An Escape Route from the Medellin Maze

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Many in the United States who follow International Law have been following the course of the Supreme Court’s 2008 Medellín case\(^1\) especially closely, both before and after its issuance by the Court.

The case concerned the Vienna Convention on Consular Relations,\(^2\) which imposes certain obligations on the authorities of any state party when they take as a prisoner a national of another state party. Among these is the obligation to inform the foreign prisoner that the Convention affords the prisoner the right to communicate, while in prison, with consular officials from the prisoner’s home country.\(^3\) Various states in the U.S. appear to have been chronically lax in providing this information to criminal defendants incarcerated in their prisons who are also foreign nationals.\(^4\)

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3 See Vienna Convention on Consular Relations, Article 36(1)(b) (“Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.”).
4 For example, the judgment of the International Court of Justice (“ICJ”) in the Avena case (discussed later in text, above) cites nine U.S. states that have in recent years collectively placed large numbers of Mexican criminal defendants on death row, allegedly without having complied with the requirements of the Vienna Convention. These are there cited to be: California (28 cases), Texas (15 cases), Illinois (3 cases), and Arizona, Arkansas, Nevada, Ohio, Oklahoma and Oregon (1 case each). The time period encompassed by this particular tally is
A 2004 judgment of the International Court of Justice,\(^5\) in the Hague, directs the U.S. to take action remedying these violations of the Convention.\(^6\) And President George W. Bush also directed the Texas courts to abide by the judgment of the international court.\(^7\) But in the \textit{Medellín} decision, the Supreme Court held that Texas courts were not required to comply with the judgment of the International Court of Justice, or with the President’s memorandum, when state-law procedural limitations barred petitions to obtain such compliance.\(^8\) Accordingly, the Supreme Court’s decision permitted Texas to execute José Ernesto Medellín, a convicted murderer who was a Mexican citizen, without having afforded him the protections of the Convention before his conviction.\(^9\)

The \textit{Medellín} decision, when read with other recent Supreme Court cases, creates a veritable “maze” of obstructions for any defendant, and any foreign sovereign, who wants to obtain protection in U.S. courts under the Vienna Convention. I refer to this set of obstructions as the “Medellín Maze”. Any incarcerated foreign defendant, or any home country of any such defendant, in trying to secure the benefits of the Vienna Convention, will need to analyze possible escape routes from this

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\(^6\) Avena and Other Mexican Nationals, \textit{supra} note 5, at 72, ¶ 153(9) (declaring that “the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to” in the Court’s judgment).

\(^7\) George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), \textit{quoted in Medellín, supra} note 1, at 1355 (“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 \textit{(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.”).

\(^8\) \textit{Medellín, supra} note 1, at 1353 (“We conclude that neither \textit{Avena} nor the President’s memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.”).

\(^9\) The ICJ noted Ernesto Medellín’s execution by the State of Texas, on August 5, 2008, in a later judgment regarding a request for interpretation submitted to the ICJ by Mexico. \textit{Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals, No. 139, ___ I.C.J. ___}, 4; ¶ 6 (January 19, 2009).
“Medellín Maze”. Sadly, and frustratingly, each of the possible escape routes that have so far been explored by litigants potentially leads to an impassible obstruction, or “Dead End” in the “Maze”. There is one possible course of action, however, that could well furnish an as-yet un-blocked escape route from the Maze. The purpose of this article is to delineate the nature and extent of the obstructions, or “Dead Ends”, currently in place, and to describe this possible plan of escape from the Maze.

In so doing, this article is neither praising nor criticizing the Supreme Court’s pronouncements in Medellín regarding broader jurisprudential issues. Such issues relate chiefly to the meaning of the phrase, “self-executing treaty”, the limitations on presidential powers, and the interpretation of the phrase “supreme Law of the Land” in Article VI, clause 2 of the U.S. Constitution. This article is not avoiding comment on the Supreme Court’s treatment of these issues because the issues are unimportant; of course the issues are very important.

In spite of their importance, however, actual incarcerated foreign defendants, and their home countries, must now take the Court’s pronouncements in these broad

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12 E.g., Carlos Manuel Vázquez, “Treaties as Law of the Land: the Supremacy Clause and the Judicial Enforcement of Treaties”, 122 Harvard Law Review 600 (2008) (hereinafter cited as “Vázquez”), at 602 (asserting that the Supremacy clause creates a presumption that treaties are self-executing, which can be overcome by a clear statement to the contrary); Curtis A. Bradley, “Self-Execution and Treaty Duality”, SSRN Abstract No. 1340651 (February 10, 2009) (hereinafter cited as “Bradley”), at 9 (“The Supremacy clause does not by itself tell us the extent to which treaties should be judicially enforceable”).
jurisprudential issues as a “given”. This article, in addressing the needs of such defendants and countries, must do so as well. This article will certainly address these issues, but it will do so from the perspective of counsel for an incarcerated foreign defendant or such a defendant’s country. That is, this article will address the Court’s pronouncements on these issues as features of a maze through which a course must be safely charted. This maze must be negotiated in order to secure rights under the Vienna Convention for real criminal defendants and their home countries.

This article takes the view that the parties best suited to securing the protection of foreign incarcerated defendants under the Convention are not the defendants themselves, but rather their home countries. It is broadly believed that the Vienna Convention, unlike the U.N. documents at issue in the Medellín decision, is self-executing. It is thus broadly viewed as enforceable in U.S. courts. But due to the intricacies of the doctrine of self-execution, sovereign states are better placed to secure the protections the Convention provides to prisoners than the individual prisoners themselves.

Furthermore, even sovereign states will not be able to obtain the Vienna Convention’s protections for the most unfortunate prisoners—those whose initial criminal prosecutions have already run their full course and who have exhausted all linear appeals. However, in each jurisdiction where any such foreign incarcerated defendant has been denied the protections of the Vienna Convention, this article provides the home country of such defendant with a means of assuring that no further denials will take place in that jurisdiction for any future foreign defendants.

This article posits the use of an “Article 36 Prospective Injunction”, named for the provision of the Vienna Convention that requires the consular notice involved in Medellín. This article will explain how and why a prisoner’s home state can obtain a federal injunction against the authorities of any state that has denied Article 36 protections, prohibiting them from denying any prisoner’s protections under the

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13 Gandara v. Bennet, 528 F.3d 823, 828 (11th Cir. 2008) (“The Vienna Convention is self-executing because it has the force of domestic law without Congress having to implement legislation”); Cornjoe v. County of San Diego, 504 F.3d 853, 856 (9th Cir. 2007) (“There is no question that the Vienna Convention is self-executing.”); Jogi v. Voges, 480 F.3d 822, 830 (7th Cir. 2007)(“It is undisputed that the Convention (VCCR) is self-executing, meaning that legislative action was not necessary before it could be enforced.”); Jogi v. Voges, 425 F.3d 367, 378 (7th Cir. 2005)(“We…conclude that the Vienna Convention is a self-executing treaty.”), withdrawn, 480 F.3d 822, 824 (7th Cir. 2007).

14 See Part IV.B., infra.
Convention in the future. Such an injunction will avoid the restrictions of the 11th Amendment, and can thus have broad, indefinite, prospective effect, guaranteeing future compliance by each enjoined jurisdiction with the Vienna Convention.

A disadvantage of this approach is that it does not apply to current prisoners (including those on death row) who, having experienced their full trials and all linear appeals, have also failed to raise the Vienna Convention issue prior to the present time. The rationale of prospective application, necessary to avoid the application of the 11th Amendment, precludes the availability of the proffered injunction for these prisoners. The major focus of this article, however, regards the continued availability of international law, that is, the Vienna Convention protections under Article 36. As long as there is a mechanism providing ready enforcement of these protections in a broad variety of prospective cases, a mechanism this article describes, it is unfortunate, but not overly detrimental to this analysis, that current prisoners such as these are beyond its reach.

In order to fully appreciate the basis of the “Article 36 Prospective Injunction” proposed in this article, it is necessary to be familiar with the Vienna Convention as a whole. Accordingly, Part I of this article begins with a description, perhaps more thorough than many, of the text and purposes of the Vienna Convention as an entire

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15 See Part IV.D., infra.

16 The fact that many of the foreign prisoners in U.S. detention whose VCCR rights have been denied were also death row inmates has been a significant element of the passion that has attached to these cases. See, e.g., Margaret E. McGuinness, Medellín v. Texas: A Symposium: Three Narratives of Medellín v. Texas, 31 Suffolk Transnat’l L. Rev. 227 (2008) (describing the Supreme Court’s 2008 Medellín decision as “a rallying point for anti-death penalty activists around the world”, at 230; and describing the use of VCCR non-compliance as a “norm portal” through which the death penalty can be attacked, at 242-43); Valerie Epps, The Medellín v. Texas Symposium: A Case Worthy of Comment, 2008 Suffolk Transnat’l L. Rev. 209, 210 (remarking that “the happenstance of these cases (of VCCR violation) occurring in circumstance where the death penalty had been ordered has brought them a type of universal fame that certainly would not have adhered to regular treaty violation cases”); Christina M. Cerna, The Right to Consular Notification as a Human Right, 2008 Suffolk Transnat’l L. Rev. 419, 438 (referring to a “frontal attack launched by Europe and Latin America against the continued imposition of the death penalty by the United States”). See generally William Schabas, international Law, the United States of America and Capital Punishment, 2008 Suffolk Transnat’l L. Rev. 377 (describing the ways in which the death penalty figures in the ICJ rulings on the U.S. violation of the VCCR and the Medellín case).
document. After an overview of the whole treaty, more particular attention is given to Article 36 and its relationship to the treaty in general.

Next, in Part II, this article details the structure of the “Medellín Maze”. Each possible strategy that has so far been attempted by a foreign prisoner or home country to secure Article 36 protections, and each strategy that could be attempted in light of judicial and academic discussions up to this point in time, is considered in turn. But even though there have been, and could be, many such strategies, the impact of the Medellín case, as well as other lines of federal case law, will be shown to erect substantial barriers to each of them. It will thus be shown that each such strategy meets a “Dead End” in the Medellín Maze.

Some of these barriers, or “Dead Ends”, have been clearly erected by the Supreme Court, or other federal courts, in Medellín or other cases. These “Dead Ends” are impregnable. Others of the “Dead Ends” have not yet been definitively established as such by the Supreme Court, and strategies otherwise running through them may remain technically available for prisoners, home countries or those mindful of their interests. But for these potential strategies, this article takes the position that there are substantially well-developed areas of federal constitutional law that are as likely as not to result in the erection of “Dead Ends” blocking the strategies. The article does not denominate these strategies as “Dead Ends” out of a conviction for their actual invalidity. Rather, this article calls these strategies “Dead Ends” out of a strong suspicion that the federal courts (and the Supreme Court in particular) may well erect doctrinal barriers against them in the future. This would be the case even if the objectively “best” view of the relevant doctrines would not in fact result in their being erected.

This article then returns to the Vienna Convention in Part III. This time, the review is more particular with respect to the precise provisions and formulations from the Convention’s text that lay the groundwork for the “Article 36 Prospective Injunction”. Finally, in Part IV, the article specifically proposes the use of the Injunction, and demonstrates why its issuance would be consistent with the 11th Amendment.

I. The Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations (the “VCCR”, or the “Convention”) is one of the foundational documents of modern international relations. It is the framework convention that provides the legal medium through which consuls

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and consulates exercise their functions on a daily basis throughout the world.\textsuperscript{18} It does this principally by prescribing a broadly stated and somewhat lengthy set of consular functions\textsuperscript{19} and an extensive list of consular privileges and immunities.\textsuperscript{20} The Convention includes intricate systems for facilitating these functions and protecting these privileges and immunities, described more fully below.\textsuperscript{21} In so doing, the Convention refers to any State that establishes a consular post in another State as a “sending State”, and refers to any State in which a consular post is established by another State as a “receiving State”.\textsuperscript{22}

(It is to be remembered that, whereas Ambassadors and Embassies represent the political interests of their sending States in receiving States, Consuls and Consulates

\textsuperscript{18} E.g., Charles W. Freeman, Jr., The Diplomat’s Dictionary (rev’d ed. 1997) at 305 (”Vienna Convention on Consular Relations: A convention, dated 1963, that codified international practice with regard to consular privileges and immunities.”) In addition, one of the most widely available reference works on practical diplomacy bases its section titled “Consular Officers and Consular Posts” almost exclusively on the text of the Convention. In the 10-page chapter, there are repeated explicit references to the Convention, and the discussion reflects the Convention’s provisions with almost slavish fidelity. Ralph G. Feltham, Diplomatic Handbook (8\textsuperscript{th} ed. 2004), at 45-54, & at 45, 48, 49, 50. See also R.P. Barston, Modern Diplomacy (3\textsuperscript{rd} ed. 2006), at 341 (citing the Convention as “the relevant international agreement () concerning the operation and functioning” of consulates).

\textsuperscript{19} Article 5 of the Convention is titled “Consular functions”, and contains 13 sub-paragraphs delimiting such functions, usually in broad language. (For example, sub-paragraph (a) lists as such a consular function, “protecting in the receiving State the interests of the sending State and its nationals, both individuals and bodies corporate, within the limits permitted by international law”.)

\textsuperscript{20} Chapter II of the Convention (Articles 28-57) lists and protects consular facilities, privileges and immunities. These are further broken down into “Facilities, Privileges and Immunities relating to the Consular Post” (Section I; Articles 28-39), and “Facilities, Privileges and Immunities relating to Career Consular Officers and other members of a Consular Post” (Section II; Articles 40-57).

\textsuperscript{21} See Parts III.A.1 and III.A.2, infra.

\textsuperscript{22} E.g., Article 4(2) (“The seat of the consular post, its classification and the consular district shall be established by the sending State and shall be subject to the approval of the receiving State.”).
generally represent the interests of their domestic nationals when those nationals are present in receiving States.\(^{23}\)

In order to understand the intricacies of the *Medellin Maze*, it is first necessary to secure a somewhat intimate familiarity with the Convention, and in particular its Article 36. We shall now briefly review the Convention’s general characteristics, some of the circumstances of its preparation, the precise text of Article 36, and the significance of that text for many of those most closely involved with it.

**A. The General Features and Functions of the Convention**

The VCCR consists of 77 Articles grouped into 5 chapters, and in its original UN manuscript double-spaced form, it is 45 pages long.\(^{24}\) Most of its provisions deal with the establishment and functioning of consular relations, or with the various privileges and immunities accorded to consular personnel.

For example, the VCCR prescribes a long set of “consular functions”, most prominently including protecting in the receiving State the interests of the nationals of the sending State,\(^{25}\) furthering commercial and cultural relations between the sending State and the receiving State,\(^{26}\) and issuing passports, visas and other transit documents to persons located in the receiving state.\(^{27}\) The Convention also describes the procedures for, and consequences of, a declaration by a receiving State that a consular officer from a sending State is “*persona non grata*”.\(^{28}\) Among its many other provisions detailing the mechanics of consular relations, the Convention assures freedom of movement and freedom of communication for consular officials,\(^{29}\) and provides for the inviolability of consular premises, archives and documents.\(^{30}\)

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\(^{23}\) See, *e.g.*, Charles W. Freeman, *supra* note 18, at 54 (“A consul is an official agent sent by a state to reside in a foreign territory to assist and see to the protection of its nationals there.”); 55 (“Consulates are headed by consuls.”); 13 (defining an “Ambassador” as “A diplomatic agent of the highest rank, accredited to a foreign sovereign … as the resident representative of his own government ….”); 98 (defining “Embassy” as “The residence of an ambassador.”).

\(^{24}\) The original manuscript form of the Convention can be found through consulting “Chapter III” of the “Status of Treaties” page at the website of the U.N. Treaty Collection. For the general website, go to [http://treaties.un.org](http://treaties.un.org).

\(^{25}\) VCCR Article 5(a).

\(^{26}\) VCCR Article 5(b).

\(^{27}\) VCCR Article 5(d).

\(^{28}\) VCCR Article 23.

\(^{29}\) VCCR Articles 34 & 35.

\(^{30}\) VCCR Articles 31 & 33.
Among the privileges and immunities provided for in the Convention are a qualified immunity from arrest and detention.\textsuperscript{31} The Convention generally protects consular officers and employees from the jurisdiction of judicial and administrative authorities of the receiving State.\textsuperscript{32} Consular officers and employees are also generally exempt, under the Convention, from requirements for residence permits, work permits, and social security compliance.\textsuperscript{33} Consular premises and consular officers and employees are generally exempt from most taxes levied by the receiving State.\textsuperscript{34}

B. The International Law Commission as the Convention’s Author

The VCCR was drafted under the auspices of the International Law Commission, or the “ILC”, and ultimately signed in 1963.\textsuperscript{35} The UN General Assembly had created the ILC in 1948,\textsuperscript{36} pursuant to the UN Charter’s mandate to encourage “the progressive development of international law and its codification”.\textsuperscript{37} Accordingly, a significant portion of the ILC’s work has consisted of preparing draft multilateral treaties for signature and ratification that codify previously existing international law from customary sources or more narrowly-based earlier treaties.

In the early years of the UN organization, the ILC turned its attention to codifying some of the most basic structures of international law, structures that had previously been chiefly the realm of customary law. Among the ILC’s earliest projects were the broadly-subscribed Treaty on the Continental Shelf,\textsuperscript{38} signed in 1958, and related maritime treaties.\textsuperscript{39}

\begin{itemize}
  \item \textsuperscript{31} VCCR Article 42.
  \item \textsuperscript{32} VCCR Article 43.
  \item \textsuperscript{33} VCCR Articles 46-48.
  \item \textsuperscript{34} VCCR Articles 49 & 50.
  \item \textsuperscript{35} The history of the ILC’s work through the various drafting stages of the VCCR is described at the ILC’s website, \url{http://www.un.org/law/ilc}. The drafting history is found at the “texts, instruments and final reports” page of the website.
  \item \textsuperscript{36} G.A. Resolution 174(II) (Nov. 21, 1947), establishing the International Law Commission and approving its Statute.
  \item \textsuperscript{37} U.N. Charter, Article 13(1)(a).
\end{itemize}
With the arrival of the 1960’s, the ILC was preparing a set of draft treaties directed to diplomatic relations and other aspects of the relationships between states. The most prominent of these was probably the Vienna Convention on Diplomatic Relations, signed in 1961. It was and remains the basic framework document setting forth the legal rules under which the activities of ambassadors, embassies and their staffs are conducted. The VCCR followed, and then in 1969 another signal ILC achievement, the Vienna Convention on the Law of Treaties, was signed. The foundational character of all of these treaties was an important stabilizing influence in view of the anxiety surrounding the height of the Cold War.

It is worthwhile to keep in mind the provenance of the VCCR within the ILC for at least two reasons. First, the fact that it was the ILC that developed the VCCR, and the fact that it did so early in the life of the ILC, emphasize the central and foundational character of the VCCR subject matter to modern international law. On the other hand, the provenance within the ILC also can be viewed as having a limiting effect on certain interpretational questions involving the VCCR. The work of the ILC has been almost exclusively focused on what might be called operational issues of international law among states. The ILC has done very little work regarding the development of international human rights law. Many of the most foundational human rights documents have been developed through the General Assembly or specialized U.N. commissions, rather than the ILC. Although this observation is not conclusive on any particular point, it is relevant to the issue, also addressed later, as to whether the notice requirements of the VCCR state fundamental human rights personal to the prisoners involved.

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42 The “texts, instruments and final reports” page of the ILC website, note 35 supra, lists the drafts, treaties and other documents prepared over the years by the ILC, arranged according to subject matter. In this list, there is no subject heading for “Human Rights”, for example. The closest subject heading would be “Position of the individual in international law”, and the only finished materials listed under that subject heading involve the Convention on the Reduction of Statelessness, 1961.

43 For example, the Universal Declaration on Human Rights was initially proclaimed by the U.N. General Assembly, and the ICCPR and ICESCR were initially developed by the U.N. Commission on Human Rights. E.g., Frank Newman & David Weissbrodt, International Human Rights 2 (Anderson 1990).

44 See Part II.C., infra.

45 There is persuasive comment expressing skepticism as to whether these are indeed fundamental human rights. See Cerna, supra note 16, at 432 (noting the significance in this respect of the VCCR’s failure to “require the (imprisoned) national’s state to provide assistance
C. Article 36 of the Convention, and Its Broadest Applications

As noted in the Introduction, it is Article 36 of the VCCR that contains the prisoner notification requirement that is at the heart of the Medellín line of cases. Within the VCCR, it is accordingly Article 36, through the impact of the Medellín litigation and its precursors, that has attracted most of the attention in recent years. This identification of Article 36 with the fact pattern of cases like Medellín, involving prisoners accused of serious violent crimes, often sitting on death row, has leant urgency to the issues involved. However, it has also obscured the broader picture of the VCCR, and (to a degree) even Article 36 itself.

Although Article 36 certainly applies to prisoners held in detention by foreign states, it also has broader applicability. As part of the VCCR, the Article 36 requirements are part of an extensive scheme of consular relations, integral to the conduct of modern international affairs. Some of the protections of Article 36 apply to all persons finding themselves in foreign jurisdictions, and not just prisoners. Within paragraph (1) of Article 36, only the last 2 sub-paragraphs, (b) and (c), apply to prisoners. The first, sub-paragraph (a), protects all nationals of one state party finding themselves within the jurisdiction of another, in whatever context.

The full text of Article 36 is:

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending


State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

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

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

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

The chief concern underlying this Article is the preservation of free communication, within any receiving State, between the consular post of any sending State and the sending State’s nationals in the receiving State. This concern is most broadly expressed in sub-paragraph (1)(a), which describes two correlative “rights” opposable against the officials of any receiving State. First, the consular officials of any sending State have the right to communicate with nationals of the sending State who find themselves within the receiving State, and to have access to them. Second, and correlative, sending-State nationals have the right to communicate with consular officials of the sending State within any receiving State, and to have access to them. 47

To anyone who has traveled in foreign countries, and who has been even minimally conscious of his or her circumstances while outside the home country, the

47 In both such cases, there is no specification or delimitation of any particular varieties of sending-State nationals for whom it might be especially important to assure these communications and this access. This kind of protection is considered under sub-paragraph (a) to be important regarding all nationals of a given sending State within any receiving State, without any differentiation as to their circumstances.
The potential need for consular aid can arise for any traveler abroad, at virtually any time, for any number of conceivable reasons. For example, a business person from the sending State may need assistance if licensing authorities from the receiving State are behaving in ways that are illegal and grossly unjust, a visiting sending-State national who becomes physically incapacitated in the receiving State may need assistance in returning to the sending State, visitors from the sending State may need assistance in dealing with last-minute changes to visa requirements imposed by the receiving State as they leave the receiving State, and so on.

Sub-paragraph (a) helps assure the ability of consular officials and sending State nationals to contact each other by safeguarding their mutual ability to communicate with and have access to one another. Clearly, if a receiving State does not even permit consular officials and sending-State nationals to communicate with and have access to one another, in contravention of sub-paragraph (1)(a), the broader goals of the entire VCCR framework, vis-à-vis that receiving State, could be substantially impaired.

In that event, the interests of the sending State’s nationals in the receiving State would certainly suffer. However, it is important to realize that the interests of the sending State itself, as a sovereign entity, would also suffer. The residents of the sending State would see their government as being unable to protect them abroad, decreasing the legitimacy of the government and in some cases the State itself. The sending State would be seen in the international community as unable to protect its nationals,

48 When any person leaves his or her own home country, any protections afforded to that person by the constitution or laws of the home country are generally not opposable against officials of foreign states. Nationals of any state present in a state other than their own are, in this sense, “at the mercy” of the officials of the foreign state. Differences in language, legal traditions and cultural norms can result in difficulties for anyone traveling outside his or her own home country. When these difficulties arise, the aid of an official representative from one’s own home country, located in the foreign country where the problem has arisen, can prove indispensable.

49 Article 5, sub-paragraphs (b) and (c) of the VCCR list among consular functions “furthering the development of commercial, economic, cultural and scientific relations” and “ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State”, respectively.

50 Article 5, sub-paragraph (h) of the VCCR lists among consular functions the “safeguarding (of) the interests of minors and other persons lacking full capacity who are nationals of the sending State”.

51 Article 5, sub-paragraphs (d) and (e) of the VCCR list among consular functions “issuing passports and travel documents to nationals of the sending State” and “helping and assisting nationals ... of the sending State”, respectively.
decreasing its stature and potentially its trustworthiness in international relations. The ability of the sending State to conduct international relations could also be put into doubt, to the extent that its consular staff was shown to be undependable and ineffectual. For all these and many other reasons, a violation of sub-paragraph (1)(a) could injure a sending State as much as, if not more than, its nationals.

D. Article 36 of the Convention, and Its Impact on Prisoners

While sub-paragraph (1)(a) has broad application to all sending State nationals located in receiving States, sub-paragraphs (1)(b) and (1)(c) are aimed specifically at ending-State nationals who find themselves arrested, imprisoned, in custody or otherwise detained by authorities of a receiving State. Nevertheless, in spite of their more specific application, these sub-paragraphs also raise precisely the same dignitary concerns for the sending State, as a sovereign entity, as are raised by sub-paragraph (1)(a). If a receiving State denies the protections of sub-paragraphs (1)(b) or (1)(c), the interests of the sending State are impaired in the same ways as when sub-paragraph (1)(a) is being violated. It is largely for this reason, no doubt, that the fact situations contemplated in these two sub-paragraphs appear in Article 36, immediately following sub-paragraph (1)(a).

Sub-paragraph (1)(b) sets forth two correlative sets of “rights” in these circumstances. On the one hand, the incarcerated sending-State national has three “rights” as against the receiving-State authorities. These are: (i) a “right” to require receiving-State officials to inform the consular officials of the sending State of his or her arrest, imprisonment, custody or detention; (ii) the “right” to have the receiving-State authorities forward any communications to the sending-State consular post without delay; and (iii) the “right” to be informed by receiving-State authorities, without delay, of the first two of these “rights”. On the other hand, the consular post has the correlative right, as against the receiving-State authorities, to receive without delay, notification of the arrest, imprisonment, custody or other detention of any sending-State national who has decided to exercise the first of the above-described rights ascribed to him or her, to have consular officials so notified.

Within this context of arrest, imprisonment, custody or detention, sub-paragraph (c) is a bit more general. It provides that consular officials generally have the right to visit a sending-State national who is in prison or custody, to converse and correspond with any such national, and also to arrange for the legal representation of any such national.52

Just as the general protections afforded by sub-paragraph 1(a) are obviously important to any and all foreign travelers, the protections of sub-paragraphs (b) and (c)

52 They only have this right, however, if the sending-State national who is arrested, imprisoned, in custody or detained does not expressly oppose such actions on their part. VCCR Article 36(1)(c).
are extremely important to those particular persons in a foreign country who find themselves incarcerated.\textsuperscript{53}

The importance of this interest is all the more compelling when one remembers that incarceration in a foreign country may not be the result of a wrongful act at all. Once more, differences in language, legal traditions and cultural norms can cause misunderstandings that result in incarceration of various kinds, even when the incarcerated person is completely (or largely) blameless. Add to this those circumstances in which foreign authorities, or their nationals, may harbor a certain amount of ill will to those from other States (or a particular other State), and one readily sees that this type of consular assistance is of paramount importance to anyone in this position. It should be clear that sub-paragraphs (b) and (c) of Article 36 help assure the availability of this assistance in these circumstances.

In this connection, it is worthwhile to address an aspect of the Medellin case emphasized by the Supreme Court in its opinion. The Supreme Court majority goes a certain distance out of its way to describe in grisly detail the violent crime of which Jose Medellin was convicted.\textsuperscript{54} Such a recounting is of course not strictly necessary for any

\textsuperscript{53} Being incarcerated in a foreign country, again with differences in language, customs and legal systems, is a distressing situation to say the least. One may be legitimately suspected of a serious crime in the foreign country, and the incarceration may in fact be objectively justifiable. But that does not reduce the importance of access to (and communication with) officials of one’s home consulate. Even if one has in fact committed a serious crime, the general world consensus is that one should have fully adequate legal representation. And for foreign nationals incarcerated by States other than their own, fully adequate representation is very likely to include the involvement of one’s home consulate.

\textsuperscript{54} In Part I.B. of its opinion, the Court provides the following details:

“Petitioner Jose Ernesto Medellin, a Mexican national, has lived in the United States since preschool. A member of the ‘Black and Whites’ gang, Medellin was convicted of capital murder and sentenced to death in Texas for the gang rape and brutal murders of two Houston teenagers.

On June 24, 1993, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena were walking home when they encountered Medellin and several fellow gang members. Medellin attempted to engage Elizabeth in conversation. When she tried to run, petitioner threw her to the ground. Jennifer was grabbed by other gang members when she, in response to her friend’s cries, ran back to help. The gang members raped both girls for over an hour. Then, to prevent their victims from identifying them, Medellin and his fellow gang members murdered the girls and discarded their bodies in a wooded area. Medellin was personally responsible for strangling at least one of the girls with her own shoelace.
of the legal points the majority makes in it opinion. However, the rhetorical function of
the graphic description is obvious. The Court majority is attaching implicit and unstated
importance to the fact that Medellín committed a heinously violent and vicious act
and that there is no question that he is guilty. Those who argue his cause in the name
of international law, the Court’s rhetoric implies, are doing so in the unmerited service of
a ghastly man who has committed a ghastly crime.

It is worth pointing out that when U.S. nationals find themselves incarcerated
abroad, they might themselves be accused and convicted of crimes that, according
to local mores, can be horrific indeed.\(^55\) Sometimes the crimes may be no less alarming
to American sensibilities, and sometimes they might seem comparatively less atrocious
to U.S. nationals than they do to the nationals of other countries. But that, of course, is
irrelevant. A principal reason that activists and commentators care so much about the
treatment of Medellín is the license that poor treatment by the U.S. of foreign detainees
could give to foreign governments to apply poor treatment to U.S. detainees within
their own borders. That is, the more casually U.S. states treat VCCR protections of
foreign nationals in the U.S., the less confident U.S. citizens and their officials can be that
VCCR protections will be accorded to them abroad.

And it is no answer to say that states will only be casual about VCCR protections
for the most ghastly criminals, because comparatively less harmful acts may be
considered to be similarly ghastly when committed by U.S. nationals in foreign countries.
All the more so in those circumstances in which the U.S. national may not have
committed what U.S. law considers a crime at all, or is being held on potentially
trumped-up charges created to mask a political imprisonment. Governments holding
foreign prisoners for political reasons are all the more likely to charge them, as an

\(^{55}\) Medellin was arrested at approximately 4 a.m. on June 29, 1993. A few hours
later, between 5:54 and 7:23 a.m., Medellin was given Miranda warnings; he then signed
a written waiver and gave a detailed written confession.\(^5\)


\(^{55}\) See, e.g., McGuinness, supra note 16, at 244-45 (“Consular protection can mean the
difference between fair process, some process, and no process. In places with less developed
rule of law traditions, where international human rights regimes have largely failed to make a
difference in individual cases, political intervention on behalf of co-nationals can be a more
effective means of protecting individual rights. Indeed, this fact is the premise on which the
VCCR is based.”).
official matter, with crimes that are especially heinous.\textsuperscript{56} It makes no difference that the charges are transparently false. The mere fact that U.S. states can deny VCCR protections with impunity in the case of particularly heinous crimes provides all the “cover” that is necessary for nefarious governments to do the same for U.S. nationals, whether or not there are any bases to the charges.

E. Individual Enforceability under Article 36

The text of Article 36 refers to the “right” of sending state nationals to protection under its terms. And, indeed, the discussion up to this point has on occasion referenced a foreign prisoner’s “right” or “rights” under the VCCR. However, the use of the word “right” in this connection is arguably problematic. The frequency with which this linguistic usage has arisen in the discussion so far, and with which it will arise going forward, requires a short pause at this point to discuss the sense in which it can cause interpretative problems.

In the context of international treaties, “rights” of nationals of the contracting states are often referenced when the nationals do not themselves have “rights” to enforce them in the conventional domestic sense. Some lower federal courts have used the example of a fishing treaty between the U.S. and other states,\textsuperscript{57} which may refer to “rights” of the individuals in each country’s fishing industry to fish in the waters of the other. Such a treaty might use the word “right”, but it would not ordinarily connote the ability of the individuals in the industry to sue the foreign state if it behaved contrary to the treaty. In the event of a violation by one state or the other, the members of the fishing industry in the wronged state would normally complain to their domestic authorities, who would then address the authorities of the offending state for violating the “rights” of the members of its fishing industry.\textsuperscript{58}

\textsuperscript{56} An example here would be Libya’s treatment of the Palestinian and Hungarian physicians accused of intentionally transmitting the HIV virus to Libyan infants, when in all likelihood the infections took place in the context of inadequate sanitation in Libyan facilities. Rather than admit that his own government was inadequately protective of its own citizens, Colonel Quadafi charges the foreigners with a heinous crime for political reasons. There is no good reason to suppose that the tendency to imprison foreigners for political reasons would be any less marked when the foreigners are U.S. nationals than when they are Palestinians or Hungarians. If anything, their desirability as political foils may often be greater.

\textsuperscript{57} E.g., \textit{U.S. v. Jimenez-Nava}, 243 F.3d 192, 195 n.3 (5th Cir. 2001) (“Even where a treaty provides certain benefits for nationals of a particular state—such as fishing rights—it has been traditionally held that ... individual rights are only derivative through the States”), quoting \textit{U.S. v. Gengler}, 510 F.2d 62, 66 (2d Cir. 1975).

\textsuperscript{58} \textit{Id.}
Another example would be various human rights conventions, such as the International Covenant on Civil and Political Rights (the “ICCPR”)59 and international Covenant on Economic, Social and Cultural Rights (the “ICESCR”),60 which detail specified “rights” of individuals under them, but do not by their terms require that each state party to the convention stand ready to enforce those rights under the party’s standard domestic judicial procedures. The conventions themselves create committees that monitor compliance, and attempt to address enforcement in that way.61 It is not a necessary feature of either convention that any state party afford

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61 Under the International Covenant on Civil and Political Rights ("ICCPR"), States Parties submit reports on adopted measures fulfilling their duties giving effect to the Covenant. ICCPR, supra, at Art. 40(1). States Parties submit the reports to the U.N. Secretary-General (Art. 40(2)), who transmits them to the Human Rights Committee established pursuant to ICCPR Article 28. A State Party may, under specified circumstances, report to the Committee the failure of another State Party to fulfill the obligations under the ICCPR. Art. 41(1). In general, the Committee will ascertain that all available domestic remedies have been exhausted before it will deal with any asserted failure of compliance. Art. 41(1)(c). The Committee holds closed meetings when examining communications regarding such matters. Art. 41(1)(d). The Committee is generally required to issue a report to the States Parties concerned within 12 months. Art. 41(h).

Under the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). States Parties submit reports on the measures they have adopted and progress they have made in achieving the observance of the rights recognized in the Covenant. ICESCR, supra , at 16(1). States Parties submit these reports to the U.N. Secretary-General (Art. 16(2)(a)), who transmits them to the Economic and Social Council. The Economic and Security Council may bring to the attention of other U.N. organs and agencies any matters arising out of such reports that may assist such other bodies in deciding on international measures likely to contribute to the progressive implementation of the Covenant. Art. 22. States parties agree to certain international actions for the achievement of the rights recognized in the Covenant. Art. 23.

Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural rights of the U.N. Economic and Social Council (the “Committee”) assumes certain duties under the ICESCR. For example, under the Protocol, communications may be submitted to the Committee by or on behalf of individuals or groups of individuals under the jurisdiction of a State Party, claiming to be victims of a violation of the ICESCR. Optional Protocol to the ICESCR, at Art. 2. Communications will not be admissible unless all available domestic remedies have been exhausted. Art. 3(1). The Committee may recommend necessary interim measures to avoid possible irreparable damage to victims. Art. 5. The Optional Protocol also outlines procedures for the friendly settlement of matters arising under the ICESCR and the Optional Protocol. Art. 7. The Optional Protocol also
domestic relief through domestic judicial action. And yet both conventions make liberal use of the word, “right”.

There is a substantial question in the context of Article 36 as to whether the rights it mentions must be directly enforceable by individuals in domestic courts. This question will be addressed in more detail in Part II.C. of this Article, below. However, at this point, various capsule observations are in order. The substantial majority of the U.S. Circuit Courts of Appeal that have addressed this question have answered it in the negative. On the other hand, the International Court of Justice and the Inter-American Court of Human Rights have answered the question in the affirmative. Similarly, there is no shortage of academic commentary arguing that Article 36 rights must be individually

provides the Committee with authority similar to that of the ICCPR Human Rights Committee with respect to reported violations of the ICESCR. Art. 10-13.

62 Gandara v. Bennet, 528 F.3d 823, 828 (11th Cir. 2008) (“The Treaty (VCCR) simply fails to confer individual rights that may be judicially enforced.”); Cornejo v. County of San Diego, 504 F.3d 853, 863 (9th Cir. 2007)(“Accordingly, we hold that Article 36 does not unambiguously give Cornejo a privately enforceable right.”); Medellín v. Texas Dept. of Crim. Justice, 371 F.3d 270, 280 (5th Cir. 2004) (“We are bound to apply this holding, (that Article 36 of the Vienna Convention does not create an individually enforceable right.]”): U.S. v. Jimenez Nava, 243 F.3d 192, 198 (5th Cir. 2001)(“The sum of Jimenez-Nava’s arguments fails to lead to an ineluctable conclusion that Article 36 creates judicially enforceable rights of consultation between a detained foreign national and his consular office.”). Contrast: Jogi v. Voges, 480 F.3d 822, 835 (7th Cir. 2007) (“Article 36 of the Vienna Convention by its terms grants private rights to an identifiable class of persons...from countries...parties to the Convention who are in the United States.”): Jogi v. Voges, 425 F.3d 367, 382 (7th Cir. 2005), withdrawn, 480 F.3d 822, 830 (7th Cir. 2007) (“Article 36 confers individual rights on detained nationals.”).

63 LaGrand, 2001 I.C.J. 466 (June 27), at 494, ¶ 77 (“the Court concludes that Article 36, paragraph 1, creates individual rights”); Avena, supra note 5, at 36, ¶ 40 (quoting this statement in LaGrand); Right to Information on consular assistance in the Framework of Guarantees of Due Process of Law, Advisory Opinion OC-16/99 (Inter-American Court of Human Rights; Oct. 1, 1999), at 50, ¶ 84 (concluding that Article 36 of the VCCR “endows a detained foreign national with individual rights that are the counterpart to the host State’s correlative duties”).
enforceable. The Supreme Court has repeatedly, and explicitly, left the question undecided.

The question is arguable from both sides, but it is most likely that the federal courts, having taken note of the ongoing erection of the Medellín Maze, will not let this possibility grow into a useful escape route. This is primarily because the arguments against individual enforcement of rights under Article 36 are, perhaps unfortunately, quite strong. Furthermore, Federal District Courts and Federal Circuit Courts of Appeal have witnessed over the last 11 years how the Supreme Court has treated VCCR Article 36. The only U.S. Court of Appeals to find in favor of judicially enforceable individual rights under Article 36 is the Seventh Circuit. And this was done in two successive hearings of the same case, the first of which occurred before the last two Supreme Court rulings in this area were issued. Most federal courts are not apt to interpret the highly debatable individual enforceability of Article 36 in a way that is helpful to the types of defendants that the Supreme Court has been so uniformly finding against. However, the question of judicial enforcement by individuals is only one issue forming one part of the Medellin Maze. Accordingly, this Article now turns to examine each component of this Maze in order.

II. A Guided Tour through the Medellín Maze

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64 Jordan V. Paust, Medellín v. Texas: A Symposium: Medellín, Avena, The Supremacy of Treaties, and Relevant Executive Authority, 31 Suffolk Transnat’l L. Rev. 301, 308 n.16 (2008) (“I agree with the ICJ, the Inter-American Court of Human Rights and others that individuals have rights under the Convention.”); Cerna, supra note 16, at 419 (quoting Joan Fitzpatrick, the Unreality of International Law in the United States and the LaGrand Case, 27 Yale J. Int’l L. 427, 427-33, to indicate Fitzpatrick’s view that “consular access is an individual right”).

65 United States v. Breard, 523 U.S. 371 (1998), at 376 (asserting that the VCCR “arguably confers on an individual the right to consular assistance following arrest”); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) at 343 (declaring it “unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights”, and that “we assume, without deciding, that Article 36 does grant … such rights”); Medellín at 1357 (the Court “assumes without deciding” that “Article 36 grants foreign nationals ‘an individually enforceable right to request that their consular officers be notified of their detention’”).

66 Jogi v. Voges, 480 F.3d 822, 822 (7th Cir. 2007) (Indian National brought an action against law enforcement officials alleging violation of Article 36 of the Vienna Convention on Consular Relations. Court held Vienna Convention was self-executing and conferred individually enforceable rights.). Jogi v. Voges, 425 F.3d 367, 367 (7th Cir. 2005) (Indian National brought action alleging a violation of Article 36 of the Vienna Convention on Consular Relations. Court held Article 36 was self-executing and individually enforceable. The 7th Circuit rendered its opinion prior to the Supreme Court rulings of Sanchez-Llamas and Mendellín.) withdrawn, 480 F.3d 822 (7th Cir. 2007).
As indicated above, Jose Ernesto Medellín was a Mexican citizen living in the United States who was convicted of a capital crime in the State of Texas. When his case was included in the international arguments before the World Court, 51 other non-U.S. citizens were also included as death row inmates among the subjects of the litigation. Some of those prisoners have, like Medellín, since been executed. Most of the rest presumably remain on death row. In addition, it is eminently foreseeable that many other foreign nationals will become incarcerated by state governments within the U.S. in the near-to-medium term future. The issues litigated in the Supreme Court’s Medellín decision will have impacts on many of them as well. Indeed, it is these future inmates to which the analysis of this essay is primarily directed.

A. Timing Difficulties for Many Inhabitants of the Medellín Maze

The death-row inmates like Medellín who found themselves the focus of the VCCR Article 36 issue were all convicted of violent crimes without having been adequately informed of their rights under that provision. In most cases the receiving state authorities did not notify the sending-State consulates of their incarceration. The Supreme Court has seemed to acknowledge that both the failures to inform and the failures to notify were violations of Article 36 of the VCCR.

No one has claimed that if Medellin and the other death row inmates in his position had been afforded timely compliance with Article 36, they would have been

67 Sometimes, commentators are sensitive to the use of private parties’ names in developing lengthy discussions of legal doctrine based on the cases in which such private parties have been involved. However, in view of the circumstances of this case, this is not a material concern. This discussion will refer to this litigation, and the veritable maze that it has constructed, through the use of the defendant’s name.

68 E.g., Avena and Other Mexican Nationals, 2004 I.C.J. 12 (March 31), at 25 (¶ 16(38))(listing Medellin among 52 Mexican nationals initially so affected).

69 In Medellín, for example, the Supreme Court refers to the withholding of Medellín’s rights under the VCCR: “Local law enforcement officers did not … inform Medellín of his Vienna Convention right to notify the Mexican consulate of his detention.” (128 S. Ct. at 1354; emphasis added.) In a subsequent footnote, the Court also references obligations of state notification under VCCR Article 36(1)(b), and then concludes that, in light of the ultimate disposition the Court “need not consider whether Medellín was prejudiced in any way by the violation of his Vienna Convention rights.” (128 S. Ct. at 1355 n.1; emphasis added.) In Sanchez-Llamas, the Court also describes the facts in ways that seem to acknowledge that rights under the VCCR were violated. In describing the police arrest of the Oregon defendant in that decision, Sanchez-Llamas, the Court notes that “at no time … did they inform him that he could ask to have the Mexican Consulate notified of his detention. (548 U.S. at 340.) And then, in describing the detention of the Virginia defendant Bustillo, the Court notes that “Authorities never informed him that he could request to have the Honduran consulate notified of his detention.” (548 U.S. at 341.)
found innocent of their crimes. The intimation seems to be that, at least in some cases, adequate assistance by consular officials might have resulted in more effective representation in court, and possibly avoidance of the death penalty.\footnote{70}{The Supreme Court has averted to this argument in the context of Breard, 523 U.S. at 377 (“Breard’
's asserted prejudice— that had the Vienna Convention been followed, he would have accepted the State’s offer to forgo the death penalty in return for a plea of guilty—is far more speculative than the claims of prejudice court routinely reject ... “.)} Such a concern is, of course, highly conjectural. Even if a death sentence were not avoided, however, advocates may feel that a procedure in which a defendant has all the assistance to which he or she is legally entitled is still to be preferred over one in which the defendant is not given such protection. One need only recall the discussion in the first part of this Article, discussing the predicament of a U.S. traveler incarcerated in a foreign country not known for procedural fairness, to appreciate this point.

One of the major problems that litigating inmates have had in complaining about Article 36 violations has been timing. Unfortunately for Medellín and many of the other inmates, the defense attorneys working on their cases did not complain about the Article 36 violation until it was too late.\footnote{71}{In Medellín, for example, the Supreme Court noted that “Medellín first raised his Vienna Convention claim in his first application for state post-conviction relief. The state trial court held that the claim was procedurally defaulted because Medellín had failed to raise it at trial or on direct review.” (128 S. Ct. at 1354.) Similarly, in Sanchez-Llamas, the Court noted an analogous delay for the Virginia defendant in that decision, Bustillo. “After his conviction became final, Bustillo filed a petition for a writ of habeas corpus in state court. There, for the first time, he argued that authorities had violated his right to consular notification under Article 36 of the Vienna Convention.” (548 U.S. at 341.)} In many states, “procedural default” rules prevent a defendant from pursuing collateral relief on the basis of arguments that were not made during trial or on direct appeal. These kinds of procedural default rules have played havoc with defendants who have been denied their Article 36 protections.

In Medellín’s case, for example, he had gone through a complete set of state trial court and state appellate court proceedings without any of his attorneys raising the issue: the issue did not arise until state habeas corpus proceedings were instituted on his behalf.\footnote{72}{Medellín v. Texas, 128 U.S. at 1354 (“The State trial court held that the claim was procedurally defaulted because Medellín had failed to raise it at trial or on direct review.”).} The state courts then deployed the procedural default rule to estop the further development of the Article 36 claim.\footnote{73}{Id., & at 1355 (indicating affirmance by the Texas Court of Criminal Appeals).} These procedural default rules can make it almost impossible for current death row inmates to obtain the relief on the basis of Article 36.

In the course of the last 11 years, the U.S. Supreme Court has shown itself broadly unreceptive to these concerns, while the International Court of Justice ("ICJ") has been
more completely sympathetic. The Medellín decision, far from being the first, is in fact the third Supreme Court ruling allowing state procedural bar rules to trump Article 36 claims. For its part, the ICJ has issued two final judgments addressing this issue, both finding that Article 36 precludes its frustration by domestic procedural bar rules.

First, the Supreme Court decided Breard v. Greene in 1998.\(^{74}\) In that case, for a variety of reasons, the Court determined that state procedural default rules could effectively preclude relief resulting from Article 36 violations.

One year later, the ICJ issued its judgment in its LaGrand case,\(^{75}\) and determined that Article 36 requires that States Parties to the VCCR not allow procedural default rules to preclude relief after its terms have been violated.\(^{76}\) The ICJ appeared to be particularly perturbed that the inmates’ delays in presenting their claims of violation seemed to result largely from the government’s own failure to inform inmates of the Article’s protections.\(^{77}\) The one surviving inmate at issue in the LaGrand case had actually been executed by state authorities more than two years before the issuance of the ICJ judgment. However, the sending-State authorities had decided to pursue the ICJ proceedings until final judgment even though both prisoners by then had been executed.\(^{78}\)

Mexico then commenced proceedings in the ICJ with respect to 52 of its nationals then on “death row” detention in various states of the United States. Although nothing had occurred in the interim to have disturbed the LaGrand judgment, Mexico was no doubt attempting to ameliorate the plight of its U.S. death-row inmates in an ICJ

\(^{74}\) 523 U.S. 371.

\(^{75}\) 2001 I.C.J. 466 (June 27).

\(^{76}\) 2001 I.C.J. at 498, ¶ 91 (“Under these circumstances, the procedural default rule had the effect of preventing ‘full effect (from being) given to the purposes for which the rights accorded under this article are intended’, and thus violated paragraph 2 of Article 36.”).

\(^{77}\) 2001 I.C.J. at 497, ¶ 91 (emphasizing that it was “because of the failure of the American authorities to comply with their obligation under Article 36” that “the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds”). This element of irritation was also presented in the Avena judgment, when the ICJ complained that “it has been the failure of the United States itself to inform (foreign prisoners) that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial.” (2004 I.C. J. at 57, ¶ 113.

\(^{78}\) See, e.g., John F. Murphy, Medellín v. Texas: Implications of the Supreme Court’s Decision for the United States and the Rule of Law in International Affairs, 31 Suffolk Transnat’l L. Rev. 247, 258 (describing the timing of these events, and contrasting Germany’s decision in LaGrand with that of Paraguay in Breard).
action that would have applied specifically to them. The ICJ ultimately ruled in Mexico’s favor, in its judgment titled **Avena and other Mexican Nationals**, in 2004. In **Avena**, the ICJ reiterated its conclusion in **LaGrand** that Article 36 precludes its frustration through domestic procedural default rules.

Two years after the **Avena** judgment, the U.S. Supreme Court again addressed Article 36 claims in **Sanchez-Llamas v. United States**. This case involved two non-U.S. nationals sentenced to lengthy prison terms in U.S. state courts. Sanchez-Llamas himself was a Mexican national, convicted in Oregon, while the second defendant, named Bustillo, was a Honduran national convicted in Virginia. Even though Sanchez-Llamas was a Mexican national, the ICJ **Avena** judgment would not have applied directly to him because he was not one of the death-row inmates expressly covered by Mexico’s action in **Avena**.

This was nevertheless the first time the Supreme Court addressed Article 36 claims since the ICJ issued its judgments in **LaGrand** and **Avena**. And once again the procedural default issue arose, because Bustillo had not raised his Article 36 claim until after his conviction had run its course through Virginia trial and appellate courts and become final. The Supreme Court acknowledged the **LaGrand** and **Avena** rulings, but nevertheless again held that state procedural default rules could trump protections under Article 36.

It was two years after this ruling in **Sanchez-Llamas** that one of the Mexican detainees covered by the ICJ’s **Avena** judgment arrived at the U.S. Supreme Court. That was **Medellin**, and as noted above, the Supreme Court decided for the third time that state procedural defaults could block relief under Article 36. This time, however, the Supreme Court’s ruling was in direct contravention of an ICJ judgment applying to the specific defendant before the Supreme Court.

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79 In any event, Article 59 of the ICJ Statute states that each decision of the ICJ “has no binding force except between the parties and in respect of that particular case.” Accordingly, Mexico might not have been able to strongly rely solely on the **LaGrand** judgment for the proposition that an earlier ICJ judgment had directly prohibited the execution of its nationals.

80 2004 I.C.J. 12 (March 31).

81 2004 I.C.J. at 56-57, ¶ 112 (quoting the ICJ’s determination in **LaGrand**, and confirming that “(t)his statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.”).


83 **Sanchez-Llamas**, 548 U.S. at 352 (“(Bustillo) argues that since **Breard**, the ICJ has interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims.”)
B. Procedural Defaults as a “Dead End” in the Maze for Tardy Defendants

In addressing the effect of procedural default rules on Article 36 protections, the best place to start is the text of Article 36 itself. As noted earlier, paragraph (2) of Article 36 provides:

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

On the one hand, this clause supports the argument that procedural bar rules can trump Article 36 rights, to the extend it affirms that the rights “shall be exercised in conformity with the laws and regulations of the receiving State”. On the other hand, the clause can be read to negate that effect to the extent that the procedural bar rules would not “enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”

In its three Article 36 opinions, the Supreme Court has given primary weight to the first part of paragraph 2, the provision affirming that Article 36 rights shall be exercised in conformity with the laws and regulations of the receiving State. The Court has simply not given effect to the second part of paragraph 2. In Breard, the Court merely recited the first part of paragraph 2, and asserted its availability for allowing procedural bars to trump Article 36. Rather than moving on to the second part of paragraph 2, the Court instead noted the effects of the “last-in-time-is-best-in-right” rule governing the domestic legal relationship in the U.S. between treaty provisions and federal statutes. The Court viewed the passage of the Antiterrorism and Effective Death Penalty Act in 1996 as an intervening statute that would supersede any residual protection afforded by paragraph 2.

In Sanchez-Llamas, the Court recited Breard’s reliance on the first part of paragraph 2, and then dealt with the second part by providing a somewhat detailed

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84 The Court has also maintained that, even apart from paragraph 2 of Article 36, “the procedural rules of domestic law generally govern the implementation of an international treaty.” (Sanchez-Llamas, 548 U.S. at 356, citing Breard, 523 U.S. at 375.)

85 523 U.S. at 375-76 (“By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia.”).

86 523 U.S. at 376 (“[I]n 1996, … Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) … . Breard’s ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule … . This rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him.”).
description of the importance of procedural default rules in adversary judicial systems. In Medellín, the Court does not directly address paragraph 2 at all.\textsuperscript{88}

By contrast, the ICJ, in its two Article 36 final judgments, has given substantial weight to the second part of paragraph 2. In LaGrand, the ICJ criticized the application of a procedural default rule to trump Article 36 protections. The ICJ first allowed that, in itself, “the rule does not violate Article 36 of the Vienna Convention.”\textsuperscript{89} However, the ICJ noted that by the time Germany was made aware of the LaGrands’ situation and was able to provide some assistance to them, “because of the failure of the American authorities to comply with their obligation under Article 36, the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds.”\textsuperscript{90} Accordingly, the ICJ concluded that, “(u)nder these circumstances, the procedural default rule had the effect of preventing ‘full effect (from being) given to the purposes for which the rights accorded under this article are intended’, and thus violated paragraph 2 of Article 36.”\textsuperscript{91}

In its 2004 Avena judgment, the ICJ noted quoted from this aspect of the LaGrand judgment, and then noted that:

“the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded

\textsuperscript{87} 548 U.S. at 356 (“This reasoning (that procedural default rules fail to give ‘full effect’ to the purposes of Article 36 contrary to its terms) overlooks the importance of procedural default rules in an adversary system ...”).

\textsuperscript{88} In Medellín, the Court states that “we reiterated in Sanchez-Llamas what we held in Breard, that “absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.” (128 S.Ct. at 1363, citing Sanchez-Llamas, 548 U.S. at 351, and Breard, 523 U.S. at 375.) This statement, however, goes to the general rule of interpretation that the Court there asserted, rather than the text-based analysis of paragraph 2. The Court next contends that “there is no statement in the Optional Protocol, the U.N. Charter, or the ICJ Statute that supports the notion that ICJ judgments displace state procedural rules.” 128 S.Ct. at 1364. Finally, the Court expresses alarm at “the consequences of Medellín’s argument”, asserting that under his argument an ICJ judgment “is not only binding domestic law but is also unassailable.” This assertion by the Court addresses the scope of ICJ authority rather than the meaning of paragraph 2.

\textsuperscript{89} 2001 I.C.J. at 497, ¶ 90.

\textsuperscript{90} 2001 I.C.J. at 497, ¶ 91.

\textsuperscript{91} 2001 I.C.J. at 498, ¶ 91.
counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial."\textsuperscript{92}

The ICJ thus determined that “the procedural default rule may continue to prevent courts from attaching legal significance to the ... violation of the rights set forth in Article 36.”\textsuperscript{93} Since, unlike the situation in LaGrand, however, most of the Avena detainees had not yet progressed to the stage where “there was no further possibility of judicial re-examination”, the ICJ decided it would be “premature” to conclude that violations of Article 36, paragraph 2 had already occurred in those cases.\textsuperscript{94}

It is understandable that the ICJ would take the position it has. The second part of paragraph 2 of Article 36 certainly limits the application of the laws and regulations of the receiving State to those laws and regulations that do not impair the full effect of the rights accorded under that Article. And procedural default rules, by precluding the assertion of those rights, do tend to impair the full effect of the Article’s provisions granting those rights.

However, the U.S. Supreme Court has spoken on this point, and the procedural default rules seem to be squarely supported in its opinion. The Court points out that state procedural default rules can preclude the assertion of constitutional rights under the Federal Constitution, and asserts that it would be anomalous to allow preclusion of the assertion of Constitutional rights, but not allow preclusion of rights under treaties. As noted above, the Court seems to claim that procedural default rules are founded in the fundamental notion of an adversary system of justice, which “relies chiefly on the parties to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication.”\textsuperscript{95}

The Court thus seems to be arguing that adherence to procedural default rules is critical to the effective operation of an adversarial system of justice. Among other things, the implication seems to be that the procedural default rule prevents counsel from purposely “squirreling away” arguments in abeyance, reserving each successive argument solely for later proceedings, after adverse determinations in earlier proceedings with respect to earlier arguments. This would appear inherent in the Court’s explanation that the “consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim.”\textsuperscript{96}

\textsuperscript{92} 2004 I.C.J. at 57, ¶ 113.
\textsuperscript{93} 2004 I.C.J. at 57, ¶ 113.
\textsuperscript{94} 2004 I.C.J. at 57, ¶ 113.
\textsuperscript{95} Sanchez-Llamas, 548 U.S. at 356 (emphasis original).
\textsuperscript{96} Sanchez-Llamas, 548 U.S. at 356-57.
There is probably some merit to the Court’s perspective in this regard, but in at least one respect the Court is woefully far of the mark. The Court goes on to decry a “parade of horribles”, asserting that if procedural defaults are invalidated for Article 36 claims, “presumably rules such as statutes of limitations and prohibitions against filing successive habeas petitions must also yield in the face of Article 36 claims.” That deduction is plainly unwarranted. The reason that procedural defaults so offend Article 36 is that Article 36 guarantees the provision of information to a criminal defendant in detention, and the benefits of Article 36 cannot be enjoyed by a criminal defendant unless he or she knows about them. The receipt of knowledge about the benefits is the purpose of the Article. For the state to refuse to inform the detainee of these benefits as it is required to do, and then penalize the detainee for not having been informed about them, is circular. No such circularity arises regarding statutes of limitation or quantitative limits on habeas petitions. Procedural bars arising from such limitations could well be opposable against detainees without penalizing them for a lack of information that it was the state’s treaty-based duty to supply.

In any event, however, the continued vitality of state procedural default rules, as opposed against detainees who have not timely asserted Article 36 claims, appears certain. Accordingly, as far as the Supreme Court is concerned, no judicial relief is available to detainees who have not asserted an Article 36 claim within the time frame required by applicable law. The procedural default rule thus represents the first of several “dead ends” in the Medellín Maze.

C. A Second Probable “Dead-End”: Individual Enforceability

As noted above, the interpretation of a treaty often involves the question of whether rights mentioned in the treaty are judicially enforceable by individuals in domestic courts. That has been a key element of contention in recent years as to VCCR Article 36.

Significant international authorities have lined up on the side of individual enforceability. In both its LaGrand and Avena judgments, the ICJ concluded that “Article 36, paragraph 1 creates individual rights”. Granted, in both those proceedings, as is required under the ICJ Statute, the litigating party was Mexico

97 Sanchez-Llamas, 548 U.S. at 357.


99 Article 34(1) of the ICJ Statute declares that “(o)nly states may be parties in cases before this Court.” Accordingly, the ICJ would rarely have a basis for directly determining whether any particular domestic court would be required to hear a claim of treaty violation brought by an individual. Such an issue could arise if a treaty were to provide by its terms for direct enforcement through court proceedings brought by an individual. But the ICJ makes no such determination.
rather than the individuals involved. However, the logical consequences of the ICJ view are relatively clear. If the ICJ believes that Article 36 creates individual rights, it would be most usual for those rights to be of the type that are individually enforceable in domestic jurisdictions. Neither the *LaGrand* judgment nor the *Avena* judgment requires this result, but such a result would probably be most consonant with those judgments.

In addition, the Inter-American Court of Human Rights issued an advisory opinion on October 1, 1999.\(^{100}\) Mexico requested this advisory opinion, and the consideration of Mexico’s application by the IACHR also took into account submissions by over half a dozen other North, South and Central American states, including the United States, and also including the Inter-American Commission.\(^{101}\) The IACHR concluded on this point that Article 36 “endows a detained foreign national with individual rights that are the counterpart to the host State’s correlative duties …”.\(^{102}\) The clear implication of this language was that the IACHR expected states subject to its jurisdiction that had ratified the VCCR to allow individual enforcement of Article 36.

Academic commentary offered in connection with *Medellín* and its attendant issues has been to varying effects. In a recent symposium undertaken at Suffolk Law School and published in the *Suffolk Transnational Law Review*, this point is addressed by several participants, specifically regarding the rights at issue in *Medellín*. None of them finds against individual enforceability, and those who do address the point either favor of individual enforceability or seem decidedly open to it.\(^{103}\)

On the other hand, other academic commentators have addressed the issue of individual enforceability of treaties after *Medellín* in more general terms. They tend to view the majority opinion in *Medellín* as boding poorly for private judicial enforcement of treaty rights. This emanates from, among other factors, the Court’s allusion in *Medellín* to the Restatement’s assertion that “international agreements … generally

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\(^{101}\) IACHR Advisory Opinion at 9-34, ¶¶ 26-28.

\(^{102}\) IACHR Advisory Opinion, supra note 100, at 50, ¶ 84.

\(^{103}\) Jordan V. Paust, Medellín v. Texas: A Symposium Lead Article: Medellín, Avena, The Supremacy of Treaties, and Relevant Executive Authority, 31 Suffolk Transnat’l L. Rev. 301, 308 n.16 (2008) (“I agree with the ICJ, the Inter-American Court of Human Rights and others that individuals have rights under the Convention.”); Christina M. Cerna, Medellín v. Texas: A Symposium Lead Article: The Right to Consular Notification as a Human Rights, 31 Suffolk Transnat’l L. Rev. 419, 456 (2008) (“The ICJ Judgments in the LaGrand case and the Avena case were both issued prior to the U.S. withdrawal from the Protocol and held that Article 36 of the VCCR confers an individually enforceable right to consular notification.”).
do not create private rights or provide for a private cause of action in domestic courts.”

Especially cogent in this regard is commentary by John Parry, who states that the Medellin majority opinion generally “seems hostile to enforcement of treaties in federal court proceedings brought by individuals against state actors.” In fact, he goes so far as to say that the decision “articulates a presumption against finding individual rights in treaties” and “stands against treaty enforcement by individuals.” Paul Stephan finds it clear that, after Medellin, “one cannot claim that the Supreme Court accepts a presumption in favor of judicial enforcement of treaty provisions.” Christina Cerna notes that two of the ICJ judges who sat for the LaGrand judgment “questioned the majority’s finding that an obligation to individuals had been breached, rather than solely an obligation to the State.”

Furthermore, the determinations of U.S. courts that have considered the issue do not, on balance, support individual enforceability. Of the half-dozen or so recent Court of Appeals cases that have involved the status of the VCCR before U.S. domestic courts, only one majority ruling has found that the protections of Article 36 are judicially enforceable by private individuals.

One of the earliest points at which this issue was judicially addressed was in the context of the Breard case at the appellate level, in the 4th-Circuit decision called Breard v. Pruett. In that decision, the 3-judge panel only dealt with the VCCR Article 36 claim from the standpoint of procedural defaults, and did not address the issue of individual enforceability. However, the concurring opinion by Judge Butzner states that:

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128 S. Ct. at 1357 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, Comment a (1986).


106 Parry, supra note 105, at 36. For a fuller discussion of the appellate cases before Medellín and how they relate to the issue of private judicial enforceability, see id. at 63-67.

107 Paul B. Stephan, Open Doors, 13 Lewis & Clark L. Rev. 11 (2009), at 11. In this respect, he is answer earlier arguments by Carlos Manuel Vázquez to the effect that the Supremacy Clause supports a presumption in favor of self-execution. Carlos Manuel Vázquez, Treaties As Law of the Land: The Supremacy Clause and Judicial Enforcement of Treaties, 122 Harv. L. Rev. 599 (2008). Although this colloquy relates specifically to self-executing status, a treaty cannot be judicially enforced by an individual, standing on its own, unless it is at least self-executing.


109 134 F.3rd 615 (4th Cr. 1998).
“The Vienna Convention is a self-executing treaty—it provides rights to individuals rather than merely setting out the obligations of signatories. The text emphasizes that the right of consular notice and assistance is the citizen’s.”

The year after *Breard v. Pruett*, the 9th Circuit considered whether evidence secured in violation of VCCR Article 36 needed to be suppressed; in determining that suppression was not required, the court did not directly address the general question of individual judicial enforceability. Nevertheless, two dissenting opinions were more charitable to notions of individual judicial enforceability. In the 2000 case of *U.S. v. Li*, the 1st Circuit majority also found that evidence obtained in violation of VCCR Article 36 did not need to be suppressed, without specifically addressing individual enforceability. One concurring opinion maintained that Article 36 rights were not individually enforceable, and one argued that they were.

The 5th Circuit then found against individual enforceability in *U.S. v. Jimenez-Nava*. This was a non-capital case involving counterfeit immigration documents. There, the 5th Circuit had a detailed analysis and determined that “the presumption against judicially enforceable rights ... ought to be conclusive” in that case.

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110 134 F.3rd at 622 (internal citation omitted). The quoted passage betrays confusion between the concept of self-execution and individual enforceability, but in point of substance seems to be referencing the idea of individual enforceability. The year after *Breard v. Pruett*, the 9th Circuit considered whether evidence secured in violation of VCCR Article 36 needed to be suppressed; in determining that suppression was not required, the court did not directly address the general question of individual judicial enforceability. *U.S. v. Lombera-Camarlinga*, 206 F.3d 882 (9th Cir. 1999). Nevertheless, two dissenting opinions were more charitable to notions of individual judicial enforceability.

111 *U.S. v. Lombera-Camarlinga*, 206 F.3d 882 (9th Cir. 1999).

112 See dissenting opinions of Judges Boochever (206 F.3d at 889-890) and Thomas (206 F.3d at 895).

113 206 F.3d 56 (1st Cir. 2000).

114 See concurring opinion of Judges Selya & Boudin, 206 F.3d at 67.

115 See dissenting opinion of Judge Torruella, 206 F.3d at 69-70.


117 243 F.3rd at 198.
Then a later panel of the 5th Circuit, in the precursor to the Medellin Supreme Court opinion, decided *Medellin v. Dredtke*. In the *Medellin* 5th-Circuit opinion, the panel said that “we are bound to apply this holding (in *Jimenez-Nava*), the subsequent decision in *LaGrand* notwithstanding, until either the Court sitting en banc or the Supreme Court say otherwise.” Of course, no such contrary superior opinion has yet emerged.

In fact, the Oregon Supreme Court then followed suit when, in its version of *Sanchez-Llamas*, it concluded that “Article 36 does not create rights to consular access or notification that a detained individual can enforce in a judicial proceeding.”

In 2007 a 9th-Circuit majority did directly hold that Article 36 rights were not judicially enforceable by private persons, in *Cornejo v. County of San Diego*. Once again, however, there was a dissent maintaining that such rights should be individually enforceable. In 2008, both the 2nd and 11th Circuits issued opinions involving Article 36 violations; in neither case did the majority find in favor of private judicial enforceability. In the 2nd-Circuit case, the court never addressed the issue of individual judicial enforcement, and in the 11th Circuit case, the court determined that Article 36 is not privately judicially enforceable. Here there was a “special concurrence” finding individual judicial enforceability.

The 7th Circuit is the only Circuit Court of Appeals that has issued a majority opinion finding in favor of private judicial enforcement of Article 36 rights, and it did so twice, as a result of two successive considerations of the same case.

The Supreme Court has three times decided to decline to resolve the issue. In *Breard*, the Court noted in passing that Article 36 “arguably confers on an individual the

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119 371 F.3rd at 280.
120 338 Ore. 267, 276, 108 P.3d 573, 578 (2005)(en banc).
121 504 F.3rd 853 (9th Cir. 2007), at 863.
122 See dissenting opinion of Judge Nelson, 504 F.3d at 864.
123 *Mora v. New York*, 524 F.3d 183 (2nd Cir. 2008), at 188.
124 *Gandara v. Bennett*, 528 F.3d 823 (11th Cir. 2008), at 825.
125 See special concurrence of Judge Rogers, 528 F.3d at 835-36.
126 Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005), at 382, withdrawn; Jogi v. Voges, 480 F.3d 822 (7th Cir. 2007), at 835.
right to consular assistance following arrest”. 127 This brief comment probably created an inference that the Court was assuming, without deciding, that Article 36 affords the capacity for individual judicial enforcement.

Next, in its Sanchez-Llamas majority opinion, the Court explicitly found it “unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights”. 128 Accordingly, in that opinion, the Supreme Court majority explicitly declared that “we assume, without deciding, that Article 36 does grant (the defendants there) such rights.” 129

Finally, the Court in its Medellin majority opinion “assumes without deciding” that “Article 36 grants foreign nationals ‘an individually enforceable right to request that their consular officers be notified of their detention …’.” 130

The arguments against individual enforceability of Article 36 are relatively strong. As more than one court has noted, 131 the preamble to the VCCR expressly that:

“the purpose of (consular) privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.” 132

On the one hand, this language could be read to disavow the ability of individuals to rely on any provisions of the VCCR as individual legal claimants. Even if read to be limited to those aspects of the VCCR described by its terms as “privileges and immunities”, Article 36 falls within that portion of the VCCR so denominated. 133

The Inter-American Court of Human Rights, at a crucial point in its Advisory Opinion, quotes this language from the preamble, and allows that the VCCR would thus would “not appear to be intended to confer rights to individuals; the rights of

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127 523 U.S. at 376.
128 548 U.S. at 343.
129 548 U.S. at 343.
130 128 S.Ct. at 1357.
131 E.g., Jimenez-Nava, 243 F.3rd at 196 (“This language would appear to preclude any possibility that individuals may benefit from it when they travel abroad, even, perhaps, if they are among the consular corps.”). the IACHR also addresses this argument, as described infra.
132 VCCR, penultimate precatory clause.
133 Section I of Chapter II of the VCCR is headed “Facilities, Privileges and Immunities Relating to a Consular Post”, and encompasses Articles 28 through 39.
consular communication and notification are, ‘first and foremost’, rights of States.”

However, immediately after making this momentary concession, the IACHR notes that “the ‘individuals’ to whom (the preamble) refers are those who perform consular functions”, and that “the clarification (in the preamble) was intended to make it clear that the privileges and immunities granted to them were for the performance of their functions.” The implication seems to be that the exclusion of rights only excludes putative rights of consular officials and employees, and that the rights of other sending State nationals are not thereby excluded by the preamble.

This argument is unpersuasive; the limitation to consular officials could just as easily cut the other way. If consular officials, who are the main beneficiaries of the VCCR’s privileges and immunities, cannot even claim individual rights under it, it is all the more arguable that mere citizens of the sending State would be in even a less advantageous position to do so.

Some seize upon the wording of Article 36, which at one point in sub-paragraph 1(b) refers to the “rights” of the detainees it references. However, as noted earlier, many international treaties use the word “rights” in contexts when it is clear that domestic judicial relief for individuals is neither required nor even especially contemplated. That the ICCPR, one of the foremost conventions in the field of Human Rights, is in this category, is especially telling.

The Inter-American Court of Human Rights also cited interpretive methodology as a basis for finding that Article 36 imparted individual rights. It states that the question is not so much whether Article 36 guarantees individual human rights, but rather “whether it concerns the protection of human rights” within the Court’s geographic

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134 IACHR Advisory Opinion, supra note 100, at 47, ¶ 73.

135 IACHR Advisory Opinion, supra note 100, at 47, ¶ 74.

136 E.g., Jimenez-Nava, 243 F.3d at 196 (emphasizing the impact on some of “the references to ‘rights’ in Article 36”); IACHR Advisory Opinion, supra note 100, at 48, ¶ 78 (“The text in question makes it clear that both the consular officer and the national of the sending State have that right …”).

137 The International Covenant on Civil and Political Rights, 999 U.N.T.S.171 (1967), entered into force in 1976. It is a comprehensive human rights instrument, and makes constant use of the words “rights” and “right” throughout its text. Yet as initially drafted, the ICCPR did not contemplate judicial enforcement by individuals in domestic courts. Instead, it set up an “International Human Rights Committee” to monitor compliance, as an administrative matter, around the world. This feature of the ICCPR has since been modified in practice, but not in ways that detract from the point that its primary enforcement mechanism has never been intended to be through domestic judicial legal actions by individuals.

138 IACHR Advisory Opinion, supra note 100, at 46, ¶ 72 & at 47, ¶ 76 (emphasis in both original passages).
ambit. The IACHR attaches importance to this interpretive distinction as a result of its past jurisprudence on interpretation. But U.S. federal courts are not obliged to adopt the IACHR’s interpretative traditions, and are unlikely to do so.

It has also been noted by those finding against individual enforceability that a relatively small number of provisions of the VCCR address the position of individual nationals. In Jimenez-Nava, for example, the Fifth Circuit panel declared that “only one article out of 79 in the Treaty even arguably protects individual non-consular officials”. While one might quibble with the precision of this statement, it is certainly the case that the grand majority of the VCCR’s provisions do not touch on individual private nationals of either the sending or receiving State.

One could additionally note that the provenance of the VCCR, from the International Law Commission, as described earlier. During the time that the ILC was preparing drafts of treaties such as the VCCR, it was engaged primarily in the codification of the existing standards of international law and practice, through vehicles such as the 1958 Law of the Sea Conventions, the Vienna Convention on the Law of Treaties, and the Vienna Convention on Diplomatic Relations. It was plainly not a primary goal of the ILC at that point to draft treaties dealing with individual rights. Provisions such as Article 36 of the VCCR are included to help assure the effective operation of consular services, rather than establish a norm of human rights.

Perhaps the most powerful argument against an individual human rights interpretation has been offered by Christina Cerna, who has trenchantly suggested that if Article 36 really were meant to state personal human rights of the detainees, Article 36 would not make the satisfaction of those rights facultative with the sending State consular officers, as it plainly does. Article 36 leaves any and all actions in aid of sending State nationals to the discretion of sending State consular officers in the receiving State. It is difficult to see how this could be the case if Article 36 rights were personal human rights of detainees.

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139 243 F.3d at 196.

140 For example, Article 37 (requiring receiving State “to inform the consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity”) could be read to involve protection of individuals with relative ease. And the blanket description in Article 5 of all the “Consular Functions” normally carried on by consular posts includes “helping and assisting nationals, both individuals and bodies corporate, of the sending State” (sub-paragraph (e)), safeguarding the interests of nationals … in cases of succession mortis causa (sub-paragraph (g)), and similar matters.

On balance, it seems unlikely that U.S. Supreme Court would find that Article 36 states personal rights that are enforceable by individuals in U.S. courts. The Court seems especially disposed, after Medellín, to find such rights as a general matter, and the arguments against such rights in this context seem substantive and formidable. Whether a finding against such rights is the best resolution of the issue is not the point of this Article; this Article only argues what the most likely definitive result would be in the federal courts. Accordingly, the “individual rights” aspect of Article 36 constitutes a dramatic “dead end” in the Medellín Maze.

D. Enforcement through the Executive Branch as a Certain “Dead End”

In investigating possible escape routes from the Medellín Maze, this Article now posits the possibility that a U.S. President could order courts in the U.S. to insist on Article 36 compliance in their proceedings, or order police officials within the U.S. states to abide by the terms of Article 36 in their arrest procedures. Indeed, on the Medellín facts, President George W. Bush did in fact issue a Presidential Memorandum to his Attorney General. However, the memorandum there was directed, not to the general enforcement of Article 36, but rather specifically to the “reconsideration and review” mandated by the ICJ’s Avena judgment. Nevertheless, the Court’s treatment of that Presidential Memorandum, addressed specifically to the Avena judgment, is indicative of how the Court would treat any presidential attempt to enforced Article 36 generally. Any presidential mandate in this area is apt to pose another “Dead End” in the Medellín Maze.

Indeed, the Supreme Court’s Medellín opinion appears to be on reasonably firm ground when it refuses to give effect to Presidential Memorandum that President Bush did issue. The key provision of the Memorandum, as there quoted, reads:

“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.”

Even the text of the Memorandum hints at its own deficiency. The awkwardness of the locution, “the United States will discharge its obligations … by having State courts give effect to the decision” bespeaks its problematic character. A more direct, and less awkward, way of communicating the apparently intended idea would have been to say: “I, as President, shall assure that the United States discharges its obligations through my directive, which I hereby transmit, ordering State courts to give effect to the decision.”

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128 S. Ct. at 1355, citing the Application to Petition for Certiorari.
Of course, it is difficult to believe that any U.S. President would issue such a Memorandum. This is because simply to write the language is to remind the reader that the President does not have the authority to require State courts to do anything of the kind. The key realization here is the requirement that judicial operations maintain the required degree of constitutional independence. As far back as 1792, with its the publication of the rule in *Hayburn’s Case*, it has been clear Supreme Court doctrine that the federal executive has no power to intervene in federal judicial proceedings.

And the strictures of *Hayburn’s Case* apply to intervention in federal courts; any attempted interference in state courts should be all the more constitutionally problematic.

The use of the phrase “by having the State courts give effect” seeks to avoid language, such as the posited language above, that would draw attention to its own invalidity. But this is to no avail, because the resulting awkwardness clearly points to the linguistic feint that has been attempted.

In its *Medellín* opinion, the Supreme Court makes relatively short work of the suggestion that the President has the authority to effectuate an order of this kind. The Court does not rely on the broad separation-of-powers concerns noted above, but (in response to the arguments presented by the U.S.) addresses itself to the nature of the treaties involved. The Court refers to the U.N. Charter and the Optional Protocol to the VCCR, and suggests that giving effect to the President’s Memorandum would allow the President to “unilaterally convert[] a non-self-executing treaty into a self-executing one.” Presumably, if either the U.N. Charter or the Optional Protocol specifically gave executive officers in adhering countries the authority to influence court proceedings, and if those agreements were self-executing in the United States, the Court would have decided the question the other way. But neither such agreement contains such a specific grant of power, and the Court clearly views both agreements as non-self-executing.

The Court also considered the possibility that the President might have inherent constitutional foreign affairs power to issue a document such as his Memorandum to the Attorney General. The proponents of the Memorandum were probably hoping that it could be analogized to the Presidential claims-settlement orders in cases like *United

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143 2 U.S. (2Dall.) 408 (1792).


145 128 S. Ct. at 1368.
States v. Belmont\textsuperscript{146} and United States v. Pink.\textsuperscript{147} As the Court pointed out, those cases involved factual circumstances of a particular and distinct kind.\textsuperscript{148} In those situations, the President ordered that funds being held under State law be disposed of in certain ways pursuant to executive agreements he had concluded with the then-nascent Soviet Union. The relevant facts thus involved a particular kind of executive agreement that is lacking in the facts regarding Article 36 enforcement.

A view opposed to the Court’s perspective is advanced by Jordan Paust, who maintains that, “under the Constitution state judges cannot” ignore “the mandate of the Avena judgment or … avoid its implementation.” He accordingly concludes that “after the President’s directive, the state courts are left basically where they had been without his directive, i.e., with a minimal conforming discretion to choose appropriate means for review and reconsideration of convictions and sentences”\textsuperscript{149}. At very least, it would seem that under Professor Paust’s approach, the Presidential Memorandum should have been given effect. As noted earlier, however, any presidential directive to the conduct of proceedings in state courts would encounter substantial separation-of-powers and federalism issues.

Again, the focus of this Article at this point is not what the most correct view of such issues might be, but what perspective the Court is likely to take. Given that the Court was unwilling to give effect to the President’s Memorandum when it was designed to implement the UN Charter, Optional Protocol and ICJ Statute, it is unlikely to do so when the rule being enforced by a presidential order is Article 36 itself.

Indeed, it is quite clear that any attempt to use a federal executive order or directive, without any supporting treaty language or legislation, to enforce Article 36, would be a “Dead End” in the Medellín Maze.

E. Enforcement through Congress Quite Possibly an Additional “Dead End”

In its Medellín opinion, the Supreme Court repeatedly stresses that there is no binding U.S. federal legislation implementing ICJ judgments.\textsuperscript{150} These intimations by the

\textsuperscript{146} 301 U.S. 324 (1937).

\textsuperscript{147} 315 U.S. 203 (1942).

\textsuperscript{148} 128 S. Ct. at 1371 (“The claims-settlement cases involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.”).

\textsuperscript{149} Jordan J. Paust, Medellín, Avena, the Supremacy of Treaties, and the Relevant Executive Authority, 31 Suffolk Transnat’l L. Rev. 301 (2008), at 317.

\textsuperscript{150} E.g., 128 S.Ct. at 1357 (“Only ‘[i]f the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, (will) they have the force and effect of a legislative enactment.’ “)(quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888) (implying that
Court might seem to suggest that Congress could direct state courts to enforce ICJ judgments directly if it passed federal legislation to that effect.\textsuperscript{151} Furthermore, at a critical juncture the Court admits that “Congress could elect to give (ICJ judgments) wholesale effect … through implementing legislation, as it regularly has.”\textsuperscript{152} The Court thus might seem to take the position that Congress could require state courts to enforce ICJ judgments.

Given these statements by the Court, it is tempting to go further and suggest that, as far as the Court is concerned, Congress could also legislatively require state authorities to enforce Article 36. Activists and diplomatic and consular personnel might well prefer this approach, since it is more direct. Rather than simply authorizing state courts to implement ICJ judgments requiring Article 36 compliance, it would be more direct, less time-consuming and more efficient for Congress to require state governmental authorities, \textit{ab initio}, to inform detainees and notify consular officers, as specified in the treaty. Surely from an instrumental point of view, if Congress is able to do the one, efficiency and operational logic (at least) would indicate that it should be able to do the other.

However, it is by no means clear that potentially applicable Supreme Court precedents would allow the Congress to require that state law enforcement officials comply with Article 36. It is well-known that the Supreme Court has in recent years been embarking on a judicial program of “New Federalism”. This judicial program has sounded prominently in the area of not permitting the Federal Congress to direct the states to take certain actions traditionally considered within the scope of their sovereign prerogatives. A federal statute directed to requiring state officials to provide information to detainees and notices to consular officials, pursuant to Article 36, would be doing so in the context of their routine work in the enforcement of state criminal laws. A federal mandate that state criminal laws be enforced along certain lines, even if founded in international treaty obligations, could well run afoul of the doctrine of this “New Federalism”.

The most cogent case in this context is also one of the foundational cases of the “New Federalism”, \textit{Printz v. United States}.\textsuperscript{153} In \textit{Printz}, the Court invalidated provisions of a federal law that purported to require state law enforcement officers to administer the

\textsuperscript{151} See the parenthetical explanations in note 150, \textit{supra}.

\textsuperscript{152} 128 S.Ct. at 1365.

\textsuperscript{153} 521 U.S. 898 (1997).
provisions of federal gun-control legislation.\textsuperscript{154} The Court determined that “congressional action compelling state officers to execute federal laws is unconstitutional”\textsuperscript{155}, after considering its view of history, constitutional structure and earlier case law. This review induced the Court to believe that the Constitution established a system of “dual sovereignty”, in which such sovereignty retained by the States was, although “residuary”, still inviolable.\textsuperscript{156} Federal control of state officers was found to be generally impermissible, not merely for reasons of federalism, but also because it “would also have an effect upon … the separation and equilibration of powers between the three branches of the Federal Government itself.”\textsuperscript{157} Finally, the Court concluded that “the Federal Government may not compel the States to enact or administer a federal regulatory program.”\textsuperscript{158}

It certainly would be arguable that a federal statute requiring state law enforcement officers to abide by the terms of Article 36 would fall victim to the same doctrine that invalidated the gun-control act in \textit{Printz}. Such a statute could easily be seen as “congressional action compelling state officers to execute federal laws”. The fact that the federal laws were authorized by a treaty would not seem to be a terribly significant distinction from the \textit{Printz} facts. (Treaties are the “Law of the Land” under the Supremacy Clause,\textsuperscript{159} but so is the Commerce Clause of the Constitution, on which the statute in \textit{Printz} was founded.) States would seem to value their “dual sovereignty” and view it as no less “inviolable” when the federal law pertained to notifications and information requirements upon the detention of criminal defendants, than when it pertained to the control of handgun sales. To the extent that federal mandates regarding handgun sales restrictions could weaken Presidential power through the congressional allocation of duties to the states, such weakening could also be experienced through congressional allocation of treaty compliance duties power to the states. Finally, in requiring local state law enforcement officers to abide by Article 36, Congress would certainly be “compelling the States to administer a federal regulatory program.” Again, the fact that the program was based in treaty obligations would arguably be immaterial.

\textsuperscript{154} The federal statute was the Brady Handgun Violence Prevention Act, Pub. L. 103-150, 107 Stat. 1536.

\textsuperscript{155} 521 U.S. at 905 (“Petitioners here … contend that congressional action compelling state officers to execute federal laws is unconstitutional.”); 918 (“constitutional practice we have examined … tends to negate the existence of the congressional power asserted here”).

\textsuperscript{156} 521 U.S. at 918-19.

\textsuperscript{157} 521 U.S. at 922.

\textsuperscript{158} 521 U.S. at 933 (quoting \textit{New York v. United States}, 505 U.S. 144, 188 (1992)).

\textsuperscript{159} U.S. Constitution, 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 …”).
Craig Jackson has squarely addressed the potential effect of the New Federalism on fact patterns of the type at issue in *Medellin*. As a general matter, he asserts that “U.S. interests are best served by allowing the federal government to enter into important international obligations without the impediment of notions of federalism best applicable to domestic policy scenarios.” In that connection, he quite reasonably asserts that “the treaty power is not limited by the Tenth Amendment”, since “a power that is constantly subject to attack under the rubric of federalism” would run counter to the principles of *Missouri v. Holland*.

Jackson also considers the extent to which the ruling in *Printz* could impair Congressional enforcement of international-law obligations. He suggests that “the reasoning in *Printz* (in) its domestic setting does not set the stage for an anti-commandeering foreign policy principle”. This observation is based on the concern underlying part of the *Printz* rationale that Congressional devolution of federal enforcement authority to the States can have decentralizing effects. Jackson then asserts that in matters of foreign policy, the greater danger of decentralization comes from refusing Congressional ability to enforce international law, and devolving this power to state enforcement.

He also notes that the anti-commandeering principle that underlies much of the New Federalism can work in favor of federal enforcement of international law. He cogently observes that the anti-commandeering doctrine of cases like *New York v. United States* is based in part on the idea that “federal officials should take the heat for mandates forced upon state and local governments lest those government officials

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162 252 U.S. 416 (1920).


164 Craig Jackson, The Anti-Commandeering Doctrine and Foreign-Policy Federalism—The Missing Issue in Medellin v. Texas, 31 Suffolk Transnational Law Review 335, 368 (2008) (“Justice Scalia) argues that by decentralizing the presidential function of enforcing the laws of the United States, ‘the unity in the Executive Branch of the Federal Government would be shattered, and the power of the President would be subject to reduction, if Congress could . . . require state officials to execute its laws.’ “ In matters of foreign policy as in *Medellin*, however, the danger of decentralization is not in the disparate and uncoordinated implementation, but in the failure to implement foreign policy brought on by decentralization.”).

be blamed for a particular federally mandated policy”.  But since, “in foreign affairs there can be no mistaking the identity of the responsible government” (namely, the federal government), there is no basis for applying the anti-commandeering doctrine where Congress is legislating to enforce obligations under international law.

Notwithstanding these considerations, it is still quite possible that federal courts would apply the Printz rationale to a federal statute enforcing Article 36. To begin with, the anti-commandeering principle is inapposite in such a situation. That principle, as developed in New York v. United States, restrained the ability of Congress to require State legislatures to legislate in their own right. The full reference to “commandeering” in New York v. United States castigates the federal government for passing a federal law that “commandeers the legislative process of the States”. That is, for commandeering the State legislature by telling the State legislature how to legislate.

That would not be a necessary feature of a federal statute requiring State compliance with Article 36. Rather, for the federal statute to have effects that were most direct, and most responsive to requirements of international law, it would simply direct state law enforcement officers to comply with Article 36. This would not necessarily require state legislation. It would however, involve “pressing the state law enforcement officers into the federal service”, the type of action directly at issue in Printz, rather than New York v. United States. Accordingly, commandeering of the type

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168 505 U.S. 144, 175 (1992). The O’Connor opinion for the Court criticizes the so-called “take title” feature of the Low-Level Radioactive Waste Policy Amendments Act of 1985, because the two provisions of the Act involved with this issue would have been either “no different than a congressionally compelled subsidy from state governments to radioactive waste producers” or “indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents”. The assumption by the State of either the subsidy or the liabilities would have involved legislative action by the State legislature. Accordingly, Justice O’Connor observes, for the Court, that: “Standing alone, this provision … would ‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments.”


170 Printz, 520 U.S. at 905 (“Petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional.”).
described in *New York v. United States* is not at issue here, whereas the *Printz* rationale is.

Regarding a concern about decentralization, to the extent *Printz* serves as a means to reinforce centralization, it is a centralization that is content to prevent the Federal Congress from imposing uniform behavioral standards on law enforcement authorities in an area of substantial national concern, handgun sales. Similarly, the Medellín result allows different States throughout the country to allow for Article 36 relief, or not, based on individuated judicial procedural rules. If the *Printz* concern for centralization, such as it is, requires invalidation of Congressional legislation imposing uniform police behavior in handgun control, it is difficult to see why it might not also require invalidation of Congressional legislation imposing uniform police behavior prescribed by Article 36.

It might be asserted the international law stands on a different constitutional footing than the commerce clause. That is, it might be asserted that a stronger degree of uniform behavior across States is necessary to implement the former than the latter. However, proponents of the New Federalism have been creative in attempting to debunk the necessity for federally imposed uniformity in International Law. Most recently, Robert Adieh has attempted to argue against federal hegemony in enforcing international law, and has favored instead giving a greater voice to the States, putting faith in the ability of the States to engage in “coordination” vis-à-vis external relations.\(^{171}\) Before him, Curtis Bradley and Jack Goldsmith argued that Customary International Law, previously thought to be safely within the federal purview, should actually be viewed as an element of State law.\(^{172}\) And before that, David Golove alerted us to the revisionist types of views that have attended continued examination of *Missouri v. Holland*.\(^{173}\) The views involved in these kinds of observations may not yet have been specifically approved by the Supreme Court. But in the atmosphere of the New Federalism and the *Medellín* decision, they need to be taken quite seriously.

It can by no means be assured that federal courts will view the international law context of Article 36 as deserving any more federally imposed uniformity than the gun-safety context of *Printz*. Accordingly, there is an appreciable chance that direct federal legislation requiring the States to comply with Article 36 will be yet another “Dead End” in the Medellín Maze.

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Of course, the Supreme Court in *Avena* leaves open the possibility that federal legislation could enforce the *Avena* judgment itself, rather than Article 36 more generally. In other words, the Supreme Court might view more favorably a federal statute giving an ICJ judgment “wholesale effect”. That would be a different proposition than a general Article 36 enforcement statute, and would be a good deal less useful. For one thing, the *Avena* judgment by its terms only applies to the detainees and U.S. States named within it. And furthermore, it is far less useful, and probably fatally impractical for defendants, to require the obtaining of an ICJ judgment every time Article 36 is violated. In order for a federal statute to afford meaningful vindication of Article 36 rights, it would probably need to address the state law enforcement authorities directly. And that, as just noted, is a “Dead End.”

**F. Enforcement by International Tribunals as another “Dead End”**

The discussion so far has demonstrated that there are several “Dead Ends” to federal judicial enforcement of Article 36 rights. We have seen that U.S. courts are probably disposed to find that Article 36 protections cannot be enforced judicially by individuals, that procedural default rules present a bar to tardy claims by detainees, that unilateral action by the Executive Branch to mandate such protections are invalid, and possibly even that the role of Congress in enforcing such protections can be limited.

In the face of these frustrations, one temptation is to seek enforcement of Article 36 protections in international tribunals. Of course, the primary holding of the Supreme Court’s *Medellín* decision is that the ICJ’s *Avena* judgment, attempting to enforce Article 36, does not constitute “directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.” Language within that opinion is even more sweeping; at one point the Court heavily suggests that, as a general proposition, “ICJ judgments were not meant to be enforceable in domestic courts.” The Court’s opinion in *Sanchez-Llamas* also broadly declared that: “Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.”

The Court’s chief reason for so concluding is that the view that “ICJ decisions are automatically enforceable as domestic law is fatally undermined by the enforcement structure established by Article 94” of the UN Charter. The Court also finds in the text

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174 128 S. Ct. at 1365.

175 128 S.Ct. at 1353.

176 128 S.Ct. at 1359.

177 548 U.S. at 354.

178 128 S.Ct. at 1360. Article 94(1) of the UN Charter imposes the requirement that: “Each Member of the United Nations undertakes to comply with the decision of the International Court
of the ICJ Statute evidence it considers persuasive for the proposition that “the ICJ’s Avena judgment does not automatically constitute federal law judicially enforceable in United States courts.” These considerations also primarily motivated the Court’s statements on this subject in Sanchez-Llamas.

The Supreme Court’s rejection of the domestic judicial enforceability of ICJ judgments, by its terms, only applies to ICJ judgments, rather than the judgments of international tribunals generally. As just noted, the Court’s rationale depends specifically on the ICJ provisions of the UN Charter and the ICJ Statute. However, the Supreme Court’s perspective is also fundamentally based on certain foundational statements in Sanchez-Llamas. In that decision, the Court based its analysis in part on the observation that, where treaties are concerned, “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.”

In terms used by Margaret McGuinness, the Court’s perspective on the direct application of ICJ judgments could be called “internal/constitutional”. As such, in the Court’s view, it derives its judicial authority from the Federal Constitution and its prescribed role in the constitutional framework. This is consistent with an entirely “Dualist” notion of the relations between domestic law and international law. If the

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179 128 S.Ct. at 1360. The Court has two basic reasons for this: the Statute’s statement that the ICJ “can hear disputes only between nations, not individuals” (id., citing Article 34(1) of the ICJ Statute); and the Statute’s insistence that “the decision of the (ICJ) has no binding force except between the parties and in respect of that particular case” (id., citing Article 59 of the ICJ Statute).

180 548 U.S. at 354-55 (citing Articles 34 & 59 of the ICJ Statute and Article 94(1) of the UN Charter).

181 548 U.S. at 353-54 (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)).


183 Margaret E. McGuinness, Three Narratives of Medellin v. Texas, 31 Suffolk Transnational Law Review 227, 234 (2008) (“This narrative is consistent with the doctrine of dualism, which posits that international law is not superior to national law, but rather remains outside and parallel to the Constitution.”).
Court adopted what theorists call a “Monist” view of that relationship.\textsuperscript{184} the Court might have viewed ICJ decisions differently in Sanchez-Llamas and Medellin. However, the Dualist perspective seems firmly entrenched on the Court.\textsuperscript{185}

Paul Stephan has presented an argument regarding international tribunals generally.\textsuperscript{186} He considers whether international comity might be used as a rationale supporting the domestic judicial enforcement of rulings by treaty-based international tribunals. He maintains that “dynamic reciprocity characterizes interstate relations”, and that this dynamism is the “core premise” of the comity concept.\textsuperscript{187} He defines this dynamism as being composed of reciprocity, non-recognition (of foreign judgments that do not reciprocally recognize U.S. judgments), dynamic interaction, and discrimination (allowing respect for judgments from cooperative state and disallowing it for judgments from uncooperative states).\textsuperscript{188} In his view, “states lack the capacity to respond reciprocally to the behavior of international dispute settlement bodies), and “these bodies also find it hard to respond reciprocally to state behavior”.\textsuperscript{189} Accordingly, “whatever else may justify the willingness of U.S. judges to enforce the decisions of international dispute settlement bodies, comity cannot do the job.” \textsuperscript{190}

In view of the Dualism described by Professor McGuinness, as more than amply demonstrated by Sanchez-Llamas and Medellin, the Court is extremely unlikely to give effect to interpretations of Article 36 offered by supranational tribunals, even apart from the ICJ. Professor Stephan has demonstrated that concepts of comity would also not be useful in establishing a basis for giving such effect. Accordingly, the prospect of using international tribunals as a means of enforcing Article 36 rights in U.S. courts is also clearly a “Dead End”.

\textsuperscript{184} A sample definition of the Monist perspective is offered by Malcolm Shaw in his discussion of some of the theories of Hans Kelsen. Malcolm M. Shaw, International Law 50 (5\textsuperscript{th} ed. 2003)(“International law and municipal law are not two separate systems but one interlocking structure and the former is supreme. Municipal law finds its ultimate justification in the rules of international law by a process of delegation within one universal normative system.”).

\textsuperscript{185} Shaw, for example, defines dualism in the context of his discussion of positivism. In his view, dualism “stresses that the rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other.”. Malcolm M. Shaw, International Law 122 (5\textsuperscript{th} ed. 2003).

\textsuperscript{186} Paul B. Stephan, Open Doors, 13 Lewis & Clark L. Rev. 11 (2009).

\textsuperscript{187} Stephan, supra note 186, at 16.

\textsuperscript{188} Stephan, supra note 186, at 17-18.

\textsuperscript{189} Stephan, supra note 186, at 20.

\textsuperscript{190} Stephan, supra note 186, at 20.
G. Corrective Injunction Sought by Sending State an 11th Amendment “Dead End”

It was described earlier how several lower courts have determined that Article 36 and the VCCR offer no rights that individuals can enforce directly in U.S. courts. It was also noted earlier that the U.S. Supreme Court demurred on the issue of individual enforcement in Medellín. Finally, it was also earlier argued that the Court is unlikely to be receptive to the suggestion of direct individual enforcement at such time that it decides to address the issue.

One pattern of litigation that circumvents the question of direct individual domestic judicial enforcement involves actions commenced by the detainee’s sending State, rather than the detainee individually. If the sending State challenges the violation of a detainee’s Article 36 rights in a U.S. court, then the “real party” to the VCCR, the State party to the treaty, is the complaining party in court. Such a challenge by a sovereign state can go forward consistent with the idea that sovereign states, rather than private individuals, are parties to treaties and are the primary entities who can complain about their violation. For such a procedure to go forward, the treaty involved must be found to be self-executing, so that its enforceability in domestic courts can be countenanced. But if the VCCR is held to be self-executing, at least as an initial matter, the way is open for Article 36 to be enforced by sovereign states, free of the preclusion of individual judicial relief.

This pattern was followed in at least one line of Article 36 cases: the lower-court federal litigation in the Breard case in the late 1990’s. Initially, Breard himself, through his counsel, pursued relief in federal court on his own behalf, but the Federal District Court for the Eastern District of Virginia found against him in 1996. Breard appealed that ruling to the Fourth Circuit Court of Appeals, which affirmed the result against Breard in 1998. However, back in 1996, the Republic of Paraguay commenced a separate action in the same district court, with itself as the complaining party.

In this 1996 District Court action, Paraguay asked the court to: (1) declare that the Virginia state authorities violated the VCCR by failing to notify Paraguayan consular officials of Breard’s arrest; (2) declare that those authorities continued to violate the VCCR by failing to afford Paraguayan officials a meaningful opportunity to give Breard assistance during the proceedings against him; (3) declare Breard’s conviction void; (4) enjoin the Virginia authorities from taking any action based on the conviction and declare that any further action based on the conviction would be a continuing violation of the VCCR; and (5) grant an injunction vacating Breard’s conviction and

directing the Virginia authorities to abide by the VCCR during any future proceedings against Breard.\footnote{Paraguay v. Allen, 949 F. Supp. 1269, 1272 (E.D. Va. 1996). Paraguay also complained about violations of a Treaty of Friendship, Commerce and Navigation between it and the U.S., but the court’s treatment of that treaty is identical to its treatment of the VCCR.}

In pursuing such relief, Paraguay was acting both in Breard’s interest and its own interest. As a sovereign party to the VCCR, it has an independent interest in assuring compliance with the terms of the treaty regarding its own nationals and consular officials. This interest has importance apart from the fate of any one particular national in any particular case. As long as the court were to view the VCCR as self-executing, and therefore enforceable in domestic court proceedings, Paraguay would be in a position to advance its interests under the VCCR as a matter distinct from the interests of Breard in his individual case.

In Paraguay’s action, both Paraguay and the Virginia authorities viewed the VCCR as self-executing, and the District Court did not dispute that view.\footnote{949 F. Supp. at 1274 (“The parties agree that the (VCCR is) ‘self-executing’ under th(e) definition” relating to “a treaty that does not require implementing legislation before becoming federal law.”).} However, the District Court nevertheless dismissed Paraguay’s claims for relief for failure of subject-matter jurisdiction. The primary consideration precluding subject matter jurisdiction was Virginia’s sovereign immunity under the 11th Amendment.

The District Court noted that the 11th Amendment bars suits by a foreign government against a state government or its officers in federal court.\footnote{949 F. Supp. at 1272. By its terms, the 11th Amendment only denies federal courts jurisdiction over actions against a state by “Citizens of another State or by Citizens or Subjects of any Foreign State.” However, under Principality of Monaco v. Mississippi, 292 U.S. 313 (1934), the Supreme Court expanded state immunity under the 11th Amendment to also apply to suits by foreign sovereign states. \textit{Id}.} However, the court also noted a well-known exception to 11th Amendment restrictions, under the early 20th-century case of \textit{Ex Parte Young}.\footnote{209 U.S. 123 (1908).} Under the rule of that case, a party at risk of suffering a violation of federally protected rights may seek to enjoin the offending state officers under some circumstances.\footnote{949 F. Supp. at 1272.} However, even under \textit{Ex Parte Young}, intervening case law has required that two criteria must be satisfied to take advantage of the exception. First, the plaintiff must show that it seeks a remedy for a continuing
violation of federal law. Second, the plaintiff must show that the relief requested is prospective.\textsuperscript{198}

The Virginia Federal District Court determined that the circumstances in Breard’s case did not satisfy the first of these two criteria. The court stated that Paraguay had not alleged that the Virginia authorities were at that time impairing Paraguay’s access to Breard.\textsuperscript{199} Indeed, the court emphasized that Paraguay had helped Breard with his individual habeas action in the very same court.\textsuperscript{200}

Of course, all this was after the state authorities had initially failed to inform him of his Article 36 rights in a timely manner. But that failure was not a continuing violation for 11\textsuperscript{th} Amendment purposes. The District Court stated that it was “disenchanted” with Virginia’s failure to abide by the VCCR, and indicated that the results of Virginia’s failure might have resulted in tragic consequences for Breard.\textsuperscript{201} However, the court emphasized that this result was “still a consequence of the violation and not a continuing wrong.” Allowing Paraguay its requested relief in such circumstances would have accorded it “retroactive relief”,\textsuperscript{203} which is precisely what the \textit{Ex Parte Young} exceptions, as progressively interpreted, preclude.

A panel of the Fourth Circuit, on appeal,\textsuperscript{204} affirmed the District Court on its 11\textsuperscript{th} Amendment analysis.\textsuperscript{205} The Fourth Circuit emphasized its determination that a particular Supreme Court precedent urged by Paraguay, \textit{Milliken v. Bradley},\textsuperscript{206} was unavailing. In that 1977 Supreme Court case, federal injunctive relief was allowed for “ongoing consequences of past violations.”\textsuperscript{207} The Fourth Circuit panel in the Paraguay

\textsuperscript{198} 949 F. Supp. at 1272 (citing \textit{Green v. Mounsour}, 474 U.S. 64 (1986)).

\textsuperscript{199} 949 F. Supp. at 1272 (“There is no allegation that defendants refuse to allow plaintiffs to give Mr. Breard legal assistance.”).

\textsuperscript{200} 949 F. Supp. at 1272.

\textsuperscript{201} 949 F. Supp. at 1273.

\textsuperscript{202} 949 F. Supp. at 1273.

\textsuperscript{203} 949 F. Supp. at 1273.

\textsuperscript{204} Paraguay v. Allen, 134 F.3\textsuperscript{rd} 622 (4th Cir. 1998) (“We agree ... that the violation alleged here is not an ongoing one (and) that the essential relief sought is not prospective.”).

\textsuperscript{205} The District Court had also found lack of subject matter jurisdiction because “(w)ith the exception of federal habeas review, district courts do not have jurisdiction to review final decisions of a state court.” 949 F. Supp. at 1273. However, the Fourth Circuit panel explicitly declined to address this issue. 134 F.3\textsuperscript{rd} at 626 & n.4.

\textsuperscript{206} 433 U.S. 267.
litigation, however, emphasized that in the 1977 Milliken case, the violation involved a federal school desegregation order issued against state officials who “were in violation of federal law at the precise moment when the case was filed.”

The Supreme Court reviewed both the appeal of Breard’s individual habeas action and the appeal of Paraguay’s action, on petitions of certiorari. The Court denied both petitions. As discussed earlier, the Court denied Breard’s individual habeas petition due to procedural default. Like the Fourth Circuit panel, the Supreme Court viewed the 11th Amendment as a dispositive bar to the grant of Paraguay’s requested relief. The Court acknowledged Paraguay’s assertion that the Breard facts were “within an exemption dealing with continuing consequences of past violations of federal rights”, but dismissed this argument, concluding that the “failure to notify the Paraguayan consul occurred long ago and has no continuing effect.”

Accordingly, even though an injunction pursued by the detainees’ sovereign sending State might avoid the question of whether individuals can assert Article 36 rights in U.S. courts, when such an injunction was sought in a thoroughly litigated criminal case going all the way to the Supreme Court, the 11th Amendment blocked its use. In that situation, the sending State was seeking an injunction for a criminal case that had already been taken through final state appeal, and when consular assistance was no longer being precluded. It is foreseeable that in most such scenarios, the sending-State consul would also, at some post-conviction phase of the proceedings, become involved. Accordingly, any future request by a sending State for a detainee in a similar position would, through the 11th Amendment, encounter yet another “Dead End” in the Medellín Maze.

H. Escape from the Maze: A Sending-State Article 36 Prospective Injunction

207 134 F.3rd at 628, citing Milliken, 433 U.S. at
208 134 F.3rd at 628.
210 523 U.S. at 371.
211 523 U.S. at 377 (“The Eleventh Amendment provides a separate reason why Paraguay’s suit might not succeed.”).
212 523 U.S. at 377.
213 523 U.S. at 378. The Supreme Court also added that “neither the text nor the history of the (VCCR) clearly provides a foreign nation a private right of action in United States’ (sic) courts to set aside a criminal conviction and sentence for violation of consular notification provisions.” Id.
This Article suggests a potential escape from the Medellín Maze. The point of this suggestion is not to persuade actors and observers who are hostile to the interests of criminal detainees caught in the Maze that such actors are compelled to behave in new ways regarding such detainees. Rather, the point of the suggestion is to offer a means of release from the Maze that might be deployed by more sympathetic actors and observers, while still maintaining doctrinal consistency with the elements of the Maze that are already in place.

This Article suggests that a sovereign state whose national has been detained by U.S. authorities in violation of the detainee’s Article 36 rights should be able to secure from a U.S. court of applicable jurisdiction an injunction. The injunction (an “Article 36 injunction”) would be granted to the foreign state itself, and would apply prospectively to any of its nationals held by the authorities in that U.S. jurisdiction. The injunction would be advancing the interests of the sovereign state under the VCCR, rather than the interests of the initial detainee. Indeed, the injunction would not be directed to the initial detainee at all, because any relief in that direction would be retrospective. But upon that first unlawful detention, the foreign sovereign’s interests under the VCCR would be so impaired, and the VCCR is a legal instrument of such a particular nature, that the VCCR violation would be continuous and ongoing from the moment of its commencement. Accordingly, a prospective Article 36 injunction, granted at the request of the foreign sovereign sending state to secure future compliance by the U.S. authorities regarding future detainees, should issue.

The Supreme Court’s position that state procedural default rules survive direct challenge from the ICJ, and probably other international tribunals, is unlikely to be weakened. Accordingly, tardy detainees, even those on death row, are (perhaps tragically) unlikely to be able to escape the Medellín Maze. Even those detainees who timely complain about Article 36 violations may also be caught in a “Dead End”, to the extent that Article 36 is held not to provide rights that can be judicially enforced by individuals. Direct enforcement by international tribunals encounters an additional Dead End, as does is direct enforcement by the U.S. Executive. Even a federal statute directly requiring Article 36 compliance may encounter a Dead End, through the “New Federalism”. Finally, the 11th Amendment Dead End will often bar a foreign state from obtaining an injunction on behalf of previously detained individuals. An Article 36 Injunction, of the type herein suggested, avoids all these pitfalls.

III. The Consular Relationship and the VCCR

The purpose of the VCCR is to set up a permanent, ongoing, continuing relationship. Whenever there is substantial non-compliance with an important provision of the VCCR, that relationship is compromised and impaired. Whenever a particular party decides to not comply with the VCCR, the effects of that non-compliance reduce the degree of trust experienced by the other party. This increases the probability that the other party will in turn not comply with one of its obligations at a time in the foreseeable future. At very least, the quality of the mutual consular
relationship will be adversely affected by the initial non-compliance, and further consular relations of various types would well be affected.

When any state decides to materially violate the VCCR, the treaty is of course violated immediately upon any specific incident of violation. However, any material violation of the VCCR also begins a situation of continuing and ongoing non-compliance with the treaty’s object and purpose. This is because the violation substantially impairs the relationship that is the sole reason for the treaty’s existence.

In the context of Article 36 of the VCCR, this period of continuous and ongoing non-compliance survives as a matter of the total relationship between the treaty parties. Accordingly, the period of continuing and ongoing non-compliance continues, even if any particular sending State begins consulting with any one of its nationals detained in any particular receiving State. The consultations may address the needs of an individual detainee, but they do not ameliorate the impairment of the consular relationship that is the treaty’s reason for being.

A. The Need for Constant Co-Operation and Consent

The title of the Convention is the “Vienna Convention on Consular Relations”. The use of the word, “Relations” in the very title connotes the significance of the fact that an ongoing, continuous relationship is being established. The focus of the Convention is on the maintenance of the ongoing consular relationship. This is irrespective of whether there are any diplomatic relations (Art. 2(3)), whether the premises are owned, leased or inhabited by other means (Art. 1(1)(j) contemplates a variety of modes of habitation), and who the consular officials are from time to time (Art. 10 clearly contemplates changes in identity of officials).

1. Consular Activities

Throughout the Convention there are numerous bases on which mutual consent is explicitly required between the sending and receiving state. These make possible the day-to-day activities of consular officials and employees. Mutual consent to various actions must be reached on a regular basis throughout the conduct of consular relations.

Mutual consent is, of course, required for the establishment of consular relations to begin with (Art. 2(1)). The location of the seat of the consular post, its classification (career or honorary), and the limits of the consular district, must all be consented to as an initial matter by the receiving State (Art. 4(2)), and any changes to any of these arrangements must also be consented to (Art. 4(3)).

The receiving State’s consent is required for a consular officer to exercise his functions outside his or her consular district (Art. 6). More generally, any receiving State has virtually absolute discretion as to whether to grant an exequatur to any person whom the sending state has appointed as the head of a consular post. Any such
exequatur must be granted before the head of any consular post can exercise consular functions (Art. 12).

Consent of receiving State is required for the appointment of an acting head of post if the appointee is neither already a diplomatic agent nor a consular officer (Art. 15(2)). A receiving State’s consent is required if a consular officer is to perform diplomatic acts in the absence of a diplomatic mission in the receiving state (Art. 17(1)). Consent of a receiving State is also required if the same person is to serve as a consular officer for two or more states (Art. 18).

The size of the consular staff of any sending State depends, within the limits stated in the Convention, on the agreement of the receiving State (Art. 20). The receiving State has absolute discretion over whether a sending State may appoint consular officers who are nationals of the receiving State (Art. 22(2)), and receiving States may also reserve rights of consent for appointments of third-state nationals (Art. 22(3)).

The capacity of a receiving State to declare any consular officer persona non grata can be exercised in its sole discretion, without any obligation to provide reasons (Art. 23). Upon severance of consular relations, the sending State may entrust the consular premises and the protection of its interests to a third State, but only if the third State is acceptable to the receiving State (Art. 27(1)).

2. Consular Functions

Article 5 of the VCCR consists of a long list of specific functions that consuls are expected to perform. Most of these functions cannot be adequately performed unless there is more or less constant cooperation or consent from the receiving state.

In most general terms, the consular function is the protection of the interests of the Sending state and its nationals within the receiving State (Art. 5(a)). Article 5 describes certain other consular functions in general terms. For example, one function that is describe only generally is the ascertainment “by all lawful means” of conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, and the delivery of reports thereon to the government of the sending State (Art. 5(c)). Another general function is the transmittal of judicial and other official documents, commissions and letters to the courts of the sending State, in any “manner compatible with the laws and regulations of the receiving State” (Art. 5(j)).

Article 5 is also more precise in providing specific examples of particular consular functions. For example, consular staff may be expected to safeguard the interests of nationals in cases of succession mortis causa in the receiving State (for example, getting the body of a deceased national back to the sending state, or dealing with it in a manner consistent with the wishes of family or relations back in the sending state) (Art. 5(g)).
Also, consular staffs may be called upon to safeguard the interests of minors who are nationals of the sending state (Art. 5(h)). A consular staff may exercise rights of supervision and inspection in respect of vessels having the nationality of, and aircraft registered in, the sending State (Art. 5(k)). Consular staff members may also assist such vessels and aircraft and their crews (Art. (l)).

3. Power of Receiving States over Consular Activities and Functions

Any particular receiving State can substantially impair any of these activities and functions of any sending State, through any number of inconvenient laws or official acts. Many such laws and acts may well not violate the terms of the VCCR. So the execution of consular activities, and the fulfillment of consular functions, depend on the continued and constant cooperation of the receiving State.

More particularly, the ability of any sending State to fulfill its functions under the VCCR in any other State can reciprocally depend on the respect being experienced by the receiving State at its own posts in the sending State. If any receiving State is not experiencing suitable treatment at the consulates wherein it acts as a sending State, the relationships required for the functioning of the VCCR are jeopardized.

B. Mandatory Duties under the VCCR

Many of the VCCR provisions outlined above allow one State (usually the receiving State) to exercise discretionary consent in the conduct of consular relations. At the same time, the VCCR provides for many other aspects of consular relations that are mandatory. The exercise of discretion, again by the receiving State, so as to deny consent to any proposal from the other state (again, usually the sending State), does not occasion a violation of the VCCR. But noncompliance with one of the mandatory provisions would occasion such a violation.

Obviously, a pattern and practice of violation of one or more of the provisions of the VCCR by either State in a given consular relationship could certainly affect the willingness of the other to assent to consular proposals of the former.

For example, if a particular receiving State were to engage in a pattern and practice of violating one or more provisions of the VCCR with respect to a particular sending State in their mutual consular relationship, that sending State could be justifiably angry or offended by that receiving state’s behavior. That sending State could be counted on to consider negative discretionary determinations in its capacity as a receiving State when the violating state, acting as a sending State, makes consular proposals in its capacity as a sending State.

Most of the obligatory requirements of the VCCR relate to consular privileges and immunities. Of these, there are 2 types: those that relate to the consular post itself and those that relate to the officers and members of the post.
1. Privileges and Immunities Relating to the Consular Post

Article 28 requires the receiving State to accord “full facilities for the performance of the functions of the consular post.” Here, mostly mundane, yet crucial examples come to mind, such as the provision of access to public utilities and public services (water, electricity, sewage, and police and fire protection).

But most critical are the essential dignitary and practical privileges of consular relations. These are of utmost value to any sending State, and their procurement and guarantee would necessarily be among the prime reasons for any State to enter into the VCCR. These include the inviolability of the Consular Premises (Art. 31), of the consular archives and documents (Art. 33), and of official correspondence (Art. 35(2)). They also include the obligation of the receiving State to ensure freedom of movement and travel to all members of the consular post. (Art. 34).

Additional examples are the obligation of the receiving state to “permit and protect freedom of communication on the part of the consular post for all official purposes” (Art. 35(1)), and the consular exemption from taxation of the consular premises (Art. 32).

2. Privileges and Immunities Relating to Consular Officers and Members of the Post.

Article 40 requires the receiving State to provide protection of consular officers from “any attack on their person, freedom or dignity” (Art. 40). Consular officers may not be held liable for arrest or pre-trial detention, nor committed to prison, in either case except in the case of a grave crime (Art. 41(1) & (2)). (This differs from the Diplomatic Relations Convention, which says that “a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State” (VCDR Art. 31(1)).)

The VCCR goes on to specify that “(i) if criminal proceedings are instituted against a consular officer, he must appear before the competent authorities” (Art. 41(3)), although this provision does then restrict the authorities’ discretion over the treatment of the officer. This is one of the few obligations on the part of sending State personnel in the VCCR.

Members of a consular post can generally be asked to give evidence, but if they refuse to do so, no coercive measure or penalty may be applied (Art. 44(1)). (This also differs from the Diplomatic Relations Convention, which provides that “(a) diplomatic agent is not obliged to give evidence as a witness” (VCDR Art. 31(2)).)

Consular officers & employees are generally immune from the jurisdiction of judicial or administrative authorities in respect of acts performed in the exercise of their consular functions (Art. 43(1). They are not immune regarding civil actions arising out of a contract concluded in an individual and personal capacity, or civil actions by third
parties for damages arising from an accident in the receiving state caused by a
vehicle, vessel or aircraft (Art. 43(2)). (The exceptions to immunity from jurisdiction for
diplomats under the Diplomatic Relations Convention is more limited, relating to real
property actions, succession in deceased’s estates, or professional or commercial
activity outside official duties (VCDR Art. 31(1)(a)-(c)).) There are additional consular
immunities regarding exemption from requirements for the registration of aliens, the
procurement of work permits, and the satisfaction of social security obligations (Arts. 46,
47 & 48).

C. Uniqueness of VCCR and VCDR

It might be observed that every treaty entered into between or among States
involves a relationship. Along these lines, it might be objected that there is nothing
unusual or special about the relationships created by the VCCR.

It is certainly true that most every treaty involves relationships. But to simply assert
the truth of that statement is to miss most of the point that is being made here. For most
multilateral treaties, even though the multilateral arrangement produces a relationship,
and even though the relationships are of a very high value, the primary focus of the
treaty itself, and its primary reason for being, are not the creation and maintenance of
the relationship. Their focus and reason for being are the policy concerns that are the
subject matter of the treaty.

For example, the United Nations Convention on the Law of the Sea
("UNCLOS")214 has as its primary focus “the desire to settle, in a spirit of mutual
understanding and cooperation, all issues relating to the law of the sea”.215 The
International Covenant on Civil and Political Rights ("ICCPR")216 is designed to protect
political and civil rights. The Rome Statute for the International Criminal Court217 sets
forth the beginnings of a regime of permanent and wide-ranging international criminal
law enforcement. These multilateral treaties may create relationships among states
parties, but the relationship is not the reason for being of the treaty; policy-based
strategies for protecting the sea and civil rights are their reasons for being. Even the
foundational U.N. Charter, although it certainly produces very valuable and critical
relationships, is primarily concerned with setting up the modern structure of international
governance, rather than the maintenance of those relationships, per se.

Not so for the VCCR and the VCDR. For these two treaties, there is no other
policy-based reason for being. Their only real reasons for being are the creation and

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215 Id., first preamble paragraph.


maintenance of the relationships they govern. These are the only two multilateral treaties for which this is the case. For every other multilateral treaty, the relationship is incidental to the purpose of the treaty; it is not the purpose itself.

Similarly, bilateral treaties also create relationships, but they are also founded on policy-based concerns. The reason for extradition treaties is to assist in the execution of criminal justice in the signatory countries; the reason for border demarcation treaties is to quiet sovereign title disputes between the two countries. As with multilateral treaties, the relationship is incidental to the purpose of the treaty; it is not the purpose itself.

IV. Consular Relations and the 11th Amendment

Obtaining an Article 36 Injunction is one way out of the Medellín Maze for a sovereign sending State concerned about future VCCR compliance in the United States. However, injunctions against U.S. state authorities can be problematic to obtain, due to the 11th Amendment. This is no less the case for injunctions sought by foreign sovereign States than it is for injunctions sought by private persons. Indeed, one of the more recent U.S. Supreme Court cases interpreting and enforcing the 11th Amendment is the 1998 Breard decision, regarding relief sought by Paraguay against Virginia authorities.

But the limitations imposed by the Breard opinion should not restrict the availability of an Article 36 Injunction. The injunction that Paraguay sought in Breard was sought in protection of Breard himself, as a particular criminal defendant whose conviction in state court was already final. An Article 36 Injunction, as proposed in this Article, would be directed not to any particular defendant, but rather to continuous and ongoing compliance with the VCCR regarding other detainees. Accordingly, neither Breard specifically nor the 11th Amendment in general is a bar to obtaining an Article 36 Injunction as herein proposed.

A. The Breard Decision and the 11th Amendment

The Supreme Court’s majority opinion in Breard takes the form of a per curiam denial of petitions for certiorari and habeas corpus. It is only 12 paragraphs long. The ninth paragraph of the opinion addresses the 11th Amendment.

See also McGuinness, supra note 16, at 244 ("The consular protection function is central to the smooth functioning of the international system.").

523 U.S. at 371, see discussion in text at notes 209-213, supra.

These are the two principal petitions denied in Breard. The Court also denies a motion for leave to file a bill of complaint and stay applications filed by Breard and Paraguay. 523 U.S. at 378-79.
This ninth paragraph is based on two main assertions. The first assertion states the Court’s doubt, as a matter of the VCCR text and history, as to whether the VCCR “provides a foreign nation a private right of action in U.S. courts to set aside a criminal conviction and sentence” for a VCCR violation. This assertion should be viewed as based in the concern for the finality of state judgments. The assertion clearly evinces the Court’s desire to respect the “criminal conviction and sentence” of the Virginia State courts, and views as potentially undesirable Paraguay’s wish to “set aside” this particular sentence and conviction. This assertion should not be read as having any effect on the status of the VCCR as a self-executing treaty in general, because the assertion is limited in its content to Paraguay’s desire to “set aside a criminal conviction and sentence.”

The second assertion sets forth the 11th Amendment as a bar to Paraguay’s requested relief regarding its national, Breard. This assertion is based on the 11th Amendment itself, rather than any inherent limitations stemming from the text and history of the VCCR, rooted in concerns for finality state court judgments. In this assertion, the Court describes the basic concerns underlying the Amendment and its principal effects, then observes that Virginia’s “failure to notify the Paraguayan Consul occurred long ago and has no continuing effect”. Accordingly, the impact of Paraguay’s requested relief would have been retrospective, and not within 11th Amendment exceptions allowing for injunctions against “continuing consequences of past violations of federal rights.” The requested relief was thus barred under the 11th Amendment.

Accordingly, both assertions constituting Breard’s treatment of the 11th Amendment have application only to actions against U.S. States regarding detainees whose rights have already been violated under the VCCR, and in many cases whose convictions may already be final. The two assertions deal with retrospective relief, not relief against violations that are continuous and ongoing. The 11th Amendment analysis in Breard thus has no necessary application to an Article 36 injunction, which would enjoin a State to comply with Article 36 notice requirements in the future.

B. The VCCR as a Self-Executing Treaty

Because the Supreme Court has not resolved the question, it is still technically uncertain whether the VCCR is a self-executing treaty. However, at this point the better view is that the VCCR is self-executing. As such, there would be no general impediment to its enforcement in U.S. courts by other parties to the treaty. Since 2005, majority decisions of at least three U.S. Circuit Courts of Appeals have found the VCCR to be

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221  523 U.S. at 377.
222  523 U.S. at 378.
223  523 U.S. at 378.
self-executing. As noted above, some U.S. courts have held that the VCCR is not directly enforceable in U.S. courts by private individuals. But that does not reflect on its character as a self-executing treaty.

Status as a self-executing treaty is a separate matter from status as a treaty that allows individual judicial enforcement. The major problem in this area of the law is that courts and commentators do not always adequately distinguish between these two distinct concepts, but distinct they are. The American Law Institute’s Restatement (Third) of the Foreign Relations Law of the United States makes this point explicitly. According to the Third Restatement, a treaty is self-executing if courts are bound to give effect to it immediately upon its coming into force, without any domestic implementing legislation. If a treaty is “non-self-executing”, United States courts will not give it effect in the absence of legislative implementation.

On the other hand, as a separate point altogether, the Restatement also cautions that the traditional understanding is that treaties generally do not create private rights or provide for a private cause of action in U.S. courts. This general understanding applies whether a treaty is self-executing, or non-self-executing. Thus a treaty can be self-executing, but not enforceable by individuals in U.S. courts. This means that a finding that a treaty is not individually judicially enforceable does not preclude a finding that a treaty is self-executing. Some authorities, in blurring the distinction between self-executing status and individual judicial enforceability, lose sight of the possibility that neither self-executing status, nor a lack of it, is conclusive on the subject of individual judicial enforceability.

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224 Jogi v. Voges, 425 F.3d 367, 378 (7th Cir. 2005), withdrawn; Jogi v. Voges, 480 F.3d 822, 830 (7th Cir. 2007); Cornejo v. County of San Diego, 504 F.3d 853, 856 (9th Cir. 2007); Gandara v. Bennett, 538 F.3d 823, 828 (11th Cir. 2008).

225 There is, of course, room for disagreement as to precisely what the phrase, “self-executing treaty” means. See, e.g., David Sloss, Ex Parte Young and Federal Remedies for Human Rights Treaty Violations, 75 Wash. L. Rev. 1103, 1120 & n.74 (2000) (declaring that “(t)he term ‘non self-executing’ has multiple meanings”, and collecting supporting references). However, as noted in text above, the Supreme Court relied on the Third Restatement in its majority Medellín opinion for the conventional interpretation adopted in this Article.

226 Restatement (Third) of the Foreign Relations Law of the United States (1986), at § 111(c) (“Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.”).

227 Id.

228 Id., at § 907 cmt. a (“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 ....”)
The U.S. Supreme Court confirmed this view in its Medellín majority opinion. In footnote 3 of its opinion, the Court confirmed the Third Restatement’s provision stating that treaties generally do not create private rights, “even when treaties are self-executing in the sense that they create federal law”. Admittedly, the Court’s discussion of self-executing status in the Medellín majority has been described as suggesting confusion on the part of the Court. But this affirmative statement of the Restatement’s distinction between self-executing status and individual judicial enforceability is clear enough as far as it goes.

Much scholarly debate has recently circulated over how to determine whether a treaty is self-executing or non-self-executing. It has been asserted that the Medellín opinion creates a rebuttable presumption against self-executing status, while some commentators have urged that in fact there should be a presumption in favor of self-executing status. The traditional view, as exemplified by the Third Restatement, has been that the intention of the United States in entering into a treaty generally

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229 Medellín, 128 S. Ct. at 1357 n.3.


231 E.g., Parry, supra note 230, at 58 (“Medellín tightens the test for finding a treaty self-executing.”); at 60 (The Court “comes close to creating a presumption that treaties have a status similar to legislation only if the proponent of that view can prove that the language of the treaty supports such an interpretation.”); & at 62 (referencing “the Court’s apparent default position (after Medellín) that treaties are not self-executing”).

232 E.g., Jordan J. Pau, Medellín, Avena, the Supremacy of Treaties, and relevant Executive Authority, 31 Suffolk Transnat’l L. Rev. 301, 329 (2008) (“there is a presumption that all treaties are self-executing unless a contrary intent of the creators is manifest in the terms of the treaty”; “if a treaty expressly or impliedly confers rights on individuals, it is self-executing”); Carlos Manuel Vázquez, Treaties as Law of the Land: The Supremacy clause and the Judicial Enforcement of Treaties, 122 Harv. L. Rev. 600, 602 (2008) (“the Supremacy clause is best read to create a presumption that treaties are self-executing”).
determines whether it is to be self-executing. Special importance is given to any statements by the President in concluding the treaty, or by the Senate in ratifying it.

The Supreme Court itself has explicitly declined to decide whether the VCCR is self-executing. The view has been expressed in federal courts that the VCCR is in fact self-executing. As noted above, in the last 5 years, at least 3 majority rulings of Circuit Courts of Appeals have expressly held that the VCCR is self-executing. Furthermore, the District Court opinion for Paraguay’s action in the Breard case noted that both “parties agree that the (VCCR) is ‘self-executing’ under the definition” relating to “a treaty that does not require implementing legislation before becoming federal law.” The same year, a concurring opinion in the 4th Circuit decision for Breard’s individual appeal of his conviction also determined that the VCCR was self-executing. Admittedly, the exact language of this concurring opinion may be an example of confusion between self-executing status and individual enforceability. However, even if it is read to do so, whenever there is no federal legislation purporting to implement a treaty, a finding of individual enforceability necessarily establishes self-executing status.

Also, the U.S. State Department declared, in a report delivered to the Senate during the ratification process for the VCCR, that the VCCR was “entirely self-executing.” The Department also stated in this report that: “To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after

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233 Restatement (Third) of the Foreign Relations Law of the United States (1986), at § 111 cmt. h (“the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation”). Cf. Paust, supra note 232, at 329 (“The text involves attention to the text of a treaty in light of the treaty’s context and object and purpose and can include inquiry with respect to the probable intent (express or implied) of its creators as well as I light of other international law.”)

234 Id. (“If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement …, and of any expression by the Senate … in dealing with the agreement”).


236 Breard v. Pruett, 134 F.3rd 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (“The Vienna Convention is a self executing treaty—it provides rights to individuals rather than merely setting out the obligations of signatories. The text emphasizes that the right of consular notice and assistance is the citizen’s.”)(internal citation omitted).

ratification, would govern,”238 Both of these quotations were emphasized by Justice Breyer in his Medellin dissent,239 and justifiably so.

In view of ratification representations by the State Department, and indications from lower court opinions, and the Supreme Court’s decision to hold the question open, the VCCR can and should be found to be self-executing.

C. 11th Amendment Update

As many will recall, the text of the 11th Amendment, by its terms, generally excludes from the jurisdiction of the federal courts any legal action against a State by a private plaintiff from outside that State.240 Supreme Court interpretation of long date has made it clear that the scope of plaintiffs whose actions are barred in federal court includes foreign sovereign states.241 This would seem to pose an initial stumbling block for a foreign sovereign State seeking to enforce a treaty against a U.S. State in federal court.

However, Supreme Court interpretations have also established certain exceptions to the 11th Amendment’s jurisdictional bar. The primary exception is based on the early 20th-century case of Ex Parte Young,242 in which “the Supreme Court held that a state officer could be forbidden in a federal suit from enforcing state law.”243 In

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239 128 S.Ct. at 1386 (Breyer, J., dissenting).

240 The text of the 11th Amendment provides:

“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

U.S. Const. Amend. 11. See John E. Nowak & Ronald D. Rotunda, Constitutional Law (7th ed. 2000), at 50 (“The Eleventh Amendment acts as a bar to federal jurisdiction over state governments, as such, when they are sued by anyone other than the federal government or another state.”) (citing Tennessee Department of Human Services v. U.S. Department of Education, 979 F.2d 1162, 1166 (6th Cir. 1992)).

241 Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934) (“As to suits brought by a foreign State, we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State.”).


243 Nowak & Rotunda, supra note 240, at 53.
the years since its issuance, the *Ex Parte Young* exception has grown into a complex doctrine. The basic point of the later developments is that under the exception as now interpreted, “a private person may bring an equitable action to force state officers to comply with federal law in the future”.244 In recent years, the picture has become more involved than that.

For purposes of this analysis, the current status of the Ex Parte Young exception rests basically on two Supreme Court opinions from the last quarter of the 20th century: *Milliken v. Bradley* (”Milliken II”)245 and *Papasan v. Allain*.246

The *Milliken v. Bradley* litigation involved a de jure racially segregated school system that operated in and around Detroit. Initially, in *Milliken I*,247 the Supreme Court invalidated a lower-court remedial order that would have imposed an “inter-district” student reassignment scheme. Then, in *Milliken II*, the Court validated the district court’s second order designed to remedy the effects of the earlier de jure segregation. This second order went beyond mere student re-assignment within Detroit, and also entailed 4 additional programs regarding reading, in-service teacher training, testing and counseling. The order also required that the State of Michigan pay half the costs of these 4 additional programs.

In *Milliken II*, the Supreme Court sustained this payment obligation against an 11th-Amendment attack. The Court sustained the obligation even though it was monetary in character. This was notable because one of the major considerations used in interpreting certain features of the 11th Amendment is the desire to “prevent federal courts from issuing judgments that must be paid out of the state treasury.”248

In validating these payments, the Court drew a distinction between payments for retrospective compensation and payments to fund future compliance. The Court allowed that “‘the award of an accrued monetary liability . . .’ which represent(s)

244 Nowak & Rotunda, supra note 240, at 53.


248 See Nowak & Rotunda, supra note 240, at 52. Nowak and Rotunda offer this statement as part of the explanation for why “(a)n entity that is merely the instrumentality of state government shares its immunity, but an entity that is a politically independent unit enjoys no Eleventh Amendment protection.” *Id.* They later continue: “(I)n determining whether an agency is entitled to share in the state’s Eleventh Amendment immunity, the court should determine if the state is obligated to pay any of the agency’s indebtedness. If the state has no legal obligation to bear the debts of the enterprise, then the Eleventh Amendment is not implicated.” *Id.*
'retroactive payments’"249 would indeed be invalidated under the 11th Amendment. However, the Court in Milliken II indicated that the payments ordered there were not such retrospective payments, but rather ‘‘a necessary consequence of compliance in the future with a substantive federal-question determination . . . ‘’250

The Court described this distinction further by asserting that factual situation in Milliken II fit squarely within the ‘‘prospective-compliance exception’’ developed in earlier cases following Ex Parte Young.251 The Court then reiterated that this exception ‘permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury.’252

The Court went on to say: ‘‘These programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke, as could a retroactive award of money (damages). Rather, by the nature of the antecedent violation, which (caused harm to the victims, the victims) will continue to experience the (harmful) effects until such future time as the remedial programs can help dissipate the continuing effects of past misconduct.’253

The Papasan case concerned federal grants of land to the State of Louisiana that were made in contemplation of their use by the State for the purposes of building and maintaining public schools in the northern part of the State. The State invested the lands in the erection of railroads that were destroyed during the Civil War and never rebuilt. In recompense, the State legislature started making regular payments to the affected school districts as ‘interest’ on the notional ‘corpus’ representing the lost lands. The petitioners considered this arrangement inadequate. They sought in federal court, among other things, to compel ‘the establishment by legislative appropriation or otherwise of a fund in a suitable amount to be held in perpetual trust for the benefit of plaintiffs’.254

The Papasan plaintiffs seem to have viewed their situation to be analogous to that in Milliken II, on the theory that they were experiencing continuing harm resulting from the effects of past misconduct. But the Supreme Court majority disagreed:

251 Milliken II, 433 U.S. at 289.
252 Milliken II, 433 U.S. at 289.
253 433 U.S. at 290.
254 478 U.S. at 275.
"We discern no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners. In both cases, the trustee is required, because of the past loss of the trust corpus, to use its own resources to take the place of the corpus or the lost income from the corpus. Even if the petitioners here were seeking only the payment of an amount equal to the income from the lost corpus, such payment would be merely a substitute for the return of the trust corpus itself. That is, continuing payment of the income from the lost corpus is essentially equivalent in economic terms to a one-time restoration of the lost corpus itself … ."  

The Court’s interpretation in this respect centered on the character of a stream of payments that are made in restitution for deleterious acts undertaken in the past by a state legislature. The Court in essence maintained that branding the payments a “continuing obligation” did not make them any less a liability for a past breach. What’s was crucial, in the Court’s view, was that the breach of legally required behavior occurred in the past, and the payments were thus viewed as retroactive.

In the wake of Supreme Court cases such as *Milliken II* and *Papasan*, it is possible to discern a 2-part test for determining when facts of the type they involved allow for relief consistent with the 11th Amendment. The 4th Circuit Court of Appeals panel in *Paraguay v. Allen* stated the matter succinctly: “(F)ederal courts may exercise jurisdiction over claims against state officials by persons at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective.”

As noted earlier, the U.S. Supreme Court, after *Milliken* and *Papasan*, and as part of its disposition of the *Breard* litigation, addressed 11th Amendment issues in one paragraph of its short per curiam opinion in *Breard*. The Court’s application of the 11th Amendment precedents to the facts in *Breard* was so brief as to be virtually cursory. The Court merely cited *Milliken II*, and said that the Milliken precedent did not apply to the *Breard* facts since “(t)he failure to notify the Paraguayan Consul occurred long ago and has no continuing effect.” The Court seems to have meant that the violation of federal law was no longer continuing, as the Court had viewed the asserted violation in *Papasan* as no longer continuing. The Court’s curt concluding observation on the issue was then that “(t)he causal link present in Milliken (II) is absent in this suit”, apparently meaning that the causation of the harm in *Breard* was not continuously linked to then-present facts.

255 478 U.S. at 281; footnote deleted.

256 134 F.3d at 627.

257 523 U.S. at 377-78.

258 523 U.S. at 378.
In any event, the 2-part formulation stated by the 4th Circuit panel in Paraguay v. Allen, described above, seems like the most accurate and succinct analytical test to use in evaluating this type of claim under the 11th Amendment at the present time.

D. The Article 36 Injunction and the 11th Amendment

If any national of a sending State is detained in the U.S. and is convicted without Article 36 compliance, the failure to observe the VC CR results in a treaty violation. The VCCR, as a self-executing treaty ratified according to constitutionally adequate procedures in the U.S., is binding federal law. Accordingly, its violation is a violation of federal law.

As this Article has shown, any noncompliance with Article 36 notice and information requirements creates an ongoing and continuous breach of the consular relationship defined in the VCCR. Because the sole focus and purpose of the VCCR is the establishment and maintenance of that relationship, the ongoing and continuous breach of the relationship is an ongoing and continuous breach of the treaty itself.

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259 In the academic literature after Medellín, there has been some discussion regarding the extent to which non-self-executing treaties can legitimately be considered the “supreme Law of the Land”. E.g., Curtis A. Bradley, Internt, Presumptions, and Non-Self-Executing Treaties, 102 A.J.I.L. 540, 548 (2008) (“the (Medellín majority) opinion leaves unclear ... whether a non-self-executing treaty is simply judicially unenforceable, or whether it more broadly lacks the status of domestic law”). There is much less cause for such misgivings, however, with respect to a self-executing treaty, such as the VCCR. At the very least, self-executing treaties are judicially enforceable, and as such are readily perceived to occupy the status as federal law.

260 It has been asserted generally that “the Supremacy Clause arguably creates an implied right of action to enjoin enforcement of state laws that are preempted by treaties”. David Sloss, 75 Wash. L. Rev. 1103, 1152 (2000). This approach suggests that the Ex Parte Young exception to the 11th Amendment is broadly applicable for all claims against U.S. states for treaty violations. This is an intriguing approach, and this Article is not intended to detract from it. However, this Article makes the more limited point that an Article 36 violation, when made the subject of an Article 36 Injunction of the type herein suggested, would normally satisfy the continuing violation and prospective relief requirements that have generally applied even when the Ex Parte Young exemption is applicable. Those federal cases allowing the Ex Parte Young exemption for treaty claims have still retained these requirements. E.g., Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 914 (8th Cir. 1997), aff’d on other grounds, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (concluding that the 11th Amendment did not bar the residual treaty claims there at issue because they sought “prospective injunctive relief against state officials in their official capacities for continuing violations of the Bands’ federal treaty rights”).

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This Article has also suggested that a sending State whose national has been denied Article 36 protection can sue for an injunction to secure prospective compliance by State authorities in that State. With this “Article 36 injunction,” the Federal Court orders state authorities, in all future dealings with detainees who are nationals of the sending State, to observe the Article 36 notice and information requirements. The injunction addresses the ongoing and continuous breach of the VCCR, and is not addressed to any retrospective action regarding the treatment of any detainee occurring in the past. It relates to a concrete, real and palpable worsening of the consular relationship clearly caused by the initial breach and conviction.

The violation caused by an initial detention and conviction of a national from the sending State petitioning for the injunction causes the ongoing and continuous breach of the treaty, and that ongoing and continuous breach of the treaty causes harm to the sending State. That harm is like the continuous harm experienced by the petitioners in Milliken II, because the VCCR relationship continues unabated after non-compliance, just as the harm from the establishment of segregated school continued unabated after establishment. The Injunction itself is also like the prospective relief validated in Edelman, since it is directed solely toward the cessation of the ongoing violation, rather the individual circumstance of any person already convicted.

The Article 36 injunction does not assist any person already convicted in circumstances of an Article 36 violation, and due to 11th Amendment considerations, it could not. This feature does not rob the Injunction of its utility. The sending State for the foreign detainee in the U.S. is the real party in interest, as against the U.S., whenever Article 36 is violated. The sending State is the counterparty of the U.S. under the VCCR, the treaty that has been violated. The sending State is the counterparty whose consular relationship has been abrogated as a result of non-compliance with the Article 36 requirements. Although the position of any detainee from any sending State convicted without compliance with Article 36 is unfortunate, a large part of the harm caused by such non-compliance relates to future prospects for later detainees. This harm is what is directly addressed by the Article 36 Injunction.

The United States, both in the capacity of its President, and in the capacity of its Supreme Court, has recognized that non-compliance with the Article 36 notice and information requirements violates an international treaty obligation. Given that the President and the Supreme Court have both openly declared that a failure of Article 36 requirements has caused a breach of international law, it is especially appropriate to accord meaningful Article 36 relief. The formal and written acknowledgment by the President and the Supreme Court that detentions of foreign nationals without compliance with Article 36 violates international law fortifies the Federal Courts in providing relief for such violations.

261 See Lori Fisler Damrosch, The Justiciability of Paraguay’s Claim of Treaty Violation, 92 A.J.I.L. 697, 700 (1998) (“There is no present reason why foreign states should not be able voluntarily to submit their treaty claims for adjudication by U.S. courts.”).
Conclusion

A mass of lower court opinions, Supreme Court opinions and constitutional doctrines, most recently the U.S. Supreme Court opinion in *Medellín v. Texas*, has greatly impaired the enforceability of VCCR Article 36 in U.S. courts. This mass of precedent has created a confusing and nearly impenetrable maze for any party in the U.S. seeking Article 36 enforcement; the “Medellín Maze”.

Prisoners who have been convicted after state authorities have not complied with Article 36 have been precluded from complaining about the violations through state procedural default rules. The Supreme Court has upheld such state procedure rules against attack from international tribunals. Lower courts have maintained that, even if a detainee were to complain in a timely manner that avoided procedural default, Article 36 does not allow for judicial relief to individuals in U.S. courts. The Supreme Court clearly believes that judgments by multilateral international tribunals cannot be imposed upon U.S. courts to secure Article 36 compliance. Existing separation-of-powers doctrines prevent the federal executive from directly ordering such compliance in U.S. courts, and may well also prevent the Federal Congress from requiring compliance at the state level. The 11th Amendment prevents individuals from seeking injunctions against criminal proceedings in violation of Article 36. The Medellín Maze is intricate and seemingly impregnable.

This very intricacy and apparent impregnability tremendously ill serves the United States in the current international legal environment. It is now especially important, in the international arena and at home, for the U.S. to stand for the rule of law. The 3 opinions of the U.S. Supreme Court in recent years addressing Article 36 have consistently resulted in a failure of its enforcement in the U.S. The “Medellín Maze” is a significant problem for the current relationship between the U.S. and international law.

However, this Article has acknowledged that the enforcement of Article 36 in domestic courts does involve serious domestic legal and constitutional issues in the U.S. It is indeed legitimate to take these issues, involving separation of powers, federalism, and the character of a common-law adversarial legal system, into account.

Accordingly, this Article has offered an “escape route” out of the Medellín Maze that is particularly crafted and has a specifically defined scope. The Article 36 Injunction herein proposed would enforce Article 36 notice and information requirements for a sending State’s future detainees once authorities in a State of the U.S. have convicted a national of that sending State in non-compliance with Article 36. Such an injunction would meaningfully address the interests of the sending State that have been impaired by the Article 36 violation, while still observing the strictures imposed by concerns for separation of powers, federalism, the character of the common-law adversary system of justice, and the finality of judgments.