resolution features in common).

139. *Id.*; *see also* Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L. J. 271, 272–74 (2003).

140. *See, e.g.*, 28 U.S.C. § 1782(a) (2000) ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.").

141. *See, e.g.*, U.N. Charter art. 10 ("The General Assembly . . . may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.").

exclude organizations that impose new obligations pursuant to a legislative process such as the process for amending the United Nations Charter[143] or the agreement forming the World Trade Organization.[144] My focus remains on international organizations that are empowered to adjudicate disputes between states.

Even narrowed to this extent, classifying the array of international tribunals is hardly a simple task.[145] Some tribunals include memberships of nearly every nation,[146] others have regional memberships,[147] and some involve only two nations.[148] Some tribunals have broad jurisdiction and competence to handle a wide variety of international disputes,[149] while others have narrow jurisdiction limited to a particular subject matter or set of international agreements.[150] Broadly speaking, international

142. The Commission draws its authority from the U.N.'s Economic and Social Council. *See id.* art. 68 ("The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."). The Commission has no greater binding power than the Economic and Social Council itself. *See, e.g., id.* art. 62 ("The Economic and Social Council . . . may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.").

143. *See id.* art. 108 ("Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.").

144. *See* Marrakesh Agreement Establishing the World Trade Organization art. X, Apr. 15, 1994, 108 Stat. 4809, 1867 U.N.T.S. 14 [hereinafter WTO Agreement].

145. The most recent scholarly effort to categorize this mass of tribunals is found in Posner & Yoo, *supra* note 137, at 8–12.

146. *See, e.g.*, Statute of the International Court of Justice, June 26, 1945, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm [hereinafter ICJ Statute] (stating that every member of the United Nations is a party to the Statute of the International Court of Justice).

147. *See, e.g.*, Statute of the Inter-American Court on Human Rights, Oct. 1979, *reprinted in* ORG. OF AM. STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 155–64 (2001), *available at* http://www.cidh.oas.org/Basicos/basic17.htm [hereinafter IACHR Statute] (limiting membership to parties to the American Convention on Human Rights).

148. *See, e.g.*, Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Eri., Dec. 12, 2000, *available at* http://www.pca-cpa.org/ENGLISH/RPC/EEBC/E-E%20Agreement.html.

149. *See, e.g.*, Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, 18 I.L.M. 1203.

150. *See, e.g.*, Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa, OHADA Overview, http://www.juriscope.org/infos_ohada/traite/pdf-gb/presentation-tgb.pdf (last visited Jan. 20, 2006).

tribunals can be grouped into two main groups: arbitral tribunals and international courts.

1. Arbitral Tribunals

The most traditional form of international dispute resolution involves the use of a special ad hoc arbitral tribunal empowered to settle a particular set of disputes between two states. An early example is the tribunal set up by the U.S. and Great Britain to settle claims arising out of the Revolutionary War.[151] This claims commission was composed of five commissioners, four of whom were appointed by the U.S. and Britain and the fifth chosen by the unanimous consent of the four appointed commissioners.[152] The commission was empowered to ascertain the amount of any compensation or damages suffered by British citizens during the war.[153] Sitting in Philadelphia, the commission was authorized to examine witnesses under oath and to receive evidence.[154] Most importantly, the treaty specified that any award of the commission "shall in all cases be final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the creditor or claimant: And the United States undertake to cause the sum so awarded to be paid . . . ."[155]

The use of similar commissions continues to this day. For instance, in 1979, the U.S. and Iran agreed to send all disputes arising out of Iran's expropriation of U.S. property to the U.S.-Iran Claims Tribunal,[156] which still sits in The Hague. Most recently, Eritrea and Ethiopia agreed to a bilateral claims commission to settle disputes arising out of their civil war.[157] Moreover, such bilateral arbitral tribunals sometimes deal with disputes unrelated to military conflict. For instance, fellow

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151. *See* Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. VI, Nov. 19, 1794, 8 Stat. 116.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, DEP'T ST. BULL., No. 2047, Feb. 1981, at 3, *reprinted in* 20 I.L.M. 230 (1981).

157. *See* Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Eri., Dec. 12, 2000, *available at* http://www.pca-cpa.org/ENGLISH/RPC/EEBC/E-E%20Agreement.html.

European Union members Belgium and the Netherlands agreed to send a century-old dispute over rights to the "Iron Rhine" railway line to an ad hoc arbitral tribunal.[158] In the modern era, the bilateral ad hoc arbitral tribunal is most commonly used in bilateral investment treaties, usually between a "developed" and a "developing" country for the benefit of developed country investors.[159]

These various and disparate types of tribunals share a few key characteristics. All of the tribunals have been created by international agreement and exist only to resolve a discrete dispute or set of disputes. National governments choose the members of the tribunals.

While traditional ad hoc arbitral tribunals remain commonplace, in recent years countries have agreed to submit disputes to hybrid arbitral tribunals. Hybrid arbitral tribunals combine the flexibility of the arbitral process with the independence of the other main form of international tribunal: the international court. Like ad hoc arbitral tribunals, hybrid tribunals have arbitrators chosen by the governments themselves. Unlike ad hoc tribunals, however, hybrid arbitral tribunals often pre-select the arbitrators prior to any particular dispute by creating a list or panel of available arbitrators. This limits the ability of the countries involved in a dispute to select the particular arbitrator for a particular dispute. Moreover, hybrid arbitral tribunals have their own set of pre-existing procedural rules. Most importantly, a number of hybrid arbitral tribunals permit appeals from decisions of arbitration panels to an appellate body composed of permanent arbitrators.

The hybrid model has proved popular and has been widely adopted by the U.S. in trade agreements like the North American Free Trade Agreement (NAFTA)[160] and investment dispute agreements like the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[161] The most prominent hybrid tribunal is the dispute resolution system of the World Trade Organization (WTO). The WTO Secretariat keeps an "indicative list" of qualified

158. *See* Exchange of Notes between Belgium and the Netherlands, July 22, 2003, *available at* http://www.pca-cpa.org/ENGLISH/RPC/BENL/BE-NL%20Arbitration%20Agreement.pdf.

159. *See, e.g.*, Model U.S. Bilateral Investment Treaty art. 24 (2004), *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

160. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1116, Dec. 17, 1992, 32 I.L.M. 605 (1993); *see also* North American Free Trade Implementation Act of 1993, Pub. L. No. 103-1082, 107 Stat. 2057 (codified at 19 U.S.C. §§ 3301–3473 (2000)) (implementing NAFTA agreement as part of U.S. law).

161. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, arts. 37–40, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

arbitrators.[162] This list is drawn from the member countries.[163] When a dispute arises, the Dispute Settlement Body of the WTO appoints a panel of arbitrators from this list, none of whom can be nationals of the countries involved in the dispute.[164] After the initial panel issues its decisions, countries may appeal to the Appellate Body, which is composed of seven permanent arbitrators, three of whom can hear an appeal.[165] Such permanent arbitrators serve terms of four years.[166]

2. *International Courts*

International courts are permanent stand-alone institutions with judges who are given a substantial level of independence. Unlike arbitral tribunals, international courts also have a wider scope of jurisdiction to resolve disputes beyond a particular international agreement. Although ad hoc tribunals remain commonplace, recent trends suggest that international courts will continue to grow in number and importance.

The ICJ is perhaps the most prominent example of this type of tribunal.[167] The ICJ was created by agreement pursuant to the United Nations Charter.[168] The ICJ Statute, which organizes the ICJ as an institution, is incorporated as a treaty by the Charter.[169] The fifteen justices of the ICJ are elected by the General Assembly and the Security Council for a term of nine years.[170]

The ICJ is unique among international tribunals because it is the only tribunal explicitly incorporated into the U.N. Charter and the only tribunal that holds, for those countries who have accepted it, compulsory jurisdiction over any type of dispute involving international law.[171] The

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162. *See* World Trade Organization, The Process—Stages in a Typical WTO Dispute Settlement Case, http://www.wto.org/English/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm (last visited Oct. 17, 2005).

163. *Id.*

164. WTO Agreement, *supra* note 144, annex 2, art. 8, *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Jan. 7, 2006).

165. *Id.*

166. *Id.* art. 17.

167. *See* Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court Biased?*, 34 J. LEGAL STUD. 599, 600 (2005).

168. U.N. Charter arts. 92–94.

169. *Id.* art. 92, para. 1 ("The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of Justice and forms an integral part of the present Charter.").

170. ICJ Statute, *supra* note 146, art. 3.

171. The United States made such a general declaration in 1946 subject to two reservations

Charter requires that: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[172] Article 36(2) of the Statute of the Court permits states to recognize the jurisdiction of the Court as compulsory with respect to treaty violations, general international law, particular breaches of international law, and remedies for those breaches.[173]

Other international courts have similar powers with respect to regional agreements. The Court of Justice of the European Community (ECJ), for instance, is authorized to hear any dispute between members of the European Community (EC) with regard to European law.[174] As I discuss in the next Section, the ECJ's decisions have also been widely followed by European national courts.[175] Regional courts have also been established with regard to regional human rights treaties.[176] The broad scope of these treaties effectively grants these courts a wide scope of jurisdiction.

Aside from regional courts, two other prominent international courts rivaling the ICJ in importance have been established in recent years. In

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limiting its acceptance of the compulsory jurisdiction to matters outside the domestic jurisdiction of the United States and for disputes arising out of multilateral treaties. *See* REMARKS OF HON. TOM CONNALLY RELATIVE TO THE CHARTER OF THE UNITED NATIONS FOR THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY, S. DOC. NO. 79-58, at 7 (1945); Recognition of Compulsory Jurisdiction of the International Court of Justice, 92 CONG. REC. 10,694 (1946), *reprinted in* DEP'T ST. BULL., Sept. 1946, at 452–53. The United States later revoked this general acceptance of compulsory jurisdiction in 1984 after receiving an adverse judgment in a case brought by Nicaragua. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 17 (June 27). The United States, however, has continued to accept the compulsory jurisdiction of the ICJ for particular multilateral treaties, including the Vienna Convention for Consular Relations. *See* VCCR and Optional Protocol, *supra* note 29, art I.

172. U.N. Charter art. 94(1).

173. ICJ Statute, *supra* note 146, art. 36(2). Article 36(2) states:

> The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. the interpretation of a treaty;
>
> b. any question of international law;
>
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

Id.

174. *See* CURIA, The Court of Justice of the European Communities, http://www.curia.eu.int/en/instit/presentationfr/index_cje.htm (last visited Jan. 7, 2006).

175. *See infra* Part II.C.2.

176. *See, e.g.*, IACHR Statute, *supra* note 147; *see also* Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, 18 I.L.M. 1203.

2002, sixty member countries joined to establish the International Criminal Court, which is authorized to issue binding judgments obligating countries to prosecute or extradite individuals alleged to have committed genocide, war crimes, aggression, or crimes against humanity.[177] In 1994, the revised Law of the Sea Treaty established the International Tribunal for the Law of the Sea, which has jurisdiction to resolve any set of disputes arising from the interpretation or application of the treaty.[178]

B. U.S. Participation in International Adjudication

The U.S. is an active participant in the trend toward more international adjudication. While the exact number of U.S. agreements to submit to international dispute resolution is unknown, there is no doubt that the overall number is substantial.[179] Many appear to require bilateral arbitration before a tribunal whose members are chosen by the U.S. and its treaty partner. Perhaps as a reflection of the growth of international tribunals, the U.S. has agreed to compulsory dispute resolution by a wide variety of international courts staffed by judges over whom it exercises little control. Agreements to arbitration by bilateral tribunals and dispute resolution by international courts may provide for voluntary or compulsory jurisdiction.

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177. *See* Rome Statute of the International Criminal Court art. 89, July 17, 1998, 2187 U.N.T.S. 90, *available at* http://www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute]. Article 89 states:

> Surrender of persons to the Court
>
> The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

Id.

178. UNCLOS, *supra* note 24, art. 21. Article 21 states:

> Jurisdiction
>
> The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

Id. I discuss the treaty's obligations on the member states to grant self-executing status to the Law of the Sea tribunals in Part IV.

179. My own review of the U.S. Treaties database reveals that the U.S. is party to nearly 300 agreements to international dispute resolution.

1. U.S. Agreements to Bilateral Ad Hoc Arbitration

The U.S. is currently party to hundreds of agreements to ad hoc arbitration. Such agreements provide for the selection of arbitrators by the parties to the agreements themselves and the jurisdiction of such tribunals is generally sharply limited to matters designated by the agreements.[180] Moreover, in many cases, executive agreements contain these provisions without any ratification or input by Congress or the Senate.[181]

U.S. agreements to ad hoc arbitration may create tribunals with voluntary jurisdiction over the parties. This means that even after a dispute has arisen, both parties to the agreement must agree to arbitration before any arbitral tribunal can be constituted. Additionally, the obligations to arbitrate are often contained in agreements that are otherwise non-binding, such as a memorandum of understanding or framework agreement. For instance, the U.S. and South Africa entered into a 2001 agreement to cooperate in scientific and environmental development.[182] The agreement includes a provision to resolve disputes over intellectual property through arbitration. The provision states that "[u]pon mutual agreement of the Parties, a dispute shall be submitted to an arbitral tribunal for binding arbitration in accordance with the applicable rules of international law. Each Party shall, consistent with its national law, give full effect to any decision or award of the arbitral tribunal."[183] This agreement is merely an agreement to consider arbitration once a dispute has arisen. Neither party has any obligation to accept arbitration even if the other party asks for it.

The U.S. is also party to arbitral agreements that grant compulsory

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180. *See, e.g.*, Investment Incentive Agreement Between the United States of America and the Republic of Honduras, U.S.-Hond., art. IV(a), July 21, 2004, State Dept. No. 04-236, 2004 WL 2544878 ("Any dispute between the Government of the United States of America and the Government of the Republic of Honduras regarding the interpretation of this Agreement or which, in the opinion of either party hereto, presents a question of international law arising out of any project or activity for which Investment Support has been provided shall be resolved . . . [by] an arbitral tribunal."); *see also supra* Part II.A.

181. *See, e.g.*, CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 77 n.58 (Comm. Print 2001) (reporting that since 1939, 90 percent of all U.S. international agreements take the form of executive agreements).

182. Framework Agreement Concerning Cooperation in the Scientific, Technological and Environmental Fields, U.S.-S. Afr., art. XII, Aug. 27, 2001, Temp. State Dep't No. 01-96, 2001 WL 1355666.

183. *Id.* annex A, art. I(D).

jurisdiction once a dispute has arisen. These agreements commit the U.S. government to accept the jurisdiction of an arbitral tribunal even if it no longer wishes to arbitrate the dispute. For example, a 2002 investment incentive agreement between the U.S. and Palau provides that where negotiations to resolve matters of international law fail, the dispute "*shall* be submitted, at the initiative of either Government, to an arbitral tribunal for resolution."[184] Such a tribunal will include a member appointed by each government and the third member will be appointed by the two appointees and must be a citizen of a third state.[185]

Such compulsory arbitration agreements are not limited to bilateral agreements. A number of international conventions or protocols to international conventions include compulsory arbitration provisions as part of a menu of dispute resolution options. For example, the recent U.N. Convention Against Transnational Organized Crime obligates parties to compulsory arbitration. If the parties do not agree to arbitrate, parties must submit their dispute to the International Court of Justice.[186] Many of these conventions, however, permit the states to join without binding themselves to dispute resolution, as the U.S. has done on a number of occasions.[187]

2. *U.S. Agreements to Dispute Resolution by International Courts*

In addition to arbitration, the U.S. has also agreed to both voluntary and compulsory dispute resolution by international courts. The U.S. is party to several international conventions that provide for voluntary dispute resolution by an international court, usually the ICJ. For example, the Convention Against Transnational Organized Crime provides the ICJ as an option for parties who do not choose arbitration as

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184. Investment Incentive Agreement, U.S.-Palau, art. 4(a), Mar. 15, 2002, Temp. State Dep't No. 02-37, 2002 WL 1025083 (emphasis added).

185. *Id.*

186. U.N. Convention Against Transnational Organized Crime art. 35(2), Dec. 13, 2000, S. TREATY DOC. NO. 108-16, 2000 WL 34248775 ("Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.").

187. *See, e.g.*, Stockholm Convention on Organic Pollutants, May 22–23, 2001, S. TREATY DOC. NO. 107-5, 2001 WL 1875757.

the exclusive mechanism for dispute resolution.[188] Moreover, in some cases, the ICJ can only acquire jurisdiction if provided for by mutual consent of the parties.[189]

The U.N. Charter grants the ICJ general compulsory jurisdiction over essentially any question involving international law.[190] Although this provision is optional rather than mandatory, many countries have agreed to such general compulsory jurisdiction.[191] The U.S. accepted such compulsory jurisdiction until 1984,[192] when it withdrew this acceptance during a dispute with Nicaragua.[193]

Despite the 1984 withdrawal, the U.S. is still party to a number of agreements granting the ICJ compulsory jurisdiction over disputes arising out of those particular agreements.[194] This was the basis for the ICJ's jurisdiction over the VCCR litigation that eventually led to the *Medellin* case.[195] The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."[196] Although

188. U.N. Convention Against Transnational Organized Crime art. 35(2), Dec. 13, 2000, S. TREATY DOC. NO. 108-16, 2000 WL 34248775.

189. *See, e.g.*, Convention on Cybercrime art. 45(2), Nov. 23, 2001, S. TREATY DOC. NO. 108-11, 2001 WL 34368783 ("In case of a dispute between Parties as to the interpretation or application of this Convention, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute . . . , to an arbitral tribunal whose decisions shall be binding upon the Parties, or to the International Court of Justice, as agreed upon by the Parties concerned.").

190. *See* U.N. Charter art. 94.

191. *See* ICJ, Declarations Recognizing as Compulsory the Jurisdiction of the Court, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm (last visited Jan. 7, 2006).

192. Declaration by the President of the United States of America, Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598, 1946 WL 25470 (respecting recognition by the United States of the compulsory jurisdiction of the International Court of Justice).

193. United States: Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua at the International Court of Justice, Jan. 18, 1985, 24 I.L.M. 246 (withdrawing from ICJ's jurisdiction in case involving Nicaragua).

194. *See, e.g.*, Treaty of Friendship, Establishment and Navigation between the United States of America and The Kingdom of Belgium, U.S.-Belg., Feb. 21, 1961, 14 U.S.T. 1284, 1963 WL 65122; Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark, U.S.-Den., Oct. 1, 1951, 12 U.S.T. 908, 1961 WL 62672; Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Greece, U.S.-Greece, Aug. 3, 1951, 5 U.S.T. 1829, 1954 WL 43300.

195. *See supra* Part I.

196. VCCR, *supra* note 29, Optional Protocol, art. I.

the U.S. withdrew from the Optional Protocol to the VCCR during the consideration of the *Medellin* case by the Supreme Court,[197] it still remains party to at least seventy treaties with identical provisions, including the Vienna Convention on Diplomatic Relations and a number of Friendship, Commerce, and Navigation treaties.[198]

C. *Theories of Compliance with International Tribunals*

Whatever form an international tribunal takes, and no matter the scope of its jurisdiction, it always faces the difficult problem of winning enforcement of its judgments. Unlike domestic courts, an international tribunal's judgment is rarely backed by an executive with enforcement power. The closest international analog to a domestic court's reliance on police and other executive officials to enforce its judgments is the U.N. Security Council, which is designated to "make recommendations or decide upon measures to be taken to give effect to" an ICJ judgment.[199] But the Security Council has never exercised this power to issue resolutions requiring compliance with an ICJ order.

Perhaps the most obvious mechanism for ensuring compliance with an international tribunal judgment is enforcement by the domestic court of the state suffering the adverse judgment. Such enforcement by domestic courts, however, is rare or non-existent because most international agreements fail to specify any particular domestic mechanism for enforcing international law obligations. The ICJ Statute is no different. For this reason, scholars have been unable to identify any U.S. court that has directly enforced an ICJ judgment.[200]

Scholars have devoted substantial attention to the effect of international tribunals on national behavior and compliance with international law. A number of leading scholars in the U.S. have advocated using the interaction between international tribunals and national courts to foster compliance by states with international law.

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197. *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1 (describing a letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations, withdrawing the U.S. from the Optional Protocol).

198. *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice, in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58, 78–81 (Lori F. Damrosch ed., 1987).

199. U.N. Charter art. 94(2).

200. *See* CONSTANZE SCHULTE, COMPLIANCE WITH THE DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 184 (2004) (reviewing court decisions interpreting ICJ opinions and failing to cite any that enforce an ICJ order).

Although these scholars typically share a commitment to compliance with international law, they approach the question of the proper relationship between international tribunals and domestic courts in two distinctive ways.

1. Liberal Internationalism

Liberal internationalism is the older, more traditional scholarship on international tribunals. Its adherents support expanding the power and effectiveness of international tribunals.[201] Such scholarship heavily emphasizes the importance of international cooperation through formal instruments such as treaties and international institutions. Scholars writing in this vein generally argue that the U.S. should, and perhaps must, comply with its international law obligations as interpreted by international tribunals.[202]

For many of these scholars, the favored method of improving compliance of nation-states, in particular the U.S., has been the enforcement of international tribunal judgments as domestic law by U.S. courts, both federal and state.[203] Such scholars support the formal incorporation of international law obligations, as interpreted by international tribunals, and generally reject constitutional obstacles to such incorporation. For example, liberal internationalist scholars have argued that judgments of the ICJ, including orders of provisional measures, should be directly enforced by U.S. courts.[204]

As Professor Lori Damrosch argued in reference to enforcement of ICJ orders in *Breard*, the U.S. Supreme Court "should have undertaken its own scrutiny notwithstanding the executive branch's submission that the petitions were not well-founded."[205] She explains that courts should

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201. For a discussion of liberal internationalism, see Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002).

202. Leading examples of theorists in this field include Thomas Franck and Louis Henkin. *See generally* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed. 1979).

203. *See, e.g.*, Jordan J. Paust, *Domestic Influence of the International Court of Justice*, 26 DEN. J. INT'L L. & POL'Y 787, 791–92 (1998); Richard A. Falk, *Towards a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of* Banco Nacional de Cuba v. Sabbatino, 26 RUTGERS L. REV. 1, 38–39 (1961); Richard B. Lillich, *Invoking International Human Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 393–94 (1985).

204. *See, e.g.*, Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INT'L L. 697, 703 (1998).

205. *Id.*

make their own determinations because noncompliance with even a provisional international tribunal judgment can have adverse consequences such as:

> — weakening the credibility of [the U.S.] respect for law, including its ability to encourage respect for law by foreign states as well as its own citizens;
>
> — increasing the likelihood of criticism from foreign states directly or in the form of U.N. action; . . .
>
> — weakening the legitimacy of [the U.S.] bargaining posture and deepening its dispute with the other party; . . . [and]
>
> — weakening the fabric of international relations on which [the U.S.] along with other states, relies to maintain international order.[206]

Professor Damrosch's argument exemplifies two important components of the liberal internationalist view. First, domestic courts have the authority and the obligation to conduct their own determination of the legal effect of international tribunal judgments even when they have been asked by the political branches not to do so. Second, domestic courts have the authority and the obligation to consider various factors, including international relations and the international rule of law, in making this determination.

2. *Liberal Transnationalism*

In the past decade, a new wave of international law scholarship, known as liberal transnationalism, has sought to bring a different approach to the question of state compliance with international law and tribunals. Borrowing from the constructivist school of international relations scholarship,[207] these liberal transnationalist scholars emphasize the dialogic and communicative aspect of domestic court interaction with international tribunals. Shunning the traditional focus on interstate disputes, they emphasize the importance of conceptualizing a "transnational" legal system involving more than national governments. Thus, by disaggregating the state into its constituent elements, the

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206. *Id.* (quoting Bernard H. Oxman, *Jurisdiction and the Power to Indicate Provisional Measures, in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 323, 332–33 (Lori F. Damrosch ed., 1987)).

207. *See, e.g.*, Anne-Marie Slaughter, *International Law and International Relations: A Dual Agenda*, 87 AM. J. INT'L L. 205, 226–38 (1993) (discussing a possible bridge between "liberal internationalist" theory and constructivist institutionalism).

transnational legal system includes individuals, government agencies, courts, international institutions and other actors.[208]

Many liberal transnationalist scholars focus on the "dialogue" between two such disaggregated actors—a domestic court and an international tribunal.[209] Such dialogue may lead a domestic court to enforce an international tribunal judgment out of deference to that tribunal.[210] A more activist version of this scholarship has argued that this dialogue should be a tool in encouraging (or even forcing) state compliance with international rules through a transnational legal process.[211]

a. The European Model for Liberal Transnationalists

For many liberal transnationalist scholars, the paradigmatic model for the use of international tribunals in fostering state compliance with international law is the ECJ. It has had success in having its judgments and interpretations obeyed by the domestic courts of Europe. Modern ECJ judgments are treated as binding and authoritative interpretations of European law. Known as "direct effect," this doctrine provides that European legal norms "may be invoked by individuals before their state courts, which must provide adequate legal remedies for the E.C. norms just as if they were enacted by the state legislature."[212] In practice, direct effect meant that countries "violating their Community obligations could not shift the locus of dispute" to the international level.[213] Such governments would have to defend their actions "before their own courts at the suit of individuals within their own legal order."[214]

The rise of direct effect in the ECJ system was hardly required by the treaties establishing the ECJ. The question of the status of ECJ judgments and EC law within member states of the European community was not discussed at all during the negotiations of the Treaty

208. *See, e.g.*, Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 522–23 (1995) (discussing the disaggregation of the state).

209. *See, e.g.*, Martinez, *supra* note 12, at 460–77 (arguing for an "antiparochialism" canon to facilitate relationships between national and international courts); Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708, 708–10 (1998) (describing the importance of dialogue between judges on international and domestic courts).

210. *See* Slaughter, *supra* note 209, at 710.

211. *See, e.g.*, Martinez, *supra* note 12, at 468–75.

212. Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413 (1991).

213. *Id.* at 2414.

214. *Id.*

of Rome.[215] In fact, the text of the Treaty of Rome neither specifies any particular domestic mechanism to enforce ECJ judgments nor does the Treaty, or any subsequent treaties, establish the domestic legal status of European law in general.[216] Instead, the doctrine of direct effect and the eventual supremacy of European law were established by judgments of the ECJ itself in conjunction with domestic courts of European member states. Hence, as Professor Joseph Weiler famously observed, the rise of Europe as a single legal community was not led by the member states via political and diplomatic negotiations;[217] rather, the rise of a Europe-wide law can be attributed more to the ECJ than to any other institution.[218]

The ECJ model of an international court instigating and shaping a political and legal transformation has been widely embraced by leading transnationalist theorists. As Professor Laurence Helfer and Dean Anne-Marie Slaughter, two of the leading scholars of this model, explain:

> [S]tripping the state of its unitary facade creates the possibility of direct relationships between the tribunals and different governmental institutions such as courts, administrative agencies, and legislative committees. The result, at least in Europe, has been the emergence of a "community of law": a partially insulated sphere in which legal actors interact based on common interests and values, protected from direct political interference.[219]

The success of the ECJ in particular demonstrates how an international court can actively shape and foster adherence to its decisions by convincing domestic courts to give effect to its judgments.

b. Dialogue and Networks

Unlike liberal internationalists, liberal transnationalists emphasize the importance of dialogue and networks between international and

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215. KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 217–21 (2001). The Treaty of Rome established the European Economic Community in 1957 eventually leading to the creation of the European Union.

216. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

217. Weiler, *supra* note 212, at 2413–23.

218. *See id.*; *see also* Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 5–6 (1981).

219. Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 277 (1997).

domestic courts.[220] For this reason, such scholars usually recommend that domestic courts should use discretionary powers to "choose a path that furthers the development of an ordered, functional international judicial system by fostering communication among participants in the system."[221] Dialogue and networks between domestic courts and international tribunals lead domestic courts to enforce or follow international tribunal judgments out of "comity" even if the legal obligation to do so is not clear.

Alternatively, a domestic court's recognition of its duty to develop a dialogue and relationship with international tribunals might lead it to go further. As Professor Jenny Martinez has argued, U.S. courts should adopt a presumption in favor of enforcing international tribunal judgments absent any countervailing legislative provision or constitutional conflict.[222] In her view, no serious constitutional conflict is likely to occur because domestic courts adopt merely a presumption in favor of enforcement, rather than a view that they have a legal obligation to do so.

In sum, the arrival of the twenty-first century coincides with the rise of an ever-increasing number of international tribunals. These tribunals take many forms, ranging from bilateral arbitral tribunals to stand-alone independent international courts. I call this phenomenon a "new world court order." The U.S. has not stayed aloof from this important phenomenon. In addition to its participation in the ICJ system, it is party to hundreds of arbitration and dispute resolution agreements, many of which empower international tribunals to invoke compulsory jurisdiction.

The confluence of these two forces has encouraged leading scholars to justify domestic judicial enforcement of these tribunals' judgments. While liberal internationalists suggest that domestic judicial enforcement is a legal requirement, transnationalists suggest that it is a discretionary decision for courts. Whether out of "antiparochialism"[223] or "dialectalism,"[224] or out of formal legal obligation, domestic courts should, in the view of these scholars, seek to carry out judgments and

220. *See* A NEW WORLD ORDER, *supra* note 12, at 65–100 (describing "judicial networks" between judges of different countries).

221. Martinez, *supra* note 12, at 434.

222. *Id.* at 500.

223. *See* Martinez, *supra* note 12, at 434.

224. *See* Ahdieh, *supra* note 12, at 2086.

interpretations issued by international tribunals. Despite the differences between the liberal internationalist and transnationalist approaches, both sets of scholars advocate a similar approach to domestic court interaction with international tribunals. Under either approach, domestic courts and international tribunals can usher in a new world court order characterized by international cooperation, respect for international law, and the development of an international judicial system.[225]

III. U.S. LAW AND COMPLIANCE WITH INTERNATIONAL TRIBUNALS

As the Supreme Court's short-lived consideration of *Medellin* demonstrates, the U.S. remains exposed to adverse judgments by tribunals to which it is obligated to comply as a matter of international law. The U.S. is party to a number of agreements committing it to binding dispute resolution by international courts or arbitral tribunals. But U.S. obligations under international law to comply with international tribunal judgments do not necessarily translate into U.S. domestic-law obligations. Liberal internationalist and transnationalist scholars have generally assumed that constitutional law gives domestic courts independent authority to bring the U.S. into compliance with such judgments.[226]

This Part argues, consistent with the Supreme Court's treatment of *Medellin*, that the determination of how and whether to comply with an international tribunal judgment is part of the foreign affairs power of the U.S. While scholars have debated whether the locus of the foreign affairs power rests with the President or Congress, none of them suggest that it resides in the court system. Not surprisingly, therefore, a review of U.S. practice confirms that the foreign affairs power to determine whether and how to comply with an international tribunal judgment is exercised exclusively by either the President or Congress.

A. Compliance as the Foreign Affairs Power

At first glance, the question of how and whether to comply with an international tribunal judgment seems to pose a judicial question. The petitioners and amici in *Medellin*, for instance, argued that the Supreme Court has both the constitutional authority and legal obligation to give

225. *See, e.g., id.*; *see also* Damrosch, *supra* note 204, at 703.

226. *See supra* Part I.

effect to the ICJ's interpretation.[227] Justice Breyer suggested a similar approach. In an earlier dissent from a denial of certiorari he argued that the ICJ's authoritative interpretation could bind the Supreme Court's determination.[228]

This understanding of the domestic legal status of international tribunal judgments misconceives the nature of international law in the U.S. system. First, U.S. law generally adheres to a dualist framework that treats international legal obligations as separate and independent from domestic legal obligations. Second, the decision whether or how to comply with an international legal obligation directly implicates the foreign affairs power of the U.S. government.

1. The Dualist Framework: Domestic and International Compliance

U.S. judicial precedents and government practice have long endorsed a "dualist" conception of the status of international law.[229] This conception holds that international law exists on two different planes: international and domestic. The existence of these two planes means that a country may incur an international obligation on the international plane while still having no obligation in the domestic plane to enforce that international obligation.

A number of well-settled legal doctrines illustrate the entrenched nature of the dualist conception in U.S. law. For instance, U.S. courts have consistently held that Congress may override a treaty obligation by enacting a statute later in time.[230] When endorsing this practice, courts have pointed out that Congress' action only has a domestic effect and does not necessarily nullify the international legal obligation.[231] A similar notion supports the U.S. doctrine subordinating international obligations, including treaties, to constitutional prohibitions.[232] Moreover, courts have indicated that they will give the executive substantial deference in the interpretation of customary international

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227. *See supra* Part II.

228. Torres v. Mullin, 540 U.S. 1035, 1037–41 (2003) (Breyer, J., dissenting from denial of petition for certiorari).

229. *See* Bradley, *supra* note 58, at 530–32 (describing the theory of dualism).

230. *See, e.g.*, Whitney v. Robertson, 124 U.S. 190, 194–95 (1888). For a fuller discussion of the last-in-time rule, see Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005).

231. *See, e.g.*, *Whitney*, 124 U.S. at 194–95.

232. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 16 (1957).

law[233] and treaties.[234]

U.S. courts have also subordinated customary international law obligations to positive domestic U.S. law. Thus, in the Supreme Court's famous formulation, "[i]nternational law is part of our law," but it is only given effect where there is no "treaty and no controlling executive or legislative act or judicial decision . . . ."[235] This understanding of customary international law suggests, for instance, that the President, as well as Congress, may override a customary international law obligation as a matter of domestic law.

International tribunal judgments are no exception to the dualist framework. International tribunal judgments, like treaties and customary international law, impose obligations on the U.S. on the international plane. But, like treaties and customary international law, international tribunal judgments may have international legal effect while at the same time having no domestic legal effect. In order for an international tribunal judgment to have domestic legal effect, petitioners like Medellín must identify some domestic legal authority determining whether or how to comply with that judgment.

2. *The Foreign Affairs Power*

The foreign affairs power is the power of the U.S. government to make foreign policy determinations on behalf of the U.S. For example, the foreign affairs power is exercised by the President's determination to recognize or to not recognize a particular foreign government. It is exercised by Congress when, for example, Congress chooses to condemn a foreign government and withdraw foreign aid to that government. This power is also exercised when Congress violates treaties by statute and when the President violates customary international law.

When the President or Congress chooses to defy an international tribunal judgment, they are exercising their authority to make determinations about the goals of U.S. foreign policy. For example, when President Ronald Reagan withdrew the U.S. from the compulsory jurisdiction of the ICJ as a result of Nicaragua's lawsuit accusing the

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233. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

234. *See, e.g.*, Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

235. The Paquete Habana, 175 U.S. 677, 700 (1900).

U.S. of mining Nicaraguan harbors,[236] he was making a determination that U.S. foreign policy goals trumped the necessity of accepting the ICJ's judgment. Sometimes the President or Congress might determine that U.S. foreign policy goals require compliance with international obligations,[237] but sometimes they do not.[238] In either case, the decision as to the goals of U.S. foreign policy is not a legal one. Given the existence of these well-settled powers to control foreign policy in defiance of international obligations, it is difficult to deny that Congress and the President also hold the power to defy international tribunal judgments.

Scholars dispute whether the foreign affairs power is wholly vested in the executive or legislative branch.[239] The importance of this foreign affairs power naturally raises Professor Edward Corwin's famous question: "Where does the Constitution lodge the power to determine the foreign relations of the United States?"[240] In other words, which branch exercises the foreign affairs power of the U.S.? The answer to this question has been hotly debated between two camps. One side maintains that the Constitution grants the President the near-exclusive power to determine foreign affairs with strictly limited interference by Congress.[241] The other side argues that Congress exercises nearly complete control over all aspects of the foreign policy.[242]

I do not need to resolve that debate here. Whether the power to determine foreign relations policy lies with the President or Congress,

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236. For a discussion and overview of the case, see *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

237. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 125, at 40–41 (explaining that the President has the authority to comply with an ICJ order by requiring state court compliance with the judgment).

238. *See, e.g.*, Diggs v. Richardson, 555 F.2d 848, 850 n.7 (D.C. Cir. 1976) (noting Congress' refusal to comply with U.N.-imposed sanctions on Rhodesia).

239. For an incisive summary and analysis of this debate, see H. JEFFERSON POWELL, THE FOREIGN AFFAIRS POWER 8–19 (2004).

240. *Id.* at 3–4 (discussing Corwin's question and answer). *See generally* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 26 (Randall W. Bland et al., eds., New York University Press, 5th rev. ed. 1984).

241. *See, e.g.*, 10 Op. Off. Legal Counsel 159, 160, 162 (1986) (arguing that the President holds "wide and inherent discretion to act for the nation" and "presumptively exclusive authority . . . in foreign affairs").

242. THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 3 (David Gray Adler & Larry N. George eds., 1996) [hereinafter Adler & George] ("The Constitution assigns to Congress senior status in a partnership with the president for the purpose of conducting foreign affairs.").

neither side claims that this power has been allocated to the courts.[243] In fact, the courts have traditionally invoked doctrines such as the political question doctrine in order to avoid ruling on cases implicating foreign affairs.[244] Thus, it is fair to say that wherever the Constitution lodges the power to determine the foreign relations of the U.S., it does not lodge that power in the courts.

B. Mechanisms for Compliance with International Tribunal Judgments

A review of U.S. mechanisms for complying with international tribunal judgments reveals that, in practice, courts have little or no independent role in the enforcement of international obligations. First, the most common domestic mechanism for complying with an international tribunal judgment is independent action by the executive branch. Second, the U.S. may also fulfill its obligations by legislative action or by the independent action of a state governor or legislation. Finally, even though domestic federal and state courts rarely ensure compliance with international tribunal judgments, executive and legislative oversight strictly controls such enforcement actions. This review of U.S. practice supports my claim that the enforcement of international obligations is a foreign affairs determination.[245]

1. Executive Compliance

The executive branch's power to comply with international tribunal judgments flows not only from statutory delegations by Congress,[246] but also from the President's inherent constitutional powers to oversee foreign affairs.[247] In particular, Article II vests the President with the executive power, the duty to "take care" that laws are executed, the

243. Leading expressions of the debate over control of the foreign affairs powers leave the role of the courts unexamined. *Compare* 10 Op. Off. Legal Counsel at 160, 162 (arguing that the President holds "wide and inherent discretion to act of the nation" and "presumptively exclusive authority . . . in foreign affairs"), *with* Adler & George, *supra* note 242.

244. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1004–06 (1979) (Rehnquist, J., concurring) (applying the political question doctrine to avoid resolving a challenge to the President's withdrawal from a treaty).

245. *See supra* Part III.A.2.

246. *See* 19 U.S.C. § 3538(b) (2000) (delegating to the Commerce Department the power to comply with WTO tribunal decisions).

247. *See* U.S. CONST. art. II.

power to appoint ambassadors, and the power to make treaties.[248] This combination of constitutional powers has led the Supreme Court to declare that the President is the "sole organ" for the conduct of foreign affairs.[249]

The executive has a variety of legal tools for ensuring compliance. First, the executive, through the supervision of administrative agencies, can directly modify U.S. law by altering an administrative determination or regulation to comply with an international tribunal judgment. The use of administrative regulations to effect international tribunal judgments may be expressly authorized by statute or not. For instance, the U.S. Department of Commerce has the statutory authority to impose tariffs or other types of duties on foreign products.[250] The Commerce Department also has the authority, pursuant to legislation creating the WTO, to issue a determination to "render the [Commerce Department's] action [relating to the imposition of duties as] not inconsistent with the findings of the panel or the Appellate Body" of the WTO.[251] The U.S. Treasury Department, on the other hand, relied on its general statutory authority over economic sanctions on foreign governments to issue regulations implementing the Algiers Accords resolving the hostage dispute with Iran. This has served as the basis for U.S. courts to comply with judgments of the U.S-Iran Claims Tribunal.[252] Similarly, President George W. Bush recently relied on his general statutory authority to impose tariffs to lower duties on steel imports after an adverse final judgment from the WTO's Appellate Body.[253]

In addition to altering existing practices or administrative regulations, the executive branch may have the authority to sue a state or local government to force it to comply with an international agreement. On two occasions, the executive branch has sued local governments to require compliance with executive agreements granting tax exemptions

248. *Id.*

249. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

250. *See, e.g.*, 19 U.S.C. § 1337(d).

251. *Id.* § 3538(b).

252. *See, e.g.*, Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1282 (9th Cir. 1985).

253. *See* Press Release, To Provide for the Termination of Action Taken with Regard to Imports of Certain Steel Products by the President of the United States of America a Proclamation (Dec. 4, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/12/20031204-7.html; Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (Nov. 10, 2003).

to foreign consular officials and diplomats.[254] Although this power has never been exercised to enforce an international tribunal judgment, these precedents do suggest that lawsuits may be brought to enforce international tribunal judgments authorized by treaties.

Finally, the executive appears to have some general authority to preempt inconsistent state law by declaring compliance with international tribunal judgments a national foreign policy objective. The Supreme Court opened the door to this practice in a 2003 decision overturning a California statute requiring insurance companies to disclose information concerning Holocaust-era policies.[255] President Bush may have relied on this decision when he issued his memorandum requiring state courts to comply with the ICJ's judgment in *Avena*. His memorandum declared that it was his determination that the U.S. should comply with the ICJ's decision in *Avena* by having state courts give effect to the ICJ's decision.[256] The scope of the President's power in this regard is currently being challenged in Texas courts.[257]

2. *Legislative Compliance*

While the executive branch is the primary mechanism for complying with international tribunal judgments, Congress also plays an important role in this process. Where an international tribunal judgment requires the repeal or amendment of a statute or the appropriation of funds, Congress has acted as the entity responsible for compliance. Most prominently, Congress, rather than the executive branch or the courts, is the only body authorized to comply with adverse WTO judgments requiring modifications of U.S. tax and trade laws. Legislation implementing the WTO agreements expressly prohibits any other part of the government from acting to comply with an adverse judgment by one of the trade dispute tribunals.[258]

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254. *See* United States v. County of Arlington, 669 F.2d 925, 928 (4th Cir. 1982) (enforcing a treaty exempting consular premises from taxation by the county); United States v. City of Glen Cove, 322 F. Supp. 149, 150 (E.D.N.Y. 1971) (enforcing a 1968 Consular Convention exemption for property owned by the Union of Soviet Socialist Republics).

255. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419–20 (2003).

256. Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 125, app. 2.

257. *See* Mark Donald, Medellin *Returns: CCA Considers Bush's Memo To Override Its Own Procedural Rules*, TEX. LAW., Sept. 19, 2005, at 1.

258. *See* Uruguay Round Agreements Act, 19 U.S.C. § 3512(b)(2)(A) (2000) (barring anyone other than the United States from challenging U.S. or state action or inaction based on its consistency with the Uruguay Round Agreements); URUGUAY ROUND AGREEMENTS ACT:

For instance, since 1999, WTO dispute resolution bodies have twice found that U.S. tax laws providing special treatment for U.S. companies with foreign subsidiaries violate U.S. obligations under the WTO and General Agreement on Tariffs and Trade (GATT) agreements.[259] Congress has responded to these rulings by amending U.S. tax laws to bring the U.S. into compliance with the WTO agreements.[260] The battle is not over because the European Union, dissatisfied with this amendment, has filed another claim before the WTO.[261] Similarly, Congress is the primary obstacle to U.S. compliance with WTO tribunal judgments finding a provision of U.S. anti-dumping laws, the so-called "Byrd Amendment,"[262] in violation of WTO obligations.[263] Although the Bush Administration has stated its intentions to comply with the WTO tribunal judgment, it cannot do so on its own. Congress is the only body that can bring the U.S. into compliance.

The U.S. has not been subject to an international tribunal judgment calling for the payment of funds. If such a judgment were issued, however, Congress is almost certainly the only institution authorized to make such a payment. The Constitution allocates the power to appropriate funds to Congress exclusively.[264] Indeed, Congress has made sure that the Court of Federal Claims has no jurisdiction over any treaty-based claim against the U.S. government.[265]

STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, at 675–77, 1043–44 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4054–56, 4327.

259. *See* Appellate Body Report, *United States—Tax Treatment for "Foreign sales Corporations"—Recourse to Article 21.5 of the DSU by the European Communities*, paras. 256–57, WT/DS108/AB/RW (Jan. 14, 2002); Panel Report, *Unites States—Tax Treatment for "Foreign Sales Corporations,"* paras. 177–80, WT/DS108/AB, (Feb. 24, 2000), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/108abr.doc.

260. *See* FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Pub. L. No. 106-519, § 3(a), 114 Stat. 2423, 2423–24, *repealed by* American JOBS Creation Act of 2004, Pub. L. No. 108-357, § 101, 118 Stat. 1423, 1423–24 (codified as amended at 26 U.S.C.A. § 114 (West 2002 & Supp. 2005)).

261. Request for the Establishment of a Panel by the European Communities, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/29 (Jan. 14, 2005).

262. Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, 114 Stat. 1549 (codified as amended at 19 U.S.C.A. § 1675c (West 1999 & Supp. 2005)).

263. *See, e.g.*, Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 27, 2003).

264. U.S. CONST. art. I, § 7 ("All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.").

265. 28 U.S.C. § 1502 (2000) ("Except as otherwise provided by Act of Congress, the United States Court of Federal Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.").

3. *State Compliance*

The expansion of international law in recent years to encompass areas of law such as criminal punishment and domestic relations has exposed state laws to greater international scrutiny.[266] As *Medellin* and other VCCR cases have illustrated, state and local authorities were the primary violators of the VCCR.[267] In a different vein, state tort,[268] environmental,[269] and gambling regulations[270] have recently been challenged in international trade tribunals.

Because state activities are increasingly subject to challenge by foreign countries in international tribunals, states have also become the front lines in bringing the U.S. back into compliance. While the President may have the authority to sue or even order a state to comply with an international tribunal judgment, states may also comply without any formal federal pressure. For instance, in 2003, Brazil filed a claim in the WTO dispute settlement body challenging a Florida scheme to tax foreign oranges and divert funds to advertising for Florida oranges.[271] Before the dispute settlement body issued a judgment, Florida's legislature repealed the law, citing its probable violation of WTO obligations.[272]

The federal government has recognized the role of the states in complying with international law obligations. For instance, when attaching a federalism and non-self-execution declaration to the

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266. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 402–09 (1998) (reviewing the potential conflicts between treaties and state laws).

267. All three ICJ cases against the United States involved VCCR violations by state and local authorities, as opposed to federal officials. *See, e.g.*, Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).

268. *See* Loewen Group, Inc. v. United States, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ICSID Case No. ARB(AF)/98/3 (Jan. 5, 2001), *available at* http://naftaclaims.com/Disputes/USA/Loewen/Loewen%20-%20Jurisdiction%20I%20-%20Award%20-%2005-01-2001.pdf.

269. Methanex Corp. v. United States, Statement of Claim, ICSID (W. Bank, NAFTA Ch. 11 Arb. Trib., Dec. 3, 1999).

270. Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1, S/L/110 (Mar. 27, 2003).

271. *See* Request for the Establishment of a Panel by Brazil, *United States—Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products*, WT/DS250/2 (Aug. 19, 2002).

272. *See* Notification of Mutually Agreed Solution, *United States—Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products*, WT/DS250/3, G/L/680 (June 2, 2004) (reporting that Florida had amended its statutes to comply with WTO rules).

International Covenant on Civil and Political Rights, the Senate declared that the United State's compliance was, at least in part, the responsibility of state and local governments.[273] State laws, policies, and actions, therefore, formed part of the U.S. system for complying with international obligations.

State governments have a long history of modifying or adjusting their laws to bring the U.S. into compliance with international law.[274] State governors have been responsible for fulfilling treaty obligations toward foreign nationals, including the provision of consular notification and estate law rights.[275] Indeed, the expansion of international law into a wider variety of subjects increases the likelihood that states will play an ever more important role in ensuring compliance with international court judgments.

4. Judicial Compliance

Somewhat surprisingly, the institution with perhaps the smallest role in the enforcement of international tribunal judgments is the judicial branch. Prior to the Oklahoma court's decision in *Torres*, for instance, no federal or state court in the U.S. had ever implemented an international tribunal judgment absent a separate statutory authorization.[276] As I explain below, to the extent that courts have implemented international tribunal judgments, they have done so pursuant to specific legislative or executive authorization. As explained above, compliance with most adverse international tribunal judgments is the sole responsibility of the political branches or perhaps the states.

As a doctrinal matter, the main reason for the relatively small judicial role is the doctrine of self-execution. While treaties hold the status of the

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273. U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. 8071 (1992) (enacted) ("That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.").

274. *See* Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 476–99 (2004).

275. *Id.* at 482–83.

276. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 696 & n.74 (2003).

"law of the land" pursuant to Article VI of the U.S. Constitution,[277] courts will only give effect to treaties in the same manner they give effect to federal statutes if they find the treaty to be self-executing.[278] Unfortunately, determining whether or not a treaty is self-executing is hardly a simple task for courts and remains a matter of substantial confusion among scholars.[279] Adding to the confusion is the legal distinction between an executive agreement made by the President and a treaty made with the advice and consent of the Senate. Because the domestic legal status of executive agreements remains somewhat unsettled,[280] courts generally look for statutory authorization before implementing any judgments. For instance, courts have read statutes implementing the WTO agreement to mean that such judgments have no domestic effect.[281]

In many cases, statutes implementing a treaty that commits the U.S. to a dispute resolution system provide guidance for courts on domestic enforcement. The International Centre for Settlement of Investment Disputes (ICSID) implementing legislation, for instance, instructs U.S. courts to give full faith and credit to ICSID judgments.[282] Courts have

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277. U.S. CONST. art. VI. The status of customary international law has a more problematic textual basis. A recent Supreme Court decision strongly suggests that the power to interpret customary international law falls within the common lawmaking power of the federal courts, although the scope of the decision remains unclear. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

278. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314–15 (1829). *But see* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2091–94 (1999) (arguing that the original understanding of the Constitution made almost all treaties non-self-executing); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2233–40 (1999) (arguing that the text and structure of the Constitution support a presumption of non-self-execution).

279. For a worthy but unsuccessful attempt to clarify the self-execution doctrine, see Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 697–700 (1995).

280. *See, e.g.*, Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 811 (1995) (pointing out that the text of the Constitution permits an inference that treaties are a non-exclusive means of creating international agreements); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249–78 (1995) (rejecting the interchangeability of treaties and executive agreements).

281. *See, e.g.*, Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1348 (Fed. Cir. 2005) ("WTO decisions are not binding on the United States, much less this court.").

282. 22 U.S.C. § 1650a(a) (2000) ("An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the

also looked to the Federal Arbitration Act (FAA)[283] as the basis for enforcing certain international tribunal judgments. For instance, courts have generally treated judgments of the Iran-U.S. Claims Tribunal as arbitration awards within the meaning of the FAA.[284]

On the other hand, where treaties bind the U.S. to international dispute resolution but are unaccompanied by any implementing legislation, courts have been very cautious. Prior to the *Medellin* case, only two federal courts had considered this question. Neither came to a definitive doctrinal conclusion as to the domestic legal effect of such international tribunal judgments.

The first major case to consider the domestic legal effect of an international tribunal judgment arose out of a dispute between the U.S. and the U.N. Security Council over U.S. policy toward South Africa.[285] The U.N. Security Council had imposed obligations on member states to refrain from relations with countries recognizing South African control of the neighboring state of Namibia.[286] Plaintiffs, including U.S. citizens, alleged that the U.S. government was violating these resolutions and sought enforcement of the U.N. Security Council resolution in federal district court.[287] Plaintiffs cited U.S. obligations to abide by resolutions of the Security Council.[288] The U.S. Court of Appeals for the District of Columbia dismissed the complaint, holding that "even assuming there is an international obligation that is binding on the United States—a point we do not in any way reach on the merits—the U.N. resolution underlying that obligation does not confer rights on the citizens of the United States that are enforceable in court in the absence of implementing legislation."[289]

The treaty obligations of the U.S. to abide by judgments of the ICJ are slightly different. Still, the D.C. Circuit used similar reasoning to dismiss a complaint seeking enforcement of an ICJ order finding that the U.S. had violated international law by mining Nicaragua's harbors.[290]

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several States.").

283. 9 U.S.C. § 10 (2000).

284. *See, e.g.*, Ministry of Def. of the Islamic Republic of Iran v. Gould Inc., 887 F.2d 1357, 1363–67 (9th Cir. 1989).

285. *See* Diggs v. Richardson, 555 F.2d 848, 849 (D.C. Cir. 1976).

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 850.

290. *See* Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 933–34 (D.C. Cir.

The court refused to give effect to the ICJ order on a number of grounds, including that the provision of the U.N. Charter granting jurisdiction to the ICJ was not self-executing.[291] In other words, while the U.N. Charter did impose real obligations on the U.S. to accept the jurisdiction of the ICJ, it did not impose an obligation on U.S. courts to give effect to the ICJ order.

These precedents stand for the proposition that international tribunal judgments should not have self-executing domestic legal effect. Courts have avoided independently enforcing international tribunal judgments and have often sought separate congressional authorization. This further supports my view that enforcement of international judgments is a foreign affairs power assigned to the political branches of the U.S. government.

In sum, international tribunal judgments, like any other international obligation imposed on the U.S., exist in a dualist framework. The U.S. government may comply, but it may also choose not to. Many liberal internationalist and transnationalist scholars have failed to grapple with the significance of this power to refuse compliance with international law. Accepting the existence of this power transforms an international tribunal judgment into a question of foreign policy. As such, enforcement requires an exercise of a general power over foreign affairs. And that power is held by either Congress or the President, or both. It is not held by the courts.

U.S. practice with respect to international tribunals confirms this understanding. It places the task of bringing the U.S. into compliance with international tribunal obligations on the political branches of the U.S. federal and state governments. In particular, the executive branch has played a central role both in complying with international tribunal judgments and in overseeing and supervising the limited judicial role in such compliance efforts.

IV. A NEW WORLD COURT ORDER AND THE U.S. CONSTITUTION

This Part argues that because the source of U.S. authority to comply with international tribunal judgments lies in the foreign affairs power, the most serious constitutional difficulty with enforcement of

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1988).

291. *Id.* at 935–37.

international tribunal judgments is excessive delegation of the foreign affairs power of the U.S. to an international tribunal.[292] First, I consider the problems with a new world court order posed by Article III, Section 1 of the U.S. Constitution. Then I address the nondelegation doctrine and its tension with an increased U.S. acceptance of the new world court order.

A. The Incompleteness of Article III Objections

The most commonly raised constitutional objection to the new world court order is based on Article III, Section 1, which provides that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[293] An international tribunal judgment that is binding on U.S. courts arguably violates this provision because an international tribunal is neither the Supreme Court nor an inferior court established by Congress. More importantly, if an international tribunal's judgments are binding on U.S. courts, then the international tribunal is impermissibly exercising the "judicial Power of the United States."[294]

This argument, while persuasive to some degree, is vulnerable to a number of objections. Analogizing enforcement of international tribunal judgments to enforcement of foreign judgments, liberal internationalist and transnationalist scholars argue that international tribunals are not

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292. One of the most common objections to granting international tribunal judgments domestic effect is that it would amount to a "transfer" of sovereignty to international organizations. The "sovereignty" argument is usually invoked by critics of international organizations. For instance, critics of the Law of the Sea Treaty have argued that joining the treaty would amount to a transfer of sovereignty to the United Nations Law of the Sea bureaucracy. The most sophisticated version of this argument is presented by Professor Jeremy Rabkin. In a series of books, he has argued tirelessly against greater or deeper engagement with international organizations. His main argument is that, as a matter of political theory, the U.S. and other constitutional democracies cannot remain faithful to their liberal democratic commitments while at the same time transferring more and more authority to international organizations. *See, e.g.*, JEREMY RABKIN, THE CASE FOR SOVEREIGNTY 68–70 (2004); JEREMY RABKIN, LAW WITHOUT NATIONS? 44–51 (2005). While compelling, the sovereignty argument is not grounded in any particular doctrine of constitutional law. No court or scholar has suggested that the concept of sovereignty, standing alone, represents a legal limitation on U.S. participation in various international organizations. In other words, while sovereignty is a compelling political challenge, it does not provide a useful legal framework for analyzing or evaluating U.S. relationships with international organizations or tribunals. *See, e.g.*, William Safire, Op-Ed., *Beware Entangling Treaties Kyoto is Just One Example: America Should Refuse to Sign Away Sovereignty to International Bodies*, PITT. POST GAZ., Apr. 10, 2001, at A19 (arguing against U.S. participation in new international institutions).

293. U.S. CONST. art III, § 1, cl. 2.

294. *Id.* cl. 1.

exercising federal judicial power pursuant to Article III. As Professor Louis Henkin explains, "[t]here would seem to be no compelling constitutional reasons why the relations between the United States and its citizens could not be subject to both the laws and courts of the United States and to the international law administered by international tribunals exercising international judicial power."[295] In other words, as long as international tribunals limit their exercise of judicial power to U.S. international obligations as opposed to U.S. domestic laws, there is no Article III problem raised by U.S. participation in international tribunals. Otherwise, anytime a federal court enforced a foreign judgment, it would also run into an Article III problem. Further, as Professor Martinez has recently argued, courts could avoid the Article III problem simply by enforcing international tribunal judgments as a matter of comity.[296] As long as Article III courts are not bound to enforce an international tribunal judgment, the final authority to apply the judicial power of the U.S. remains with Article III courts.[297]

B. The Nondelegation Objection

Even if domestic judicial enforcement of international tribunal judgments does not violate Article III, it might come into conflict with the Constitution in some other way. When a court in the U.S. agrees to follow an international tribunal's determination of U.S. obligations under international law, the court has made a foreign policy determination that the U.S. will comply with the tribunal. If the court treats the international tribunal's determination as binding, it will have recognized a delegation of that foreign policy determination to the international tribunal.[298] This constitutes an "international delegation" of the foreign affairs power of the U.S.

Under existing Supreme Court doctrine, the nondelegation doctrine operates as a general separation of powers requirement seeking to prevent any branch of the government from transferring excessive authority to any other branch.[299] The classic example of delegation is

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295. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 267 (2d ed. 1996).

296. Martinez, *supra* note 12, at 502.

297. *Id.*

298. *See, e.g.*, Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 83–87 (2000).

299. *Id.* at 89–93.

when Congress transfers or delegates legislative authority to the executive branch and its administrative agencies.[300] Delegations may also occur when Congress attempts to transfer the power of the other branches.[301] For instance, Congress' creation of an independent counsel not subject to executive oversight was challenged as a violation of the Appointments Clause.[302] But the Appointments Clause is a textual limitation on the impermissible delegation of executive power to the legislative branch.[303] Similarly, courts have wielded Article III to prevent Congress from transferring the federal judicial power away from the federal courts.[304]

Not all international delegations are constitutionally impermissible. However, no advocates of the new world court order have grappled directly with the importance of delegation as a constitutional constraint on the powers of such tribunals and on domestic courts following such tribunals. The difference between U.S. obligations under international law and the consequence of those obligations in domestic U.S. law illustrates why they should. When an international tribunal imposes an obligation on the U.S. under international law, it is not exercising any delegated power of the U.S. government. But when that international obligation becomes an enforceable legal obligation under U.S. domestic law and in U.S. courts, then the international tribunal's action becomes some exercise of the U.S. government's constitutional powers to make, interpret, and implement an international law obligation of the U.S.

As explained in Part III, the U.S. government's political branches have generally reserved for themselves the power to make, interpret, and implement international obligations as a matter of domestic law. Courts have widely deferred to the executive branch's interpretation of treaties and customary international law.[305] They have refused to enforce treaty obligations, even when petitioned directly by foreign governments, if Congress has overruled that treaty obligation by statute or if they believe

300. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

301. *See* Ku, *supra* note 298, at 91–92.

302. Morrison v. Olson, 487 U.S. 654, 659–60 (1988).

303. *Id.* at 673–77.

304. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982).

305. *See, e.g.*, Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); F.W. Stone Eng'g Co. v. Petroleos Mexicanos of Mexico, D.F., 42 A.2d 57, 59–60 (Pa. 1945) (giving complete deference to the State Department's determination of the applicability of the law of foreign sovereign immunity).

the treaty was not meant to be self-executing.[306] Indeed, the whole doctrine of non-self-execution is based on the assumption that many treaty obligations can only be enforced by either the executive or legislative branch.[307]

This allocation of domestic constitutional powers has a plain functional imperative, as I discuss in the next Part. Here, it is enough to point out that judicial enforcement of international tribunal judgments represents a shift of authority from the executive and legislative branches to the international tribunal. In other words, it represents a "delegation" of the power to implement international obligations away from the political branches of the federal government to the international tribunal. Rather than follow the President or Congress on how and whether to enforce an international law obligation, the new world court order instructs U.S. courts to independently decide whether and how to follow the international tribunal.

In sum, delegation is useful as an analytical framework because it shifts the analysis away from the comparatively narrow question of whether an international tribunal is exercising the "judicial Power of the United States." Instead, it requires courts to conduct a broad separation of powers analysis to assess whether the international tribunal is exercising some aspect of the U.S. government's broad power to make and interpret international agreements. If, as internationalist and transnationalist supporters of the new world court order have argued, international tribunals are merely interpreting and adjudicating the international obligations of the U.S., the delegation analysis reminds us that even this power is subject to some constitutional limitations.

V. INTERNATIONAL DELEGATIONS

In this Part, I flesh out and defend the application of the nondelegation doctrine to international tribunal judgments. I argue that the much-criticized nondelegation doctrine still has applicability to international delegations. In particular, the doctrine can survive as a clear statement rule requiring courts to adopt interpretations that avoid delegations to international tribunals. I also offer functional justifications

306. *See, e.g.*, Whitney v. Robinson, 124 U.S. 190, 194 (1888); Taylor v. Morton, 23 F. Cas. 784, 785 (C.C.D. Mass. 1855) (No. 13,799), *aff'd on other grounds*, 67 U.S. (2 Black) 481 (1862).

307. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314–15 (1829) (noting that in some cases, a 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").

for adopting such an approach.

A. Nondelegation: A Doctrine that Won't Die

The U.S. Supreme Court has rarely relied on the nondelegation doctrine over the past seventy years.[308] Although the Supreme Court has never rejected the doctrine, it has consistently refused to strike down delegations when applying the doctrine. Most recently, it refused to affirm a lower court's determination that a provision of the Clean Air Act constituted an unconstitutional delegation of legislative power to the Environmental Protection Agency.[309]

The doctrine has become so underused that leading scholars have recently tried to bury it. Professors Eric A. Posner and Adrian Vermeule have argued, for instance, that there is no such thing as a delegation of legislative power.[310] Rather, all so-called delegations are themselves exercises of legislative power that satisfy the requirements of Article I of the U.S. Constitution.[311]

Such analyses have been criticized for misconstruing the text of the Constitution and for failing to adequately address the functional necessity of a nondelegation doctrine.[312] For my purposes, the functional response is more relevant. After all, even if Professors Posner and Vermeule are correct as a formal textual matter, their analysis does not answer the functional problem that the nondelegation doctrine is designed to guard against. Without a nondelegation constraint, Congress could undercut the basic system of separation of powers by arrogating many constitutional powers within a single branch. Moreover, Congress can shift responsibility for policies to agencies and other institutions, thus undercutting its political accountability.[313]

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308. The Supreme Court has not found a violation of the nondelegation doctrine since 1935. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (finding an impermissible delegation by Congress).

309. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001).

310. *See, e.g.*, Posner & Vermeule, *supra* note 16.

311. *Id.* at 1723.

312. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1305–10 (2003) (offering an alternative textual understanding of the Constitution that requires a nondelegation doctrine). *Contra* Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331 (2003) (responding to critics).

313. For a spirited and lengthy discussion of the relationship between political accountability and delegation, see DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

Replacing the nondelegation doctrine with an "exclusive" delegation requirement does not resolve the criticism of failing to deal with functional problems. Professor Thomas Merrill suggests that an exclusive delegation doctrine would require courts to trace all such legislative delegations to an exercise of Congress' authority under Article I.[314] In this view, Congress's delegations would be policed by requiring Congress to identify a source in Article I for its delegation. Professor Merrill hopes that imposing this requirement would enhance the accountability of Congress for legislative actions.[315] Moreover, as other scholars have pointed out, Congress still retains substantial control over administrative agencies through budgetary oversight and reporting requirements.[316]

International delegations raise at least the same, if not greater, functional concerns as excessive domestic delegations. While Professor Merrill's solution might alleviate concerns about political accountability and legitimacy in the domestic context, it is less helpful in the international context. As I have argued elsewhere, international delegations pose a different separation of powers challenge to the federal government.[317] Unlike delegations within the federal government, or to the states or private organizations, international delegations are made to international organizations largely independent of other mechanisms of federal control. There is some evidence that U.S. policymakers have recognized the real possibility of an international delegation by attaching signing statements and proposing non-self-executing delegations to legislation involving international tribunals.[318]

B. Nondelegation as a Super-Strong Clear Statement Rule

Although the nondelegation doctrine is rarely invoked, it can still have serious and significant doctrinal consequences for international tribunal judgments as a matter of treaty interpretation. Although the nondelegation doctrine has been dormant as a matter of judicial

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314. Thomas Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2150–51 (2004).

315. *Id.* at 2142.

316. *See, e.g.*, David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 956–58 (1999).

317. *See* Ku, *supra* note 298, at 88–113.

318. *See, e.g.*, Statement on Signing the Clean Diamond Trade Act, 39 WEEKLY COMP. PRES. DOC. 491 (Apr. 25, 2003).

application, a number of scholars have argued that the nondelegation doctrine has substantial doctrinal importance as a canon of statutory construction.[319]

Over the past decade, the Supreme Court has applied a number of "super-strong clear statement" rules in the interpretation of federal statutes.[320] The Court has used these super-strong clear statement rules to interpret statutes to avoid constitutional difficulties.[321] Federal courts have used the super-strong clear statement rules to avoid constitutional difficulties with doctrines such as the nondelegation doctrine, even though such doctrines are rarely if ever directly enforced.[322] In other words, a court is more likely to interpret a statute to avoid a violation of the nondelegation doctrine rather than find that statute in violation of that doctrine. By invoking the super-strong clear statement rules as a method of statutory interpretation, the Supreme Court has revived and invigorated constitutional doctrines long believed to be defunct. Members of the Court, for instance, have cited avoidance of the nondelegation doctrine as the basis for rejecting an agency's interpretation of a statute.[323]

The normative desirability of using such interpretive mechanisms remains questionable.[324] I defend the use of such rules on normative and functional grounds.[325] For my purposes, it is enough that courts need not directly apply the traditionally underenforced nondelegation doctrine to limit the delegation of the legislative or the treaty-making power.

Courts might apply the nondelegation doctrine, as Professor Curtis Bradley has suggested, to interpret delegations to international tribunals

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319. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223 (2000) ("The nondelegation doctrine, in other words, now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330–37 (discussing how courts use nondelegation canons to impose constraints on administrative power).

320. Eskridge & Frickey, *supra* note 21, at 597.

321. *See, e.g.*, NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 507 (1979) (citing the danger of First Amendment infringement as a basis for the narrow interpretation of a labor statute); Eskridge & Frickey, *supra* note 21, at 599–600 (discussing the Supreme Court's invocation of the doctrine to avoid constitutional difficulties).

322. *See* Eskridge & Frickey, *supra* note 21, at 606–07 (discussing the interpretive use of the nondelegation doctrine).

323. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 671–88 (1980) (plurality opinion) (Rehnquist, J., concurring).

324. *See* Eskridge & Frickey, *supra* note 21, at 640–45.

325. *See infra* Part V.D.

as non-self-executing.[326] Absent a super-strong clear statement from the treaty-makers that a delegation of foreign affairs power is self-executing, a U.S. court should interpret all such delegations as non-self-executing.[327] In this way, the nondelegation doctrine creates a presumption of non-self-execution when courts consider international tribunal judgments.[328]

By requiring courts to first identify a super-strong clear statement from the political branches, a super-strong clear statement rule would make it more difficult, although not impossible, for international tribunals to "penetrate" the state to "network" or "dialogue" with domestic courts.[329] Under this approach, such penetration could still occur, but only after explicit and clear authorization from the political branches responsible for the administration of foreign policy. Authorization could occur in the form of implementing legislation from Congress or in the language of the treaty itself. In effect, a presumption of non-self-execution reverses the approach recommended by liberal internationalists and transnationalists.

C. Application of the Nondelegation Doctrine

How might a nondelegation canon of treaty interpretation work in the international context? In this Section I apply my proposed approach in two situations. First, I examine how the nondelegation doctrine would affect a court faced with a treaty that is silent on the question of domestic judicial enforcement. Second, I consider how that doctrine would be applied where a treaty's language plainly requires domestic judicial enforcement.

1. The Optional Protocol to the Vienna Convention on Consular Relations

The Optional Protocol to the VCCR grants the ICJ jurisdiction over the U.S.[330] The Optional Protocol is the sole basis of the ICJ's jurisdiction because the U.S. has withdrawn its acceptance of the ICJ's

326. Bradley, *supra* note 23, at 1587–95.

327. *See id.*

328. *Id.* at 1587.

329. *See supra* Part III.B.4.

330. VCCR, *supra* note 29, Optional Protocol, art. I.

general compulsory jurisdiction.[331] Article I of the Optional Protocol reads in full: "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."[332]

While nothing in the language of article I of the Optional Protocol touches on the self-executing nature of the ICJ's judgments pursuant to the Protocol, supporters of the new world court order might focus on the phrase "within the compulsory jurisdiction of the International Court of Justice."[333] Acceptance of such language, as Justice Breyer noted, might make the ICJ the authoritative interpreter of the VCCR for the U.S.[334] As such, domestic courts, including the U.S. Supreme Court, would be required to follow the ICJ's interpretation. In my view, the Optional Protocol does not provide a sufficiently clear statement of its self-executing status to satisfy concerns about excessive delegation to the ICJ. The question for the Court in *Medellin* and *Torres* was whether the Optional Protocol's allocation of jurisdiction to the ICJ also required domestic courts to follow the ICJ's judgments.[335] The self-execution of the ICJ's judgments depends not on whether the VCCR is self-executing, but on whether the Optional Protocol is self-executing. The Optional Protocol does not contain a super-strong clear statement that the U.S. delegated to the ICJ the authority to issue self-executing judgments.

It is worth recalling that when previous courts considered other grants of compulsory jurisdiction to the ICJ, they did not find such language to be self-executing.[336] In *Committee of United States Citizens Living in Nicaragua v. Reagan*,[337] the D.C. Circuit held that neither the ICJ Statute nor language in the United Nations Charter where the U.S. "undert[ook]

331. *United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction*, 24 I.L.M. 1742, 1742–43 (1985) (withdrawing from ICJ's jurisdiction in the case involving Nicaragua); *see also* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 480 (June 27).

332. VCCR, *supra* note 29, Optional Protocol, art. I.

333. *Id.*

334. Torres v. Mullin, 540 U.S. 1035, 1037–41 (2003) (Breyer, J., dissenting from denial of certiorari).

335. *Medellin III*, ___ U.S___ (May 23, 2005), 125 S. Ct. 2088, 2089 (2005) (per curiam); Torres v. Oklahoma, No. D-1996-350 (Okla. Crim. App. Mar. 1, 2004).

336. *See supra* Part III.B.2.

337. 859 F.2d 929 (D.C. Cir. 1988).

to comply with the decision of the International Court of Justice in any case to which it is a party" gave private individuals the right to enforce the treaty in U.S. federal court.[338] Moreover, the language of the provision also suggests that only parties to the VCCR and the Protocol can make an application to the ICJ.[339] Only states can be parties to the ICJ, which suggests that individuals like Medellín and Torres are not intended to be able to directly enforce the Optional Protocol.

The *travaux préparatoires* to both the VCCR and Optional Protocol do not clarify matters. They do not appear to discuss the mechanisms of domestic enforcement. In the case of other international tribunals that have been delegated power pursuant to a treaty, the U.S. has specified standards for its courts to follow before enforcing international tribunal judgments, especially judgments that purport to place binding obligations on the U.S. government. For instance, while U.S. courts are instructed to give "full faith and credit" to judgments of the ICSID, U.S. courts are given specific standards when enforcing judgments made pursuant to the New York Convention for the Recognition and Enforcement of Arbitral Awards.[340]

Yet in this instance, courts would have to read the Optional Protocol as granting similar authority without any such standards. Such a standardless delegation to an international institution is a classic case for the nondelegation doctrine. But, under my proposal, a court could avoid the tricky application of the nondelegation doctrine by simply interpreting the Optional Protocol as non-self-executing. By doing so, a court would avoid the difficult constitutional analysis that the nondelegation doctrine requires.

Under my approach, ICJ judgments interpreting the VCCR would not have self-executing status as a matter of domestic law because the Optional Protocol does not contain a super-strong clear statement to that effect. In such a case, the U.S. government's political branches and constituent state government executives and legislatures could enact legislation or issue executive orders to bring the U.S. into compliance with the alleged VCCR violations. In fact, with respect to the ICJ's *Avena* decision, the political branches have already acted to implement that judgment pursuant to state court proceedings.[341]

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338. *Id.* at 937–38 (quoting U.N. Charter art. 94).

339. *Id.*

340. *See* Alford, *supra* note 276, at 690–93, 700–04.

341. *See supra* Part I.B.3.c.

2. *The Law of the Sea Treaty*

Could any treaty satisfy the super-strong clear statement requirement? The Law of the Sea Treaty, currently under consideration by the U.S. Senate,[342] provides such a clear statement provision. As I will explain, the reaction of the political branches to this provision reveals the benefits of requiring super-strong clear statement rules before granting international tribunal judgments self-executing status.

The Law of the Sea Treaty provides a comprehensive set of regulations for all matters pertaining to the world's oceans.[343] In addition to providing a comprehensive legal framework for navigation of the seas and the recognition of territorial waters,[344] the Law of the Sea Treaty also provides rules for the development of undersea resources, especially oil and minerals located in deep ocean seabeds and on the continental shelf.[345] The Law of the Sea Treaty also establishes institutions for the administration of these rules. Perhaps the most controversial institution, at least in the U.S., is the creation of a Seabed Authority authorized to levy fees on individuals seeking rights to develop undersea resources not located within the territory of any particular nation.[346]

The Law of the Sea Treaty establishes a complex network of international tribunals. Parties to the treaty may choose between special arbitral tribunals, the ICJ, and the newly constituted International Tribunal for the Law of the Sea (ITLOS) to resolve disputes under the treaty.[347] Although the treaty gives parties broad discretion to choose dispute resolution mechanisms for most issues, parties must submit to the compulsory jurisdiction of the ITLOS Seabed Disputes Chamber for any disputes relating to the seabed provisions of the treaty.[348] Not only does the ITLOS Seabed Disputes Chamber have compulsory jurisdiction over any dispute between parties relating to the seabed, but the enforceability of its judgments is spelled out in the treaty: "decisions of

342. *See* Press Release, Sen. Richard G. Lugar, Foreign Relations Committee Advances Law of the Seas [sic] Treaty (Feb. 25, 2004), http://lugar.senate.gov/pressapp/record.cfm?id=218386.

343. *See generally* UNCLOS, *supra* note 24.

344. Message from the President of the United States Submitting the United Nations Convention on the Law of the Sea, at vi, July 29, 1994, S. TREATY DOC. NO. 103-39, *available at* 1992 WL 725374.

345. *Id.*

346. UNCLOS, *supra* note 24, arts. 156–58.

347. *Id.* arts. 186, 188.

348. *Id.* art. 188.b.

the [Seabed Disputes] Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought."[349] Thus, unlike the Optional Protocol's vague reference to "compulsory jurisdiction," article 39 explicitly discusses the question of domestic enforcement. The plain language of article 39 requires U.S. courts to treat Seabed Disputes Chamber decisions in the same way that they would treat judgments of the U.S. Supreme Court.

The language in this provision qualifies as a super-strong clear statement requiring domestic judicial enforcement of Seabed Disputes Chamber judgments. Indeed, as the State Department notes, it is such a clear statement that it creates constitutional concerns.[350] The State Department has recommended that the Senate attach a declaration to the Law of the Sea Treaty identifying this provision of the treaty as "non-self-executing." The Law of the Sea Treaty, however, states that no reservations to its requirements are permitted.[351] Given the clarity of this language, it is unclear how the Senate could override the treaty's requirements of domestic judicial enforcement by attaching a reservation that is also in violation of the treaty's obligations.

In any case, although the nondelegation doctrine would not be invoked here, its existence as a canon of treaty interpretation still matters. The very clarity of the Law of the Sea Treaty's provisions spurred substantial efforts by the political branches to limit or prevent judicial enforcement that they believe could cause constitutional difficulties. By imposing a clear statement rule, courts can help to ensure that the political branches have the opportunity to "constitutionalize" such provisions.

D. Functional Justifications for Applying a Nondelegation Doctrine to International Tribunal Judgments

Even as a super-strong clear statement rule, courts may be reluctant to invoke the long-dormant nondelegation doctrine against international tribunals. Certainly, the lack of recent judicial usage of the doctrine and its subjection to severe academic criticism make it a relatively

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349. *Id.* annex VI, art. 39.

350. COMM. ON FOREIGN RELATIONS, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, SEN. EXEC. REP. 108-10, at 13–15 (2004).

351. UNCLOS, *supra* note 24, art. 309 ("No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.").

unattractive option for judges. For this reason, I offer three functional justifications for applying the nondelegation doctrine to international delegations: (1) to force political accountability; (2) to bolster the political legitimacy of international adjudication; and (3) to ensure that the institutions with greater expertise in foreign affairs remain in control of compliance with international obligations.

1. A Super-Strong Clear Statement Rule Forces Political Accountability

A super-strong clear statement requirement for judicial enforcement of international tribunal judgments enforces political accountability. It shifts the decision of how and whether to comply with a tribunal's judgment to the political branches.[352] This does not mean that the U.S. will always defy that tribunal's judgments.

As explained in Part III, both the executive and legislative branches have ample means to ensure compliance with international tribunal judgments. Indeed, the President's intervention in the *Medellin* case is a classic example of how the executive branch can take responsibility for compliance with an international tribunal judgment. Even if the U.S. Supreme Court does not intervene, the President appears to have the authority to force compliance with an ICJ judgment.

Forcing the political branches to clarify their intentions about judicial enforcement prevents them from avoiding responsibility for the consequences of an international tribunal's judgment. In many if not most instances, the political branches will act to limit the independent judicial role in the enforcement of international obligations, as they have done in the proposed conditions for ratification of the Law of the Sea Treaty. If they do not take steps to limit such a rule, the fact that the enforcement provision is a clear statement prevents future claims that an activist domestic or international court is wrongly interpreting such a provision.

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352. As Nicholas Rosenkranz has observed, the use of a clear statement rule as an interpretive rule operates in a similar manner to default rules in the private law context. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2122–23 (2002). Legal scholars like Ian Ayres and Robert Gertner have noted that certain doctrines of contract law act as default rules forcing the parties to reveal information to each other in order to reach the fairest and most efficient outcome. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

2. *A Super-Strong Clear Statement Rule Creates Political Legitimacy*

Political legitimacy is another related justification for the clear statement rule. By taking courts out of the enforcement process absent the clearest statement by a political branch, the political legitimacy of international tribunal judgments becomes enhanced. Why? Because rather than relying on domestic courts to enforce their judgments, international tribunals will have the imprimatur of Congress or the President for their judgments.

Courts in the U.S. play a central role in the U.S. constitutional system. But their unique status is highly dependent on limits to their role. In particular, scholars have debated for decades the courts' counter-majoritarian or non-democratic difficulty when they wield constitutional law to overturn decisions made by Congress or the President.[353] The counter-majoritarian concern is alleviated by the courts' reliance on the Constitution as the basis for its determinations.

A similar although less serious counter-majoritarian difficulty arises when a court is faced with the enforcement of an international tribunal judgment. In such cases, the U.S. has suffered an adverse judgment before an international tribunal. A domestic court giving effect to that judgment could very easily clash with the executive or legislative branches that had been contesting, and might continue to contest, the validity of the international judgment.

By relying on the political branches to bring the U.S. into compliance with international obligations, courts ensure that the political branches have made the determination to comply with the international tribunal judgment. As I have argued, almost all compliance with international tribunal judgments has been carried out by the executive and legislative branches.[354] In doing so, any question of counter-majoritarian difficulties are resolved and the political legitimacy of any such compliance is unquestionable.

The importance of political legitimacy also explains why an international delegation cannot be understood merely as a useful re-allocation and division of authority akin to domestic federalism. Professor Edward Swaine has argued that international delegations could be justified in the same way that U.S. federalism can be justified: as a

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353. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 201–02 (2002).

354. *See supra* Part III.B.1–2.

separation of powers that sets different levels of governmental authority as a check against each other.[355] This is an attractive concept, but it does not fully grapple with the weaker political legitimacy, to say nothing of political accountability, of international tribunals and institutions. Rather than force national and local authorities to enhance social welfare, delegations to international tribunals are just as likely to open the door to unseemly political backlash against such institutions and concomitant disruptions in both foreign and domestic relations.

3. *A Super-Strong Clear Statement Rule Preserves Executive and Legislative Expertise Over Foreign Affairs*

Finally, a super-strong clear statement rule shifts the decision on compliance with an international tribunal judgment to the institutions of the government with the greatest expertise in foreign affairs: the executive and legislative branches. International tribunal judgments do not always represent simple determinations of legal obligations. They often take place amidst a complex bilateral or multilateral relationship. For instance, at the time Mexico was suing the U.S. in the ICJ, the U.S. was attempting to win Mexico's vote to support the U.N. Security Council Resolution to invade Iraq.[356] Less dramatically, U.S. compliance with decisions of trade tribunals is often done as part of a complex multi-level trade relationship. Attempts by the U.S. to comply with WTO requirements by altering U.S. tax laws, for instance, were finely tuned political efforts to modify the laws in a way least disadvantageous to U.S. corporations.

To complicate matters further, only some countries grant international tribunal judgments self-executing effect in their domestic courts. For instance, most, if not all, countries that are party to the Statute of the ICJ do *not* grant the ICJ's judgments self-executing effect in their domestic courts.[357] Without a super-strong clear statement rule, the several states, U.S. government officials, and possibly the U.S. government itself could be subject to lawsuits in their own courts by private parties and foreign

355. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1586 (2004).

356. *See* Andres Oppenheimer, *Bush Putting Mexican President on Hold*, MIAMI HERALD, Mar. 27, 2003, at 18A (describing Mexico's eleventh-hour decision to oppose a U.N. Resolution authorizing the use of force in Iraq).

357. *See* Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as Amici Curiae in Support of Respondent, *supra* note 123, at 23–24.

governments seeking to directly enforce an international tribunal judgment. Thus, a foreign government could ask a U.S. court to enforce an international tribunal judgment—even though the U.S. government has rejected enforcing that judgment as a matter of domestic law. A court would have to determine whether and how to enforce judgments absent reciprocity.

All of this suggests that courts are the institution least competent in determining how or whether to comply with an international tribunal's judgment. A court is, by design, not privy to the broader information about the U.S. relationship with other countries or particular international tribunals. Nor does it have any expertise in assessing that relationship and the proper way to deal with other countries or with international institutions.[358] In some instances, courts will be asked to play that role, despite their functional shortcomings. But a clear statement requirement ensures that the political branches have made the proper deliberations about what kind of international adjudicatory regime is best suited for judicial enforcement.

CONCLUSION

At first glance, it seems perfectly logical and sensible to permit U.S. courts to independently determine enforcement of international tribunal judgments. International tribunals are an increasingly important part of modern international relations and, as many scholars have pointed out, domestic enforcement of international tribunal judgments could be a major contribution to the development of a global rule of law, or at least a global network of governance. The reasonableness of this new world court order was reflected in the briefing and argument before the Supreme Court in *Medellin*. Yet the Court's decision to avoid resolving this issue in favor of deference to President Bush's intervention may ultimately prove the wisest move. As I have argued, the executive and legislative branches are the institutions constitutionally authorized to determine whether or how to comply with an international tribunal judgment.

Indeed, the constitutional objections to the new world court order are far more serious than its proponents have admitted. Any attempt to

358. For a more detailed comparative analysis of the executive and judicial branches' ability to make foreign policy determinations, see Julian G. Ku & John C. Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 181–99 (2004).

directly enforce an international tribunal judgment would have to be based on a delegation of the foreign affairs power from the U.S. to international tribunals. For this reason, such a delegation would have to satisfy constitutional standards spelled out in the nondelegation doctrine.

I suggest the most likely manifestation of the nondelegation doctrine should be as a rule of treaty interpretation requiring courts to seek a super-strong clear statement before giving international tribunal judgments self-executing effect. The application of this rule would be salutary for a number of reasons. First and foremost, it would shift the responsibility for compliance with international tribunals to the institutions most accountable to the public. Second, it would boost the political legitimacy of these international institutions because political branch enforcement would require action by the entities that have the greatest political and constitutional legitimacy in the U.S. system for this action. Finally, this rule would permit those institutions with the greatest knowledge of and expertise in foreign affairs to control the level of compliance with international tribunal judgments.

The U.S. must ensure that the mechanisms for complying with international tribunal judgments are both constitutionally authorized and functionally adequate. The need increases as the U.S becomes more deeply embedded within systems of international adjudication. Sharply limiting the independent role of U.S. courts in the enforcement of international tribunal judgments may disrupt aspirations for a new world court order, but it is more likely to benefit both the constitutional system and the effectiveness of international adjudication in the long run.