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Inflated Federalism and Deflated International Law: Roberts CJ v. The ICJ

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I. Introduction: Background to the Problem of Medellin and the ICJ

The United States continues to be engaged in a conflict with Mexico regarding the appropriate interpretation and efficacy of the Vienna Convention on Consular Relations (VCCR).² Both States submitted their dispute over the Treaty to the International Court of Justice (ICJ) to provide an authoritative legal clarification of the reach of the treaty in the context of United States state convictions of Mexican nationals. The nationals, all recipients of the death penalty in state court, had been denied certain VCCR consular access during their arrest and trial. In the case of *Medellin v. Texas*³ [*Medellin*], the Supreme Court addressed the legal implications of an ICJ judgment which determined that the US was in breach of its VCCR obligations. Prior to the Supreme Court's ruling in *Medellin*⁴, President Bush issued a memorandum,⁵ (President's Memorandum) in which he directed the Texas courts to comply with international law and give effect to the judgment rendered by the ICJ.⁶ The Supreme Court of the United States rejected the President's memorandum as well as the relevance of the ICJ decision as law binding on the Court.

Since this decision seems to be out of step with the traditional role of the Supreme Court in the making and application of international law, we embark on careful research to understand what exactly moved the Court to come to the startling result. We discovered in our research that the judgment of Robert CJ demonstrated striking parallels to the posture of the Federalist Society

² Vienna Convention on Consular Relations, Apr. 24, 1963, 21 *U.S.T.* 77, 596 U.N.T.S. 261 (VCCR).

³ See *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

⁴ *Id.* at 1355.

⁵ Memorandum from George W. Bush, President, U.S., to Attorney Gen., U.S., on Compliance with the Decision of the International Court of Justice in *Avena*, U.S. (Feb. 28, 2005) (President's Memorandum).

⁶ *Id.*

of United States and its well known skepticism of international law as well as to its partiality to the strengthening of state rights and state sovereignty. The influence of the society's perspective is evident in the Chief Justice's treatment of the respective competencies of the three branches of the Federal Government in relation to international law generally, and to treaty obligations in particular. From this point of view, the Chief Justice showed a tendency sometimes explicitly, sometimes implicitly, to limit the role of the Executive in foreign affairs while stressing a more expansive role for the Congress, the legislative branch of government. In doing so, Chief Justice Roberts also implicitly limits the scope of judicial power in its important role in the development of the prescription and application of international law.

This article commences with an examination of the United State's relationship to international law and a brief overview of the history of United States Supreme Court's endorsement of international law. This general overview is followed by a more detailed review of the role that each of the three branches of the U.S. Government has played in international law. After addressing the general role of the three branches in international law, the article then focuses its analysis on the *Medellin* case and the ways in which the Supreme Court is currently guiding American jurisprudence regarding the role of the three branches of government in this area. The *Medellin* case is introduced with a review of the case's background in the Texas state court system and the relevance of the ICJ decision to the Texas case. The article continues by providing a critical analysis of the Supreme Court's judgment as it relates to the interaction of the three branches of United States Government in international law, and how these views reflect the views of the Federalist Society. The articles concludes by suggesting that there are assumptions and influences in modern American legal culture that bare on the Chief Justice's judgment that are not historically consistent with the key role of the Judiciary in the making,

application, and enforcement of international law. In particular, the article will examine the influence of the Federalist Society on the shaping of contemporary isolationist views on international law. In this sense, the article provides a mild plea in avoidance with regard to the direction that the Chief Justice is shepherding the Supreme Court, which is indeed determining the destiny of the United States with regard to its respect for international law and international obligation.

II. The United States and International Law

A. Sovereignty of States and Compliance

The concept of compliance with international law may be framed historically in terms of a traditional positivist approach to international law, which confines the subjects of international law to sovereign nation states.⁷ The positivist theory of sovereignty assumes that a sovereign

⁷ See generally Legal Positivism (Mario Jori ed., 1992). In Austin's famous formulation, law is the command of a sovereign imposed by a sanction. See John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (Scholarly Press 1977). The obvious concern with this model would be the status of law made beyond the boundaries of the sovereign, such as international law. In this sense, according to Austin, international law is positive morality rather than law. *Id.* In fact, it has been said that international law is the vanishing point of legal theory. Thomas E. Holland, *The Elements of Jurisprudence* (1924). The modern jurisprudence of positivism indicated a central tenet that in order to objectify law, there had to be a criterion objectively specified or assumed by which any communication could be tested for its legal pedigree. According to Austin, the test was whether the purported rule originated in the sovereign. John Austin, *The Province of Jurisprudence Determined*, in 1 J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* 79-341 (R. Campbell 5th ed. 1911) (six lectures originally delivered at the University of London in 1828, parts of which were limitedly published in 1823)). In the jurisprudence of modern analytical positivism, Professor H.L.A. Hart developed the idea of a master secondary rule of recognition. H.L.A. Hart, *The Concept of Law* 79, 97-114 (1962) (suggesting that the "rule of recognition" is the primary rule that establishes certain parties or organizations as rulemaking institutions). The work of Professor Dworkin, on the other hand, has demonstrated that law and rights are not only derived from some master principle, but in effect, are subject to complex processes using tools of justification rather than formal logical analysis from an initial starting point. Ronald Dworkin, *Taking Rights Seriously* 3-4 (1978), at 22-130. In this sense, the techniques of justification that often incorporate rigorous moral analysis enlarge the boundaries of legal discourse and legal decision making. Analytical positivism teaches us that the practices of the State's highest law-applying organ are the best indicators of what constitutes the normative content of the official legal order. See Joseph Raz, *The Concept Of A Legal System: An Introduction to The Theory Of Legal System* 6 (1970). Other approaches stress, not only normative analysis, but also rigorous contextuality as central to the processes of legal decisionmaking. See Harold D. Lasswell & Myres S. McDougal, *Jurisprudence for a Free Society* (1992).

cannot be bound under international law unless a sovereign agrees to be bound.⁸ This approach came close to being juridically affirmed in the *Lotus Case*⁹ where the Permanent Court of International Justice¹⁰ held that limitations on the sovereignty of states could not be presumed in international law.¹¹ This legal standard gives a state the discretion to determine whether it has an obligation as well as the extent to which it will honor that obligation under international law.¹² Such a flexible concept of obligation under international law left the issue of compliance limited by state sovereignty and largely undeveloped until after World War II.

B. The Good Faith Restraint on Sovereign Discretion

After World War II there were serious global efforts to restraint unlimited sovereign discretion and to strengthen the force of international obligation.¹³ Most notable were the

⁸ See J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* 51 (6th ed. 1963) (“[The legal philosophy of positivism] teaches that international law is the sum of the rules by which states have consented to be bound, and that nothing can be law to which they have not consented.”).

⁹ See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) [hereinafter *Lotus*, 1927]. The Permanent Court of International Justice stated: International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.” *Id.* For a detailed examination of the *Lotus* case and the modern application of the *Lotus* principle, see Hugh Handeyside, “Student Note: The *Lotus* Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?”, 29 *Mich. J. Int’l L.* 71 (2007).

¹⁰ The Permanent Court of International Justice (PCIJ) was the predecessor to the ICJ. See Ian Brownlie, *Principles of Public International Law* 677-78 (6th ed. 2003).

¹¹ Under this theory of sovereignty, states have the competence to advance their interests as they see fit in the absence of a specific rule of international law limiting the exercise of sovereign competence. A strong *Lotus* theory essentially means that the principle of sovereignty is given great weight at the expense of a presumed obligation to limit the sovereignty of the state. A soft *Lotus* theory is essentially a position that subordinates the doctrine of the *Lotus* case or ameliorates it in order to enhance the concept of international obligation.

¹² See *Lotus*, 1927.

¹³ See Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 *COLUM. J. TRANSNAT’L L.* 141, 154-59 (2004). One of the most important outcomes of World War II was the general acceptance of the principle that States that act as aggressors abuse their sovereignty,

adoption of the UN Charter and the development of the United Nations Organization.¹⁴ The UN Charter, it has been said, is our international global constitution.¹⁵ One of the central principles which animates the Charter is the principle that there is a good faith obligation to cooperate in the development of modern international law.¹⁶ Consequently, a state's noncompliance with international law challenges a fundamental value of the UN Charter, and a critical constitutional principle of the international system. This principle has been strengthened by the adoption of the Declaration on Friendly Relations and Cooperation,¹⁷ which might be seen as codifying a

and their leaders may be accountable directly to the international community. The establishment of this principle marked a revolutionary change in the scope of sovereignty. This was a major change in the international constitutional system, not only by limiting sovereignty, but also by making individual State officials directly accountable, thus creating the principle that individuals have rights and obligations directly under international law. The post-World War II limitations on sovereignty and State absolutism covered such concerns as those identified with *jus ad bellum*, *jus in bello* and the principles of humanitarianism. The Nuremberg Charter and subsequent trials provided a serious limitation on the absolutist idea of sovereignty. Nazi absolutism could not provide a defense for Nazi leaders responsible for war crimes. The ascription of individual responsibility for war crimes also created another critical innovation in international law. The individual could assert civil and political rights - human rights - directly under international law. The Nuremberg process and the growth of human rights changed the concept, if not the foundations, of sovereignty under the Charter system. Moreover, it is currently asserted that States as sovereigns have no competence to commit acts of aggression, to transgress the Geneva Conventions and its Protocols, or to violate basic fundamental human rights.

¹⁴ *Id.*

¹⁵ The promulgation of the UN Charter in 1945 created an unambiguous, globally codified constitution that is "not merely a treaty ... [but rather] the constitutive instrument of a living global organization." See Thomas M. Franck & Faiza Patel, UN Police Action in Lieu of War: "The Old Order Changeth," 85 Am. J. Int'l L. 63, 66-67 (1991). See also ERIKA DE WET, THE INTERNATIONAL CONSTITUTIONAL ORDER (2005); N. White, *The United Nations System: Conference, Contract, or Constitutional Order?* 4 SING. J. INT'L & COMP. L. 281 (2000); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 594-95 (1998); Blaine Sloan, *The United Nations Charter as a Constitution*, 1989 PACE Y.B. INT'L L. 61.

¹⁶ UN Charter arts. 1(2), 1(3). Article 1(2) of the U.N. Charter provides that its purpose is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *Id.* art. 1, para. 2. The obligation of good-faith is derived from the fundamental legal principle of *pacta sunt servanda*, which is Latin for "agreements must be kept." This principle of international law is also codified in the Vienna Convention on the Law of Treaties which holds: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331.

¹⁷ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971). Note that the VCCR, from which the issues in the Medellín case arise, also seeks to enhance the promotion of "Friendly relations among nations." See VCCR pmbl., 21 U.S.T. 77, 79.

principle analogous to the notion in American constitutional law of giving full faith and credit to the law of sister states.¹⁸

C. Sovereignty and Private International Law

Outside of this framework of public international law, the principle of compliance could also be informed by the practical experience of multistate cooperation in the context of private international law.¹⁹ In particular, the principle of compliance can be seen at work in the choice of law process²⁰, which permits a state to adopt foreign law as the rule of decision in its domestic courts, as well as in the recognition of foreign judgments based on the principle of comity.²¹ In short, the issue of compliance in international law generally, and more specifically the issue of U.S. compliance with public international law raised by the Supreme Court's decision in *Medellin*,²² are issues that require nuanced treatment and significant development. Certainly

¹⁸ See U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); Act of June 25, 1948, ch. 646, 62 Stat. 947 (codified as amended at 28 U.S.C. § 1738 (2006)) ("The records and judicial proceedings of any court of any such State ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken.") For a general discussion of international recognition of judgments, in which the practice of international recognition of judgments is likened to the practice of giving full faith and credit, see PETER HAY, Patrick J. Borchers & Symeon C. Symeonides, *CONFLICT OF LAWS* §§ 24.33-24.45 (2010).

¹⁹ See generally Winston P. Nagan, *Conflicts Theory in Conflict: A Systematic Appraisal of Traditional and Contemporary Theory*, 3, No. 3 N.Y. J. Int'l & Comp. L. 343 (1982).

²⁰ For analysis of the importance of choice-of-law analysis in private international law, see Donald T. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 Ohio St. L.J. 586 (1961). "Once it is recognized that the problem may be to decide which of the statutes of two or more countries should be applied to a particular case it is apparent that the court faces a problem much like that dealt with in the conflict of laws. Choice-of-law rules are designed to resolve precisely such problems." *Id.* at 616.

²¹ The common law rules for recognition and enforcement of foreign judgments as a matter of international comity was set forth by the U.S. Supreme Court in *Hilton v. Guyot*, 159 U.S. 113, 212 (1895). See *infra*, n. 145.

²² *Medellin*, 128 S. Ct. 1346 (2008).

volumes have been written on the general topic, and a significant amount on the *Medellin* decision by now, but little attention has been directed towards the way the Roberts majority has infused its own sense of inflated sovereignty conditioned federalism to avoid compliance with international law. An appreciation of the dangers of this trend is impossible without a firm grasp of the United States' experience with international law.

D. Historical Background

Throughout its history, the United States has at different points, both embraced and shied away from a role of global leadership in the arena of compliance and development of international law. At times, the United States Supreme Court has led the way in seeking to ensure that international law would be effectively made and that it would be applied in the domestic courts of the United States.²³ In this sense, the legal culture of the United States has given great credence to the value of international law and the importance not only of national compliance but also of giving effect to international law obligations in the domestic courts.²⁴ It may be that Woodrow Wilson's grand vision for an international quasi-legal body after World War I was partly inspired by the respect given to international law in the U.S. domestic courts and diplomatic practice of the past.²⁵

²³ See e.g. *Murray v Schooner Charming Betsy*, 2 Cranch 64, 118 (1804), in which the Supreme Court held that an Act of Congress should, whenever possible, be construed in a way that does not violate the law of nations. Additionally, the Supreme Court reinforced the power of the federal courts to declare non-consensual rules of international law by setting the example that the court could construe the rules of customary international law as rules of decision in concrete cases. See *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290 (1900).

²⁴ *Id.*

²⁵ See Aaron Xavier Fellmuth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941*, 3 BUFF. J. INT'L L. 413 (1996-1997).

Wilson's efforts to give meaning to the cliché that World War I was a war to end all wars represented the most significant trend toward a more sustained U.S. presence in international law and relations. Wilson had an extremely ambitious view of what the post-war peace process should deliver,²⁶ which culminated in his commitment to the establishment of the League of Nations.²⁷ This initiative in U.S. foreign relations was certainly one of the most ambitious undertakings ever by an American President, and it was not without opposition.²⁸ Due in large part to his suffering a stroke, Wilson was not able to get the United States Senate to ratify the League of Nations Covenant.²⁹ Wilson's stroke and untimely death was unfortunate for the internationalist constituency in the U.S., and energized an interest group identified as "isolationists."³⁰ Led by Wilson's Senatorial nemesis, Senator Henry Cabot Lodge³¹, the

²⁶ Wilson's effort to remake the global social and political process in the aftermath of the war was codified in his Fourteen Point Peace Program. *Id.* at p. 87-90.

²⁷ See Robert D. Schulzinger, *U.S. Diplomacy Since 1900*, 4th edition, 43-44 (1998).

²⁸ See *infra*, n. 26.

²⁹ *Id.*

³⁰ The conventional take on U.S. exceptionalism is rooted in the idea that it was the first modern revolutionary state emphatically committed to the principles of liberty and democracy. Implicit in these ideas is an argument about the nature of political and legal authority. The movement rests on the premise U.S. was founded by revolutionary forces committed to freedom and democracy it established a state completely distinctive to the global political reality at the time. Settling in a new homeland they felt secure in their remoteness from the political stage that made them victims. Among the leading voices promoting the values of isolationism was Tom Paine's, *Common Sense*. See Tom Paine's *Common Sense* 1776. Available at: 1776:<http://www.ushistory.org/paine/commonsense> (last visited 7/22/10). This contribution had much influence and its general orientation was that the national interest of the United States was better served by avoiding foreign alliances and entanglements. This view was also well expressed in the farewell address of President George Washington. According to Washington:

"The great rule of conduct for us, in regard to foreign nations, is in extending our commercial relations, to have with them as little political connection as possible. Europe has a set of primary interests, which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities." See George Washington's Farewell Address 1796.

Available at: <http://www.earlyamerica.com/earlyamerica/milestones/farewell/text.html> (last visited 7/22/10). The endurance of this idea is reflected in the conservative views of organizations like the Federalist Society who see international law as representing a democracy deficit. See *infra*, n. 40. In this view international law is

movement to defeat the League of Nations in the Senate was successful. This defeat is commonly seen as a victory for isolationism, encouraging a mutated form of American exceptionalism.³²

Isolationism went on to develop a strong foothold in the political culture of the United States and was important in limiting what President Franklin D. Roosevelt could do with the rise of Nazi Germany.³³ Although Roosevelt recognized the threats posed by totalitarian Germany and imperial Japan, Roosevelt was securely bound by isolationist support for rigorous neutrality.³⁴ On December 7, 1941, the Japanese navy and air units launched a devastating air strike on the U.S. Navy in Pearl Harbor. In response, the U.S. entered World War II on the side of Britain and the allies, and isolationism entered a period of incubation. During the formative stages of the U.S. engagement in the conflict, prior to the attack on Pearl Harbor, Roosevelt provided Congress with his famous Four Freedoms speech.³⁵ The speech set out the war aims for

generated from sources lacking the strong and vibrant distinctiveness of American democracy under the rule of law. Such a view tends to prefer the primacy of national law and national interests over the interests implicated in the larger global community and represented in legal culture by international legal order. In turn isolationism provides a perspective that is skeptical of international and foreign law. In particular, hostile to the view that international and or foreign law should influence the interpretation of American law or the American Constitution. Id.

³¹ Lodge was a Senator and a Republican from Massachusetts. He was a spokesman for so-called conservative internationalism and served as Chairman of the Senate Foreign Relations Committee, 1900-1904. It has been pointed out that not only were Wilson and Lodge political rivals but that they hated each other. Lodge on the other hand, poured scorn on Wilson's moralizing and his vanity. According to Schulzinger, "The Senator believed that Wilson thought he was better than others, while Lodge knew that actually he surpassed his own colleagues." Schulzinger 99-103. There is a suggestion that Lodge's envy was the most "corrosive emotion." Schulzinger 103.

³² Insights into American exceptionalism and foreign policy are found in Schulzinger, Id. at p. 11, 39, 44, 81. It is suggested that the U.S. entry into the war, regardless of Wilson's idealistic exceptionalism, essentially made the United States another great power, like the other great powers.

³³ See Fellmuth, 3 BUFF. J. INT'L L. , supra n. 22.

³⁴ There was a certain genius in the Roosevelt Administration's policies which rhetorically respected neutrality, but in practice sought to find ways of helping its allies.

³⁵ Roosevelt's State of the Union Address given January 6, 1941, was devoted to an attack on isolationism. State of the Union Address to Congress, Jan. 6, 1941 transcribed by American Rhetoric (Four Freedoms). Available at:

both the United States and its allies, and stressed four fundamental freedoms to which the United States was committed, the freedom of speech and expression, the freedom of religion, the freedom from want, and the freedom from fear.³⁶ These freedoms became the foundational principles upon which the war was fought and became the foundation stones of a new international legal order based on the UN Charter.³⁷

The Four Freedoms may be viewed as an expression of the most vital and fundamental principles of American foreign policy. To the extent that this expression of U.S. foreign policy became strongly influenced post-war political and legal arrangements for the world community, it is an indication that U.S. foreign policy actually served as the cornerstone of the new international legal order under the UN Charter. In the United States, the Four Freedoms did not generate significant opposition from either isolationists or exceptionalists, and consequently the momentum of the doctrine continued unchecked into the conference which drafted the UN

<http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm> (last visited 7/23/10). Roosevelt noted "The future and the safety of our country and our democracy are overwhelmingly involved in events far beyond our borders." See Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need it More than Ever*, 80-81 (2004). What was critical to this speech was not only his vision for a more just America, but these ideas suggested a future "which we seek to make secure" as "we look forward to a world founded on four essential human freedoms." Id. 81. In the speech he declared there were 4 essential human freedoms that the world should strive to obtain: the freedom of speech and expression everywhere in the world, the freedom of religion everywhere in the world, the freedom from want, and the freedom from fear. Four Freedoms. Roosevelt noted "The future and the safety of our country and our democracy are overwhelmingly involved in events far beyond our borders." Id

³⁶ Id.

³⁷ The Four Freedoms speech was followed by the Atlantic Charter which was issued on August 14, 1941. The Charter was the result of a meeting between Roosevelt and Churchill. The central idea that Roosevelt had in mind was that the Charter would serve as an objective codification of the war aims of the allies. According to Roosevelt, the Atlantic Charter is a "declaration of principles at this time presents a goal which is worthwhile for our civilization to seek." He added that these freedoms "are a part of the whole freedom for which we strive." See President Roosevelt's Message To Congress on the Atlantic Charter, August 21, 1941. Available at: <http://avalon.law.yale.edu/wwii/atcmess.asp> (last visited 7/22/10).

Charter.³⁸ Importantly, the Four Freedoms also represented the quintessential spirit of Roosevelt's New Deal.³⁹ Thus it can be confidently maintained that modern international law evolved from what was at one time a dominant view in U.S. politics: the perspective of the humanistic promises of the Four Freedoms and the New Deal.

The Allied war victory in WWII provided an assurance of a strengthened international law together with the development of an international bill of rights.⁴⁰ However, the developing human rights aspect of international law was seen by the resurgent American isolationists as essentially an infringement of United States sovereignty, and they threatened to try to bury the human rights covenants so deep that no American Administration would dare to resurrect them.⁴¹ On the other hand, internationalists conceded the ideological importance of a human rights based international law in the context of the Cold War. Since the United States was now a major international player, there was a significant interest in the importance of international law as a tool for the effective conduct of U.S. foreign policy. However, this view ran alongside the increasing development of isolationist perspectives in the theory and practice of international law. The most important institution to surface in support of these isolationist and exceptionist

³⁸ References to the Four Freedoms were incorporated into the so-called "Declaration of the United Nations" of January 1, 1942, which was signed by the representatives of twenty-six countries, including the United States, the United Kingdom, the USSR and China. Joint Declaration of the United Nations, U.N.T.S. 1942 No.5 (Cmd. 6388).

³⁹ In Roosevelt's view the commitment to a healthy and strong democracy included a number of New Deal values. These included equality of opportunity for youth and others; jobs for those who can work; security for those who need it; termination of special privileges for the few; preservation of civil liberties for all; enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living." See Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need it More than Ever*, 80-81 (2004).

⁴⁰ The International Bill of Rights consists of 3 international treaties: 1. the Universal Declaration of Human Rights, 2. the International Covenant on Civil and Political Rights, and 3. the International Covenant on Economic, Social and Cultural Rights. Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/law/> (last visited Aug. 12, 2010).

⁴¹ A statement made by a leader of the isolationist contingent in the Senate, Senator Bricker. For a detailed discussion of the Senate's early relationship with the Human Rights movement, See generally Natalie Hevener Kaufman & David Whiteman, *Opposition To Human Rights Treaties in The United States Senate: The Legacy of the Bricker Amendment*, 10 Hum. Rts. Q. 309 (1988).

ideologies was the Federalist Society.⁴² Beginning with the Reagan administration, many members of the society became influential in Republican administrations and many were placed in important positions on the courts.⁴³ This paper will further explore the role of the Federalist Society in the shaping of US views on compliance in international law in Part V.

Since the Reagan Administration, the U.S. has sent mixed signals to the world regarding its position on international law. At times the isolationist tendencies have come through the clearest, while at other times the U.S. has displayed a more internationalist trend. The *Nicaragua*⁴⁴ case is an example of the influence of isolationism at work in the Reagan administration. In *Nicaragua*, the U.S. refused to honor a judgment of the ICJ against the United States.⁴⁵ Moreover, it was understood politically that should the Security Council make an effort to enforce the judgment, the United States would veto such an effort.⁴⁶ Meanwhile, as the executive branch thumbed its nose at international jurisprudence, the domestic courts were actually showing internationalist leanings. In the early 1980's, district courts began giving effect to a significant body of claims brought under the Alien Tort Statute and based on

⁴² See The Federalist Society, Our Background, <http://www.fed-soc.org/aboutus/id.28/default.asp> (last visited July 21, 2010); For information on the development of the Federalist Society, See McGinnis, John O. An opinionated history of the Federalist Society. 7 Geo. J.L. & Pub. Pol'y 403-413 (2009).

⁴³ See *infra*, section V for an overview of the Federalist Society presence in modern politics.

⁴⁴ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 1 (June 27).

⁴⁵ Three days before **Nicaragua** filed its application to commence suit, the United States filed a document with the ICJ saying that it would not view itself as subject to ICJ jurisdiction for a period of two years on disputes "related to events in Central America." See Ilene R. Cohn, **Nicaragua v. United States: Pre-Seisin Reciprocity and the Race to The Hague**, 46 Ohio St. L. J. 699 (1985); See U.S. Vetoes U.N. Slap at Contra Aid, Chi. Trib., Oct. 29, 1986, at 2C; United Nations: Assembly Urges U.S. Compliance with World Court, Inter Press Serv., Nov. 3, 1986.

⁴⁶ Following the decision in **Nicaragua**, the United State vetoed a draft Security Council resolution calling for compliance with the judgment. See U.N. Doc. S/18428 (Oct. 28, 1986) (vetoed by S.C. Doc. S/PV.2718 (Oct. 28, 1986)).

violations of customary international law.⁴⁷ The Supreme Court affirmed the application of the statute as a remedy in domestic courts for a limited set of violations of international law.⁴⁸

On the other hand, in the Supreme Court's more recent handling of a string of death penalty cases involving the Consular Convention and related ICJ judgments, the impetus towards compliance has been significantly weakened.⁴⁹ This damaging trend is evident in the Supreme Court's recent holdings relating to compliance with international law in the *Medellin*⁵⁰ case. The issue of compliance as dealt with in the *Medellin* case cannot be properly understood without an overview of the separate roles that the Judiciary, Executive, and Legislature play in U.S. foreign relations and international law.

E. Theoretical Background

⁴⁷ These claims involved a somewhat novel interpretation of a 1792 law, the Alien Tort Statute, 28 U.S.C. § 1350 (2009) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). *Id.*; See Kenneth C. Randall, Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U. J. Int'l L. & Pol. 1, 4-5 n.15-16 (1985) (noting that until 1980, the Alien Tort Statute had only been invoked twenty-one times, only two of which were successful). In modern times, this statute has been applied in several federal district courts, the first instance being in the Second District in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The most recent application in the district courts was****

⁴⁸ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719, 724 (2004). In *Sosa*, the Court maintained that the Alien Tort Statute was not intended as a "jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners," but, rather, was meant to have a "practical effect the moment it became law" to "provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* The original offenses targeted by the Statute included "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 715.

⁴⁹ See e.g. *Breard v. Commonwealth*, 445 S.E.2d 670, 673 (Va. 1994); *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998) (procedurally barring Consular Convention issues from being raised during a habeas corpus proceeding); *Breard v. Greene*, 523 U.S. 371, 377 (1998) (per curiam) (denying a stay of imminent execution on procedural grounds in spite of ICJ ruling declaring violation of consular rights) (Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9)); *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998), cert. denied, 525 U.S. 971 (1998) (*LaGrand Case (F. R. G. v. U.S.)*, 2001 I. C. J. 466 (Judgment of June 27)); *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999); *Valdez v. State*, 46 P.3d 704 (Okla. Crim. App. 2002)

⁵⁰ *Medellin*, 128 S. Ct. 1346 (2008).

1. The President and International Law: the Foreign Affairs Power

The President is responsible for a “vast share of responsibility for the conduct of our foreign relations,”⁵¹ yet the Constitution does not spell out the President’s power over foreign affairs as an overarching allocation of competence. Unlike the English system, which assigned to the Crown full authority over foreign affairs,⁵² the Framers expressly allocated aspects of the foreign affairs power away from the Executive.⁵³ The Constitution laid the groundwork for understanding the foreign affairs power of the President, however, the current boundaries of the

⁵¹ *Am. Ins. Ass’n v. Garamendi*, 123 S. Ct. 2374, 2386 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)); see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (observing that the President has “unique responsibility” in matters of “foreign and military affairs”); *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (stating that the President has “the lead role... in foreign policy”). Recognition of independent Executive authority in foreign affairs is reflected a long line of cases. See, e.g., *United States v. Belmont*, 301 U.S. 324, 327, 330-31 (1937) (); *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U.S. 68, 74 (1938) (deferring to the Executive’s recognition of a foreign sovereign’s immunity, the Court stated “If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.”); *United States v. Pink*, 315 U.S. 203, 223, 230-31 (1942); *Ex parte Republic of Peru*, 318 U.S. 578, 587-589 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (“It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”). *Garamendi*, 539 U.S. at 415-417 (holding the President has authority to make executive agreements with other countries without congressional approval and that such agreements preempt state law); *Dames & Moore v. Regan*, 453 U.S. at 679, 682-683.

⁵² The “executive power” of the English crown included, among other things, the ability to conclude treaties and alliances. See, e.g., 1 William Blackstone, *Commentaries* *257; See also Jean Louis de Lolme, *Constitution de l’Angleterre* 73 (Dublin, P. Byrne & J. Moore ed. 1793) (1775). The founders were also familiar with systems that did not vest the full foreign relations power with the chief executive, such as Sweden, Switzerland, and the Netherlands. See 1 John Adams, *Defence of the Constitutions of Government of the United States of America* (1777) (surveying forms of government in Europe). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., Concurring) [hereinafter *Youngstown*, 343 U.S. 579] (noting that one of the reasons for the for limiting the power of the executive by the Founding Fathers was to check the “unlimited executive power” exercised by George III, King of England).

⁵³ These powers include the Senate’s role in treaty ratification and the naming of ambassadors, and Congress’ power to declare war and to raise, support, and regulate armed forces. U.S. Const. art. I, §8., art. II, §2. Of course, the Constitution did convey specific foreign relations powers exclusively to the President, such as the powers of Commander-in-Chief of the armed forces, and the power to receive ambassadors and other public ministers. See *id.* at art. II, §2, cl. 1, §3.

competence are the result of an evolution of practice and necessary implication.⁵⁴ Much of this competence is implied from an historic gloss on the constitutionally explicit executive power.⁵⁵ This competence includes not only specifically enumerated domestic powers, but also broad authority over matters in foreign affairs, including matters of diplomacy and national security.⁵⁶ These presidential foreign affairs powers often do not rest directly on affirmative grants from the Constitution or an act of Congress, but instead are seen as inherent in the office of President, as Chief Executive, and reflect the “necessary concomitants of nationality.”⁵⁷ The Constitution

⁵⁴ This evolution has been seen through a long string of Supreme Court cases. See, e.g., *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 425, 426, 45 S. Ct. 176, 69 L. Ed. 352 (1925) (holding the Executive has inherent power to bring a lawsuit “to carry out treaty obligations.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (holding the President’s Article II power over foreign affairs “does not require as a basis for its exercise an act of Congress.”); *United States v. Belmont*, 301 U.S. 324, 326-327 (1937) and *United States v. Pink*, 315 U.S. 203, 223, 230-31, 233-34 (1942) (establishing the President’s authority to make and to implement executive agreements respecting international claims settlement, which can require contrary state law to be set aside); *Ex parte Peru*, 318 U.S. 578, 588, 63 S. Ct. 793, 87 L. Ed. 1014 (1943) (clarifying that the Executive, operating without explicit legislative authority, can assert the principles of foreign sovereign immunity over state law and in state court); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329, 114 S. Ct. 2268, 129 L. Ed. 2d 244 (1994) (reserving judgment as to “the scope of the President’s power to preempt state law pursuant to authority delegated by . . . a ratified treaty”); *American Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003) (finding state statute to be preempted by executive agreements and affirming that in the area of foreign affairs “the President has a degree of independent authority to act.”)

⁵⁵ U.S. Const. art. II, §1. The “Executive Vesting Clause,” as it is known, states that “the executive power shall be vested in a President of the United States of America.” *Id.* See *Garamendi*, 539 U.S. at 414 (quoting *Youngstown* 343 U.S. 579, 610-611)). “Although the source of the President’s power to act in foreign affairs does not enjoy any textual detail, the historic gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’ ” *Id.*

⁵⁶ See *United States v. Curtiss-Wright*, 299 U.S. 304, 315-316 (1936) (drawing a distinction between the President’s powers in domestic and foreign affairs, and finding the theory that the Executive could “exercise no powers except those specifically enumerated in the Constitution” to only be categorically true “in respect of our internal affairs.”) In *Curtis-Wright*, the Court addressed whether Congress made an unlawful delegation of its authority to the President when it authorized him to impose an embargo on the sale of arms to Bolivia and Paraguay. *Id.* at 314.

⁵⁷ *Id.* at 317-318. The foundation of the “inherent powers” competence of the President as Commander and Chief, derived from both the Constitution and international law, often rests on the law of war principles of armed conflict analogous to war. These powers are both a sword and a shield for the Executive. The principles of self-defense based on military necessity, proportionality and humanitarianism empower the President to act in self-defense for vital national interests. While consistent with a democratic society under the rule of law, this competence provides a hefty sword of power to the President. These powers are also a shield in the sense that the President has been historically secure from improvident attacks that would challenge his actions and subject him either to impeachment or to prosecution a leaving office. However, if the President were to act as if the concept of

specifically obligates the President to defend the Constitution of the United States,⁵⁸ which implies an obligation inherent, but not exclusive, to the Executive to defend the sovereignty of the United States. Concerns for the sovereignty of the United States will largely be matters relating to foreign relations. In short, direct support for the President's foreign affairs power enjoys constitutional and historical support that is broad, yet imprecise.

Indirect support for the President's foreign affairs power is often revealed through the resolution of tension between the precise scope of Congressional concern and the inherent and textual powers of the President as Chief Executive and Commander and Chief.⁵⁹ This tension manifests itself in a wide area of executive agreement making, including the treaty making process.⁶⁰ Justice Jackson addressed the tension between Presidential and Congressional authority in *Youngstown*, providing a three-tiered scheme of relative Presidential power.⁶¹

Though *Youngstown* dealt with presidential power on the domestic front, the framework

"inherent" was limitless, he would risk losing the confidence of the people and their representatives in a time of crisis. A broad loss of confidence in the President would certainly undermine the security of the nation as a whole.

⁵⁸ See U.S. CONST, art. II, § 2, cl. 8 ("Before he enter on the execution of his office, he shall take the following oath or affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.""").

⁵⁹ See U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States....").

⁶⁰ The President's power in foreign affairs is extremely wide in the area of agreement making. Apart from the treaty making power, constitutional support for this wide competence is scant, yet scholars, and more importantly the Supreme Court, have largely agreed that the President has power to enter into binding nontreaty agreements without the advice and consent of Congress. What the limit or scope of this power should be is the topic of continuous debate. See Louis Henkin, *Foreign Affairs and the U.S. Constitution* 215, 222 (2d ed. 1996) (famously stating that "There are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate, ... but neither Justice Sutherland nor anyone else has told us which are which."). Of course, this broad power is based on the President's role representing the United States in the family of nations. This role invokes international powers and obligations inherent in the concept of nationality, and thereby inherent in the office of the executive.

⁶¹ *Youngstown*, 343 U.S. 579, 635-38. In *Youngstown*, the Court considered whether President Truman's attempt to invoke "emergency powers" and seize domestic steel mills during a nationwide strike were constitutional. *Id.* at 587-89 (majority opinion).

provided by Justice Jackson is now used to structure executive power generally, including on the international front.⁶² According to the Youngstown framework, the President's authority is at its zenith when he acts "pursuant to an express or implied authorization of Congress, for it includes all that he possesses in his own right plus all that Congress can delegate."⁶³ The absence of direct authorization from Congress, invokes the second tier of Presidential power, which reflects a Constitutional middle ground of concurrent authority between the Congress and the President, the famous "zone of twilight."⁶⁴ Here, the scope of the President's powers may be construed in the light of "congressional inertia, indifference, or quiescence,"⁶⁵ that in the midst of congressional silence on an issue. The final tier, placing the President's power at its "lowest ebb," exists "[w]hen the President takes measures incompatible with the expressed or implied will of Congress...."⁶⁶ In these cases, the President may still be justified in his contentious action, but only through a careful construction of his powers under the Constitution itself.⁶⁷ In

⁶² See e.g. *Dames & Moore v. Regan*, 453 U.S. 654, 675-79 (1981) (applying the framework to evaluate the validity of Carter's executive orders concerning Iranian assets); *Medellin*, 128 S. Ct. 1346 at 1368, (applying the Youngstown framework to evaluate the validity of Bush's executive order concerning an ICJ ruling).

⁶³ *Id.* at 635 (*Jackson, J., concurring*). In this case, Jackson explained, the President is acting with all the authority "he possesses in his own right plus all that Congress can delegate." *Id.*

⁶⁴ *Id.* at 637. , "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* Although the President lacks an explicit congressional grant of authority, there must still be some independent constitutional authority to act. *Id.*

⁶⁵ *Id.* The President's exercise of power in the "zone of twilight" would "depend on the imperatives of events and contemporary imponderables" instead of "abstract theories of law," and congressional action might "enable, if not invite," executive action. *Id.*

⁶⁶ *Id.* at 637-638.

⁶⁷ *Id.*

the face of Congressional disapproval, the action might only be sustained if the Supreme Court steps in, “disabling the Congress from acting upon the subject.”⁶⁸

Justice Jackson’s analysis reminds us that the President does not act in a legal vacuum. When the President, as Commander and Chief, asserts his power, including foreign affairs powers, he does so with sanction of the Constitution of the United States. The President’s constitutional authority in the arena foreign relations requires him to address international law, both conventional and customary. The President is not only potentially bound by this law, but is also frequently the party responsible for giving effect to and executing the law. The broad, yet often imprecise nature of the President’s foreign affairs power stands in uneasy tension with the vast responsibility of the President in the arena of foreign affairs. Given this tension, turning to Justice Jackson’s scheme in order to help define the foreign affairs power is tempting, but problematic. The scheme falters in this task because it assumes at least some Congressional competence in the arena in question, where as foreign affairs issues often do not lend themselves to legislative action, but rather require the timely, independent action of the President.⁶⁹

⁶⁸ *Id.*

⁶⁹ See *supra*, n. 57. See also *Garamendi*, 539 U.S. at 414. (stating that in arena of foreign affairs “the President has a degree of independent authority to act.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (stating that the President’s Article II power over foreign affairs “does not require as a basis for its exercise an act of Congress.”); *Sanitary Dist.*, 266 U.S. at 425-426 (Executive authority to bring an action in court to secure compliance with a treaty does not require an act of Congress). The tendency to draw sharp distinctions between legal norms in domestic affairs and foreign affairs has been termed “foreign affairs exceptionalism.” See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 461 (1988); Ernest A. Young, *Treaties as “Part of Our Law,”* 88 Tex. L. Rev. 91, 137 [hereinafter Young, *Treaties as “Part of Our Law”*]. For an early expression of the exceptionalist theory see *United States v. Belmont*, 301 U.S. 324, 330-31 (1937) (“In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.”). However, some scholars interpret recent Supreme Court cases as an attempt to normalize foreign affairs law, moving away from the historical position. See Young, *Treaties as “Part of Our Law,”* *supra* at 137; Cf. Ernest A. Young, *It’s Just Water: Toward the Normalization of Admiralty*, 35 J. Mar. L. & Com. 469, 517-21 (2004) (arguing that foreign affairs law should be normalized in a way similar to maritime law); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 Geo. Wash. L. Rev. 139, 141-42 (2001) (critical of the approach to foreign affairs related issues that is predicated on a sharp line between foreign and domestic

Applying Justice Jackson's framework to the President's foreign affairs powers is especially troublesome in relation to the treaty making power. The difficulty comes, again, from the broad yet imprecise scope of the President's competence in foreign affairs, combined with the lack of legislative application to many foreign affairs issues. The treaty making power was explicitly created under Art. II of the Constitution,⁷⁰ as a competence to be sequentially shared by the President and the Senate.⁷¹ Thus, applying Justice Jackson's scheme, it would seem that when a treaty is ratified by the Senate, the President's foreign affairs power under that treaty would be at its zenith.⁷² In fact this is the argument that the State Department set forth in support of the President's Memorandum in the *Medellin* case.⁷³ The Roberts majority rejected the

concerns). Professor Young, in particular, welcomes the normalization of foreign affairs law, a trend he sees in the cases *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), and *Medellin*, 128 S. Ct. 1346 (2008).

⁷⁰ U.S. CONST. art. II, § 2, cl. 2 "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls..." Id.

The following provisions of the U.S. Constitution are also relevant to the ratification process:

Article 1, Section 10 Clause 3: No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State or with a foreign Power

Article II, Section 3 Clause 1: ... [H]e shall receive Ambassadors and other public Ministers; ...

Article VI, Clause 2: This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Tenth Amendment: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

⁷¹ Id. The competence is sequential in that first, the President negotiates, constructs and signs a treaty. Only then is it taken before the Senate to be ratified by approval of two-thirds of the Senators voting. Upon ratification, the treaty becomes supreme federal law, and the President is then both bound by it as well as responsible for its execution.

⁷² See *Youngstown*, 343 U.S. 579, 635-36.

⁷³ See Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Medellin v. Texas*, 129 S. Ct. 290 (2008) (No. 06-984) [hereinafter Brief for U.S. Supporting Petitioner No. 06-984 ("When the President acts pursuant to a duly ratified treaty on his own constitutional authority, he acts with the full authority of the United States, and his authority is at its zenith ... "). Perhaps a more reasonable approach would have been to place the President's action within the second tier of concurrent authority, in which case due to Congressional silence, the President may have been authorized to act. However, the State Department arguments in support of the

argument, finding instead that the circumstances surrounding the President's action actually placed him in the third, most uncertain tier.⁷⁴ The case illustrates the shortcomings of the Jackson scheme in defining the President's authority under a treaty which after explicit approval by the Senate, has been treated with indifference by Congress.

The significance of the shared treaty power is evidenced by the unique preemptive status that treaties enjoy, being not only designated as supreme federal law⁷⁵ but also expressly denied to the states.⁷⁶ Reacting to the impotence of a heavily decentralized system under the Articles of Confederation, the framers designed and delegated the exclusively federal treaty power in such a way as to present a strong, unified national face on the international scene.⁷⁷ As the

President's Memorandum consistently asserted the President's power in the most aggressive and contentious terms possible, thus facilitating the Supreme Court's rejection of those arguments. See *infra*, n. 213-215 and associated text.

⁷⁴ See *Medellin*, 128 S. Ct. at 1368-69. As will be discussed in section IV, the Supreme Court found that rather than acting with Congressional approval, the President was acting contrary to Congressional will. The relevant treaties were non self-executing, signaling the Senates intent that further Congressional action be taken before the treaties could be domestically enforced. *Id.*

⁷⁵ U.S. CONST. at art. VI, cl. 2 The "Supremacy Clause" provides in part that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." The preemptive nature of treaties comes from their inclusion within the Supremacy Clause. The treaty making power is a hybrid form lawmaking; while the Constitution grants treaties the preemptive force of federal law, their creation is not fully a function of the Legislature, since the President is charged with actually "making" the treaty. See *id.* at art. II, § 2, cl. 2.

⁷⁶ See *id.* at art. I, § 10, cl. 1 (prohibiting the states from entering "into any Treaty, Alliance, or Confederation"). In case expressly delegating the treaty making power to the federal branches, and expressly denying the power to the states does not clearly enough convey the framers intent, the Constitution creates an express duty upon states to enforce treaty provisions in state courts. See *id.* at art. VI, cl. 2 (providing that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

⁷⁷ Inclusion of treaties in the Supremacy clause was directly influenced by the embarrassing problem under the Articles of Federation of individual states refusing to adhere to national treaty obligations, such as the 1783 Treaty of Paris with Great Britain. See Young, *Treaties as "Part of Our Law,"* at 112. The Supreme Court has continued to affirm the exclusive role of the Federal Government in foreign affairs. See e.g. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889) (declaring that "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) ("The only government of this

representative of the nation in the world community, the President negotiates and signs treaties on behalf of the nation.⁷⁸ Although the President's signature alone carries a soft juridical imprimatur, the Constitution also requires the advice and consent of the Senate in order to secure the ratification of the treaty.⁷⁹ Thus in the exercise of United States sovereignty, the President also exhibits a broad competence over foreign relations generally. It is in this area, where the Chief Justice has in effect sought to redraw the lines of Constitutional competence causing Congressional authority to trump Executive and the Judicial authority, and placing state concerns over those of the nation as a whole.⁸⁰

country, which other nations recognize or treat with, is the government of the Union.... The Constitution of the United States speaks with no uncertain sound upon this subject.”); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) (citing the need to avoid exacerbation of U.S. relations with foreign nations is a basis for federal preemption in foreign affairs). *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) (“The Framers’ Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.”); *Belmont*, 301 U.S. at 331 (stating that federal policy in matters of foreign affairs “is not and cannot be subject to any curtailment or interference on the part of the several states.” (citing *Curtiss-Wright Export Corp.*, 299 U.S. at 316)). *United States v. California*, 332 U.S. 19, 35 (1947) (“[P]eace and world commerce are the paramount responsibilities of the nation, rather than an individual state....”); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (declaring that foreign affairs and international relations [are] matters which the Constitution entrusts solely to the Federal Government,”); *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (observing that with respect to the Import-Export Clause, the Constitution addressed “the Framers’ overriding concern that ‘the Federal Government must speak with one voice when regulating commercial relations with foreign governments’” (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976))). Of course, the framers also made it clear that the judiciary would be responsible for enforcing treaties. See U.S. Const. art. III, § 2, cl. 1. (“The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made....”).

⁷⁸ See Alfred Hill, *The Law-making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1050 (1967). (“[T]he President is the sole representative of the United States in governmental intercourse with foreign states; has an exclusive initiative and negotiating function in the making of treaties; and a largely exclusive competence in the matter of recognition and its incidents.”)

⁷⁹ *Id.* at art. II, §2.

⁸⁰ See *infra*, Section IV, which examines in detail the effects of the Chief Justices conclusions.

2. The Congress and International Law

While the Senate alone shares a key foreign affairs competence with the President in the treaty making process,⁸¹ the Constitution also allocates to the entire Congress a variety of other powers and responsibilities that place the Congress squarely within the realm of foreign relations and international law.⁸² For instance, Art. I, Section 8 grants Congress the specific power to declare war,⁸³ to define and punish crimes against international law,⁸⁴ and more generally authority for providing for the external defense of the country.⁸⁵ The Constitution also gives Congress the power to, *inter alia*, regulate commerce with foreign nations,⁸⁶ to create rules for the naturalization of foreign citizens,⁸⁷ and to give advice and consent to diplomatic appointments.⁸⁸ The realm of foreign affairs then, is clearly not the exclusive domain of the

⁸¹ See U.S. CONST. art. II, § 2, cl. 2, *supra* n. 69.

⁸² Early drafts of the Constitution gave even more foreign relations power to Congress by giving the treaty power to the Senate alone and by giving Congress the power to “make war,” instead of merely to “declare war.” See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 150, at 263-66 (1996). Similar to the treaty-making power, this competence was shaped by concerns regarding the lack of federal monopoly over foreign affairs that had existed under Articles of Confederation. See 2 THE FEDERALIST NO. 42, at 50 (Alexander Hamilton)(New York 1788) (justifying the clause in the Constitution giving authority to Congress to define offenses against the law of nations and criticized the absence of such authorization in the Articles of Confederation).

⁸³ US CONST. at art. I, § 8, cl. 11 (granting Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”).

⁸⁴ See *id.* art. I, § 8, cl. 10 (granting Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).

⁸⁵ See *id.* art. I, § 8, cl. 1 (granting Congress the power to “provide for the common Defense... of the United States”); *id.* art. I, § 8, cl. 12 (delegating authority to “raise and support Armies”); *id.* art. I, § 8, cl. 13 (granting authority to “provide and maintain a Navy”); *id.* art. I, § 8, cl. 14 (conferring authority to “make Rules for the Government and Regulation of the land and naval Forces”).

⁸⁶ *Id.* art. I, § 8, cl. 3.

⁸⁷ *Id.* at cl. 4., regulating the value of foreign currency, *id.* at cl. 5.

⁸⁸ US CONST. at art. I, § 8, cl. 11 (granting Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”), cl. 3, and cl. 4., art. II, § 2, cl. 2.

Executive.⁸⁹ Rather, the country has long recognized a balancing role between the Executive and Congress in the realm of foreign affairs that goes beyond the Senate's role in treaty ratification process.⁹⁰ A key instance of this balance can be found in what is known as the "last-in-time" rule, in which Congress may override a treaty or treaty provision by passing legislation subsequent to the treaty.⁹¹ In the same way, treaties passed subsequent to a Congressional statute, supersede the statute.⁹² On the other hand, in the interpretation of acts of Congress and treaties, the courts are to, whenever possible, do so in a way that gives meaning to both.⁹³ Thus, Congress as a whole, possesses key constitutional safeguards against the foreign affairs power of the President.

⁸⁹ Early drafts of the Constitution gave even fewer foreign relations powers to the President. The treaty power, for example, was initially slotted to the Senate alone, and Congress had the power to "make war," not merely to "declare war." See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 150, 263-66. (1996).

⁹⁰ See generally *Youngstown*, 343 U.S. 579, 635-37 (setting forth a tripartite framework regarding the relationship between the Executive and Legislative Branches lawmaking power). See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (articulating theory of overlapping powers of the President and Congress based on implicit congressional "acquiescence" to presidential action over time).

⁹¹ See *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870) (recognizing a "later in time rule" under which a treaty can supersede a prior Congressional statute and a Congressional act can supersede a prior treaty) See also *Reid v. Covert*, 354 U.S. 1, 17 (1957); See also *Reid v. Covert*, 354 U.S. 1, 17 (1957) ("The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent." (quoting *Geoffroy v. Riggs*, 133 U.S. 258, 267 (1890))).

⁹² *Cherokee Tobacco*, *supra*.

⁹³ See Restatement (Third), § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); See also *Asakura v. City of Seattle*, 265 U.S. 332, 341-42 (1924).

While Congress' has a clear role to play in foreign affairs, in its distinctive and primary function as legislator, it is largely excluded from the treaty making process. Indeed, the same exclusion is historically true concerning the implementation of treaties.⁹⁴ Originally, there was no room for the so called non-self executing treaty, which is defined as requiring further implementing legislation from Congress in order to have full domestic effect.⁹⁵ Treaties were understood to be the "supreme Law of the Land" immediately as binding on the whole nation as any legislatively instituted federal statute.⁹⁶ As such, treaties were to supersede not only previous conflicting national legislation, but also conflicting state legislation.⁹⁷ As supreme national law, treaties were also to be applied to cases and controversies in all state and federal

⁹⁴ During the 1787 Constitutional Convention, recommendations that treaties require legislative implementation since they "are to have the operation of laws," were defeated. See J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 520 (recommendation of Gouverneur Morris on Aug. 23), 597 (recommendation, quoted in part in the text above, by James Wilson on Sept. 7) (1966 ed.) (1840); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 297 (Mercer), 538 (Wilson) (M. Farrand ed. 1937); see also THE FEDERALIST NO. 64, at 421-24 (Jay). A proposal by James Madison that there be two types of treaties (i.e., those requiring only action by the Senate and the President, and those also requiring House action before they could take effect as law) was also rejected. See Farrand (ed.), *supra*, at 394.

⁹⁵ See Jordan J. Paust, Self-Executing Treaties, 82 Am. J. Int'l L. 760, 760 (1988) (arguing that "[t]he distinction found in certain cases between 'self-executing' and 'non-self-executing' treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that 'all Treaties... shall be the supreme Law of the Land'")

⁹⁶ See U.S. CONST. at art. VI, cl 2, *supra* n. 74. For a thorough review of the framer's views on the immediate, binding effect of treaties, see Paust, *supra* n. 98, at 761-764. The year before the Constitutional Convention, the Secretary of Foreign Affairs of the Confederation, reported to Congress that a treaty "made, ratified and published by Congress, . . . immediately [became] binding on the whole nation, and superadded to the laws of the land. . . . Hence [it was to be] . . . received and observed by every member of the nation" Jay, report to Congress, Oct. 13, 1786, quoted in 1 C. BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 268 n.4, 270 (1902). Congress unanimously adopted Jay's report, affirming his conclusions. *Id.* at 389. Jay added: "the legislatures of the several states cannot of right pass any act or acts for interpreting, explaining or construing a national treaty, or any part or clause of it; nor for restraining, limiting or counteracting the operation or execution of the same." *Id.* at 274 n.4. See also THE FEDERALIST NO. 64, at 423-24.

⁹⁷ Jay's report also reflected the expectation that treaties would be national acts creating a supreme law of the land "independent of the will and power of" state legislatures and that they were to be applied in all courts hearing causes or questions arising from or touching on such law. See 1 C. BUTLER, *supra*, at 270 n.4, 274 n.4., and 275 n.4. See also THE FEDERALIST NO. 22, at 197 (Hamilton). Hamilton affirmed the federal judicial competence over "cases arising upon treaties and the law of nations."; See also *Hamilton v. Eaton*, 11 F. Cas. 336, 337 (Sitgreaves), 340 (Ellsworth) (C.C.D.N.C. 1792) (No. 5,980).

courts.⁹⁸ The Founding Fathers choice to sideline Congress in the treaty making and implementation process was not made casually, out of custom, or without consideration of the alternatives. Indeed, much of the impetus behind the Constitutional structure of the treaty power came from the failure of the Articles of Confederation to create a coherent national foreign policy.⁹⁹ Evidently treaties were originally understood to be primarily, if not exclusively, directly effective over the whole nation upon ratification by the President and the Senate. The Supreme Court supported a presumption in favor of self-execution leaving the courts free to give effect to treaty obligations without the need for implementing legislation from Congress.¹⁰⁰

⁹⁸ Jay's report noted that "[a]ll doubts, in cases between private individuals, respecting the meaning of a treaty, like all doubts respecting the meaning of a law," were to be resolved by the judiciary. See *supra*, n. 95 at 270 n.4. Hamilton also recognized the role of the judiciary, noting that "treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations." n13 THE FEDERALIST NO. 22, at 197 (Hamilton).

⁹⁹ Unruly States had been causing foreign relations problems by avoiding the United States' international obligations through state legislation and executive action. See The Federalist No. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961); see also *Ware*, 3 U.S. (3 Dall.) at 277 (noting that the Supremacy Clause was passed to prevent states from ignoring treaty obligations, a "difficulty, which every one knows had been the means of greatly distressing the Union, and injuring its public credit"). See 1 Charles Henry Butler, The Treaty-Making Power of the United States 268-75 n.4 (1902) (citing excerpts from John Jay's Oct. 13, 1786 report to Congress, which argued that State legislatures cannot pass laws "interpreting, explaining or construing a national treaty," or otherwise limiting the operation of a treaty); see also Paust, *supra* note 98, at 760-61, 760 n.3

¹⁰⁰ See *United States v. Perchemen*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (finding a treaty self-executing where it does not stipulate to the need for some future legislative act). The presumption that treaties are self-executing is based primarily on the explicit incorporation of treaties into domestic law by the Supremacy Clause. History suggests that the language of the clause was an attempt to depart from British practice which required implementation by Parliament in order for a treaty to have domestic effect. See Carlos Vasquez, *Treaties as the Law of the Land: The Supremacy Clause and Presumption of Self-Execution*, 122 Harv. L. Rev. 599, 614-16 (2008) [hereinafter Vasquez, *Treaties as the Law of the Land*]; D. A. Jeremy Telman, *Medellin and Originalism*, 68 Md. L. Rev. 377, 409 (2009). More support for a presumption of self-execution is found in the 1796 case *Ware v. Hylton*, in which the Supreme Court struck down a Virginia law inconsistent with the Treaty of Paris, even though Congress had not passed implementing legislation. But see Ben Geslison, *Recent Development: Treaties, Execution, and Originalism in Medellin v. Texas*, 128 S. Ct. 1346 (2008), 32 Harv. J.L. & Pub. Pol'y 767, 776 (2009) (noting continuing academic debate regarding the original default status of treaties as either self-executing or non-self-executing).

The problematic distinction between self-executing and non self-executing treaty was not actually brought into American jurisprudence until the days of the Marshall Court.¹⁰¹ While the distinction has since taken on a life of its own, as understood by Marshall, the possibility that a treaty would require implementing legislation encompassed a very limited set of circumstances, tied directly to the text of the treaty.¹⁰² Given that the language of a treaty is common to all its signatories, the fact that many nations, by the very structure of their government always require implementing legislation, makes the focus on the language of a treaty problematic.¹⁰³ Indeed, given the fact that in the United States, treaties are undeniably the Supreme Law of the land, and the reality that treaties more often than not do not require implementing legislation, the debates surrounding *Medellin* and other recent cases, on whether a treaty is “self-executing” or not, are a bit misplaced. The more important issue is whether the Judiciary is the appropriate body to

¹⁰¹ While not using the term “self-executing,” Chief Justice Marshall introduced the concept in 1829 when he stated that a treaty “is carried into execution . . . whenever it operates of itself,” comparing this to treaties that “the legislature must execute.” *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.). See Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 Am. J. Int’l L. 540 (2008) [hereinafter Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*] (asserting that it has been settled since the *Foster* decision that some treaties are unenforceable unless implemented by Congress); The first Supreme Court opinion to actually use the phrase “self-executing” was *Bartram v. Robertson*, 122 U.S. 116, 120 (1887) (Field, J., opinion); See also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (Field, J., opinion); Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int’l L. 760, 760 (1988) (arguing that the distinction created in case law between self-executing and non-self-executing treaties “is patently inconsistent with express language” in the Supremacy Clause); Ramsey, *Torturing Executive Power*, *supra* note 14, at 1233 (characterizing the idea of non-self-executing treaties as “judicially created”). According to Paust, the phrase “self-executing” did not appear in a Supreme Court opinion until 1887 in *Bartram v. Robertson*, 122 U.S. 116 (1887). See Paust, *supra*, at 766.

¹⁰² Of course, Marshall was well familiar with the practice of some countries, such as Britain, in which a treaty is “not a legislative act” and “does not generally effect, of itself, the object to be accomplished . . . but is carried into execution by” legislation or other exercises of “sovereign power.” 27 U.S. (2 Pet.) 253, 314 (1829). In contrast, he noted that “[i]n the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself” *Id.*

¹⁰³ See Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT’L L. 627, 635-49 (1986) (describing the confusion resulting from the use of phrases such as “self-executing,” which mean different things in different countries). See also RESTATEMENT (THIRD), *supra* note 42, § 111 Reporters’ Note 5 (“few other states distinguish between self-executing and non-self-executing treaties”).

consider the remedies available to a person who has had a treaty based right violated, or whether the Legislator or Executive must be relied upon to first give effect to that person's rights.¹⁰⁴

Debates over the proper balance power between Congress and the Judiciary have always existed, and always will. Familiarly, in the early days of U.S. jurisprudence, Justice Marshall established the core of judicial competence by solidifying the notion of judicial independence and the power of judicial review.¹⁰⁵ However, toward the end of the 19th Century, a movement gained strength which was concerned with the growing power of the Judiciary relative to its coordinate branches. The concerns are well articulated in the writings of James Bradley Thayer.¹⁰⁶ Focusing on the counter-majoritarian nature of the Judiciary, Thayer saw an unrestricted Judiciary as a threat to the deliberative, democratic capacity and duty of the elected branches.¹⁰⁷ Restriction of judicial competence over constitutional interpretation was especially necessary in order to broaden the range of policy and legislative choices available to the President and Congress. Thayer saw no reason why, save for in cases of a clear violation of the constitution, a majority of an unelected court should trump the elected representative majority or executive.¹⁰⁸ In fact, always deferring to Judiciary to make the constitutional call, he claimed,

¹⁰⁴ David Sloss, Non-Self-Executing Treaties: Exposing a Constitutional Fallacy, 36 U.C. Davis L. Rev. 1, 6 (2002) (arguing that too much emphasis on the idea of non-self-execution "is at odds with fundamental precepts concerning the role of an independent judiciary in preserving the rule of law").

¹⁰⁵ See *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803).

¹⁰⁶ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

¹⁰⁷ *Id.*

¹⁰⁸ Thayer championed a deferential standard of review for legislative acts, noting: This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. *Id.* at 144. Note that Thayer did not extend this deferential review toward state

leads lawmakers to shirk their own duty of allegiance to the constitution.¹⁰⁹ The process of judicial restraint advocated by Thayer, came to be known as the “clear-mistake” rule, signifying that the Courts would only overrule Congress when it had committed a clear constitutional error.¹¹⁰ Thayer’s original concerns were specifically over judicial interference with legislative acts, as evidence of the popular will, rather than with other types of government action. Since Thayer’s time, the Supreme Court has gone on to develop a wide array of Constitutional standards of review, with varying degrees of deference. Shades of Thayer’s perspective are evident in the deference given to Congress in contemporary jurisprudence illustrated in the “presumption of constitutionality” that the Supreme Court regularly affords to federal statutes.¹¹¹

legislative action, but only to the acts of a “co-ordinate department.” *Id.* at 154-55. For a deeper understanding of Thayer’s claims and motivations, see Thomas C. Grey, *Thayer’s Doctrine: Notes on its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28 (1993).

¹⁰⁹ In Thayer’s own words:

No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. Moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our States. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light. See *supra*, n. 105, at 155-56. See also James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, NATION, Apr. 10, 1884, at 314 (“[O]ur constitutional system, in its actual development, has tended to bereave our legislatures of their feeling of responsibility and their sense of honor”).

¹¹⁰ See Thayer, 7 HARV. L. REV. 129 (1893), *supra* n. 105, at 150 (“the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.”)

¹¹¹ See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000) (noting that according to the presumption of constitutionality, “[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds”); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (“[A] decision to declare an Act of Congress unconstitutional ‘is the gravest and most delicate duty that this Court is called on to perform.’”); *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“We begin, of course, with the presumption that the challenged statute is valid.”). See Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003). For an argument that a presumption of constitutionality bears little resemblance to the “clear-mistake”

However, for the most part, the argument has lost favor as the role of the Judiciary to “say what the law is” has proven resilient.¹¹²

While the Thayerian “clear-mistake” standard of legislative deference does not live on in Supreme Court Jurisprudence, Thayer’s general arguments regarding the destructive effect of judicial review on the democratic process have shown resurgence in relation to another separation of powers issue. As will be explored later, this populist concern can be seen in the reluctance of the Roberts court to directly enforce decisions of the ICJ as required by the VCCR. Leaning on the bulwark of legislative deference, the Roberts court seems to prefer to delegate an essentially juridical function to Congress.¹¹³ It seems the Roberts court, in line with the Federalist Society mantra, may be reacting to what it perceives as a “democracy deficit” endemic to international judicial bodies.¹¹⁴ Unfortunately, this theoretical trend fails to grasp the true function of the Judiciary, as the instrument for rational deliberative application of the law to the “molecular” circumstances of a particular case.

standard, *See* Steven G. Calabresi, Thayer’s Clear Mistake, 88 NW. U. L. REV. 269, 275 (1993) (“[O]nce an American court has presumed a statute to be constitutional there is no need to find that the legislature has made a clear mistake before its actions can be invalidated—any old mistake, even an opaque one, is sufficient.”).

¹¹² *See* Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 190 (Yale Univ. Press 1990) (observing that Thayer-style deference “has not provided an enduring working standard for modern judicial review” and “has, for now, been largely abandoned”); Evan H. Caminker, Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past, 78 Ind. L.J. 73, 75 (2003) (“If actions speak louder than words, it appears that the Court’s continuing recitation of a presumption of constitutionality afforded congressional enactments has become mere sport.”); Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 Yale L.J. 676, 681 (2006) (“The strength of the doctrinal presumption [of constitutionality], has waxed and waned over the course of American constitutional history. Today, many believe that the presumption has withered away, particularly in certain contexts.”).

¹¹³ Ironically, this is from a majority whose immediate conservative ancestor was noted to be historically aggressive in its invalidation of federal statutes. *See* Evan H. Caminker, *supra* at 74.

¹¹⁴ *See* generally McGinnis, John O. and Somin, Ilya, Should International Law Be Part of Our Law? 59 Stanford Law Review 1175 (2007). Professor McGinnis is a member of the Federalist Society, and key speaker at Federalist Society Conventions. In 1997, he was awarded the Paul Bator award by the Federalist Society. The award is given to “an outstanding academic under 40.” The Federalist Society for Law and Public Policy Studies. Available at: <http://www.fed-soc.org/publications/author/john-o-mcginnis>

3. The Judiciary and International Law: a matter of reasonableness

While the foreign affairs powers of the Legislature and the President are often intertwined, the coordinate law making powers of the Legislature and the Judiciary are significantly distinguishable.¹¹⁵ Judicial law making is not simply the appropriation of legislative powers. Albeit using terminology foreign to the modern ear,¹¹⁶ Justice Holmes provided a practical distinction when he described legislative powers as molar and judicial powers as molecular.¹¹⁷ This means that the Judiciary, rather than the Legislature, is the institution designed to consider case specific facts leading to prescription, application and enforcement of law in specific cases. Over time, these specific cases, involving contentious litigants and complex procedural matters encountered before during and after trial, have served to define the distinctiveness of the judicial role in law making as compared to that of Congress.

¹¹⁵ See also *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 97 (1981) (“[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.”).

¹¹⁶ While frequently quoted, the term “molar” and “molecular” used by Holmes, are rarely defined, much less precisely understood. See Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 Wm. & Mary L. Rev. 19 (1995). Grey cites **RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 872** (1991) for the definition of molar as “pertaining to a body of matter as a whole, as contrasted with molecular and atomic.” He also notes “This statement makes a macabre reference back to an opinion Holmes had written as a state judge, rejecting a constitutional challenge to the replacement of hanging by electrocution as the method of execution: ‘The suggestion that the punishment of death, in order not to be unusual, must be accompanied by molar rather than molecular motion seems to us a fancy unwarranted by the constitution.’ *In re Storti*, 60 N.E. 210, 211 (Mass. 1901).”

¹¹⁷ See *Southern Pacific. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (‘I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.’). See also *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 1981, 101 S.Ct. 1571, 1582, 451 U.S. 77, 94, 67 L.Ed.2d 750 (Stevens, J.). (“Broadly worded constitutional and statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decisions in the common-law tradition.”); Cardozo, *The Nature of the Judicial Process*, 1921, 113 to 115.

Though wielding considerable legislative powers, the law making nature of the Judiciary is defined more by its restrictions than by its powers.¹¹⁸

In *Marbury v. Madison*,¹¹⁹ Chief Justice Marshall was careful to point out that under the Constitution some matters are within the exclusive competence of the Executive Branch.¹²⁰ Justice Marshall had been Secretary of State and therefore was familiar with foreign relations issues. Yet, Marshall also understood that there was an appropriate role for the judiciary in foreign relations law.¹²¹ What is this role? An answer may be found in the foundational principles of *Marbury* itself. One might read *Marbury* as standing for the proposition that the Court's power to review is be found in a residual principle of reasonableness, that is the power to logically and deliberately interpret and apply principles of law in particular cases.¹²² Since this discipline is best expressed through the training and judgment of lawyers, it will find its strongest expression through the institution of the judiciary. This idea of reasonableness has a general

¹¹⁸ See Richard A. Posner, *The Anti-Hero*, New Republic, Feb. 24, 2003, at 27, 30. Judge Posner discusses the multiple constraints imposed upon the Judiciary:

THE SUPREME COURT is a political court. The discretion that the justices exercise can fairly be described as legislative in character, but the conditions under which this "legislature" operates are different from those of Congress. Lacking electoral legitimacy, yet wielding Zeus's thunderbolt in the form of the power to invalidate actions of the other branches of government as unconstitutional, the justices, to be effective, have to accept certain limitations on their legislative discretion. They are confined, in Holmes's words, from molar to molecular motions. And even at the molecular level the justices have to be able to offer reasoned justifications for departing from their previous decisions, and to accord a decent respect to public opinion, and to allow room for social experimentation, and to formulate doctrines that will provide guidance to lower courts, and to comply with the expectations of the legal profession concerning the judicial craft. They have to be seen to be doing law rather than doing politics.

Id.

¹¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹²⁰ Id. at 165-166 ("By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience.")

¹²¹ Id. at 170 ("The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court.")

¹²² Id. at 177 ("Those who apply the rule to particular cases must, of necessity, expound and interpret that rule.")

pedigree in the tradition of natural law.¹²³ The principles of natural law were influential in the development of international law.¹²⁴ A strong expression of these principles is evident in the Roman Dutch legal tradition as well as the approach to international law of the great Dutch scholars.¹²⁵ The two most influential scholars of this tradition were the leader of the Dutch school, Hugo De Groot (Grotius)¹²⁶ and the Swiss scholar, Emmerich de Vattel.¹²⁷ The Grotian

¹²³ St. Thomas Aquinas developed the concept that natural law was inherently reasonable, as it was a reflection of the rational mind of God. See 2 St. Thomas Aquinas, *Summa Theologica*, Question 94, art. 6 (Fathers of the English Dominican Province trans., 1948) (“[T]he natural law, in the abstract, can nowise be blotted out from men’s hearts.”); see also Ralph McInerney, *St. Thomas Aquinas* 63-70 (1977) (exploring St. Thomas Aquinas’ philosophy that natural law emanates from God). For a biographical note on St. Thomas Aquinas, see George C. Christie, *Jurisprudence: Text and Readings on the Philosophy of Law* 86-89 (1973) (citing excerpts from the *Summa Theologica*). See also H.L.A. Hart, *The Concept of Law* 152 (1961) (“[T]he Thomist tradition of Natural Law...comprises a twofold contention: first, that there are certain principles of true morality or justice, discoverable by human reason without the aid of revelation even though they have a divine origin; secondly, that man-made laws which conflict with these principles are not valid law.”).

¹²⁴ This trend is particularly evident in the law of individual human rights. See *Restatement (Third) of Foreign Relations Law of the United States* pt. VII, intro. note (1987) (stating that international law, including human rights law, is “derived from historic conceptions of natural law, as reflected in the conscience of contemporary mankind and the major cultures and legal systems of the world”). See also Louis Henkin, *The Rights of Man Today* 5-23, 148-52 (1978) (chronicling how international human rights law is continuing to develop into what might be referred to as the “new natural law”); Francisco de Vitoria, *On the Power of the Church*, in *Political Writings* 45, 84 (Anthony Pagden & Jeremy Lawrance eds., 1991) (advancing the notion that a universal community of nations exists, over which a natural law predominates that is common to all cultures--also known as a “law of nations” or, *ius gentium*--and that is a part of a larger declaration of human rights);

¹²⁵ The concept of the “Law of Nation” dates to Roman times as the law that governed Romans in conflict with foreigners. See H.F. Jolowicz, *Historical Introduction to the Study of Roman Law* 61-63 (1961). The Law of Nations evolved into what is now known as customary international law (CIL), that is international law that “results from a general and consistent practice of states followed by them from a sense of legal obligation [*opinio juris*].” *Restatement (Third) of the Foreign Relations Law of the United States* § 102(2) (1987). See also *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (noting that the law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law”); *The Estrella*, 17 U.S. (4 Wheat.) 298, 307- 08 (1819) (referring to non-treaty international law of nations as the “the customary . . . law of nations”). CIL is only one form of international law. The International Court of Justice (ICJ) has delineated the following as the applicable sources of international law: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of international law. *Statute of the International Court of Justice* art. 38, P 1, June 26, 1945, 59 Stat. 1055.

¹²⁶ Grotius, known as the “father of international law” is famous for his synthesis of Dutch and Germanic law into a holistic system.

tradition is commonly seen as providing a compelling juridical basis for the idea of a comprehensive legal obligation predicated upon a rule of law and founded on principles of reason, rationality, and moral ordering.¹²⁸ Vattel similarly upheld the role of rational deliberation in international law stating that it consists of “a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns.”¹²⁹ State obligation then, arose not out of the protection of sovereignty, but rather out of a sense of moralistic duty.¹³⁰

The views of Grotius and Vattel are clearly reflected in the writings of Lord Blackstone, the predominant English jurist whose work was widely known and influential to American legal minds. Blackstone saw the Law of Nations as “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”¹³¹ To Blackstone and other English jurists the universal nature of the Law of Nations provided the

¹²⁷ The international legal theories of Hugo Grotius and Emmerich de Vattel were predominant during the formative period of the U.S. political and legal structure. See Peter Onuf & Nicholas Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions 1776-1814*, at 11 (1993).

¹²⁸ See H. Lauterpacht, *The Grotian Tradition in International Law*, 23 *Brit. Y.B. Int'l L.* 1, 18-21 (1946). For Grotius there were two primary sources of international law: “the principles of nature” and “common consent.” 2 Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* 23-24 (James Brown Scott ed., Francis W. Kelsey et al. trans., Clarendon Press 1925) (1625) (stating “[W]hen many at different times, and in different places, affirm the same thing as certain, that ought to refer to a universal cause; and this cause . . . must be either a correct conclusion drawn from the principles of nature, or common consent.”).

¹²⁹ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns* 9 (Charles G. Fenwick trans., 1916) (1758); See Jesse S. Reeves, *The Influence of the Law of Nature upon International Law in the United States*, 3 *Am. J. Int'l L.* 547, 549 (1909) (arguing that de Vattel was one of the influential international legal thinkers on early U.S. jurisprudence). See also David Gray Adler, *Court, Constitution and Foreign Affairs*, in *The Constitution and the Conduct of American Foreign Policy* 137-38 (David Gray Adler & Larry George eds., 1996); Peter Onuf & Nicholas Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions 1776-1814*, at 11 (1993).

¹³⁰ Vattel, *supra*. See also de Vattel, at lvi (stating that “the law of Nations is originally no other than the law of Nature applied to Nations”). *Id*

¹³¹ William Blackstone, 4 *Commentaries* *66. Blackstone, had himself indicated “The rule which natural reason has dictated to all men is called the law of nations.” See Wayne Morrison, *Blackstone’s Commentaries, Vol. I* 2001 (p.32)

logical basis for its legitimacy in domestic English courts.¹³² The same line of reasoning did not allow for a meaningful distinction between private and public international law in English jurisprudence.¹³³ The same would hold true in early American legal theory.

The international legal theories of Grotius, Vattel, and Blackstone were predominant during the formative period of the U.S. political and legal culture.¹³⁴ These sources which endorsed reasonable construction and interpretation would have certainly influenced Marshall in the landmark *Marbury* decision. The place of international law in early U.S. and political and legal culture was sustained by the strength of its professional articulation in the courts and the

¹³² William Blackstone, 4 Commentaries *67. Lord Blackstone stated in full: In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by royal power: but since in England no royal power can introduce a new law or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. Id.

¹³³In fact, Lord Mansfield, the most prominent English jurist to speak to the issue, made no distinction at all between public and private law his reasoning on the universality of international law in *Lindo v. Rodney* reprinted in *LeCaux v. Eden*, (1782) 99 Eng. Rep. 375 n.1, 385 (K.B.). Lord Mansfield stated: By the law of nations, and treaties, every nation is answerable to the other for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a Court for trial of prize. Every country sues in these Courts of the others, which are all governed by one and the same law, equally known to each. Id. at 388. See See Dickinson, *supra* note ##, at 28. In 1807, Lord Stonewell echoed Mansfield's reasoning, noting "the High Court of Admiralty . . . is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the law of nations, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which, it is well known, they have at all times expressed no inconsiderable repugnance. The Recovery, (1807) 165 Eng. Rep. 955, 958 (Adm.).

¹³⁴On the influence of Grotius and Vattel, see Peter Onuf & Nicholas Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions 1776-1814*, at 11 (1993) (stating that Vattel's work "was unrivaled ... in its influence on the American founders"); Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power*, 77 *N.C. L. Rev.* 133, 219 (1998) "From the day Vattel's treatise arrived in America in 1775, it was invariably invoked as authoritative on matters of international law by the likes of Alexander Hamilton, James Madison, James Wilson, Edmund Randolph, Thomas Jefferson, John Marshall, Joseph Story and James Kent, among others. Moreover, it was relied upon by the Second Continental Congress, the Constitutional Convention and the U.S. Congress."; see also David Gray Adler, *Court, Constitution and Foreign Affairs*, in *The Constitution and the Conduct of American Foreign Policy* 19, at 133, 137-38 & nn.27-30 (David Gray Adler & Larry George eds., 1996).

development of a strong scholarly tradition.¹³⁵ The legal ideology and jurisprudence implicated in the idea of reasonableness inherited from English and Continental theorists, most likely fueled the Supreme Court's early confidence in international law jurisprudence. Like its English counterpart, early 19th century US jurisprudence made no clear distinction between public and private international law.¹³⁶ Instead, they were both understood as elements of the Law of Nations.¹³⁷ Neither did American jurists consider the Law of Nations to be a foreign legal

¹³⁵ For the views of the Framers on the uniform application of international law in American courts, see *The Federalist*: No. 3, at 22, by John Jay (Bourne ed. 1947, Book I); No. 80, at 112 and 114; No. 83, at 144, and No. 82, by Alexander Hamilton (Bourne ed. 1947, Book II); No. 42, by James Madison (Bourne ed. 1947, Book I). Thomas Jefferson, speaking as Secretary of State, wrote to M. Genet, French Minister, in 1793: 'The law of nations makes an integral part...of the laws of the land.' I Moore, *Digest of International Law* (1906), 10. And see the opinion of Attorney General Randolph given in 1792: 'The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land.' 1 Op.Atty.Gen. 27. Also see Warren, *The Making of the Constitution*, Pt. II, c. I, at 116; Madison's Notes in 1 Farrand 21, 22, 244, 316. See generally Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. of Pa. L. Rev. 26 (1952).

¹³⁶ See generally Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 27 (1952). See Black's Law Dictionary (9th ed. 2009), which equates public international law with, inter alia, international law more broadly, the law of nations and jus gentium. Public international law is defined as "The legal system governing the relationships between nations; more modernly, the law of international relations, embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes)." Id. See also Philip C. Jessup, *A Modern Law of Nations* 17 (1949). "[I]nternational law or the law of nations must be defined as law applicable to states in their mutual relations and to individuals in their relations with states. International law may also, under this hypothesis, be applicable to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern." Id. For an illuminating discussion of the meaning of private international law, See G.C. Cheshire, *Private International Law* 15 (6th ed. 1961) "[A] word must be said about the name or title of the subject. No name commands universal approval. The expression 'Private International Law,' coined by Story in 1834 [Joseph Story, *Commentaries on the Conflict of Laws* § 9 (1834)], and used on the Continent by [Jean Jacques Gaspard] Foelix in 1838, has been adopted by Westlake and Foote and most French authors. The chief criticism directed against its use is its tendency to confuse private international law with the law of nations or public international law, as it is usually called. There are obvious differences between the two. The latter primarily governs the relations between sovereign states and it may perhaps be regarded as the common law of mankind in an early state of development; the former is designed to regulate disputes of a private nature, notwithstanding that one of the parties may be a private state. There is, at any rate in theory, one common system of public international law ... ; but ... there are as many systems of private international law as there are systems of municipal law."

¹³⁷ See generally Dickinson *supra*, at 26-34. It should be noted, however, that by the time of *Hilton v. Guyot*, *infra* n. 145, private international law was identified separately from the law of nations, though both were explicitly included as part of U.S. law.

system, but instead treated it as a component of general common law.¹³⁸ Again, this openness to international law in the United States reflected the English legal heritage in which the Law of Nations was accepted as part of English Common Law.¹³⁹ In both the U.S and England, the ready incorporation of the Law of Nations into common law reflected the Grotian ideal of the universal applicability of the law, whether to states in public international law or to individuals in private international law.¹⁴⁰ Although in discussions of the role of international law in the United States, scholars often ignore the arena of private international law, in the U.S. legal practice, private international law actually provides a rich repository of examples of domestic interaction and compliance with international law. It is beyond the scope of this article to examine these cases, but they are witness to the ease and frequency with which American courts have traditionally applied international law to cases and controversies.

¹³⁸ See *Henkin, International Law as Law in the United States*, 82 *Mich. L. Rev.* 1555, 1555-61 (1984). According to Professor Henkin, "[e]arly in our history, the question whether international law was state law or federal law was not an issue: it was the 'common law.'" *Id.* at 1557; *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-160 (1795) (Iredell, J.) (stating "[t]hat prima facie all piracies and trespasses committed against the general law of nations, are enquirable, and maybe proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it."); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 228 (1796); see also *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.); In *Boyle*, C.J. Marshall stated that "[t]he United States having, at one time, formed a component part of the British empire, their prize law was our prize law. When we seted, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it." *Id.* at 198. Cf. *The Nereide*, *Bennett*, Master 13 U.S. (9 Cranch) 388, 423 (1815) (Chief Justice Marshall stating that "the court is bound by the law of nations which is part of the law of the land"); *Talbot v. Seeman*, 5 U.S. 1, 35 & 43, 1 Cranch 1, 36 & 43 (1801) (Marshall, C.J.); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (Iredell, J.); see also Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 *COLUM. L. REV.* 1024, 1043 (1967). In *Respublica v. De Longchamps*, 1 U.S. 119, 1 Dall. 111 (O. & T. Pa. 1784), a Philadelphia court treated a violation of international law as a violation of state law. 1 U.S. at 123, 1 Dall. at 114.

¹³⁹ See, e.g., *Mogadara v. Holt*, (1691) 89 Eng. Rep. 597, 598 (K.B.) (stating that the law of nations "is no more than the law of merchants, and that is jus gentium, and we are to take notice of it"). See *Heathfield v. Chilton*, (1767) 98 Eng. Rep. 50 (K.B.); *Triquet v. Bath*, (1764) 79 Eng. Rep. 936 (K.B.); *Ware v. Hylton* 3 U.S. (3 Dall.) 199, 228 (1796) (stating that "the law of nations is part of the municipal law of Great Britain"); See also Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 *U. Pa. L. Rev.* 26, 29-32 (1952) (discussing the applicability of the Law of Nations in English courts).

¹⁴⁰ Edward Dumbauld, *Hugo Grotius: The Father of International Law*, 1 *J. Pub. L.* 117, 118-19 (1952).

Another avenue, by which American courts have directly applied the decision of foreign courts, is through the transitory cause of action. Historically all causes of action in the common law were local actions,¹⁴¹ and there was no room for foreign causes of action.¹⁴² However, by a fiction the common law invented the transitory cause of action.¹⁴³ This meant that the pleader could plead that the facts of a circumstance in some foreign venue, which would only have constituted a foreign cause of action, had by fiction occurred in the venue of the court.¹⁴⁴ Thus under the common law rules of private international law, one could plead the law of a foreign

¹⁴¹ The law of venue relates to the place where a lawsuit may be properly instituted. Broadly speaking, the law of venue divides between a local action and a transitory action. A local action means that a lawsuit can only be brought in the place of the situs of real property. Matters not “local” in this sense are considered transitory and may be brought wherever one can find the Defendant. See *generally* *Livingston v. Jefferson*, 1 Brock 203, 15 F.Cas. 660 (No.8411) (D. Va. 1811).

¹⁴² The transitory tort doctrine allows courts to obtain jurisdiction over torts occurring in foreign nations or in domestic states other than the forum state. See 18 N.Y.U. J. Int'l L. & Pol. 1 (1985). The forum court must still obtained personal jurisdiction over the defendant, a requirement usually satisfied by virtue of the defendant's presence in the forum territory. *Id.* The doctrine was established in England by Lord Mansfield's opinion in *Mostyn v. Fabrigas*, 1 Conn. 161 (1774). [I]f A becomes indebted to B, or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A in England, if he is there found '[A]s to transitory actions, there is not a colour of doubt that [every] action [that] is transitory may be laid in any county in England, though the matter arises beyond the seas.' American courts had made reference to the transitory tort doctrine by the early nineteenth century. See, e.g., *Stout v. Wood*, 1 Blackf. 70 (Ind. Circ. Ct. 1820); *Watts v. Thomas*, 5 Ky. (2 Bibb) 458 (1811).

¹⁴³ See *id.* On legal fiction generally, see Sir Henry Maine, *Ancient Law* 17-36 (Oxford Univ. Press 1959). For the development of the transitory action see *Cuba Railroad v. Crosby*, 22 US 478. Holmes J. states the following: “[W]hen an action is brought upon a cause of action arising outside the jurisdiction...the duty of the court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions, the liabilities of the parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. That, and that alone, is the foundation of their rights.” P. 478. Compare *Loucks v. Standard Oil, Co.*, 120 NE 198, 201 (1918), Cardozo, J., “A foreign statute is not in this state, but gives rise to an obligation, which if transitory, follows the person and maybe enforced wherever the person is found. The plaintiff owns something and we will help him get it. We do this unless some sound reason of public policy makes it unwise for us to lend our aid.” Further clarification is given by Holmes J. in *Slater v. Mexican National Railroad Co.*, 194, 120 at 126 (1904), “The theory of a foreign law suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation which, like other obligations follows the person and maybe enforced wherever the person is found. But as the only source of the obligation is the law of the place of the act, it follows that law determines not merely the existence of the obligation but equally its extent.” *Id.*

¹⁴⁴ *Id.*

state as the rule of decision in the case.¹⁴⁵ From this perspective the judicial experience in the U.S. contains thousands of cases where the courts have applied the rule of decision of a foreign court or state. Again, a review of these cases is beyond the scope of this article, but the practice is worth noting for its relevance to the competence of the American judiciary in dealing with foreign legal decisions.

Finally, in the context of public international law, the 19th and early 20th century Supreme Court definitively established the principle that customary international law is part of federal common law.¹⁴⁶ The term “federal common law” usually involves federal judge made law in an area that has been federally preempted by the Constitution or by Congress.¹⁴⁷ In cases arising in these areas, the federal judiciary must furnish the rule of decision. That such decisional law is binding upon the states is unquestioned, as it represents the implementation of the statute

¹⁴⁵ See *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (1918) (Cardozo, J.) (“A foreign statute is not in this state, but gives rise to an obligation, which if transitory, ‘follows the person and may be enforced wherever the person may be found. . . .’ The plaintiff owns something and we will help him get it. We do this unless some sound reason of public policy makes it unwise for us to lend our aid.” (citations omitted)).

¹⁴⁶ See e.g., *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (“International law, in its widest and most comprehensive sense - including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation - is part of our law....”); See, also, *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir 1980) (the law of nations “became a part of the common law of the United States upon the adoption of the Constitution.”); Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 26-34 (1952); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1042-49 (1967); Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1555-60 (1984) “[T]here is now general agreement that international law [or the law of nations], as incorporated into domestic law in the United States, is federal . . . law; that cases arising under international law are ‘cases arising under the Laws of the United States’ and therefore are within the judicial power of the United States under [A]rticle III of the Constitution; that principles of international law as incorporated in the law of the United States are ‘Laws of the United States’ and supreme under [A]rticle VI...”

¹⁴⁷ See *United States v. Belmont*, 301 U.S. 324.

establishing preemption.¹⁴⁸ A similar principle is in play when the Supreme Court makes decisions which uphold actions of the Executive.¹⁴⁹

The foreign affairs power of the President has been largely defined through case by case judicial recognition of particular powers necessary for effective foreign policy leadership of the United States. In doing so, the Supreme Court has often had to navigate the often rough waters of international law and political reality. In most cases, the powers recognized by the Court do not find direct textual support, yet even so, the powers have been upheld in the face of Congressional and state resistance.¹⁵⁰ Opposition notwithstanding, the carefully reasoned decisions of the Judiciary, rooted in the molecular exigency of each case and controversy, have withstood the test of time. Many of these enduring decisions involved the setting aside of conflicting state and federal law, as well as, of course, overturning lower court decisions

¹⁴⁸ See, e.g., *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913).

¹⁴⁹ See, e.g. *United States v. Pink*, 315 U.S. 203, (1942). In *United States v. Pink* the Court reversed a New York judgment because it conflicted with a Presidential “compact” with a Russian diplomat. *Id.* at 229-30. The Court held that, although not a treaty, the compact, as an authoritative expression of national “policy,” was binding upon the states under the supremacy clause. *Id.* at 225, 227, 229, 231-34.. The compact centered on the so-called Litvinov Assignment, which dealt with settling of public and private claims between the United States and Russia. The Court stated in part (315 U.S. at 229-30):

[T]his Court [has] recognized that the Litvinov Assignment was an international compact which did not require the participation of the Senate. ... Power to remove such obstacles to full recognition as settlement of claims of our nationals ... certainly is a modest implied power of the President who is the “sole organ of the federal government in the field of international relations.” ... Unless such a power exists, the power of recognition might be thwarted or seriously diluted

“All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature, ...” *The Federalist*, No. 64. A treaty is a “Law of the Land” under the supremacy clause of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity.

¹⁵⁰ A wide array of Executive powers have been upheld against competing claims to competence, including, inter alia, those necessary for carrying out treaty obligations, for granting foreign sovereign immunity, For treaty related powers, see e.g. *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 425-26 (1925)(holding that the Executive has inherent power to bring a lawsuit “to carry out treaty obligations.”); For powers related to act of state and sovereign immunity doctrine, see e.g. n. 161, *infra*. c.f. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994)(reserving judgment as to “the scope of the President’s power to preempt state law pursuant to authority delegated by...a ratified treaty”.

invoking these laws. These controversial judicial calls have had great implications not only for the balance of powers within the federal government, but also for federalism itself. Lacking direct constitutional support, and fighting a variety of competing interests, the Supreme Court has historically found the willpower to address urgent national needs through a carefully reasoned and articulated analysis of each situation. This analysis has led to the conclusion that the urgent national need is best met through recognizing a particular foreign affairs power as inherent in the office of the Executive, thereby upholding and legitimizing the action of the President in that case and in future similar situations. The cause for urgency has varied from case to case, but usually involves the need for swift action in response to diplomatic challenges, where delay would frustrate the nation's interests.¹⁵¹

General respect within the judiciary for the diplomatic decisions of the President comes not only from the judiciary's reasoned analysis regarding the powers that are necessary to lead a sovereign nation, but also from respect for the longstanding principles of comity.¹⁵² In foreign relations law, comity refers to the recognition and deference that a nation gives domestically to foreign legislative, executive, and judicial acts.¹⁵³ In the United States, the judiciary is often the branch charged with giving effect to the principle of deference and recognition supported by

¹⁵¹ See e.g. *Ex Parte Peru*, 318 U.S. 578, 1014 (1943) (declaring that "it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court."

¹⁵² The Supreme Court set forth the common law rules for the application of comity to the recognition and enforcement of foreign judgments in the *Hilton v. Guyot*, 159 U.S. 113 (1895).

¹⁵³ *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."); See Young, *Treaties as "Part of Our Law,"* at 100.

comity.¹⁵⁴ However, given the diplomatic, national consequences of such recognition or lack thereof, the courts often defer to the Executive in determining the nature and scope of the deference to be given to foreign acts and decisions.¹⁵⁵ Indeed, generally speaking there is no strictly legal obligation to give effect to principles of comity.¹⁵⁶ In this sense, the President's guidance in applying comity principles has been important historically, receiving deference not only from the federal judiciary but also from Congress and state courts.¹⁵⁷ The Judiciary in particular, upholds comity by withholding otherwise valid action or judgment in deference to a foreign counterpart.¹⁵⁸ Sometimes this judicial deference is granted ad hoc, but more often it has been incorporated into common law norms such as the act of state and sovereign immunity doctrines.¹⁵⁹ In this way, even when responding to direction from the executive branch, the

¹⁵⁴ See, e.g., *Pilkington Bros. P.L.C. v. AFG Indus., Inc.*, 581 F. Supp. 1039, 1043 (D. Del. 1984) (“[A]n American court will under principles of international comity recognize a judgment of a foreign nation if it is convinced that the parties in the foreign court received fair treatment”).

¹⁵⁵ This relationship is often seen in decisions relating to the act of state and sovereign immunities doctrines, which find their support in principles of comity. Regarding executive decisions invoking the foreign sovereign immunity power, the Court has held that the judiciary has a “duty” to give effect to the Executive's decision even in the face of conflicting law. See, e.g., *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U.S. 68, 74 (1938) (“If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.”); *Ex parte Republic of Peru*, 318 U.S. 578, 587-589 (1943) (affirming that the Executive's assertion of the principles of foreign sovereign immunity in state court will trump contrary state law even without legislative authority); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (“It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”).

¹⁵⁶ See Alfred Hill, *The Law-making Power of the Federal Courts: Constitutional Preemption*, 67, Colum. L. Rev. 1024, 1055-56 (1967) (noting that the application of comity does not usually create a legal expectation).

¹⁵⁷ *Id.* Professor Hill notes that while state courts have resisted the authority of the President, they have consistently followed the Supreme Court's direction in adhering to principles of international law and comity.

¹⁵⁸ See e.g. *Hilton v. Guyot*, 159 U.S. at 202-03 (asserting comity principles to explain that the merits of a foreign case should be given effect and not be retried without due cause); *Medellin v. Dretke* 544 U.S. 660, 670 (2005) (Ginsburg, J., concurring) (largely equating the respect given to a judgment as a matter of comity to the effect of binding judgments).

¹⁵⁹ See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (2d Cir. 1973) (justifying judicially created act of state and sovereign immunity doctrines, the application of which restricts “otherwise applicable principles,” on

judiciary's independence and competence remains unquestioned. Thus, while the President may request the courts to respect the principles of comity in a particular instance, it is within the court's competence to comply, often based on its own precedents and judicial doctrines.

Implicit in all of the judicial practices that invoke comity principles is a respect for the importance of reciprocal tolerances between sovereign states.¹⁶⁰ Some scholars have asserted that the reciprocal state-to-state nature of comity excludes the relevance of its principles to the judgments and interpretations of supranational tribunals, which do not have the same reciprocal capacity.¹⁶¹ What this argument fails to address is the fact that sovereign states have the capacity to reciprocally respect or ignore the decisions of foreign treaty-based tribunals. In this sense, comity must certainly apply, as the respect by the judiciary of the United States for its treaty-based obligations, will certainly be relevant to whether the judiciary of another country respects its own obligations. This judicial reciprocity is especially relevant when both countries are party

comity grounds and for fear of "frustrat[ing] the conduct of this country's foreign relations."); *Oetjen v. Central Leather Co.*, 246 U.S. 297, (1918). In *Oetjen*, the Supreme Court deferred judgment of a case under a relevant treaty, preferring instead to decide the case on the basis of its own "repeated decisions" based on the act of state doctrine, which, it declared, "rests ... upon the highest considerations of international comity and expediency." *Id.* at 301-04. See See Alfred Hill, *The Law-making Power of the Federal Courts: Constitutional Preemption*, 67 *Colum. L. Rev.* 1024, 1077-78 (1967).

¹⁶⁰ See generally Paul B. Stephan, *Open Doors*, 13 *Lewis & Clark L. Rev.* 11 (2009). The realm of judicial application of comity to foreign proceedings includes a variety of related but distinct deferential practices. See Young, *Treaties as "Part of our Law,"* at 100. "When the object of comity is a foreign judicial proceeding, those principles include: (1) various forms of abstention in favor of ongoing or potential proceedings in the foreign forum, (2) enforcement of judgments already concluded by the foreign forum, and (3) acceptance of a foreign court's interpretation as evidence - possibly conclusive evidence - of the content of foreign law." *Id.*; See, e.g., *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 897 (7th Cir. 1999) (affirming the district court's stay of proceedings pending completion of foreign proceedings); *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1514 (11th Cir. 1994) (staying proceedings in light of ongoing legal proceedings abroad); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("Comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts."); *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 444 (3d Cir. 1971) (affirming the district court's enforcement of a default judgment entered by a foreign court); *Ramsay v. Boeing Co.*, 432 F.2d 592, 600-01 (5th Cir. 1970) (relying on prior decisions of Belgian courts interpreting a statute, in order to properly understand the statute).

¹⁶¹ See Paul B. Stephan, *Open Doors*, 13 *Lewis & Clark L. Rev.* 11 (2009); Young, *Treaties as "Part of Our Law,"* at fn. 164; Anthony S. Winer, 25 *Conn. J. Int'l L.* 331, 368 *An Escape Route From the Medellin Maze* (2010).

to the same treaty, and the case before the tribunal is intended to resolve conflict between those two countries, as was the case in the *Avena* decision before the ICJ.

In light of the construction of the VCCR and other relevant treaties and their relation to the case specific facts of Medellin through the *Avena* ruling, the Medellin case presents a question which is quintessentially juridical rather than legislative. Too gratuitously rope in the Congress in an attempt to develop political standards for the recognition of treaty based judgments is to confuse the molar, legislative role of the Congress with the molecular, case specific role of the judiciary. It is unquestionably the province of the judiciary to reasonably apply the law in the resolution of cases and controversies.¹⁶² In Medellin,¹⁶³ the Roberts Court unduly restricts the competencies of both the judiciary and the executive in order to provide Congress an unbalanced role in international law that is neither historically nor theoretically sound. The separation of powers issue may be a red herring though, in light of what is perhaps a more threatening trend in the Roberts Court, one that strikes at the very heart of the Union. Evident in the Chief Justice's decision is the influence of the Federalist Society's obsession with stripping away power from the Federal Government and handing it to the states. This inflated sense of federalism has many avenues of expression, but when it begins to erode the foreign affairs power of the President and the judiciary's competence over international law, it serves to not only strangle the President in his attempt to provide global leadership, but also to undermine

¹⁶² See U.S. CONST. art. III, § 2.

¹⁶³ See *Medellin*, 128 S. Ct. 1346. The claimant himself could not bring an action against the United States under the treaty. Instead, as part of the domestic appeal process he relied on the decision in a case that had been brought against the U.S. by Mexico on his behalf. Under international law, only a sovereign state may take action against another state in response to perceived treaty non-compliance. A state whose rights are violated may seek remedies from the other state. See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, annex, pt. 2, art. 31, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."); *id.* at pt. 3, ch. 2, art. 49.

United States compliance and development with international law and order. With that, we at last move into a review of the circumstances surrounding the Medellin decision followed by a review of the decision itself.

III. Medellin

A. The VCCR and the ICJ

The Medellin¹⁶⁴ decision involved the Supreme Court review of a case in which a Mexican national who was arrested and tried in Texas, sought to enforce his rights under the Vienna Convention on Consular Relations¹⁶⁵ (VCCR). The VCCR was designed to "facilitate the exercise of consular functions relating to nationals of the sending State."¹⁶⁶ One of these functions is the ability of a foreign consulate to communicate and have access to its nationals who have been detained in the host country.¹⁶⁷ Art. 36(2) requires the consular rights to "be

¹⁶⁴ *Id.*

¹⁶⁵ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 *U.S.T.* 77, 596 U.N.T.S. 261 [hereinafter Consular Convention].

¹⁶⁶ Consular Convention, art. 36(1). Article 36(1)(b) reads: "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-graph." Article 36(1)(c) reads: "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."

¹⁶⁷ See Consular Convention, art. 36, which provides that "consular officers shall be free to communicate with nationals of the sending State and to have access to them," and "[i]f 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 person or to custody pending trial or is detained in any other manner," and "[a]ny 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." *Id.*

Article 36(1)(c) states: "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

exercised in conformity with the laws and regulations of the receiving State,” but that “the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under this Article are intended.”¹⁶⁸

In 1969, the President of the United States, with the advice and consent of the Senate,¹⁶⁹ ratified the VCCR¹⁷⁰ and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention,¹⁷¹ (Optional Protocol). By ratifying the Optional Protocol, the U.S. submitted itself to ICJ jurisdiction regarding disputes over interpretation or application of the VCCR.¹⁷² In fact the United States was the first country to take advantage of the ICJ’s

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.”

¹⁶⁸ VCCR, art. 36(2).

¹⁶⁹ See 115 Cong. Rec. 30,997.

¹⁷⁰ Apr. 24, 1903, 21 U.S.T. 77, 596 U.N.T.S. 201. .

¹⁷¹ Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, [1970] 21 U.S.T. 325, 326, T.I.A.S. No. 6820. [hereinafter Optional Protocol]. The Optional Protocol provides that “disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice” and that any party to the Optional Protocol may bring such disputes before the ICJ. Id, art. I. See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2675 (2006). Originally, in 1946, the U.S. had accepted the ICJ’s compulsory jurisdiction, but it withdrew its acceptance in 1985 after displeasure with the ruling in *Military and Paramilitary Activities In and Against Nicaragua*. The withdrawal left the U.S. with the option of accepting ICJ jurisdiction in situations of its choosing. The U.S. made this choice with the Optional Protocol in 1963, only to withdraw its acceptance again on March 7, 2005. The withdrawal was accomplished by a two-paragraph letter sent from Secretary of State Condoleezza Rice to U.N. Secretary General Kofi Annan informing him that the United States “hereby withdraws” from the Optional Protocol to the Vienna Convention on Consular Relations. See Lane, Charles, “U.S. Quits Pact Used in Capital Cases Foes of Death Penalty Cite Access to Envoys,” *Washington Post*, March 10, 2005, at A1. Available at: <http://www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html> (last visited 6/10/11).

¹⁷² The Optional Protocol provides that disputes arising out of the interpretation or application of the VCCR shall be heard by the ICJ. See Optional Protocol, art. I.

VCCR jurisdiction in 1979, when it instituted proceedings against Iran¹⁷³ for violating its VCCR obligations to the United States during the Iran Hostage Crisis.¹⁷⁴ Unfortunately for the United States, treaty obligations run both ways and its ratification of the VCCR opened the door for Mexico, also a party to the treaty, to bring a complaint against the United States before the ICJ for violations of the treaty.¹⁷⁵

In 2003 Mexico submitted a complaint to the ICJ in which it alleged violations of the Vienna Convention by the U.S. with respect to 54 Mexican nationals, including Medellin, who were facing the death penalty in the United States.¹⁷⁶ The ICJ accepted the case and delivered its opinion in *Case Concerning Avena and other Mexican Nationals (Mexico v. U.S.)*.¹⁷⁷ The decision concluded that the United States had violated its obligations under the VCCR by failing to notify Mexican nationals arrested in the United States of their right to contact the Mexican Consulate.¹⁷⁸ The ICJ determined that the United States should "provide, by means of its

¹⁷³ Application Instituting Proceedings and Request for the Indication of Provisional Measures of Protection, United States Diplomatic and Consular Staff in Tehran, United States Diplomatic and Consular Staff in Tehran, 1982 I.C.J. Pleadings 1, 4 (Nov. 29, 1979).

¹⁷⁴ Iran had taken over the U.S. Embassy in Tehran and was holding the consular staff hostage. The ICJ responded by instituting provisional measures demanding the return of the Embassy to the United States and the release of the consular staff. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 8 (Dec. 15); Press Communique No. 79/7, I.C.J., The I.C.J. Implements Preliminary Measures (December 15, 1979). Later, the ICJ issued a judgment against Iran for violation of its VCCR obligations, although Iran did not provide representation at the ICJ and refused to comply with the decision. United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. at 3.

¹⁷⁵ The United States had been sued at the ICJ twice before for violations of Article 36 of the VCCR--by Paraguay in *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248 (Apr. 9), and by Germany in *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27).

¹⁷⁶ *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 at 12, 19 (Mar. 31). Mexico amended the claim to include only fifty-two Mexican nationals. *See id.* at 27. The ICJ ultimately held that the United States had violated VCCR obligations with respect to fifty-one of the fifty-two Mexican nationals. *See id.* at 46, 50, 54.

¹⁷⁷ *Avena*, 2004 I.C.J.

¹⁷⁸ *Avena* 2004 I.C.J. at 42-43, 46.

choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals,"¹⁷⁹ to determine whether the violations had "caused actual prejudice."¹⁸⁰ As for the state procedural default rules which were blocking review in some cases, the ICJ concluded that they only violated the VCCR to the extent that they precluded the "review and reconsideration" called for.¹⁸¹ The ICJ was justifiably concerned that procedural default rules would prevent state courts from "attaching legal significance" to the violation of the consular rights, in particular how the violations had "prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defense."¹⁸² Of course, the ICJ concerns were warranted since in the end, Texas, citing procedural default rules, refused to allow legal review of Medellin's case; and Medellin was subsequently executed.

B. Medellin in Texas

Medellin was arrested in Texas in 1994.¹⁸³ The arresting officers were aware that he was a Mexican national, but did not notify him of his VCCR right to seek consular assistance.¹⁸⁴ After confessing to his participation in the 1993 murder of two girls in Houston, he was tried in

¹⁷⁹ *Id.* at 72. ("What is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.") *Id.* at 65. In light of the fact that Mexico had actually sought the annulment of the convictions and sentences of their nationals covered by the decision, the ICJ's decision shows great restraint. *Id.* at 23.

¹⁸⁰ *Id.* at 66.

¹⁸¹ *Id.* at 65. In the *Avena* case, the United States took the position that the Mexican nationals were barred from raising VCCR claims by various state procedural rules. *Id.* at 55-57.

¹⁸² *Id.*

¹⁸³ *Medellin v. Texas*, 128 S. Ct. 1346, 1354 (2008).

¹⁸⁴ Brief for Petitioner Jose Ernesto Medellin at 6-7, *Medellin v. Texas*, 128 S. Ct. 1345 (2008) (No. 06-984), 2007 WL 1886212 [hereinafter Petitioner's Brief].

Texas where he was convicted of capital murder and sentenced to death in September, 1994.¹⁸⁵ Presumably unaware of his VCCR rights, he did not assert any claim under the VCCR at trial or sentencing.¹⁸⁶ He appealed to the Texas Court of Criminal Appeals which affirmed the conviction.¹⁸⁷ Mexican authorities did not learn of Medellin's case until 1997.¹⁸⁸ The Mexican Consulate then assisted Medellin in applying to the trial court for a writ of habeas corpus based on the violation of his VCCR rights.¹⁸⁹ The Texas trial court denied the writ, finding Medellin to be procedurally barred from raising the VCCR claim since he had failed to raise the issue during his trial.¹⁹⁰ Medellin then took his case to the federal courts, first filing a habeas petition in district court¹⁹¹ where it was denied and then applying to the Fifth Circuit for a certificate of appealability, which was ultimately denied.¹⁹²

While Medellin's application before the Fifth Circuit was pending, the ICJ issued its *Avena* ruling.¹⁹³ The Fifth Circuit considered the *Avena* decision before issuing its decision, but

¹⁸⁵ *Medellin v. Cockrell*, No. H-01-4078, 2003 WL 25321243, at *1 (S.D. Tex. June 26, 2003).

¹⁸⁶ *Medellin v. Texas*, 128 S. Ct. 1346, at 1354.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Medellin*, 128 S. Ct. at 1355.

¹⁹¹ See *Medellin v. Cockrell*, 2003 U.S. Dist. LEXIS 27339, Civ. Action No. H-01-4078 (SD Tex., June 26, 2003), App. to Brief for Respondent 86-92.

¹⁹² *Medellin v. Dretke*, 371 F.3d 270, 281 (5th Cir. 2004). Both cases found that Texas' procedural default rules barred Medellin from raising his VCCR claim. *Medellin*, 128 S. Ct. at 1355.

¹⁹³ Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

ultimately denied Medellin's application.¹⁹⁴ Medellin then petitioned the Supreme Court and was granted certiorari.¹⁹⁵ However, a month before oral argument was to begin, President Bush issued a memorandum¹⁹⁶ (Bush Memorandum) to the Attorney General regarding the ICJ's *Avena* ruling. In the memo, the President stated that the United States would discharge its international obligations under the *Avena* judgment 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."¹⁹⁷ In light of the Bush Memorandum and the *Avena* judgment, Medellin filed a motion to stay the Supreme Court case and filed a successive petition for a writ of habeas corpus in the Texas Court of Criminal Appeals.¹⁹⁸ On May 23, 2005, the Supreme Court dismissed the writ of certiorari as improvidently granted citing "the possibility that the Texas courts [would] provide Medellin with the review he seeks pursuant to the *Avena*

¹⁹⁴ *Medellin v. Dretke*, 371 F.3d 320. The Fifth Circuit based its decision not only on Medellin's procedural default but also on its own prior decisions in which it had held that the Vienna Convention did not create individually enforceable rights, and Supreme Court precedent which held that VCCR claims were subject to state procedural default rules. See, e.g., *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *Breard v. Greene*, 523 U.S. 371, 375 (1998).

¹⁹⁵ *Medellin v. Dretke*, 544 U.S. 660 (2005).

¹⁹⁶ George W. Bush, Memorandum for the Attorney General of the United States (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae* 9a [hereinafter President's Memorandum].

¹⁹⁷ *Id.* The memorandum, titled "Compliance with the Decision of the International Court of Justice in *Avena*," dated February 28, 2005, reads, in its entirety:

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in *Avena*, by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision. President's Memorandum, *supra*.

¹⁹⁸ *Ex parte Medellin*, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006).

judgment and the president's memorandum."¹⁹⁹ Medellin, with the United States as amicus curiae, appeared before the Texas appeals court, arguing that the *Avena* ruling, along with the President's stance on the ruling, constituted binding federal law, preempting any state law to the contrary.²⁰⁰ The Texas court again denied Medellin habeas relief, finding that neither the *Avena* decision nor the Bush Memorandum constituted binding federal law with the power to displace a state procedural limitation on successive petitions.²⁰¹ With the Texas denial, Medellin would have one final opportunity to have his VCCR rights, appealing again to the Supreme Court which granted certiorari again in *Medellin v. Texas*.²⁰²

The Supreme Court granted certiorari in order to determine first, whether the ICJ's judgment in *Avena* was "directly enforceable as domestic law in a state court in the United States" and second, whether the Bush Memorandum "independently require[d] the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules."²⁰³ In short, the Court answered "no" to both of these questions, concluding that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions."²⁰⁴ Though fairly narrow in scope, this conclusion was reached in an opinion that wanders carelessly through a vast body of international law and foreign affairs principles

¹⁹⁹ *Medellin v. Dretke*, 544 U.S. at 666-67.

²⁰⁰ Brief for the United States as Amicus Curiae Supporting Petitioner at 19-34, *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75207), 2005 WL 3142648.

²⁰¹ *Ex parte Medellin*, 223 S.W.3d at 352.

²⁰² *Medellin v. Texas*, 128 S. Ct. 1346, 1353 (2008).

²⁰³ *Id.*

²⁰⁴ *Id.*

undermining a leadership role for the United States in international law. Instead, Chief Justice Roberts's main focus seemed to be to push his legal doctrine of inflated federalism, to the detriment of the federal competence over foreign affairs. In the section that follows, drawing from our earlier analysis, we attempt to shed light on the ways in which the Roberts's opinion lacks historical and theoretical soundness, especially in regard to the respective roles of each branch of the federal government. The long term consequences of the decision are a matter of much debate and speculation, but there was one very real and undeniable consequence to the decision. On August 5, 2008, the same day the Supreme Court denied his request for a stay of execution, the Executive of the United States and the International Court of Justice notwithstanding, Jose Medellin was executed by the state of Texas.²⁰⁵

IV. The Supreme Court Decision: Chief Justice Roberts Inflates Federalism

The Medellin case is an excellent illustration of the Chief Justice's tendency to give great weight to state sovereignty under federalist principles and correspondingly to diminish the historic role of the Supreme Court in upholding the construction and development of international law within domestic courts of the United States. The case also has significant implications regarding the important role of the office of the President in the conduct of foreign relations of the United States. This case originated in a conflict between Mexico and the United States, over VCCR obligations. However, the specific facts which precipitated this conflict involved Mexican nationals, who were convicted in state courts of capital crimes. Thus, a third layer of conflict presents itself, which at the initial level, is one involving the convicted Mexican

²⁰⁵ *Medellin v. Texas*, Nos. 06-984, 08-5573, 08-5574, 2008 WL 3821478 (U.S. Aug. 5, 2008) (per curium) (denying stay of execution); see James C. McKinley, *Texas Executes Mexican Despite Objections from Bush and International Court*, N.Y. Times, Aug. 6, 2008, at A19.

national and the state of Texas, which has violated the defendants national VCCR rights. The problem here is that the United States has to act in defense of a Federal interest, the obligation to respect its treaty obligations. Since this claim implicates the interests of the Mexican Government whose citizens have had their rights infringed by the ostensible violation of the treaty, the case emerges before the ICJ as a State to State conflict. We should keep in mind that at the back of most State to State conflicts are ordinary human beings whose vital interests are being litigated by the States representing those interests. We now proceed to break down important federalist and international law themes that surface in the Chief Justice's treatment of each three federal branches in Medellin.

1. Chief Justice Roberts on the Role of the President in International Law.

The precise terms of the President's Memorandum play an important role in the Chief Justices' opinion. If it were not for the oddly worded five line memo²⁰⁶ issued by President Bush to Attorney General Gonzales shortly before the Supreme Court was to originally hear the Medellin case, the Court's decision would have had little relevance in defining the role of the Executive in foreign affairs. As it turned out though, because of those five lines, the Medellin decision provided a broad canvas on which the Roberts majority was able to limit and reconfigure the foreign affairs power to fit within its more decentralized vision of foreign relations. It could not have been foreseen that the former Governor of Texas's "bumble" would play such an important role in bleeding so much power from the federal government and returning it to his beloved home state? It is almost as if the whole set-up was planned from the beginning. Of course the very wording of the memo is what allowed the Robert's court to

²⁰⁶ President's Memorandum, supra n. 196.

address the Presidential foreign affairs question as it did, pitting the President against state sovereignty:

The Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.²⁰⁷

Naturally, when framed this way, the President's "action" comes across as a gross violation of cherished principles of federalism. On the other hand, framing the President's directive as a correct interpretation of a treaty obligation, binding upon the states, would have fit his directive comfortably within the framework of the Supremacy Clause.²⁰⁸ Assuming the President was within his competence, if Texas had disagreed with the President's interpretation of its VCCR obligations, it still could have taken the matter to court, and the Supreme Court still could have had the final say. As the final arbiter of the law²⁰⁹, including treaty obligations²¹⁰, the Court could have struck down the President's interpretation of the VCCR obligation without

²⁰⁷ *Medellin v. Texas*, 128 S. Ct. at 1372.

²⁰⁸ U.S. CONST. at [art. VI, cl. 2](#). See n. 74-75 *supra*, and accompanying text. The Constitution and early Supreme Court case law clearly establish the supremacy of treaties, as federal law, over state law. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796) (in striking down a Virginia law that was inconsistent with the Treaty of Paris, the court held that the "laws of any of the States, contrary to a treaty, shall be disregarded.") See also Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int'l L. 760, 765, n.36 (1988) (listing ten cases decided between 1794 and 1825 in which treaty law operated as supreme federal law in the face of inconsistent state law).

²⁰⁹ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule.")

²¹⁰ See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353-54 (2006) (citing *Marbury*, 5 U.S. at 177). In *Sanchez-Llamas*, a case also involving VCCR obligations, the Supreme Court held: "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution." *Id.*

finding him to have overstepped his foreign affairs power.²¹¹ However, this course of action would not have given the Supreme Court leeway to undermine U.S. compliance with international law and federal competence over foreign affairs, something the Roberts court has seemed partial to do.

The conceptual process of framing the issues in each case, is crucial to the Supreme Court's reasoning and the outcome of the final decision. In some ways, all of the issues in the Chief Justice's decision hinge on framing, but it is especially true with regard to the discussion of the President's foreign affairs power. As noted above, the framing of the President's Memorandum as a direct attempt to overrule state law, served to pit the President's novel assertion of authority against cherished principles of federalism. Chief Justice Roberts sets himself up again, this time to slam dunk his separation of powers perspective in Supreme Court precedent. This perspective seeks to limit compliance with international law by removing it from the competence of the executive and the judiciary, and instead placing it more squarely with Congress, the most populist of the three branches. Chief Justice Roberts frames the issue by noting that the President's authority to represent the United States before the UN, the ICJ, and the Security Council "speaks to the President's *international* responsibilities, not any unilateral authority to create domestic law."²¹² In other words, the foreign affairs power does not give the President the authority to create domestic law. Who said the President was trying to create domestic law? Of course, it was Chief Justice Roberts himself who framed the issue this way,²¹³

²¹¹ In fact, only a couple of years before *Medellin*, the Supreme Court did overrule the executive branch's interpretation of a treaty obligation. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006). The Court rejected the interpretation of Common Article 3 of the 1949 Geneva Conventions, which, after Sept. 11th, President Bush had interpreted to allow the trying of "enemy combatants" in the military commission system. *Id.*

²¹² *Medellin*, 128 S. Ct. at 1371.

²¹³ *Id.* The actual wording of the President's Memorandum indicates that "the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts

but he was set up nicely by the United States' arguments in its amicus brief in support of Medellin.²¹⁴ In this brief, the United States served up recklessly bold arguments regarding the President's foreign affairs powers.²¹⁵ Building on the vague and limited wording of the President's Memorandum, the United States chose to argue the President's cause in a strategy that was bound to fail.²¹⁶ Curiously, much like the awkwardly worded President's Memorandum, the United States amicus brief paves the way for Chief Justice Roberts to make key holdings regarding issues near and dear to the Federalist Society.²¹⁷

give effect to the decision in accordance with general principles of comity..." (emphasis mine). President's Memorandum, see n. 203 *supra*. The jump in logic from equating the President's authority to "hav[e] the State courts give effect" to the claim that the President was asserting "unilateral authority to create domestic law" is suspect, but made plausible by the Courts intermediary premise. This premise is that the relevant treaties upon which the President based his assertion were not self-executing, and therefore to unilaterally give them effect would be to assert the power to unilaterally convert a non-self executing treaty into one that is self-executing – a law making power that is reserved to Congress. Medellin at 1369.

²¹⁴ *Brief for the United States as Amicus Curiae Supporting Petitioner, Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75207), 2005 WL 3142648.

²¹⁵ Principle among these arguments was the argument that the President's determination to comply with the *Avena* decision was a form of executive agreement constituting binding federal law that preempted any inconsistent Texas law provisions. *Id.* Oddly enough, the United States had argued against implementation of the *Avena* decision in Texas in *Brief for the United States as Amicus Curiae Supporting Respondent, Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). In this brief from a year earlier, the United States was writing in support of the state of Texas against Medellin. It was not until after the President's Memorandum was delivered to the Attorney General, that the United States changed sides and began to argue in support of Medellin, first before the Texas Court of Criminal Appeals in *Brief for the United States as Amicus Curiae Supporting Petitioner, Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75207), 2005 WL 3142648. and finally before the Supreme Court in *Brief for the United States as Amicus Curiae Supporting Petitioner, Medellin v. Texas*, 128 S.Ct. 1346 (2008) (No. 06-984).

²¹⁶ In fact, the Department of Justice itself called these arguments "unprecedented" in its brief supporting the state of Oregon in a related VCCR case that went to the Supreme Court. See *Brief for the United States as Amicus Curiae Supporting Respondents* at 29-30, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 04-10566, 05-51). In contrast, in the Medellin Case, the Department of Justice argued in its briefs in support of Medellin that the President was comfortably within his competence to call for the setting aside of state law. See *Brief for the United States as Amicus Curiae Supporting Petitioner, Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (No. AP-75207), 2005 WL 3142648; *Brief for the United States as Amicus Curiae Supporting Petitioner, Medellin v. Texas*, 128 S.Ct. 1346 (2008) (No. 06-984).

²¹⁷ In forefront of Federalist Society fears regarding international law are the perceived threats to U.S. sovereignty, separation of powers, and federalism. In each of these areas, the Chief Justice Roberts decision in Medellin provided a clear victory for the society's agenda. In fact the recent article published by Federalist Society favorite and attorney for the state of Texas in *Medellin v. Texas*, Texas Solicitor General Ted Cruz, speaks precisely to these

In his memo to the Attorney General, the President invoked the principles of comity in his call for state courts to give effect to the *Avena* decision.²¹⁸ Given the centrality of the principles of comity in the President's reasoning, one would expect a discussion of those principles to have featured prominently in the Supreme Court's decision. Amazingly, rather than a detailed consideration, the only occurrence of the word in the entire opinion, is in a quote of the President's Memorandum.²¹⁹ This conspicuous absence turns out to be in keeping with the tendency of the Chief Justice's opinion to mirror the issues emphasized by the Department of Justice in its supporting briefs. In its support of the President's supposedly unprecedented assertion of power, the United States amicus curiae brief, crafted by a cadre of high level State Department lawyers, did not dedicate a single word to the merits of the comity argument.²²⁰ Indeed, the only party to take the comity argument seriously was the state of Texas, in its brief for respondent.²²¹ Facing the possibility of an intrusive ruling upholding the President's authority to trump state law, Texas argued to uphold the validity of the President's Memorandum as a non-binding request invoking deferential, rather than legally binding, comity principles.²²²

victories. See Ted Cruz, *Defending U.S. Sovereignty, Separation of Powers, and Federalism in Medellin v. Texas* 33 Harv. J.L. & Pub. Pol'y 25 (2010).

²¹⁸ President's Memorandum, *supra*, n. 203.

²¹⁹ *Medellin*, 128 S. Ct. at 1355. In his concurrence, Justice Stevens alluded to importance of comity, noting that a breach of VCCR obligations would harm the United States' "plainly compelling ... [interest] in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law." *Medellin v. Texas*, 128 S. Ct. 1346, 1375 (2008). (Stevens, J., concurring) (internal citation omitted).

²²⁰ See Brief for the United States as Amicus Curiae Supporting Petitioner, *Medellin v. State of Texas*, 2007 WL 1909462 (U.S.), (U.S.)-30 (U.S.,2007).

²²¹ See *Brief for Respondent, Medellin v. The State of Texas* at 47, 2007 WL 2428387 (U.S.), (U.S.)-50 (U.S.,2007). The State of Texas actually argued that the President's Memorandum should be read literally, as a request rather than a demand, citing the President's reliance on the comity, "an inherently discretionary doctrine." *Id.*

²²² State Courts are inherently wary of Federal, and in particular Executive, interference in their domain, even in areas concerning international law. See Alfred Hill, *The Law-making Power of the Federal Courts: Constitutional*

In another clear example of issue-framing, neither the United States in support of *Medellin*, nor the Roberts Court decision as much as addressed this less contentious reading of the President's Memorandum. Instead, the President's brief words were construed in the most contentious way possible, paving the way for Chief Justice Roberts' stinging, far reaching reproach.

The President's foreign affairs power is largely inferred from his role as chief executive, and his need to be able to make critical and often sensitive foreign policy decisions.²²³

Recognizing this need, Chief Justice Roberts warns that if state and federal courts were charged with directly applying an ICJ judgment, "sensitive foreign policy decisions would...be transferred to state and federal courts...."²²⁴ If forced to implement the ICJ judgment as directly binding federal law, Chief Justice Roberts argues the courts would not have the power to decide whether to comply with the judgment, whereas under the competence of the political branches, non-compliance has "always [been] regarded as an option...."²²⁵ Thus removing a discretionary

Preemption, 67 Colum. L. Rev. 1024, 1055-56 (1967). In light of resistance to the direction of the President, it is the duty of the Supreme Court to ultimately judicially enforce national policy through giving deference to international decisions on the basis of comity. As Professor Hill notes, "in the absence of compulsion in the international community, all deference to a law other than internal law can be, and is, described quite commonly as in the interest of comity." *Id.*

²²³ See n. 50-54 *supra* and accompanying text.

²²⁴ *Medellin v. Texas*, 128 S. Ct. at 1360. According to Chief Justice Roberts, automatic domestic enforcement of ICJ judgments would cause the veto power to "no longer be a viable alternative," thereby removing the non-compliance option from the political branches. *Id.* The Chief Justice see this result as "particularly anomalous in light of the principle that '[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative--'the political'--Departments.'" *Id.* quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 (1918). The Chief Justice concluded that the Article 94(2) enforcement structure was affirmative textual evidence that Article 94(1) judgments were intended to be directly domestically enforceable. *Id.*

²²⁵ See *Medellin v. Texas*, 128 S. Ct. at 1360. The argument in full states:

If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause. Mexico or the ICJ would have no need to proceed to the Security Council to enforce the judgment in this case. Noncompliance with an ICJ judgment through exercise of the Security Council veto--always regarded as an option by the Executive and ratifying Senate during and after consideration of the U. N. Charter, Optional Protocol, and ICJ Statute--would no

competence from the political branches would create a non discretionary duty upon the judiciary. In the process, the option of non-compliance would have been removed, effectively limiting the political branches control over sensitive foreign policy decisions. This circular reasoning ignores the fact that in *Medellin*, it was actually the non-compliance of the judiciary that was removing the option of compliance from the political branches, or rather one of the political branches, the Executive. In effect, this transfers an area of sensitive foreign policy decision-making from the political branches to the courts, rather than the other way around.

Indeed, the danger of sensitive foreign policy decisions being transferred to state and federal courts is a central rationale behind the foreign affairs competence of the President. This rationale could be seen as one of the primary arguments for upholding the President's competence to direct the courts in the execution of treaty obligations.²²⁶ Chief Justice Roberts, however, paradoxically attempts to argue the opposite: that the federal political competence over sensitive foreign policy decisions would be best protected by invalidating the President's attempt to give effect to sensitive foreign affairs obligations, and by giving the states the right to ignore

longer be a viable alternative. There would be nothing to veto. In light of the U. N. Charter's remedial scheme, there is no reason to believe that the President and Senate signed up for such a result. In sum, *Medellin's* view that ICJ decisions are automatically enforceable as domestic law is fatally undermined by the enforcement structure established by Article 94. His construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law. And those courts would not be empowered to decide whether to comply with the judgment - again, always regarded as an option by the political branches - any more than courts may consider whether to comply with any other species of domestic law. *Id.* This result would be particularly anomalous in light of the principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative--'the political'--Departments." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S. Ct. 309, 62 L. Ed. 726 (1918). *Id.* To this should be added the importance of the foreign relations role of the federal judiciary in implementing the decisions of the political branches, a key factor in preventing the exacerbation of foreign relations. See Alfred Hill, *The Law-making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1055-56 (1967).

²²⁶ In fact the sensitivity of foreign affairs questions was used as an argument in support of the President's Memorandum by the United States in *Medellin v. Texas*. See *Brief for the United States as Amicus Curiae Supporting Petitioner at 11, Medellin v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984), 2007 WL 1909462.

treaty obligations. Additionally, by undermining the President's judgment regarding the sensitivity of the VCCR issue, Chief Justice Roberts, contrary to his stated interest, is actually transferring an important element of the foreign affairs power to the judiciary. Though the judiciary has historically played a significant historical role in the interpretation and implementation of international law, the dictation of ongoing foreign policy has never been one of them. If concern for the handling of sensitive foreign policy decisions is what was driving the Chief Justice, it would seem that when the President indicates the diplomatic exigency of respecting a treaty obligation, the Court would give great deference to the President's instruction. Instead, the Court chose to disregard the President's instruction, undermining his competence over sensitive foreign policy decisions. In doing so, the Supreme Court takes a significant step towards transferring to itself a crucial foreign policy role that fits best within the office of the Executive.

The sensitive foreign policy decision that Chief Justice Roberts specifically referred to in his argument is United States' veto option on the United Nations Security Council.²²⁷ According to Chief Justice Roberts, if automatic domestic enforcement of ICJ rulings was put in place, the United States veto power would "no longer be a viable alternative," because "there would be nothing to veto."²²⁸ Earlier we saw how Chief Justice Roberts put forth a herculean effort to corral the President's Memorandum within the fences of his federalist arguments. Now with his "automatic domestic enforcement" warning, he has created straw man internationalist argument tear through in an attempt to strengthen his own position.²²⁹ ICJ judgments as "automatically

²²⁷ See *Medellin v. Texas*, 128 S. Ct. at 1360, *supra*, n. 227-228 and accompanying text.

²²⁸ *Id.*

²²⁹ For a review of the distinction between "internationalist" and "constitutionalist" doctrine in United States international legal theory, see Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006

enforceable domestic law” might as well be read “loss of United States sovereignty to a foreign tribunal.” Incidentally the fear of ceding U.S. sovereignty to international bodies is one of the biggest rallying points of the Federalist Society’s resistance toward international law. Chief Justice Roberts’ opinion panders to this fear by trumping the dangers of the automatic domestic enforcement of ICJ judgments.²³⁰ Although the President’s Memorandum certainly does not require an interpretation calling for the automatic domestic enforcement of ICJ decisions, again, this was the way that Chief Justice Roberts chose to frame the issue.²³¹ ICJ enforcement as an issue before the Security Council arises only when there is intent by one of the parties not to comply. Barring a specific intention not to comply, when the ICJ obligation is clear, there would be no need to take the matter before the Security Council. In contrast, when there is an intent to comply, and compliance calls for domestic judicial implementation, there would be no need to involve the Security Council. On the other hand, if the issue of non-compliance problem is essentially political rather than juridical, then the Security Council becomes crucial. When the President has clearly affirmed the juridical nature of the dispute, then the matter is much more appropriately and expeditiously handled as a problem falling comfortably within the competence of the judicial branch. The question of whether the problem is juridical or political will be a function of whether compliance involves the remedies characteristic of judgments in domestic

Sup. Ct. Rev. 59 (2006). The “automatic domestic enforcement” question builds on the majority’s definition of “non-self executing” treaties as those that have “domestic effect as federal law upon ratification” without “implementing legislation passed by Congress.” *Medellin v. Texas*, 128 S. Ct. 1346, 1356 n.2 (2008).

²³⁰ *Id.* at. 1360.

²³¹ Justice Stevens in his concurring opinion, for instance, did not interpret the President’s Memorandum as calling for the automatically binding effect of ICJ judgments. *Medellin*, 128 S. Ct. at 1374 (Stevens J., Concurring) Agreeing with Chief Justice Roberts that ICJ judgments were not automatically binding on the courts, he was still concerned that refusing to respect them could threaten the United States own interest under the VCCR. *Id.* In this regard, Justice Stevens praised the President’s “commendable attempt” to induce Texas to provide, of its own accord, the review and reconsideration called for in the *Avena* judgment. *Id.*

tribunals. If instead the problem implicates enforcement or remedies that are not juridical but political, then recourse to the Security Council is more appropriate. The President has traditionally played an important role in asserting the political nature of potential legal disputes, leading to deference from the judiciary. Conversely, the President has not traditionally needed to force the courts to address essentially juridical issues, since the courts have routinely assumed this competence. Rather than shirking its duties in the implementation and development of international law, the Supreme Court should have stepped up to resolve essentially juridical question in *Medellin*.²³² Instead the Roberts Court deferred to Congress, the body best suited for general legislative action, but poorly suited for applying the law to individual cases and controversies, including cases which implicate sensitive foreign affairs issues.

The arena of foreign affairs is indisputably one of exclusive federal competence, involving both Congress and the President. However, as noted earlier, Chief Justice Roberts cleverly represented the foreign affairs issues in *Medellin* so as to pit the President against state sovereignty, with the state coming out on top. Where a foreign affairs issue pits a state against the whole federal government, rather than just against the President, the state would summarily be put in its place. Thus, in order for Texas to come out on top in this case, it was necessary for the Chief Justice to divide the federal house by pitting the President against Congress. He accomplished this feat by claiming that in the President's Memorandum, the President was trying

²³² The Supreme Court conceded that the United States has an international legal obligation to Mexico under the VCCR and the resulting *Avena* judgment, stating: "No one disputes that the *Avena* decision--a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to the Vienna Convention disputes--constitutes an *international* law obligation on the part of the United States." *Medellin v. Texas*, 128 S. Ct. 1346, 1356 (2005). However, Chief Justice Roberts distinguished a generic "international law obligation" from "binding federal law enforceable in United States courts." *Id.* Chief Justice Roberts maintained: "while treaties 'may comprise international commitments. . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.'" *Id.* (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st. Cir. 2005)). The Supreme Court stated in a footnote: "What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification." *Id.* at n.2.

to “unilaterally”²³³ convert a non-self executing treaty into a self-executing one.²³⁴ In doing so, the President would be falling into Justice Jackson’s third and most tenuous tier of Presidential authority,²³⁵ thereby overstepping his foreign affairs power and intruding into Congress’ domain.²³⁶ Thus, standing alone, in opposition to the will of Congress, the President loses the fight against the state of Texas, even though the foreign affairs issue at hand falls squarely within the competence of the federal branches. This conclusion, of course, depends on the Chief Justices’ questionable self-execution analysis which assumes that the Senate was intentionally seeking to restrain the President power to implement treaty obligations by not explicitly designating the relevant treaties as self-executing.²³⁷

2. Chief Justice Roberts on the Role of Congress in International Law

The discussion of Congress’ role in international law in the *Medellin* decision revolves primarily around two legislative functions.²³⁸ The first is the Senate’s role in giving advice and consent in the ratification of the VCCR and relevant treaties, and the second is Congress role in

²³³ *Medellin* at 1368 (“The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them.”).

²³⁴ *Id.*

²³⁵ *Id.* at 1369. Chief Justice Roberts notes that “When the President asserts the power to “enforce” a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate. His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson’s third category, not the first or even the second. *Id.* (citing *Youngstown* at 637-638). Chief Justice Roberts concludes that the authority expressly conferred upon the President by Congress “cannot be said to ‘invite’ the Presidential action at issue here.” *Id.* at 1371. (quoting *Youngstown* at 637).

²³⁶ *Medellin*, 128 S. Ct. 1346, at (“The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”)(citing *Foster*, 27 U.S. 253, 2 Pet., at 315, 7 L. Ed. 415; *Whitney*, 124 U.S., at 194, 8 S. Ct. 456, 31 L. Ed. 386; *Igartua-De La Rosa*, 417 F.3d at 150.)).

²³⁷ *Id.* at 1369. See *infra*, n. 251 and accompanying text for a breakdown of the Chief Justices’ self-execution argument.

²³⁸ Congress’ role in foreign affairs goes beyond these two main functions implicated by *Medellin*. For instance, Congress determines and controls the funding of foreign affairs initiatives. See *supra*, n.

giving domestic effect to treaty obligations by passing implementing legislation. Chief Justice Roberts dedicated much of his opinion to a discussion of whether the relevant treaties were ratified with the intent that they would be self-executing and directly binding on the states, or whether they were ratified as so called non-self executing treaties, with the understanding that further implementing legislation by Congress would be necessary. If the relevant treaties were not found to be self-executing based on the Senate's role in ratifying the treaties, their provisions would consequently not be binding on the states unless Congress passed implementing legislation - laws creating legal obligations on the states based on the treaty provisions. From a jurisprudential and historical perspective, the Congressional role could be seen as peripheral to a juridical analysis of whether and how to give effect in the courts to the consular rights under the VCCR and the ICJ *Avena* holding.²³⁹ However, in the *Medellin* opinion, the Congressional role took center stage, and the question of whether or not the relevant treaties were self-executing was the star player.²⁴⁰ In Chief Justice Roberts' narrative, the self-execution question became the principle determinant of whether or not the President possessed the competence to enforce the treaty based *Avena* decision directly upon state courts.²⁴¹ The President would only have power

²³⁹ Indeed the question of self-execution is a mute point if we take the Chief Justice at his word regarding a presumption against the existence of a private cause of action. He notes that "even when treaties are self-executing in the sense that they create federal law, the background presumption is that "international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Medellin v. Texas*, 128 S. Ct. 1346, 1357 n.3. If *Medellin* did not have a private cause of action under the relevant treaties, then it is irrelevant whether those treaties are self-executing or not. Given that it was the United States that had violated its VCCR obligations, the President's role in calling for the state courts to give effect to *Avena* judgment is entirely appropriate.

²⁴⁰ Chief Justice Roberts' choice to frame the bulk of his analysis of the treaty-based issues in *Medellin* around the question of self-execution is unusual. See Carlos Manuel Vazquez, *Less Than Zero?*, 102 Am. J. Int'l L. 563, 563 (2008) [hereinafter Vazquez, *Less Than Zero*] ("*Medellin v. Texas* is the first case in which the Supreme Court has denied a treaty-based claim solely on the ground that the treaty relied upon was non-self-executing.").

²⁴¹ Chief Justice Roberts initiated the substantive portion of his opinion by briefly noting *Medellin*'s reliance on the Supremacy Clause for enforcement of his consular rights before moving straight into a discussion of the distinction between self-executing and non-self-executing treaties. *Medellin*, 128 S. Ct. at 1356.

to enforce the treaties as federal law under the Supremacy Clause if the relevant provisions were found to be self-executing, which of course, they were not.²⁴²

According to Justice Chief Justice Roberts, a self-executing treaty is one that "has automatic domestic effect as federal law upon ratification."²⁴³ A self-executing treaty "contains stipulations which are self-executing, that is, require no legislation to make them operative."²⁴⁴ In contrast, a non self-executing treaty will only have domestic effect as federal law after Congress has passed implementing legislation.²⁴⁵ Although the Constitution makes no such distinction regarding the effect or nature of treaties,²⁴⁶ Chief Justice Roberts maintains that the Court has long recognized this distinction between self-executing and non self-executing treaties.²⁴⁷ He claims the distinction was "well explained" in an 1829 opinion of Chief Justice Marshall, "which held that a treaty is 'equivalent to an act of the legislature,' and hence self-

²⁴² Given the attention that role of Congress played in Chief Justice Roberts' opinion, presumably, if all of the relevant treaties had been self-executing, the President would have been justified in holding the VCCR and *Avena* decision as directly binding on the states. Under a directly binding *Avena* decision, the courts would presumably encounter no impediments in the specific prescription, application, and enforcement of the terms of the treaty in ordinary litigation.

²⁴³ *Medellin*, 128 S. Ct. 1346 at 1356 fn. 2 .

²⁴⁴ *Id.* at 1357 (quoting *Whitney v. Chief Justice Robertson*, 124 U.S. 190, 194 (1888)). See *United States v. Perchemen*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (finding a treaty self-executing where it does not stipulate to the need for some future legislative act); See *Medellin*, 128 S. Ct. 1346, at 1392-93 (Breyer, J., dissenting) (providing an appendix listing Supreme Court cases in which treaties were held to be self-executing).

²⁴⁵ *Medellin*, 128 S. Ct. 1346, at 1356 fn. 2.

²⁴⁶ See D. A. Jeremy Telman, *Medellin and Originalism*, 68 Md. L. Rev. 377, 384 (2009) ("In fact, Chief Justice Roberts's *Medellin* opinion ignored the plain meaning of the constitutional text").

²⁴⁷ *Medellin*, at 1356. Overall, the majority opinion dedicated relatively little effort to supporting its self-execution doctrine, citing only a handful of cases, the Restatement (Third) of Foreign Relations Law of the United States, and one passage from *The Federalist Papers*. See *Medellin*, 128 S. Ct. at 1356-57 (majority opinion) (citing *Whitney v. Robertson*, 124 U.S. 190 (1888); *The Head Money Cases*, 112 U.S. 580 (1884); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *Igartua-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (en banc)); *Medellin*, 128 S. Ct. at 1357 (citing *The Federalist* No. 33 (Alexander Hamilton)) (comparing laws that individuals are "'bound to observe'" as "'the supreme law of the land'" and a "'mere treaty, dependent on the good faith of the parties.'"); *Medellin*, 128 S. Ct. at 1357 n.3 (citing 2 Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a (1986)).

executing, when it ‘operates of itself without the aid of any legislative provision,’”²⁴⁸ as compared to a treaty in which “the legislature must execute the contract.”²⁴⁹ Note that Chief Justice Roberts imposes not only the terms “self-executing” and “non-self-executing” onto the language of the Marshall decision, but also awkwardly imposes the modern doctrine onto the context of the case.²⁵⁰ Regardless of whether or not the distinction was intended by the Founders, or when it became standard practice, it is a distinction that the Supreme Court now clearly adheres to. Even so, the criteria for determining whether a treaty is self-executing or not were unclear leading into *Medellin*. In spite all the attention given to the issue in the Supreme Court opinion, the criteria remain unclear.

Not only are the criteria for determining whether or not a treaty is self-executing still shrouded in mystery, it seems the *Medellin* opinion has also succeeded in casting into doubt the long-standing presumption that treaties are self-executing under the Supremacy Clause.²⁵¹ By

²⁴⁸ *Medellin*, at 1356 (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), overruled on other grounds by *United States v. Percheman*, 32 U.S. (Pet.) 51, 52 (1833)) (“Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”).

²⁴⁹ *Medellin* at 1363 (quoting *Foster*, 27 U.S. 253, 2 Pet., at 314). In *Foster*, Marshall noted that “when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.” *Id.*

²⁵⁰ See quotes from *Foster* *supra*, n. 248-249; context of case, *infra*, n. 255.

²⁵¹ See *supra*, n. 74. Scholars who have analyzed the *Medellin* opinion do not agree as to whether *Medellin* established a presumption of non-self-execution. See David J. Bederman, *Medellin's New Paradigm for Treaty Interpretation*, 102 Am. J. Int'l L. 529, 529 (2008) (noting the debate developing over whether the Court had established a presumption of non-self-execution of international agreements entered into by the United States). See e.g. Vazquez, *Less Than Zero* at 563 noting several statements in the majority opinion suggesting that treaties are presumptively non-self-executing); Julian G. Ku, *Medellin's Clear Statement Rule: A Solution for International Delegations*, 77 Fordham L. Rev. 609, 615 (2008) (noting the possibility that *Medellin* signified a departure from existing understandings of the non-self-execution doctrine by imposing a new “clear statement” requirement). But see , Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties* at 541 (interpreting *Medellin* as requiring a treaty-by-treaty approach to the question of self-execution, rather than establishing a general presumption). It should also be noted that Justice Stevens, in his concurrence, explicitly rejects the idea of a presumption of non-self-execution. *Medellin*, 128 S. Ct. 1346, 1372 (Stevens, concurring) (“I agree that the text and history of the

adhering to his self-described “time-honored textual approach,”²⁵² Chief Justice Roberts places the burden on the text of the treaty itself to prove its status as self-executing.²⁵³ Interestingly his “time-honored approach” borrows heavily from a not so time-honored 2005 lower court decision,²⁵⁴ which the Chief Justice quotes directly in holding that a treaty is “not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on those terms.”²⁵⁵ In choosing this approach, the Chief Justice explicitly rejected the reasoning of Justice Breyer’s dissent, which the Chief Justice characterized as requiring a “multi-factor, context-specific...ad hoc judicial assessment.”²⁵⁶ Justice Breyer’s method, being “arrestingly indeterminate,”²⁵⁷ would “jettiso[n] relative

Supremacy Clause, as well as this Court’s treaty-related cases, do not support a presumption against self-execution.”).

²⁵² *Medellin*, 128 S. Ct. 1346, 1362.

²⁵³ *Medellin* 128 S. Ct. 1346, 1356.

²⁵⁴ *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st. Cir. 2005) (en banc) (Boudin, C. J.).

²⁵⁵ *Medellin* 128 S. Ct. 1346, 1356 (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st. Cir. 2005)). Admittedly, in addition to the *Igartua* case, Chief Justice Roberts also relies on two early cases involving an 1819 land-grant treaty between Spain and the United States, in which Chief Justice Marshall found the language of the treaty dispositive in determining whether or not the treaty was self-executing. See *Medellin* at 1362 (citing *Foster v. Neilson*, 27 U.S. 253, 314(1829), and *United States v. Percheman*, 32 U.S. 51, 87 (1833)). Chief Justice Roberts points to the fact that in *Foster*, after distinguishing between self-executing treaties (those “equivalent to an act of the legislature”) and non-self-executing treaties (those “the legislature must execute”), Chief Justice Marshall held that the 1819 treaty was non-self-executing. *Medellin* at 1362 (citing *Foster* at 314). However, Chief Justice Roberts notes, four years later, the Supreme Court considered another claim under the same treaty, but concluded this time that the treaty was self-executing. *Id.* (citing *Percheman* at 87). Chief Justice Roberts credits the “the language” of the treaty (the Spanish translation not available to the Court in the *Foster* case) with clarifying the parties’ intent to ratify and confirm the land-grant “by force of the instrument itself.” *Id.* (citing *Foster* at 89). While Chief Justice Roberts attributes the Marshall Court’s about face to a textual cause, scholars have disagreed as to the reason behind the change. See e.g. Vazquez, *Treaties as the Law of the Land* at 628, 644-45 (arguing that the self-execution finding in *Percheman* was due to a change in the context of the application); See Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 Sup. Ct. Rev. 131, 162 (distinguishing *Foster* from *Percheman* on the ground that the treaty provision in *Percheman* “did not pose a potential conflict with preexisting statutes.”).

²⁵⁶ *Medellin*, at 1362.

²⁵⁷ *Id.*

predictability for the open-ended rough-and-tumble of factors."²⁵⁸ The rational analysis and application of legal "factors," it so happens, is precisely the domain of the judiciary, especially when these factors involve the President's call for courts to give effect to a legitimate treaty obligation which the President has clearly indicated involves sensitive foreign policy issues.²⁵⁹ As opposed to Chief Justice Roberts' insistence on finding in the text of a treaty a clear intent that it be self-executing,²⁶⁰ Justice Breyer's case by case approach acknowledges a undeniable history of judicial domestic enforcement of treaties, in which the text treaty itself conveyed no explicit intent to be self-executing.²⁶¹ Rather than requiring an explicit reference to self-execution in the text, the case law suggests an approach that examines the nature and text of the treaty to determine if its provisions are best given effect in courts, or are best given effect by the political branches.²⁶² In the conclusion of his self-execution analysis, the Chief Justice clarifies

²⁵⁸ *Id.* (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)).

²⁵⁹ See President's Memorandum *supra* n. 197.

²⁶⁰ See *Medellin*, at 1369 (If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented "in mak[ing]" the treaty, by ensuring that it contains language plainly providing for domestic enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote, consistent with all other constitutional restraints.)(citation omitted).

²⁶¹ *Medellin*, at 1382 (Breyer, J., dissenting). It is not all clear that a treaty may be non-self-executing in the face of Congressional silence. In reality, treaties rarely address domestic implementation, since they usually prescribe obligations for states. See *John Quigley, President Bush's Directive on Foreigners Under Arrest: A Critique of Medellin v. Texas*, 22 *Emory Int'l L. Rev.* 423 (2008) ("For over two centuries the Supreme Court has been finding treaty provisions to be self-executing where no mention of domestic court action appears in the treaty."). The specific question of whether a treaty is or is not self-executing is to a large extent a matter for determination by the Judiciary. Even the Chief Justice recognizes this. It is just that he would limit that determination to a specific expression of intent. In reality, the Court must take into account a host of factors, such as Congressional opinion, the overall text of the treaty, and the character of the reservations, declarations and understandings that accompany a treaty's ratification. When a treaty's terms are expressed in broad language that it is not amenable to the ordinary canons of construction and interpretation of a legal instrument, the Court should find that further implementing legislation is required.

²⁶² For instance, Breyer notes that if a treaty declares peace or promises not to engage in war, then it is clearly only addressed to the political branches and not the courts. *Id.* at 1382 (citing *Ware*, 3 Dall. At 259-62 (opinion of Iredell, J.)) On the other hand, if a treaty "concern[s] the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery," it is amenable to domestic

what the self-execution question boils down to for him: “The dissent's contrary approach would assign to the courts--not the political branches--the primary role in deciding when and how international agreements will be enforced. To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law.”²⁶³ Here as we have seen before, the Chief Justice forces the issues at hand into a framework that leaves no alternative but to reach the conclusions he wishes to draw. Certainly, he would have us conclude, the undemocratically elected judiciary should not bear the “primary role”²⁶⁴ for determining “when and how”²⁶⁵ international agreements should be enforced, a power “tantamount”²⁶⁶ to the legislator’s duty “to create the law.”²⁶⁷ Yet these conclusions depend on the shaky and unnecessary assumption that treaties are presumptively non-self executing. If Chief Justice Roberts does not trust the courts, and ultimately the Supreme Court, with the question of domestic implementation of treaty obligations, rather than manufacture a presumption against self-execution, he could have preserved the presumption of self-execution by placing the burden on the Senate and President. Their burden would be to include non-self executing language in any treaty whose terms they intended to be implemented by Congress, rather than by the executive or directly through the courts. In this way, the presumption towards self-execution inherent in the language of the

implantation through the judiciary. *Id.* Other instances amenable to domestic litigation include treaties that grant “specific, detailed individual legal rights” or create “definite standards that judges can readily enforce.” *Id.* (citations omitted).

²⁶³ *Id.* at 1363.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

Supremacy Clause would be preserved, allowing the President and the judiciary to consistently uphold and apply international law obligations.

3. *Chief Justice Roberts on the Role of the Judiciary in International Law*

Given the Chief Justice's focus on the question of self-execution, the principal question involving the judiciary becomes whether in the practice of treaty interpretation in the federal courts, it is the role of the judiciary, and ultimately the Supreme Court, to determine whether or not a treaty which has not been implemented by Congress is self-executing or non-self executing. If it is not the role of the judiciary, then presumably it is the role of the Senate and the President during the ratification process. In one sense, the answer to whether the role belongs to the judiciary must be and unequivocal "yes," as the self-execution question is inevitably answered by the judiciary's decision to give effect the treaty's terms or not to do so. Implicit in a court's decision not to give effect to an otherwise justiciable treaty obligation is the court's acknowledgement that the relevant treaty is non-self executing, whether or not the court states so explicitly. On what other grounds could it refuse to give effect to an otherwise justiciable obligation arising under the Supreme Law of the Land? Correspondingly, if a court does give effect to the treaty's terms, it has implicitly designated the treaty as self-executing. In this sense, there is no way for the judiciary to avoid making the decision regarding a treaty's self-executing status, and to say that this task belongs solely to the President and the Senate is missing the point.²⁶⁸

²⁶⁸ Certainly congress has the residual power, through the Senate, to limit the coming into being and effectiveness of a treaty until it has enacted legislation to this effect. But the problem in this case, deals with the absence of legislation, of a problem that is quintessentially juridical and not political. Here the role of the courts in either prescribing the rule of decision or applying and enforcing the rule of decision, as a separation of powers matter, is entirely appropriate.

The more precise question then is not whether, but how the judiciary determines a treaty's self-executing status in the face of Congressional silence. Does it look for a plain statement of intent indicating self-executing status? Does it make a case specific judgment as to whether the particular obligation is intended for implementation through the political branches as opposed to the courts?²⁶⁹ These important questions implicate the presumption issue discussed earlier,²⁷⁰ and while they were addressed at length in the dissent by Justice Breyer,²⁷¹ they were dismissed as "arrestingly indeterminate" by Chief Justice Roberts.²⁷² Unfortunately, the Chief Justice's approach does little to clarify the issue, but instead muddies the waters of

²⁶⁹ To the extent that the judiciary has historically assumed the competence to determine whether a treaty is or is not self-executing, it has done so according to general guidelines. One such guideline is to examine the text of the treaty to determine whether it is amenable to the ordinary canons of construction and interpretation by the courts. If the text contains language that permits the dissection of legal rights and correlative duties within the framework of litigation, and an interpretation falls within the conventional principles of judicial settlements of disputes, then the courts have tended to see such provisions as self-executing. On the other hand, where the instrument is couched in such a way as to implicate, not judicial lawmaking but legislative or executive forms of law making, the courts, have tended to see such instruments as non-self-executing. In short, the question of whether a treaty is self-executing or non-self-executing may come down to whether the treaty provokes a political question or a legal question.

²⁷⁰ See *supra*, n. 251-267 and accompanying text.

²⁷¹ In his dissent, Justice Breyer acknowledged the self-execution distinction, not just from one treaty to the next, but between terms within a single treaty. See *Medellin v. Texas*, 128 S. Ct. 1346, 1378 (2008) (Breyer, J., dissenting). Relying on the reasoning of Justice Iredell in *Ware v. Hylton*, he noted a difference between terms that had been "executed" and those that were "executory." *Id.* (citing *Ware v. Hylton*, 3 U.S. 199 at 272.). Treaty provisions are "executed" if "from the nature of them, they require no further act to be done," while they are "executory" if they require some further action of the government. *Id.* at 272-273. While this approach looks to the text of a treaty to determine whether a particular provision is self-executing, it does so based on the context, not on an explicit statement of intent covering the whole treaty. Although distinguishing some provisions as requiring further implementation by Congress, depending on the context, they might also be directed towards action by the executive or judicial branch. *Id.* Justice Iredell maintained that if a treaty is constitutional "it is also, by the vigor of its own authority, to be executed in fact." *Id.* at 277. In other words, a treaty, whether it requires implementing legislation or not, is to be decided by the nature of the international obligation, which when disputed, must be decided by the judiciary. See D. A. Jeremy Telman, *Medellin and Originalism*, 68 *Md. L. Rev.* 377, 416-17 (2009). As applied to *Medellin*, this would suggest that Art. 94 of the U.N. Charter, which provides for ICJ jurisdiction, is "executory," requiring further action. Given the context of the *Avena* decision which called for judicial review for Mr. Medellin, the branch best suited to implement this obligation would be the judiciary. See David Sloss, *The Federalist Society Online Debate Series, Part I: Self-Execution* (March 28, 2008). Available at: <http://www.fed-soc.org/debates/dbtid.17/default.asp>.

²⁷² *Medellin*, at 1362. See *supra*, n. 257-260 and accompanying text.

Supremacy Clause jurisprudence. The primary question of how, in the face of Congressional silence, the Court should determine whether a treaty or treaty provision is self-executing was not clearly addressed. By confining the self-execution question to ratification process and refusing to address the issue juridically, Chief Justice Roberts effectively defaulted to his preferred position on the matter. It apparently suits the Chief Justice perfectly that in the face of Congressional silence, there can be no such thing as a self-executing treaty or treaty provision, and Courts should never give effect to any part of a such a treaty.²⁷³

It seems that instead of addressing the question narrowly in close adherence with the language of the Constitution and careful analysis of Supreme Court precedents, the Chief Justice's arguments belie a doctrinal commitment which assumes that international law obligations, even those arising under a ratified treaty, cannot be binding law in the United States without the explicit approval of Congress. This positivist, federalist-friendly approach, the one favored by the Federalist Society, relies on the principle that a sovereign nation cannot be bound without its explicit consent.²⁷⁴ Implicit in the Chief Justice's positivistic view is the federalist concern that sovereignty in the area of foreign relations and agreement making is vested exclusively in the democratically elected Congress of the United States.²⁷⁵ This model of sovereignty has a close affinity with Austin's 19th century positivism,²⁷⁶ which places as much of the sovereignty of the national government in the hands of the legislature as possible, much like

²⁷³ Chief Justice Robert asserts that "This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that--while they constitute international law commitments--do not by themselves function as binding federal law." *Medellin*, 128 S. Ct. at 1356. This distinction between treaties as "international law commitments," but not necessarily "binding federal law" is novel, as evidenced by the Chief Justice's reliance on a 2005 circuit court opinion for its support. See *supra*, n. 254.

²⁷⁴ This resurgent isolationist view harkens back to the pre-WWII strong *Lotus* theory which held that restrictions on state sovereignty could not be presumed. See *Lotus*, 1927. See section II A *supra* for a more detailed discussion of early 20th century American views on sovereignty.

²⁷⁶ See *supra*, n. 6-8, and accompanying text.

the British concept of Parliamentary Sovereignty.²⁷⁷ However, it is not clear that this jurisprudential gloss is at all compatible with the complexities of allocating competence among the different branches of government under the constitution. Nor is vesting so much international legal authority in Congress compatible with United States practice.

As much as the Chief Justice and his Federalist Society cohorts would like to believe that we live and operate on a legal island, the reality of United States' and international practice says otherwise. In addition to treaty based legal obligations, federal courts have historically applied a broad spectrum of international law that finds no basis in explicit Congressional approval. Here the judiciary has always been free to carefully determine the appropriate scope of its authority in adopting a rule of customary international law, or of a foreign state as a rule of decision in a particular case.²⁷⁸ In addition, the courts have had to consider the compatibility of our domestic law with international law, and to develop standards to resolve an ostensible conflict between our law and international law.²⁷⁹ The United States, led by the President and supported by Congress, more than any other nation, continues to cite supranational norms and international law to justify its interference in the sovereignty of other nations. For the U.S. Supreme Court to allow these internationalist policies on the one hand, but to fall back on a nationalist, isolationist stance when

²⁷⁷ The corresponding implication is the diminished sovereign competence in the judiciary and executive in foreign affairs.

²⁷⁸ See e.g., *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) ("International law, in its widest and most comprehensive sense - including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation - is part of our law....").

²⁷⁹ See e.g. *Murray v Schooner Charming Betsy*, 2 Cranch 64, 118 (1804), in which the Supreme Court held that an Act of Congress should, whenever possible, be construed in a way that does not violate the law of nations; *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *Alien Tort Statute*, 129 28 U.S.C. § 1350 (2009) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.")

it suits its federalist interests is inconsistent at best. It is one thing when the Supreme Court exhibits this inconsistency with the support of the President, who the Chief Justice acknowledges has the “lead role...in foreign policy,”²⁸⁰ and is constitutionally delegated the “vast share of responsibility for the conduct of our foreign relations.”²⁸¹ It is something quite different, and altogether novel, when the Supreme Court imposes such inconsistent foreign policy decisions in direct defiance of the President’s direction.

Chief Justice Roberts insists that in limiting the competence of the judiciary to determine when a treaty is self-executing, he is merely upholding the constitutional principle that the Courts do not have the power to create federal law.²⁸² He points to Art. I, § 7 of the Constitution in emphasizing the Framers intent to establish a careful set of procedures subject to checks and balances when vesting the power to create federal law in the political branches.²⁸³ However, as with the issue of whether the President was trying to create federal law with his Memorandum,²⁸⁴

²⁸⁰ Medellin, at 1367. The majority claims to “not question these propositions.” Id. (citing *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion)(the President has “the lead role . . . in foreign policy”); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (Article II of the Constitution places with the President the “vast share of responsibility for the conduct of our foreign relations” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring))).

²⁸¹ Id.

²⁸² Medellin, at 1363 (“To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law.”)

²⁸³ Id. at 1362 (“Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution--vesting that decision in the political branches, subject to checks and balances. U.S. Const., Art. I, § 7. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. Art. II, § 2. The dissent’s understanding of the treaty route, depending on an ad hoc judgment of the judiciary without looking to the treaty language--the very language negotiated by the President and approved by the Senate--cannot readily be ascribed to those same Framers.”).

²⁸⁴ See Medellin, 128 S. Ct. at 1367 n.13 (stating that the Court sought to address only the limited question of whether the President “may unilaterally create federal law by giving effect to the judgment of this international tribunal pursuant to this non-self-executing treaty, and, if not, whether he may rely on other authority under the Constitution to support the action taken in this particular case”).

the Chief Justice's analysis flows freely via the conduit of his own tenuous assumptions regarding self-execution.²⁸⁵ Clearly, it is not the role of the judiciary to create federal law.²⁸⁶ However, the domestic courts are one of the most important instruments in the prescription and application of modern international law. The role of the courts, therefore, in providing the mechanisms of both prescription and compliance in international law, is a limited, but indispensable exercise of this role.

The real issue behind all the jurisprudential gymnastics evidenced throughout Chief Justice Roberts' opinion becomes clear when we focus on the key concern of the Federalist Society in regard to international law. Not only does the ICJ suffer from a general "democracy deficit," more importantly it is not dominated by U.S. majoritarian interest. Consequently, it is unthinkable that a decision or interpretation of the ICJ could be binding on the U.S. judiciary, much less the Supreme Court. According to this line of thinking, the legislator and the President are both elected branches of government, and therefore carry considerable authority. The judiciary, however, is essentially appointed and therefore does not derive its authority from "We the People." In most countries, the judiciary's authority is derived not from democratic consent, but from other sources in the political and legal culture of the each nation. Thus when using the yardstick of popular and effective participation in governance in the search for legitimacy in international law, the results are uneven, and there exists a general deficit of democratic control.

²⁸⁵ See *supra*, n. 257-260 and accompanying text.

²⁸⁶ Although the Chief Justice stresses the limitations of the law making role of the Federal Judiciary, it is unrealistic to assume that the role of our courts is not more extensive because of the Court's own initiative in adopting the Federal Rules of Civil Procedure. In fact, the term "federal common law" refers to "federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command." See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 770 (2d ed. 1973). The nature of a legal claim is always partly substantive and partly procedural. This means that there are many instances where the efficacy of a claim at law is defined by the procedural context and the interpretation of that context. In short, it may be in real litigation it is the procedural tail that wags the dog.

This deficit carries the further implication that the authority foundations of international law are similarly diminished. Accordingly, it has become a significant point of dispute in legal circles as to whether the obligation to obey international law is weakened because of its ostensible democracy deficit.²⁸⁷ Here critics maintain that since the United State is a vibrant democracy, its law should be seen as superior to the authority foundations of international legal order. It is this kind of resistance to international law, championed by the Federalist Society, which seems to provide a consistent structure to the Chief Justice's opinion. By tying notions of sovereignty into the need for a democratic authority foundation, the Chief Justice provides an ideological strut for U.S. exceptionalism. It is by no means clear that a democracy may not, by the rule of its majority, violate fundamental human rights. Thus the historic role of the court in seeking to constrain majoritarian excesses by the rule of reason and law. The fact that we have political entities that are not democratic who participate in the making and application of international law does not render international law without an appropriate authority foundation. On the contrary, international law itself has been an important source of authority for the creation and development of democratic constitutions. .

V. The Federalist Society and Chief Justice Roberts

The Federalist Society is the institution that has worked the hardest to limit the role of international law in the United States. Consequently, its members took particular interest in the outcome of the Medellin decision, which dealt directly with the role of international law in the

²⁸⁷ See, e.g., McGinnis, John O. and Somin, Ilya, *Should International Law Be Part of Our Law?* 59 Stanford Law Review 1175 (2007)(warning against the dangers of democracy deficit in international law); Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U Pa L Rev 399, 457-59 (2000)(supporting the role of the non-self-executing doctrine in fostering democratic deliberation in treaty making).

domestic courts.²⁸⁸ As it turns out, they did not have much to worry about, given the presence of one of their own at the highest position on the Court. In fact, not only has the Chief Justice been associated with the Federalist Society,²⁸⁹ it seems that during the Bush Administration, being a member of the Federalist Society was a prerequisite to being a Federal judicial appointment across the board.²⁹⁰

The Federalist Society has focused much of its criticism of international law around the notion that international law suffers from a democracy deficit. This deficit, inherent in foreign experience, is contrasted with an exceptionalist understanding of America and American jurisprudence. In this view international law is generated from sources lacking the strong and vibrant distinctiveness of American democracy under the rule of law. Such a view tends to prefer

²⁸⁸ There have been countless symposiums and debates hosted by the Federalist Society dealing with the Avena and Medellin decisions. These forums are host to a cadre of former high level Bush administration officials, republican state officials, and conservative and libertarian legal scholars. See e.g., International Law and the State of the Constitution, The Twenty-Fifth Annual National Student Federalist Society Symposium on Law and Public Policy – 2006 (hosting Curtis A. Bradley, Enforcing the Avena Decision in U.S. Courts 30 Harv. J.L. & Pub. Pol'y 119 (2006)); PANEL DISCUSSION: Medellin v. Texas: Presidential Power and International Tribunals+; From the American Enterprise Institute's Legal Center for the Public Interest; Thursday, September 27, 2007. Washington, D.C.: PANEL 1: AMERICAN LAW AND DECISIONS OF INTERNATIONAL TRIBUNALS (cosponsored by the Federalist Society's International and National Security Law Practice Group)(PANELISTS: Prof. John O. McGinnis, Northwestern University School of Law; Prof. Peter B. "Bo" Rutledge, Columbus School of Law, Catholic University of America and Prof. Michael J. Matheson, George Washington University Law School, Moderator: Prof. John Yoo, AEI); PANEL DISCUSSION: Medellin v. Texas: Presidential Power and International Tribunals+; From the American Enterprise Institute's Legal Center for the Public Interest; Thursday, September 27, 2007; Washington, D.C.: PANEL 2: PRESIDENTIAL POWER AND FEDERALISM (Cosponsored by the Federalist Society's International and National Security Law Practice Group)(PANELISTS: Prof. R. Ted Cruz, Solicitor General, State of Texas; Prof. Michael D. Ramsey, University of San Diego School of Law and Prof. Edward T. Swaine, George Washington University Law School, Moderator: Edwin D. Williamson, Sullivan & Cromwell LLP); Federalist Society Online Debate Series, Mar. 28, 2008, Medellin v. Texas, Part I: Self-Execution; The Federalist Society Online Debate Series, April 1, 2008 Medellin v. Texas Part II: Presidential & Congressional Power; Separation of Powers in American Constitutionalism, The Twenty-Eighth Annual Federalist Society National Student Symposium on Law and Public Policy - 2009 (hosting Ted Cruz, Defending U.S. Sovereignty, Separation of Powers, and Federalism in Medellin v. Texas 33 Harv. J.L. & Pub. Pol'y 25 (2010)).

²⁸⁹ See John O. McGinnis, An Opinionated History of the Federalist Society, 7 Geo. J.L. & Pub. Pol'y 403, 412(2009).

²⁹⁰ See Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045, 1075 (2001).

the primacy of national law and national interests over the interests implicated in the larger global community and represented in legal culture by international legal order. This in turn provides a perspective that is skeptical of international and foreign law. It is particularly hostile to the view that international and or foreign law should influence the interpretation of American law or the American Constitution. Although the development of international law and foreign law has a longstanding tradition in American legal history, it is often viewed with skepticism or outright hostility by this movement. The Federalist Society discourse tends to collapse foreign law, and international law as essentially the same thing. However, as we have noted, the Law of Nations was generally considered not a foreign legal system but a legal system that was a component of general common law.²⁹¹ However, many of the contributors to the Federalist Society still view international law as foreign law and argue that the American judges have neither the authority nor the mandate to adopt foreign law as the rule of decision in American cases. Their approach and antagonism to foreign law should perhaps be more narrowly focused on their concerns that modern international law in the form of human rights law has been used to support decisions of the Supreme Court of the United States. It is uncertain how far this skepticism of foreign law and international law will influence the formulation of foreign policy interests that are influenced by persuasion over coercion.

The search for a democracy deficit perhaps obscures the distinctive technical contribution that the legal profession makes using its techniques of reasoned elaboration and strenuous justification.²⁹² This perspective has been rooted in the traditions of our courts and while on its face it may seem anti-democratic it is a way in which the courts can improve on the

²⁹¹ *Filartiga v Pena-Irala*, 630 F2d 876 (2d Cir 1980) (the law of nations “became a part of the common law of the United States upon the adoption of the Constitution.”); See *supra*, n. 137.

²⁹² See *supra*, 121- 129, and accompanying text.

imperfections of majority rule. In any event, the discussion of the jurisprudence and judicial ideology that has accounted for the role of the domestic courts in the international environment is an important component that must be clarified in the defense of national interests.

It is our contention that the key architects of the Bush policies in the “War on Terror” were motivated by similar concerns shared by Justices on the Supreme Court in *Medellin*. Significant issues arose in the War on Terrorism concerning U.S. compliance with international law, including questions concerning the reasons and justification for the attack on Iraq. Additionally the conduct of the war raised questions about detainees and whether these detainees had rights under the Geneva Conventions for an impartial determination of whether they were prisoners of war or enemy combatants. The issue of the treatment of detainees raised questions about U.S. compliance with both humanitarian and human rights law. The most startling claim that emerged from the Bush administration was the assertion that when the President declared war, there were virtually no limits to his powers exercised as Commander in Chief of the Armed Forces. These issues have not been adequately resolved in the U.S. or indeed in any international forum. However, they serve as recent illustrations of a trend in U.S. compliance with international law, a trend which is being embedded into American jurisprudence in decisions under Chief Justice Roberts Court, such as we see in *Medellin*.

What the Federalist Society, the Bush Administration, and the Chief Justice Roberts Court all have in common is the presumption that the sovereignty of the U.S. cannot be bound by international law.²⁹³ In this sense, *Medellin* is one of the most important cases to have emerged on the problems of compliance with international adjudication. From the perspective of conservative isolationists, the U.S. Courts are instruments of U.S. sovereignty. As a

²⁹³ See *supra*, Section II, for analysis of sovereignty concerns.

consequence, U.S. courts ought not to use the judgments of foreign courts or international courts as sources of authority since these sources of authority are alien to U.S. concepts of sovereignty. In fact a number of key figures from the Bush Administration were drawn from the ranks of the Federalist Society and have continued to associate themselves with the movement.²⁹⁴ The Bush Administration and Federalist Society concern over the democracy deficit were clearly echoed in a 2006 speech given at the Federalist Society's annual lawyers convention. In his speech, then Secretary of Homeland Security Michael Chertoff, Bush criticized the international judicial arena for its activism and elitism, and warned against threats to United States sovereignty.²⁹⁵

²⁹⁴ During the Bush Administration prominent and active Federalist Society members were placed in key Administrative positions, including Solicitor General Theodore Olson; Energy Secretary Spencer Abraham, one of the original student founders in the early 1980s; and Interior Secretary Gale Norton. See Terry Carter, [Herding Liberals A New but Growing Legal Group Seeks to Counter the Influence of the Conservative Federalist Society](#), ABA J., December 2003, at 51, 52. For an extensive list of Federalist Society members who were part of the early George W. Bush Administration, see The Federalist Society: From Obscurity to Power, The Right-Wing Lawyers Who are Shaping the Bush Administration's Decisions on Legal Policies and Judicial Nominations. A Report by the People for the American Way Foundation, August, 2001. Available at: <http://www.ratical.org/ratville/CAH/feddieSoc.html>. In explaining why the Bush administration drew so heavily from Society ranks, a former official explained "Precisely because the law schools and legal establishment are so liberal, membership and especially leadership in the Federalist Society is a costly signal of commitment to legal conservatism, and so as a result it is also a valuable signal We would not only look for whether someone was in the Federalist Society but whether he or she actually attended monthly Federalist Society lunches or were at Ted Olson's annual barbecue, signs that they were willing to bear a cost for the signal." See Steven M. Teles, [The Rise of the Conservative Legal Movement: The Battle for the Control of the Law](#), at 158-88. Princeton: Princeton University Press, 2008.

²⁹⁵ See Secretary of Homeland Security Michael Chertoff, Remarks to Federalist Society's Annual Lawyers Convention (Nov. 17, 2006), at <http://www.dhs.gov/xnews/speeches/sp_1163798467437.shtm>. Excerpts from his speech:

I'm going to ask you to confront a new challenge, ... the rise of an increasingly activist, left-wing, and even elitist philosophy of law that is flourishing not in the United States but in foreign courts and in various international courts and bodies. For decades, the judges, the lawyers and the academics who provide the intellectual firepower in the development of international law and transnational law have increasingly advocated for a broad vision of legal activism that exceeds even the kind of legal activism we saw discussed ... here in the United States in the 60s. ... [I]t's not only been the United States that has felt the vigor of this ... very activist ... kind of international adjudication.

... [T]his ... shows an increasing tendency to look to rather generally described and often ambiguous "universal norms" to trump domestic prerogatives that are very much at the core of what it means to live up to your responsibility as a sovereign state ... Of course, to the extent we're dealing with ... treaties, if this country is party to a treaty ... --if it's been ratified by the Senate--and it's fair that we live up to the letter of the agreement... But often the letter of the agreement is not what controls; it is, in fact, what we have not agreed to that people seek to impose upon us... [T]his begins with the judges and justices of various international courts, not, of course,

VI. Conclusion

In light of the concerns expressed regarding deference to international judicial bodies, the U.S. Supreme Court is faced with an odd dilemma. Within the U.S. system, it is the final authority on the meaning of federal law. A treaty is federal law, but this means that federal law, as international law, is subject to interpretation by the forum which is globally designated and regarded as the authoritative interpreter of international legal instruments, the ICJ. Consequently, the foreign tribunal is effectively acting as the final arbiter of what federal U.S. law means, rather than the Supreme Court. This is how the system is supposed to work anyway, but the U.S., while submitting intermittently to ICJ jurisdiction, has consistently withdrawn itself from ICJ jurisdiction whenever its rulings have caused the United States inconvenience. Of course, the ICJ did say in *Avena* that the specific implementation of the decision was a matter for

appointed by or ratified by our ... political process, that looks [sic] to customary international law ... often considered to be described by ... the opinions of international law experts. That basically means professors. ... That's typically not ... the way we make law in this country. But it is quite seriously the view taken by some that international law can be discovered in the writings of academics and others who are experts, often self-styled experts.

... Congress itself has recognized that this tendency ... requires that we be very cautious ... Several times, for example, the Senate has expressly put reservations into its approval of treaties to make sure that the treaties are interpreted and applied domestically in a limited fashion ... that's consistent with our own fundamental constitutional requirements.

...And yet again, the experts and sometimes the foreign adjudicators simply view those limitations as minor impediments to insistence that we accept the full measure of the treaty as ratified by others, or perhaps as not ratified by anybody, but as having its source in that vague and fertile turf of customary international law.

...

... [H]ow we deal with this issue of international law is increasingly impacting how we defend ourselves and how we conduct our domestic affairs... [T]he source of it... [is] that the concept of judicial modesty, which at least has won respect in this country, ... is... pretty much absent in those areas where people develop and discuss international law...

...

So what we see here is a vision of international law that if taken aggressively would literally strike at the heart of some of our basic fundamental principles: separation of power, respect for the Senate's ability to ratify treaties, and the Senate's ability to reject treaties, and respect for federalism and the importance of letting the state courts set their own rules ...

...

So my bottom line is this: The problem is not the idea of international law, but it is an international law that has been captured by a very activist, extremist legal philosophy. Id.

U.S. law. Nevertheless, in order to have meaning, the supremacy of an international interpretation of a treaty would mean that the Supreme Court was bound by that interpretation. This of course, is unacceptable to the Federalist Society, and is precisely the result which we submit is what Chief Justice Roberts crafted his opinion in order to avoid. In our view, we do not see the recognition of the judgment of the ICJ as diminishing the authority of the U.S. Supreme Court. On the contrary, to have honored that judgment judicially would have enhanced the authority of the U.S. Supreme Court, not only in the U.S. but globally.

Not only would respect for the *Avena* judgment have elevated the United States global role in the implementation and recognition of international law, it would have been consistent with the history of international law adjudication before the Supreme Court. Historically, the Court has been bold to declare the operative rules of international law when it has considered that its intervention is appropriate to the role of the judiciary. This boldness is evident in the federal courts honoring of the judgment of a foreign court under the carefully developed principles of comity. While the ICJ does not have the same reciprocal relationship to the United States as would a foreign state, the judicial considerations undertaken there match or exceed those of any state. This would suggest that as a technical matter the appropriateness of the recognition of the judgment of foreign tribunal such as the ICJ, in a contentious proceeding in which the United States fully argued its position on a quintessentially judicial question, the interpretation of an international treaty. The ICJ does not come with the infirmities of national prejudice or bias. Instead, it has a reputation for conservatively discharging its important judicial role for the world community. The idea that the recognition of a judgment of this court is a political matter that must be vested in the legislature essentially means that there will be no effective legislative action on this issue. The reality is that the judgment is consigned to a legal

vacuum or limbo. Indeed, at the conclusion of this article, some three years after the Medellin decision, the United States Congress has yet to pass legislation to implement its undisputed international legal obligation under the VCCR. Lest we forget the real personal and diplomatic consequences of this failure, we should note the recent execution of the second of the Avena named nationals by the State of Texas. This is not to disrespect the strenuous effort of the Chief Justice in construing the UN Charter relating to the enforcement of an ICJ judgment as being fundamentally a matter that is political and vested with the political organs of global and international decision making. However, the critical rule of prudence is that a decision which may be determined on legal grounds should not be thrown to the political chaos or partisan advocacy in the political process. Law has an important function to play in taking some important and vexing questions of public policy out of the framework of political conflict and considering it squarely with the voice of reasoned, deliberative decision and structured advocacy. One of the functions of the ICJ is to take problems that are distinctively legal out of the political arena where conflict may be exacerbated and into the judicial arena where it may be subjected to a calmer deliberative process of reasoned elaboration. In this sense, the excess of judicial conservatism on the part of the Chief Justice, promotes not conservatism, but distrust and elevated tension between the contending States parties. In short, it promotes conflict over conflict resolution. We therefore look forward to the Court giving a clear analytical analysis of its role and the role of the coordinate branches of the Government in the making, application and enforcement of international law. Finally, the Supreme Court of the United States is the highest court of a major global power. Its pronouncements on international law are taken seriously in the global environment. This means that it does not only have a domestic role, as the judicial arm of the United States, it also has a global role. In discharging that global role, it may

inadvertently disparage the international rule of law. Alternatively, it may embrace its role and provide great authority and sustenance to the rule of law by the progressive development of international law in the context of cases appropriately within its sphere of judicial competence. Whatever the precise motivation or rationalization of the Chief Justice, the Court's ruling comes with the unfortunate historic baggage of both exceptionalism, with the United States claiming to be above international law, or isolationism, where like the ostrich, the United States has buried its head to avoid seeing the global effects of its refusal to honor its international law obligations.

VII. Post Script

In mid June of 2011 Senator Patrick Leahy introduced a new bill into the Congress as a response to the Supreme Court's ruling in the Medellin case. The bill is designed to protect the Consular Access Rights of foreign nationals who are subject to criminal prosecution and or conviction and possible execution. The bill is titled *Consular Notification Compliance Act*. Under the proposed Act the federal courts are given jurisdiction to review cases of death row inmates who are not given access to the country of origins consular services, after they were arrested. This is a right guaranteed by the Vienna Convention on Consular Relations.²⁹⁶ This is a treaty to which United States is a party. The bill also seeks to mandate the courts to ensure that such foreign nationals subject to the domestic criminal justice process will be given timely consular access in future cases. At present there are 133 foreign nationals on death row in the US. Of these, only 53 had been given proper notification of their consular rights. The Consular Treaty not only provides benefits for foreign nationals in the US but also provides benefits for US citizens caught up in foreign criminal jurisdictions. It is estimated that some 6,600 US

²⁹⁶ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, see supra, n. 137 for relevant language.

citizens have been arrested in foreign countries and access to the US Consulate has been critical in getting these citizens proper legal assistance.

As this legislation is pending the state of Texas continues to accelerate the execution of foreign nationals. The most recent illustration is the case of *Humberto Leal Garcia v. Texas*.²⁹⁷ In this case Humberto Leal Garcia appealed to the Supreme Court for a stay of execution while Congress was considering the adoption of the proposed legislation by Senator Leahy which will require the federal courts to implement the Avena decision of the International Court of Justice. The Court ruled per curiam that it would not order a stay based on the possibility of success of as yet an un-enacted legislation.²⁹⁸ It should be noted that United States filed a brief to the Court based on the pendency of the litigation. The decision per curiam was a 5-4 decision. The following Justices dissented: Breyer, Ginsburg, Sotomayor and Kagan. The dissenters stated that the execution of a prisoner would place the United States in irreparable breach of its international law obligations. The dissenters noted that the government of Mexico had also filed a brief because of its concern with Leal's imminent execution. According to the government of Mexico "Leal's imminent execution would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States on a number of joint ventures, including extraditions, mutual judicial assistance, and our efforts to strengthen our common border"²⁹⁹

The dissent concluded as follows:

²⁹⁷ *Humberto Leal Garcia v. Texas*, 564 US ____ (2011).

²⁹⁸ *Id.*

²⁹⁹ Brief for United Mexican States as Amicus Curiae 23.

“Thus, on the one hand, international legal obligations, related foreign policy considerations, the prospect of legislation, and the consequent injustice involved should that legislation, coming too late for Leal, help others in identical circumstances all favor granting a stay. And issuing a brief stay until the end of September, when the Court could consider this matter in the ordinary course, would put Congress on clear notice that it must act quickly. On the other hand, the State has an interest in proceeding with an immediate execution. But it is difficult to see how the State’s interest in the immediate execution of an individual convicted of capital murder 16 years ago can outweigh the considerations that support additional delay, perhaps only until the end of the summer. Consequently I would grant the stay that the petitioner requests. In reaching its contrary conclusion, the Court ignores the appeal of the President in a matter related to foreign affairs, it substitutes its own views about the likelihood of congressional action for the views of Executive Branch officials who have consulted with Members of Congress, and it denies the request by four Members of the Court to delay the execution until the Court can discuss the matter at Conference in September. In my view, the Court is wrong in each respect.”

Stating “Our task is to rule on what the law is, not what it might eventually be,” the majority denied the stay request, and within an hour of the 5-4 decision, the State of Texas executed Humberto Leal Garcia was executed.³⁰⁰ There is an expectation that Congress will act on the Leahy Bill in September 2011.

³⁰⁰ Adam Liptak, Mexican Citizen is Executed as Justices Refuse to Step In. New York Times (July 7, 2011). Available at: <http://www.nytimes.com/2011/07/08/us/08execute.html>