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Medellin v. Texas: The Roberts Court and New Frontiers for Federalism

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"The sin of cynicism is mortal, because it propagates a self-validating picture of reality. If men are told complacently enough that this is how things are, they will become accustomed to it and accept it. And in the end this is how things will be."

–Alexander Bickel, *The Least Dangerous Branch*

I. INTRODUCTION

The debate over what extent, if any, judges should consult "foreign" or international law when deciding cases has triggered controversy throughout the political spectrum. In 2004, The Constitution Restoration Act was proposed in the Senate with bipartisan support.[1] If the law had passed, federal courts would have been prohibited from adopting any "constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the English constitutional and common

* I would like to dedicate this article to the loving memory of my father Louis Edward Hogue. I would also like to thank Professor Stephen Schnably for his invaluable input, Shannon Greco for her encouragement, and all the editors of the University of Miami Inter-American Law Review.

1. S. 2082, 108th Cong. § 302 (2004). Title III of the bill, threatens judges with impeachment if they incorporate any of these prohibited sources into their rulings. *Id.*

law."[2] The proposed legislation represented a single front in an intellectual skirmish between two diverging viewpoints; this article will juxtapose these competing paradigms as "sovereigntists" and "internationalists."

Peter Spiro has argued that the "sovereigntists" are filled with scholars, policy makers, and judges who are skeptical and hostile to international law and institutions because of the perceived threat they pose to American culture and democratic sovereignty.[3] Conversely, Judith Resnik defines "internationalists" as assuming that "interpretations of constitutional and statutory provisions should evolve, and they welcome learning from abroad."[4] Both models have adherents on the United States Supreme Court. Conservative justices like Justice Antonin Scalia adhere to the sovereigntist paradigm and view the consultation of international law as a means to augment judicial discretion, and has referred to judicial reliance upon international law as illicit and willful.[5] Whereas more liberal justices like Justice Stephen Breyer speak favorably of citing international and foreign sources as a means of strengthening human rights at home and abroad.[6] This latter viewpoint prompts one to ask the questions: to what extent do these foreign sources of international law bind not only the federal government, but state governments as well, and how do we reconcile international commitments abroad with principles of federalism at home?

Medellín v. Texas illustrates the outgrowth of this debate.[7] In *Medellín*, the state of Texas refused to comply with the International Court of Justice's ("ICJ") *Avena* decision, which had ruled that the United States had violated the Vienna Convention by failing to inform 51 Mexican nationals of their convention rights that entitled them access to consular services to assist them with

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2. *Id.* at § 201.

3. *See* Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, 79 FOREIGN AFF. 9 (2000). Peter Spiro is also attributed with coining the term sovereigntists. *Id.*

4. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1569 (2006).

5. Stanford v. Kentucky, 492 U.S. 361, 369 (1989).

6. *See generally* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (Alfred A. Knopf 2005); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004); John Paul Stevens, *Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today's World*, 16 CHI. B. ASS'N REC. 25 (2002).

7. Medellín v. Texas, 552 U.S. 491 (2008).

their habeas petitions.[8] President Bush issued a memorandum to the Attorney General stating that the U.S. would "discharge its international obligations under *Avena* by having State courts give effect to the decision."[9] Relying on the President's memorandum, Medellín, a Mexican national filed a second Texas state-court petition challenging his capital murder conviction.[10] The Texas Court of Criminal Appeals dismissed the petition stating that neither *Avena* nor the President's memorandum was binding federal law that preempted the state's autonomy in such matters.[11] The case of *Medellín* elucidates a subtle, yet important trend in the Supreme Court to tarnish international law as a means of strengthening principles of federalism at home, which may serve to propagate the perception of American exceptionalism, and disengagement from the broader international community.

Part II of the article explores the dialogue between the sovereigntists and internationalists, and provides the framework for understanding the implications of the Supreme Court's decision in *Medellín*. Part III of this article examines the formative cases that established the Supreme Court's approach to treaty interpretations, and how the Court has adopted international law into its legal analysis. Part IV focuses on the cases leading up to the Supreme Court's landmark decision in *Medellín,* and offers a narrative tracing the trajectory of the jurisprudence of American exceptionalism. Part V offers a more detailed and narrow analysis of Chief Justice Roberts's opinion in *Medellín* that reads like the sovereigntists' critique, and Justice Breyer's dissent that particularly resembles arguments made by internationalists. Part VI of the article places *Medellín* within the framework of the new federalism and extrapolates upon fundamental differences between that case, and other cases arising under the commerce clause. The article concludes with predictions concerning the consequences of the Roberts Court's weakening international law as a means of strengthening federalism.

II. FRAMING THE DEBATE: THE SOVEREIGNTISTS AND INTERNATIONALISTS PARADIGMS

In the final book before his death, Samuel Huntington embraced the sovereigntist paradigm and predicted America's cul-

8. *Id.*
9. *Id.* at 498.
10. *Id.*
11. *See id.*

tural and economic decline.[12] While Huntington was not alone in this criticism, it was uncharacteristic for a scholar best known for his scholarly writings on international relations (writings that accurately predicted the "third wave" of democracy in Latin America and the eventual "clash of civilizations" marked by global terrorism at the end of the Cold War) to write a book focusing solely on American identity.[13] What was not uncharacteristic of Huntington's critique was his bleak outlook for the future; throughout his final work, he exuded an American exceptionalist posture. In a controversial passage, Huntington observed, "[i]n the end, the United States of America will suffer the fate of Sparta, Rome, and other human communities. Historically the substance of American identity has involved four key components: race, ethnicity, culture, and ideology. The racial and ethnic Americas are no more. Cultural America is under siege."[14] John Bolton, former United States Ambassador to the United Nations, reverberated these sentiments, "in substantive field after field—human rights, labor, health, the environment, political military affairs, and international organizations—the Globalists have been advancing while the Americanists have slept."[15]

Both Bolton and Huntington paint a Manichean picture of a sinister force threatening and undermining the fabric of American society, but what exactly is that force? For sovereigntists, the incorporation of foreign law into American jurisprudence represents a force that threatens democracy and resembles the soft tyranny that Alexis de Tocqueville warned of in his concluding chapter of Democracy in America.[16] Sovereigntists promulgate the

12. *See generally* SAMUEL HUNTINGTON, WHO ARE WE? (Simon and Schuster U.K. Ltd 2004).

13. Samuel Huntington is credited with coining the "third wave" to describe the envelopment and trajectory of liberal democratic capitalism at the end of the Cold War. He is also credited with the concept of the "clash of civilizations," which warned that conflicts would emerge in the post Cold War based on ethnic conflict and religious fundamentalism. *See generally* SAMUEL HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (University of Oklahoma Press 1991); *see also* SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (Simon & Schuster 1996).

14. SAMUEL HUNTINGTON, WHO ARE WE? 12 (Simon and Schuster U.K. Ltd 2004).

15. John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 206 (2000).

16. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 663 (University of Chicago Press 2002) (1835) ("[I]t does not tyrannize, it hinders, compromises, enervates, extinguishes dazes, and finally reduces each nation to being nothing more than a heard of timid and industrious animals of which the government is the shepherd.").

belief that when courts rely upon foreign law, they are arrogating power to themselves, resulting in a democratic deficit.[17] This particular critique is emblematic of a wider conservative legal critique of the countermajoritarian nature of judicial review, the need for judicial restraint and general principles of federalism. The majority opinion in *Medellín* honed in on this broader conservative critique of the democratic deficit, which would arguably augment itself further if courts were to effectuate foreign judgments by binding the states.[18]

Conversely, prominent internationalists like Harold Hongiu Koh believe international law may serve to actually effectuate human rights for individuals who are otherwise shut out from the democratic process because of social, political and other utilitarian laws put in place by the majority.[19] To delineate this point further, Justice Kennedy incorporated both foreign and international law in *Lawrence v. Texas*.[20] By relying upon these sources, Justice Kennedy debunked the argument that laws criminalizing homosexual sodomy were not deeply rooted in western civilization.[21] Even though this argument was employed at the highest level of generality, it had coalesced a 5-4 majority in *Bowers v. Hardwick*.[22] Internationalists, like Anne Marie Slaughter, argue that such judicial methodologies are laudable and judges should "see one another as fellow professionals in a profession that transcends national borders."[23] Moreover, she also argues "[j]udges from different legal systems should expressly acknowledge the possibility of learning from one another based on relative experience with a particular set of issues and on the quality of reasoning in specific

17. *See generally* Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 37-38 (1995) (arguing against the use of foreign law because of the democratic deficiency). "International law is generated in ways far removed from the citizens of the United States and, indeed, from the citizens of other nations." *Id.*

18. *See* Medellín v. Texas, 552 U.S. 491, 494 (2008).

19. *See* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUSTON L. REV. 623, 626-27 (1998).

20. Lawrence v. Texas, 539 U.S. 558 (2003).

21. *Id.* at 560. "An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right . . . . The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights." *Id.*

22. *See* Bowers v. Hardwick, 478 U.S. 186, 194 (1985) (stating that "the proscriptions against sodomy have very 'ancient roots.' Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization.").

23. Anne Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1124 (2000).

decisions."[24]

For both the sovereigntists and the internationalists, the conflicting paradigm poses a threat not so much to ideology, but to "first principles" of constitutional fidelity.[25] For the sovereigntist, integration of international law by domestic courts compromises democratic values of horizontal separation of powers and vertical federalism.[26] This article will focus on the latter portion of that argument.

The internationalist paradigm contrasts starkly with the sovereigntist and views the incorporation of international law by domestic courts as an important step towards transnationalism and global governance needed for a global community. Harold Koh utilizes the term "vertical domestication" to describe this phenomenon.[27] "'[V]ertical domestication' occurs through transnational law, whereby international law norms 'trickle down' and become incorporated into domestic legal systems."[28] Some internationalists have contended that incorporating international and foreign law into domestic law effectively serves to protect domestic minorities that are effectively "fenced out" from the political process locally, and would benefit from the execution of international human rights treaties. An example of this comes from the case of *Lawrence v. Texas*. The plaintiffs at issue in that case were ostracized and excoriated by the majority for their sexual mores, and the Court was able to utilize foreign law as a vehicle to undermine assumptions that such laws were prevalent throughout western civilization.[29] For internationalists, the sovereigntists' disdain for international law goes beyond American exceptionalism, and elucidates an apprehension rooted in an animus towards courts that

24. Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 217 (2003).

25. First principles will be referred to throughout the article to describe the level of value judges attribute to various aspects of the Constitution. For example, the Rehnquist Court attributed a great deal of value to the Tenth and Eleventh Amendments, and a first principle of that Court was to strengthen federalism. Whereas the Warren Court radically applied a combination of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the criminal justice system to realize its first principle of strengthening civil liberties.

26. Horizontal separation of powers refers to the checks and balances in the federal government. Vertical federalism refers to the relationship between the federal government and the states.

27. Koh, *supra* note 19, at 626-27 ("vertical domestication" occurs through transnational law, whereby international law norms "trickle down" and become incorporated into domestic legal systems).

28. *Id.*

29. Lawrence v. Texas, 539 U.S. 558, 560 (2003).

exercise judicial review by striking down state legislation based upon the judge's predilections for expanding individual liberty and equality; thus infringing upon principles of federalism.

Synthesizing these divergent views would be a Herculean task within itself, and these converging paradigms illustrate the stakes both schools of thought have within the issue. However, in a legal system that requires principled legal judgments in order to bind the nation under the rule of law, it is important to analyze what precedential value, if any, domestic courts should accord international law. Moreover, at what time does international law, foreign judgments, or treaties that the United States is a party to bind both federal and state governments; and thus, become part of our law? The Court in *Medellín* tried to answer these questions, but in doing so created a new doctrine for interpreting treaties, which calls into question the outcome of future cases and controversies arising under the supremacy clause. Furthermore, the new approach to treaty interpretation may impact the President's ability to implement treaties, which will inexorably impact foreign relations if the legislature must effectuate all treaties and international agreements for them to have the force of domestic law. In effect, such a requirement might actually serve to impair Executive power in the realm of foreign relations, and significantly empower the states, signifying new frontiers for federalism that extend beyond the truly local, and impact the international.

III. MARSHALL COURT AND LOCHNER ERA SUPREME COURT DECISIONS REGARDING TREATY INTERPRETATION AND INTERNATIONAL LAW

Treaty agreements between the United States and a foreign country that are negotiated by the President are permitted under Article II, Section 2, Clause 2 of the United States Constitution.[30] Once the Senate ratifies these treaties, they become the supreme law of the land pursuant to Article VI.[31] However, treaties cannot have the binding force of law if they violate the Constitution. In *Reid v. Covert*, Justice Black explained, "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[32] This general principle finds its origins back dur-

30. U.S. CONST. art. II, § 2, cl. 2.
31. U.S. CONST. art. VI.
32. Reid v. Covert, 354 U.S. 1, 16 (1957).

ing the tenure of Chief Justice Marshall. However, interpreting treaties in order to determine their accordance with the United States Constitution has not always been ameliorative towards continuity. In fact, even Chief Justice Marshall's approach produced somewhat inconsistent outcomes.[33]

In *Foster v. Neilson*, the Court held that "treaties sometimes require implementation by Congress before they may be enforced in the Courts."[34] However, merely four years later in *United States v. Percheman*, the Court overruled *Foster*, holding the same treaty provision to be self-executing.[35] In *Whitney v. Robertson*, the Court explained that when a statute and a treaty "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other."[36] Ostensibly, this approach makes logical sense when there are two conflicting treaties; yet, this approach provides little consistency. According to Carlos Manuel Vazquez, "[w]hat exactly makes a treaty non-self-executing has long been a matter of uncertainty."[37] Treaties that are non-self-executing cannot be given effect unless the legislature acting through the Senate ratifies the treaty by a two-thirds majority vote as required by the Constitution, or the legislature acts on the treaty in some other way.[38]

The majority opinion in *Medellín* drew upon the Marshall Court's opinion in *Foster* to develop the argument that treaties that are non-self-executing, or acted upon by the legislature, cannot be given effect by domestic courts. However, while *Foster* provides credence for this approach to treaty interpretation, subsequent courts through much of American history have not required that the legislature effectuate the treaty in order for it to

33. *Compare* Foster v. Neilson, 27 U.S. 253 (1829), *with* United States v. Percheman, 32 U.S. 51 (1833).

34. Foster v. Neilson, 27 U.S. 253, 255 (1829).

35. *See generally* United States v. Percheman, 32 U.S. 51 (1833).

36. Whitney v. Robertson, 124 U.S. 190, 194 (1888).

37. Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 628 (2008) (showing the differences between *Foster* and *Percheman*). The Court in *Foster* finds the subsequent actions by Congress in effectuating the treaty as dispositive to its binding effect on domestic law; conversely, in the earlier case of *Percheman,* the Court did not look to whether Congress took steps to effectuate the treaty in order for it to have the force of domestic law. *Id.*

38. *Id.* at 628. There is no consensus on what other way the legislature could act upon the treaty, but absence of consensus does not necessarily mean impossibility.

have the force of domestic law.[39] Conversely, these courts were deferential to the political branches on matters of international commitments regardless of the impact these international agreements had on the states.

Mark Strasser has argued that treaties cannot be interpreted as violating the Tenth Amendment and infringing upon state sovereignty.[40] Strasser uses *Missouri v. Holland*, a case involving the Migratory Bird Treaty, to illustrate this point in his case study.[41] Holmes sought to clarify the confusion that had arisen under earlier judicial interpretations, "[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution . . . . It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with."[42]

Medellín ignored the less stringent and functional approach to treaty interpretation of *Holland* by requiring that the legislature ratify, or act upon the compulsory ICJ judgment to give the decision the binding effect of the law. The court in *Medellín* analogized its approach to Justice Jackson's concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, which provides a tripartite scheme for evaluating executive power.[43] Unlike *Holland,* the *Youngstown* approach limits the discretion and authority of the executive to act outside the express will of Congress.[44] This latter approach used by the Court in *Medellín* represents a doctrinal shift in the standard of review from one of deference to Article II back to the more stringent requirement for treaty interpretation in *Foster v. Neilson*, which requires Congressional effectuation.[45] This raises an important question: if such a stringent requirement is placed on the Executive, how can the President effectively execute his

39. *See generally* Olympic Airways v. Husain, 540 U.S. 644, 649 & 657 (2004). (holding an airline liable for the wrongful death of an international passenger where the flight attendant's refusal to reseat the passenger was clearly external to the passenger, and was unexpected and unusual).

40. Mark Strasser, *Domestic Relations, Missouri v. Holland, and the New Federalism*, 12 WM & MARY BILL RTS. J. 179 (2003).

41. The Migratory Bird Treaty Act of 1918, 16 U.S.C. § 703 (2004).

42. Missouri v. Holland, 252 U.S. 416, 433 (1920).

43. *See generally* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). Part IV of this article provides a more detailed analysis of the way *Medellín* shifted the standard of review for treaty interpretation into the Justice Jackson's tripartite scheme in Youngstown. *See infra* Part IV.

44. *See generally* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (J. Jackson, concurring).

45. *See* Koh, *supra* note 19.

international obligations?[46]

Around the time *Missouri v. Holland* was decided, the Supreme Court had already begun the process of "vertical domestication" of international law into the body politic of the American political system.[47] The most notable and quotable example to illustrate this integration came from the case of *The Paquete Habana*, which memorably declared, "international law is part of our law."[48] In that case, the Court integrated customary international law with American law. Justice Holmes used a similar method in *Missouri v. Holland*, which established a more functional approach to effectuating international agreements, but also illustrates "vertical domestication" of international law.[49] However, the case proffered an analysis that went beyond just the issues and facts presented in the case; Justice Holmes's analysis of a "living constitution" had consequences beyond the standard of review for interpreting treaties and international agreements. Justice Holmes wrote:

> with regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[50]

Subsequent courts would use this analysis to broaden the scope of liberty and equality under the Fourteenth Amendment's equal protection and due process clauses, often to the detriment of states' reserved powers.

An example of the application of the "living constitution" framework into a domestic legal matter utilizing international law came in 1958 in *Trop v. Dulles*.[51] The case involved an army deserter who lost his citizenship under the Nationality Act of

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46. *See infra* Part V.

47. *The Paquete Habana*, 175 U.S. 677 (1900).

48. *Id.* at 700.

49. *See generally* Missouri v. Holland, 252 U.S. 416 (1920).

50. *Id.* at 433.

51. 356 U.S. 86 (1958).

1940.[52] In an opinion written by Chief Justice Warren, the Court held that under the Eighth Amendment "denationalization as a punishment is barred" as this is "the total destruction of the individual's status in organized society."[53] The majority opinion declared, "the words of the [Eighth] Amendment are not precise and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society."[54] To justify this "evolving standard of decency" the Court did not rely on the text of the Constitution, the history of the United States, or its traditions. Instead the court looked to international law and took note of the fact that "[t]he United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids that to be done."[55] It is noteworthy that the Court did not feign that the original meaning of the Constitution forbade such a punishment; the majority also failed to comment on the fact that desertion normally leads to execution in the military. In his dissent, Justice Frankfurter asked, "[i]s constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"[56] Justice Frankfurter's observation proved particularly Panglossian, considering later Courts would invoke the "evolving standards of decency" of the majority opinion to declare that the implementation of the death penalty by numerous states offended such standards as well.[57]

Cases like *Holland* and *Trop* inspire internationalists and their liberal counterparts, who see principles of international law as a means of strengthening liberty and equality at home. On the other hand, cases like these provide sovereigntists and their conservative counterparts ammunition to argue that judicial incorpo-

52. *See* Trop v. Dulles, 356 U.S. 86 (1958).
53. *Id.* at 101.
54. *Id.* at 100-01.
55. *Id.* at 103.
56. *Id.* at 125.
57. *See generally* Furman v. Georgia, 408 U.S. 238 (1972) (declaring the death penalty as applied in Georgia unconstitutional); Gregg v. Georgia, 428 U.S. 153 (1976) (reinstating the death penalty in Georgia); Coker v. Georgia, 433 U.S. 584 (1977) (forbidding the death penalty for the rape of a woman); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty for juvenile offenders offends the Eighth Amendment); Kennedy v. Louisiana, 129 S. Ct. 1 (2008) (holding the death penalty for child rape unconstitutional; must look to the evolving standards of decency).

ration of international law arrogates judicial discretion and imposes foreign values into domestic law, which are devoid of constitutional legitimacy. The jurisprudence of American exceptionalism delineates this latter point, and provides further context for understanding the intellectual history leading up to *Medellín*, and its consequences both domestically and internationally.

IV. THE ROAD TO *MEDELLÍN*: THE JURISPRUDENCE OF AMERICAN EXCEPTIONALISM

Unlike the cases of *Holland* and *Trop*, the Supreme Court has not always embraced the internationalist paradigm, and has at times been hostile towards it. As previously delineated, the Court has shown reluctance to expand the scope of constitutional rights extraterritorially. In *De Lima v. Bidwell,*[58] the same Court that had decided *The Paquete Habana* a year earlier held that the Constitution applies only to residents in territories that have been formally incorporated into the United States through treaties, or acts of Congress.[59] Nevertheless, this reluctance to expand constitutional rights extraterritorially did not preempt aliens from availing themselves of constitutional protections once entering the territorial jurisdiction of the United States. However, during the era of the Rehnquist Court, the Court began narrowing the expansion of constitutional rights to foreign nationals both within and outside the territorial jurisdiction of the United States.[60]

In 1990, in the case of *United States v. Verdugo-Urquidez*, Chief Justice Rehnquist employed the sovereigntists' critique on the issue of whether the Fourth Amendment applied when a DEA agent conducted an illegal search of the home of a foreign criminal suspect living in Mexico, and the government used that evidence to convict them in a federal court.[61] The Chief Justice wrote,

> "[T]he people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of the community. . . . There is likewise no indication that the Fourth Amendment was understood by contemporaries of

58. 182 U.S. 1 (1901).
59. *See generally* De Lima v. Bidwell, 182 U.S. 1 (1901).
60. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).
61. *Id.*

> the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.[62]

In a sharply worded dissent, Justice Brennan criticized the majority's reasoning for what he saw as a willful whittling down of the Fourth Amendment: "[b]y concluding that respondent is not one of 'the people' protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them."[63] The notion of mutuality that Justice Brennan discussed was rooted in international law, and offered a subtle critique of American exceptionalism. While the Chief Justice's opinion in *Verdugo-Urquidez* was arguably inflammatory, the holding itself did not represent a break from precedent, and unlike *Medellín* it did not call into question prior precedents. In fact, the holding of the case did not break from the established precedent in *Bidwell*, which recognized that the protections of the Constitution do not extend extraterritorially into jurisdictions that have not been incorporated into the United States by an act of Congress.[64]

Despite the international backlash, merely two years after *Verdugo-Urquidez* was decided, the counterrevolutionary guard of the Rehnquist Court would deny relief to an alien that had suffered an injury inside the territorial jurisdiction of the United States as a result of his kidnapping by federal law enforcement officials in Mexico.[65] The subsequent outcomes from *Verdugo-Urquidez* and the repudiation of international law by the Rehnquist Court, which resulted in international backlash, prompts one to consider future precedents by the Roberts's Court after its decision in *Medellín*.

The international attention and outcry by the Supreme Court's decision in *United States v. Alvarez-Machain*[66] paralleled the controversy surrounding *Medellín*. The facts and history surrounding the case read more like a screenplay than a Supreme Court case. The story begins in 1985 with the torture and mutilation of an undercover DEA agent in Mexico by a reputed Mexican drug lord. The ensuing investigation implicated Dr. Humberto

62. *Verdugo-Urquidez*, 494 U.S. at 265 & 267.
63. *Id.* at 284.
64. *See generally* De Lima v. Bidwell, 182 U.S. 1 (1901).
65. *See* United States v. Alvarez-Machain, 504 U.S. 655 (1992).
66. *Id.*

Alvarez-Machain in the murder.[67] Five years later, mercenaries in privity with the DEA abducted Dr. Alvarez-Machain and flew him to El Paso, Texas, where he was *officially* arrested.[68] Dr. Alvarez-Machain, the plaintiff/victim, won his case in the Ninth Circuit. In a two-page opinion, the Ninth Circuit relied on its opinion in *Verdugo*, even though the Supreme Court had refused to apply this interpretation of the law.[69] The Ninth Circuit ruled in favor of Alvarez-Machain, because Mexico had officially filed its protest in a United States federal court.[70] For the Ninth Circuit, Mexico's official protest satisfied the standing requirement.[71] Nevertheless, when the case came before the Supreme Court, the Court rejected the respondent's international law arguments and gave sparse deference to the amicus brief filed by the country of Mexico.[72]

The reasoning employed by the majority in *Alvarez-Machain* foreshadowed its opinion in *Medellín*. The Court rejected the argument that the language of the U.S.-Mexico Treaty should be read in the light of prevailing international law.[73] Chief Justice Rehnquist wrote, "[i]t would go beyond established precedent and practice to draw such an inference from the Treaty based on respondent's argument that abductions are so clearly prohibited in international law that there was no reason to include the prohibition in the Treaty itself."[74] The Court's decision in *Alvarez-Machain* broadened its ruling in *Verdugo-Urquidez*. Going forward, the Supreme Court would reject arguments based on international law, because those arguments were at variance with the Court's interpretation of separation of powers.[75] Like *Medellín*, the Court's holding in *Alvarez-Machain* was universally criticized in the international community, and far from inconsequential. For instance, in Mexico,

> reaction to the decision was uniformly unfavorable. The Mexican government had previously made its position clear by submitting an amicus curiae brief to the Court. The

67. *See generally id.*

68. *See* Bradley Thrush, *United States' Sanctioned Kidnapping Abroad: Can the United States Restore International Confidence in Its Extradition Treaties?*, 11 ARIZ. J. INT'L & COMP. L. 181, 185 (1994).

69. *See generally* United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991).

70. Thrush, *supra* note 68, at 204.

71. *See generally Verdugo-Urquidez,* 939 F.2d 1341 (9th Cir. 1991).

72. *See Verdugo-Urquidez*, 494 U.S. 259.

73. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

74. *Id.* at 666 & 668-69.

75. *See generally Alvarez-Machain,* 504 U.S. 655.

> Court acknowledged and then discarded Mexico's arguments. Mexico reacted to the decision with more than verbal attempts at persuasion. It suspended cooperation with the United States efforts to control illegal drug trafficking, banned all DEA activities in Mexico, demanded that the Extradition Treaty between the two countries be renegotiated, and requested that the United States surrender those persons responsible for the abduction.[76]

Alvarez-Machain signified a strategic victory for the sovereigntist paradigm; not only did the Court repudiate respondent's international law argument, but the Court eschewed the arguments raised in Mexico's official brief as well.[77] The internationalists' response joined the universal milieu condemning the decision. The Supreme Court for the first time seemed to say: yes, there is international law; however, there is an American exception to it.

Rather than retreat in the face of international criticism, the outcry emboldened several of the Justices, and they calibrated their response with a line of decisions that went further. In *Breard v. Greene,*[78] the Rehnquist Court placed the United States in direct conflict with the International Court of Justice for the first time. The per curiam opinion of the Court was written in a tone far more acerbic for what was otherwise a benign holding. The Court narrowed its holding to a procedural formality. The petitioner, a citizen of Paraguay, was denied a stay of execution for his capital murder conviction of an American citizen.[79] *Breard* filed a habeas motion in federal district court, alleging that arresting authorities violated the Vienna Convention on Consular Relations because they failed to inform him that, as a foreign national, he had the right to contact the Paraguayan Consulate.[80] The trial court concluded that *Breard* procedurally had defaulted on his claim by failing to raise it in state court.[81] The court of appeals affirmed.[82] However, the Supreme Court limited the scope of the treaty and held 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."[83]

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76. Thrush, *supra* note 68, at 182-83.
77. *See generally Alvarez-Machain,* 504 U.S. 655.
78. 523 U.S. 371 (1998).
79. *See id.*
80. *Id.*
81. *Id.* at 373.
82. *See* Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998).
83. Breard v. Greene, 523 U.S. 371, 375 (1998).

The salience of the Supreme Court's message was clear for all that listened: international law could not displace a State's criminal procedural law, and the Vienna Convention did not provide a foreign national with a private right of action in U.S. courts. More importantly, the outcomes of the cases raised questions of international law and questions of whether or not international law and treaties bind individual states. The intersection between international law and federalism represented an important front in the Rehnquist Revolution.[84] The Supreme Court had already curbed the excesses of the federal government by anointing itself the guardian of the states; it only made sense for the Court to protect states from the judgments of foreign courts.

IV. *MEDELLÍN* AS A DUAL CASE STUDY IN FEDERALISM AND AMERICAN EXCEPTIONALISM

Like most cases before the Supreme Court, *Medellín* did not merely present a unique federal question existing in a vacuum, but addressed a question derived from the outcome in a related case, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). Like *Medellín*, *Sanchez-Llamas* arose in the wake of the International Court of Justice's ("ICJ") decision in *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31). In *Avena*, the ICJ held that the United States had violated Article 36(1)(b) of the Vienna Convention on Consular Relations by failing to inform fifty-one named Mexican nationals of their Vienna Convention rights.[85] The ICJ held that those named individuals were entitled to review and reconsideration of their U.S. state-court convictions and sentences regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions.[86] Once again, in *Sanchez-Llamas*, the Court's decision was directly at variance with international law and represented another victory for the sovereigntists' paradigm.

The question presented in *Sanchez-Llamas* was whether a state could admit incriminating statements made to police as evi-

84. *See generally*, Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627 (2006). The term the "Rehnquist Revolution" has been used ubiquitously to describe the doctrinal shift of the Rehnquist Court's federalism jurisprudence, which shifted power away from the federal government and empowered states through the 10th and 11th Amendments. *Id.*

85. *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 70-74 (Mar. 31).

86. *Id.*

dence against a defendant, even if the evidence was obtained in violation of the Vienna Convention.[87] Writing for the majority, Chief Justice Roberts wrote that "[a]s far as the text of the Convention is concerned, the question of the availability of the exclusionary rule for Article 36 violations is a matter of domestic law. . . . The exclusionary rule as we know it is an entirely American legal creation."[88] Chief Justice Roberts went on to write that "[i]t is implausible that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law."[89] Moreover, relying upon its earlier decision in *Breard*, the Court reiterated that Article 36 claims, which were not raised in a timely manner, were procedurally barred by state rules.[90]

The Supreme Court's decision in *Sanchez-Llamas* and its refusal to give the ICJ's *Avena* judgment effect prompted international outcry and caused embarrassment for the White House. President Bush "then issued a memorandum stating that the United States would 'discharge its international obligations' under *Avena* 'by having State courts give effect to the decision.'"[91] Relying on the President's memorandum and the ICJ's decision in *Avena*, Jose Ernesto Medellín challenged his capital conviction and death sentence for the rape, torture, and murder of a teenage girl in Texas.[92] The Texas Court of Appeals rejected Medellín's second petition for habeas corpus as an abuse of the writ, "concluding that neither *Avena* nor the President's Memorandum was binding federal law that could displace the State's limitations on filing successive habeas applications."[93] The Supreme Court granted certiorari on the grounds of two important federal questions.

> *First*, is the ICJ's judgment in *Avena* directly enforceable as domestic law in a state court in the United States?[94] *Second*, does the President's Memorandum independently require the States to provide review and reconsideration of

87. *See Sanchez-Llamas*, 548 U.S. at 337.
88. *Id.* at 343.
89. *Id.* at 344.
90. *Id.* at 351.
91. Medellín v. Texas, 552 U.S. 491, 498 (2008).
92. *See generally* David Stout, *Justices Rule Against Bush on Death Penalty Case*, N.Y. TIMES, Mar. 25, 2008, http://www.nytimes.com/2008/03/25/washington/25cndtexas.html?_r=1&scp=1&sq=%22Justices%20Rule%20against%20Bush%20on%20Death%20Penalty%20Case%22&st=cse.
93. *Medellín*, 552 U.S. at 498.
94. *Id.*

> the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules?[95]

The first question prompts a singular analysis concerning the level of generality and degree international law and judgments should bind states. Whereas, the second question coincides more broadly with a vertical separation of powers issue, the limitations placed upon Article II, and the Supremacy Clause. Nevertheless, both questions intersect with federalism and build upon the theme that state's retention of broad sovereignty fulfills an intrinsic role in our democratic republic. As the Court answered each of the questions, the decisions were cumulatively strengthening the power of the states at the expense of not only international law, but the power of the federal government itself.

On the first issue, Medellín argued that the ICJ's judgment in *Avena* was binding on the states, because it was the "supreme law of the land" by virtue of the Supremacy Clause.[96] This reading of *Avena* coincides with the internationalists' paradigm regarding international laws and treaties. The majority opinion, reasoned that this reading of the treaty ignored the distinction the Marshall Court had drawn between treaties that are self-executing and those requiring congressional statutes.[97] Chief Justice Roberts interpreted *Foster v. Nielson*[98] as holding that a treaty was equivalent to an act by the legislature (subsequently abrogated by *United States v. Percheman*).[99] The Court in *Percheman* held that treaties were not self-executing and had to be enforced through legislation.[100] Furthermore, the majority opinion in *Medellín* went on to say that there is a background presumption that "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts."[101]

A. Chief Justice Roberts's Majority Opinion

Chief Justice Roberts criticized Medellín's first contention (ICJ judgments automatically became binding domestic law because of the Supremacy Clause) on the basis that this line of

95. *Id.*
96. *Id.* at 503.
97. *Id.* at 504.
98. 27 U.S. 253 (1829).
99. *Medellín*, 552 U.S. at 505.
100. *Id.*
101. *Id.* at 506 n.3 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 907 cmt. a (1986)).

reasoning would emasculate the political branches of government.[102] To support his point, Chief Justice Roberts drew heavily from not only constitutional law, but international law as well. Specifically, he emphasized Article 94 of the U.N. Charter, which states that the sole remedy for noncompliance with a judgment rendered by the ICJ rests within the purview of the Security Council of the United Nations' discretion.[103] According to the *Medellín* majority, even the U.N. (the body that created the ICJ) did not intend for the ICJ judgments to be enforceable in the domestic courts of member states. Regardless, the Security Council must effectuate the ICJ decisions before they become binding.

Hence, if ICJ judgments were automatically enforceable as domestic law, as Medellín contended, there would not be a need for the Security Council to act upon them. Therefore, Medellín's argument that ICJ judgments are domestically binding on U.S. courts through the Supremacy Clause serves to undermine the role of the Security Council in implementing those decisions. Chief Justice Roberts's reasoning on this point axiomatically leads to the conclusion that if the Court granted Medellín's petition, it would grossly usurp the power of the political branches of government to decide whether or not to execute ICJ judgments.[104]

Next, Roberts turned to Chapter XIV of the U.N. Charter, which created the ICJ, to hone in on the first wave of his two-front assault upon Medellín's first argument. Drawing from his previous opinion in *Sanchez-Llamas*, Roberts reiterated the argument that the ICJ can only hear disputes between national governments, and Article 34(1), 59 Statute 1059 provides that only the parties involved in a case are bound by the ICJ decision.[105] Following this reasoning one must ponder how Medellín, a person who cannot be a party to an ICJ proceeding under any circumstances, can claim a private right of action based upon that proceeding? If one answers the Chief Justice's question in the negative, than it is nearly impossible for any future litigant claiming a right of action under the ICJ to have standing to assert the claim.

Before moving on to the second question that Medellín's petition raised, the majority launched a textualist and originalist analytical assault. Responding to the dissent, Roberts wrote about the importance of looking at the language and text of a treaty

102. *Id.* at 511.
103. *Id.* at 509.
104. Medellín v. Texas, 502 U.S. 491, 511 (2008).
105. *Id.*

before determining whether or not it is self-executing. Thus, the majority opinion stated "we do think it rather important to look to the treaty language to see what it has to say about the issue. That is after all what the Senate looks to in deciding whether to approve the treaty."[106] According to the majority, this interpretive approach was the same one Chief Justice Marshall stated in *Foster*, in that "the point of a non self-executing treaty is that it 'addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.'"[107] The majority opinion went on to point out that the framers intended for treaties to become binding federal law only through the political branches of government.[108] Therefore, because the political branches of government have not acted to enforce the *Avena* judgment, the power to enforce the judgment falls outside the purview of the Court's power. "To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law."[109]

Before turning to the second question, the majority opinion uncharacteristically explained both why the original ICJ decision in *Avena* was flawed and the deleterious consequences of interpreting such a decision as binding domestic law.[110] The majority pointed out that not only would giving ICJ judgments domestic effect have pernicious consequences upon states, but would also result in adverse exclusionary effects on federal law. The Chief Justice wrote, "there is nothing in [Medellín's] logic that would exempt contrary federal law from the same fate."[111] However, within the same paragraph, the majority paralleled the consequences of international law displacing federal statutes alongside foreign law annulling state criminal convictions.[112] By doing so, the Chief Justice underscores a dynamic that would not only invade the sovereignty of states, but would place the federal government in equal peril. This is the dynamic that the sovereigntists and American exceptionalists fear the most, the loss of

106. *Id.* at 514.

107. *Id.* at 516.

108. *Id.* at 515.

109. Medellín v. Texas, 552 U.S. 491, 515 (2008).

110. *Id.* at 517-18 ("We already know, from *Sanchez-Llamas*, that this Court disagrees with both the reasoning and result in *Avena*.").

111. *Id.* at 518 (citing Cook v. United States, 288 U.S. 102, 119 (1933) ("[L]ater-in-time a self executing treaty [may] supersede a federal statute if there is a conflict.")).

112. *Id.*

sovereignty and the decline of the nation state, at the expense of an aggrandizing foreign or international entity.

The second substantive question Medellín posed for the Court focused on the President's power to issue a memorandum compelling the states to give effect to the *Avena* judgment. Medellín argued that the President's February 28, 2005 Memorandum to Texas preempted Texas's procedural default rule for raising objections regarding the state's failure to provide Medellín with access to consular services.[113] In its amicus brief to the Court, the United States argued that the President had broad enough powers to effectuate the judgment under Article II to resolve foreign policy issues, and to act in matters of foreign affairs.[114] Relying on *Youngstown*, the majority set up the framework to explain that this power, while plenary, still has its limits. The majority utilized Justice Jackson's tripartite framework in order to show that President acts at his lowest ebb of power with regard to giving effect to judgments of the ICJ.[115] It is noteworthy to add and is perhaps an irony of Supreme Court history that Chief Justice Roberts (former clerk for Chief Justice Rehnquist) overlooked his predecessor's warning: "Justice Jackson himself recognized that his three categories represented 'a somewhat over-simplified grouping.'"[116] Rehnquist would have likely had the upper hand in this argument considering that he had clerked for Justice Jackson, and helped to write Justice Jackson's concurrence in *Youngstown*.[117]

Regardless of this irony, the majority opined that the President did not have the authority to implement *Avena* based on his obligation that the laws be faithfully executed.[118] "The President

113. *Id.* at 525.

114. *See generally* Brief for United States as Amicus Curiae Supporting Petitioner, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984).

115. Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) established a framework that evaluates executive action in three areas. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for includes all that he possesses in his own right plus all that Congress possesses." *Youngstown*, 343 U.S. at 635. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority." *Id.* at 637. Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.*

116. Dames & Moore v. Regan, 453 U.S. 654, 669 (1981).

117. *See* WILLIAM REHNQUIST, THE SUPREME COURT 188 (Alfred P. Knopf 2001) (1987).

118. U.S. CONST. art. II, §3, cl. 4.

has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not one of them."[119] Relying on Federalist No. 47, which delineates the substantive discussion of checks and balances found in the Federalist Papers, the majority singularly focused on the fact that the President cannot unilaterally make a law.[120] By bypassing Congress and writing a memorandum to the states to give effect to the *Avena* judgment, the President exceeded his power under Article II. The fact that the President acts as a representative of the United States before the United Nations, the ICJ, and the Security Council speaks only to the President's responsibilities, however, it does not speak to the President's power to unilaterally implement those agreements made abroad at home.[121] Furthermore, the Constitution does not bestow upon the President the power to divest states of their reserved powers.[122] By extending this argument, the Court was saying that, if such broad power were relinquished to the President, he would be capable of imposing international agreements meant to bind nation states upon local governments. Not only would the relinquishment disrupt the separation of powers in the federal government, but it would also upset vertical federalism, which plays an intrinsic role in protecting the liberty of individuals in our democracy. This latter point was made more explicitly at the conclusion of the majority's opinion, which also prompts one to consider (if not conclude) that the protection of states was the first principle guiding the Court.

The majority opinion concluded that the President's actions were an unprecedented infringement and offended the dignity of the states.[123] The majority took pains to write that the states should retain sovereignty in criminal matters and the President's actions were anathema to that principle. Specifically, Chief Justice Roberts wrote:

> [i]ndeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally appli-

119. Medellín v. Texas, 552 U.S. 491, 525 (2008).
120. *Id.* at 527.
121. *Id.*
122. *See id.*
123. *Id.* at 527.

> cable state laws. . . . (citation omitted) (States possess primary authority for defining and enforcing criminal law).[124]

Therefore, the President could not rely upon his Article II powers to compel the state of Texas to annul the conviction of the petitioner Medellín.

Examining the majority's opinion, one can infer overtones of American exceptionalism intersecting with the doctrine of federalism. While the rhetoric does not have the alacrity of Justice Scalia's earlier writings excoriating the usage of international law, the decision itself marks an epochal new period in the weakening of international law as a means of strengthening federalism. *Medellín* marks a crossroads in this new period for constitutional law, because in a string of opinions the Rehnquist Court departed from the consensus that international law was American law—a consensus that found its apex in *Missouri v. Holland*. Subsequent case law during the Warren Court era provided certainty in that area of the law for the better part of the twentieth century. Throughout the 1990s and the early part of the twenty-first century, while the rest of the world was engaging in globalization and eagerly experimenting in transnational governance, the United States Supreme Court was disengaging American constitutional law from such internationalists aspirations and making the United States the exception to that movement.

B. Justice Breyer's Dissent

Nevertheless, like most matters that come before the Court, there was hardly unanimity in the *Medellín* decision. Justice Breyer's spirited dissent took issue with the majority's reasoning and the damage he thought it would cause to America's international prestige, his concerns also coinciding with many of the internationalists themes. Unlike the majority, which reserved its stronger arguments for the latter part of its opinion, the dissent places the constitutional predicate of the Supremacy Clause at the forefront. Justice Breyer begins by quoting directly from Article VI, clause 2 of the U.S. Constitution: "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."

Like the majority, the Justice Breyer's dissent emphasized

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124. *Id.* at 532.

the earlier precedents of the Marshall Court. Justice Breyer disagrees that *Percheman* abrogated *Foster v. Nielson*, and that a presumption exists that not all treaties are self-executing.[125] More importantly, Justice Breyer points out that the United States has signed and ratified a series of treaties obliging it to comply with ICJ judgments in cases in which it has given consent to the ICJ to exercise that authority.[126] He points out that the United States submitted itself to this compulsory judgment, and Congress did nothing to suggest the contrary.[127] Therefore, because Congress had not acted at variance with the President's memorandum, the President was acting within the realm of the second level of the *Youngstown* tripartite. There is an area of concurrent power between the President and Congress, and within this twilight of power, the President can act if Congress does not prevent him from doing so.

The next section of Justice Breyer's dissent turned its analysis toward the textual and originalist critiques of the Court's opinion. Justice Breyer argued that the majority relied too heavily upon the language of the treaty, and their own opinions of what the Founders thought about international law and the binding impact treaties have on domestic law. To answer that question, Breyer wrote: "[W]e must look instead to our own domestic law, in particular to the many treaty-related cases interpreting the Supremacy Clause. Those cases, including some written by Justices well aware of the Founders' original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law . . . ."[128] The dissent points out a case from 1840 that showed "instances in which treaty provisions automatically became part of domestic law were common enough for one Justice to write that 'it would be a bold proposition' to assert 'that an act of Congress must be first passed' in order to give a treaty effect as 'a supreme law of the land.'"[129] Justice Breyer relied on that case to challenge the majority's assumption and the new perfunctory rule that there are two types of treaties, self-executing and non-binding. The dissent emphasized that "the majority does not point to a single ratified United States treaty that contains the kind of 'clear' or 'plain' textual indication for which the majority

125. *Id.* at 527.
126. *Medellín*, 552 U.S. at 527.
127. *Id.* at 538.
128. *Id.*
129. *Id.* at 544-45 (quoting Lessee of Pollard's Heirs v. Kibbe, 39 U.S. 353 (1840)).

searches."[130]

Regarding the question of whether or not the *Avena* judgment should have the effect of domestic law, the dissent provided three reasons why it should. First, the language of the relevant treaties from which the ICJ emanates support direct judicial enforceability.[131] The optional protocol in the treaty that the United States was a party to had the title "Compulsory Settlement of Disputes."[132] The dissent points out that the language "compulsory" presupposes that the outcome of such a settlement will bind the nations that are parties to such disputes. Conversely, the protocol also has proceedings that are not compulsory, and because the United States opted for a forum with compulsory settlement, the ICJ judgment should have the effect of domestic law. Moreover, "in accepting Article 94(1) of the Charter, 'each member . . . undertakes to comply with the decision' of the ICJ 'in any case to which it is a party.'"[133] Therefore, the state of Texas and the Court's refusal to give such judgments binding effect places the United States in dereliction of its international commitments. Unlike the majority's assessment that the treaty lacks binding language, the dissent argues that for the purposes of the Supremacy Clause, the Court had found language in treaties that were much more equivocal and gave them the force of domestic law.[134] For example, in areas of substantive matters like property, commerce, contracts and other disparate areas of the law, the United States has enforced ICJ judgments even if those areas are traditionally within the regulatory realm of the states.[135] Therefore, because courts have held that the Supremacy Clause binds states to ICJ judgments, ICJ judgments have the power of binding the domestic courts of the states even in matters of criminal procedure.

The dissent argued the right Medellín sought was not a private right of action infringing upon the sovereignty of Texas, but rather a substantive, individual right that happens to intersect with a state's rules of criminal procedure.[136] Through this lens,

130. *Id.* at 547.
131. *Id.* at 551.
132. *Medellín*, 552 U.S. at 551.
133. *Id.*
134. *Id.*
135. *Id.* A few examples of these preemptory issues include: Convention on Offences and Certain Other Acts Committed on Board Aircraft, 20 U.S.T. 2941, 2943-2947; Convention on International Civil Aviation, 61 Stat. 1204 (1944) (seizure of aircraft to satisfy patent claims); Patent Cooperation Treaty, 28 U.S.T. 7645, 7652-76, 7708, T.I.A.S. No. 8733 (patents).
136. *Medellín*, 552 U.S. at 556.

the consequences for federalism are not so palpable and merely require that a state abide by uniform standards that are constitutional. Justice Breyer elucidates a litany of treaties that have been held constitutionally binding and affects a state's criminal procedure. Justice Breyer pointed out that:

> [t]his Court has found similar treaty provisions self-executing. *See, e.g., Rauscher*, 119 U.S., at 410-411, 429-430, 7 S. Ct. 234, 30 L. Ed. 425 (violation of extradition treaty could be raised as defense in criminal trial); *Johnson v. Browne*, 205 U.S. 309, 317-322, 27 S. Ct. 539, 51 L. Ed. 816 (extradition treaty required grant of writ of habeas corpus); *Wildenhus's Case*, 120 U.S., at 11, 17-18, 7 S. Ct. 385, 30 L. Ed. 565 (treaty defined scope of state jurisdiction in criminal case). . . . [*S*]*ee also id.*, at 18 ("To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern"). And the Executive Branch has said in this Court that other, indistinguishable Vienna Convention provisions are self-executing.[137]

Thus, Justice Breyer's analysis elucidates that the majority's assertion that the right Medellín seeks to vindicate is novel because it displaces a state's criminal procedure, misconstrues previous case law. However, Justice Breyer focuses his concerns more toward the negative implications of the United States' failure to carry out its obligation under the *Avena* judgment.

According to the dissent, the Court's refusal to compel Texas to honor the *Avena* judgment calls into question at least 70 other treaties with similar provisions. Just as the majority concluded with a strong sovereigntist tone, Justice Breyer ends the first part of his dissent echoing the internationalist's paradigm: "The consequence [of this decision] is to undermine longstanding efforts in those treaties to create an effective international system for interpreting and applying many, often commercial, self-executing treaty provisions."[138] Moreover, the decision would inundate Congress with a hodgepodge of issues decided by international tribunals that would have to be legislated upon before implementing. According to Justice Breyer, "[I]t seems unlikely that Congress will find it easy to develop legislative bright lines that pick out, provisions (addressed to the Judicial Branch) where self-execution

137. *Id.*

138. *Id.* at 560.

seems warranted."[139] However, to reemphasize the Supremacy Clause issue, the dissent argues "that it is not necessary for Congress to do so—at least not if one believes that this Court's Supremacy Clause cases *already* embody criteria likely to work reasonably well. It is those criteria I would apply here."[140]

On the issue of Article II power, the dissent recognizes that the majority opinion represents a significant break from traditional interpretations of presidential power.[141] The dissent reiterates the argument that Congress has acquiesced in the President's actions; therefore, he falls into the second level of analysis in the *Youngstown* framework, even if by doing so, he displaces state law. "It is difficult to believe," Justice Breyer writes, "that in the exercise of his Article II powers pursuant to a ratified treaty, the President can never take action that would result in setting aside state law."[142] Following this point, the dissent poses a hypothetical. Suppose the President believed it necessary that he exchange a prisoner held in state custody in order to avoid a military threat.[143] This hypothetical is not so far removed from reality considering prisoner swaps happen on a recurring basis in numerous countries. However, under the doctrine of *Medellín*, the federal government could not legally interfere in a state's criminal procedure in order to effectuate such an international agreement without going to Congress first.

This latter argument intersects with the competency of the judiciary to determine foreign affairs. The dissent notes:

> [g]iven the Court's comparative lack of expertise in foreign affairs; given the importance of the Nation's foreign relations; given the difficulty of finding the proper constitutional balance among state and federal, executive and legislative, powers in such matters; and given the likely future importance of this Court's efforts to do so, I would very much hesitate before concluding that the Constitution sets forth broad prohibitions (or permissions) in this area.[144]

Justice Breyer ends his dissent pointing out that the Court's abdication from precedent and its new doctrine of treaty interpretation will ultimately create disrespect for the law. By failing to

139. *Medellín*, 552 U.S. at 560.
140. *Id.*
141. *See id.* at 563.
142. *Id.*
143. *Id.*
144. *Id.* at 565-66.

honor the *Avena* judgment, which the president has taken pains to execute, it projects the image around the world that there is an American exception to judgments that go against the United States, and U.S. courts think so little of international law that they refuse to implement those decisions. This not only weakens American prestige, but the rule of law itself "insofar as today's holdings make it more difficult to enforce the judgments of international tribunals, including technical, non-politically-controversial judgments, those holdings weaken that rule of law for which our Constitution stands."[145]

Often, the cases that make it to the Supreme Court represent not so much a conflict of laws, or a clash of absolutes between dueling socio-political forces within our society, but manifest themselves through disagreements over first principles. For the majority, the first principles *Medellín* centered upon were protecting the sovereignty of the states from not only excesses of the federal government, but foreign judges meddling in the affairs of the states. Conversely, the arguments the majority employed echoed the sovereigntist critique, and for the most part relied upon the tools of textualism and originalism. Whereas the dissent responded with arguments similar to the internationalists paradigm, and the dissent's reliance on the Supremacy Clause parallels many of the arguments employed in federalism cases.

Medellín represents a nexus between these two streams of jurisprudence, and encapsulates a new juridical propensity to weaken international law as a means to strengthen federalism. As noted before, *Medellín* did not occur in a vacuum, but was the culmination of a string of cases not only weakening international law but also exemplifying hostility toward it. Such jurisprudence is far from inconsequential and has far-reaching consequences, both positive and negative. These negative and positive externalities will provide signposts that will help to augment an understanding of areas of law potentially affected by the decision in *Medellín* and the broader ramifications on federalism. When the *Medellín* holding was handed down, the majority of the commentary focused on the consequences the decision would have on international law, treaty interpretation, future international commitments, human rights treaties and general rights for aliens.[146]

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145. *Medellín*, 552 U.S. at 565-66.

146. *See generally* Laura Moranchek Hussain, *Enforcing the Treaty Rights of Aliens*, 117 YALE L.J. 680 (2008); David J. Bederman, *Medellín's New Paradigm For Treaty Interpretation*, 102 AM. J. INT'L L. 529 (2008); Carlos Manuel Vazquez, *Less*

However, not a single article was entirely devoted to the consequences *Medellín* would have on vertical federalism and the weakening of international law as a means of strengthening federalism at home.

V. THE ROBERTS COURT AND NEW FRONTIERS FOR FEDERALISM BEYOND THE TRULY LOCAL

Throughout the 1990s, at the behest of Chief Justice Rehnquist and his conservative brethren, in a series of cases, the Court transformed the doctrine of the Tenth and Eleventh Amendments, effectively placing a protective buffer between the states and the federal government. While an extensive overview of these doctrines falls outside the scope of a single article; nonetheless, it is important to provide a brief overview concerning the doctrinal transformation that occurred during the Rehnquist era, which significantly shifted the balance of power between the states and the federal government and established the essential framework to understanding the outcome in *Medellín*, as well as future cases that will come before the Supreme Court.

The Constitution provides that Congress has the power "to regulate commerce with foreign nations, and among the several states."[147] Since the Marshall Court, Congress had been given the elasticity to broadly pass legislation displacing state law pursuant to its regulatory powers under the Commerce Clause.[148] During the New Deal, Congress used the Commerce Clause to broaden the powers of the federal government more extensively, and the cases arising under that power were more controversial and effected activities that were arguably strictly local.

The textbook illustration of this doctrinal development manifested itself in *Wickard v. Filburn*.[149] Under the Agricultural Adjustment Act, the secretary of agriculture set a quota for wheat

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Than Zero?, 102 AM. J. INT'L L. 563 (2008); Curtis A. Bradley, *Intent, Presumptions, And Non-Self Executing Treaties*, 102 AM. J. INT'L L. 540 (2008); Tara J. Melish, *From Paradox To Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389 (2009); Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law At The End of An Era*, 77 FORDHAM L. REV. 411 (2008); Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); David J. Bederman, *Medellín's New Paradigm For Treaty Interpretation*, 102 AM. J. INT'L L. 529 (2008).

147. U.S. CONST. art. I, § 8, cl. 3.

148. *See generally* Gibbons v. Ogden, 22 U.S. 1 (1824).

149. Wickard v. Filburn, 317 U.S. 111 (1942).

production, and each farmer was given an allotment.[150] Filburn exceeded his allotment of wheat in order to feed himself and his family at subsistence.[151] He claimed the regulation of the wheat he grew for home consumption exceeded Congress's power. Nevertheless, the Court held that even though Filburn's "own contribution to the demand for wheat may be trivial by itself, it is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many other similarly situated, is far from trivial."[152] This principle later became known as the substantial effects test.

Throughout the era of the Warren Court, the Court continued to sustain Congress's controversial usage of the commerce power to effectuate civil rights legislation, even if the linkage to economic activity seemed tenuous to many observers. A core principle of American constitutional law is that the federal government has limited powers with a significant amount of powers reserved to the states. Throughout most of the 20th century, the Court's broad reading of the commerce power put nothing outside the regulatory realm of Congress. Robert Bork aptly described what he characterized as the hubris of the Warren Court era through an exchange he witnessed when he was a professor of law at Yale.

> Justice Douglas, formerly a professor at the Yale law school, visited the school when he was a leading figure on the Warren Court. A student of mine asked him why the government won every antitrust case, and he replied that he was ashamed a Yale student had to ask such a question. This was a period when one who took law and justice seriously, as an intellectual discipline, as something more than ultra-liberal politics, had reason to be extremely unhappy with the Supreme Court of the United States.[153]

Between 1936 and April 26, 1995, the Supreme Court did not find a single law passed by Congress to exceed the limits of the Commerce Clause.[154]

However, in line with a series of cases relying on the Tenth Amendment, in *United States v. Lopez*, the Rehnquist Court

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150. *Id.*

151. *Id.*

152. *Id.* at 127-28.

153. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 73 (1990).

154. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 264 (3d ed. 2006).

struck down the Gun-Free School Zones Act of 1990.[155] Writing for narrow 5-4 majority, Chief Justice Rehnquist concluded that the presence of a gun near a school did not substantially affect interstate commerce.[156] *Lopez* was a turning point in the Rehnquist Revolution and was followed by *Printz v. United States* in 1997.[157] Justice Scalia, writing for the same majority that decided *Lopez*, struck down a provision of the Brady Handgun Violence Prevention Act under the auspices that the provision violated the Tenth Amendment. The provision required that state and local law enforcement officers conduct background checks on people buying handguns.[158] Justice Scalia emphasized that Congress had usurped the power of the states by "commandeering state officials" to implement a strictly federal mandate.[159] However, the Supreme Court's subsequent decision in *United States v. Morrison* went further than both these previous cases and brought the Court closer to overruling *Wickard v. Filburn*.[160]

The same narrow 5-4 majority in *Lopez* joined *Morrison* in declaring it unconstitutional for the federal government to regulate crimes involving violence against women under its commerce clause powers. However, *Morrison* went further than *Lopez* in regulating Congress's commerce power, and held that Congress could not regulate a noneconomic activity by finding that, cumulatively, it has a substantial effect on interstate commerce.[161] No other justice summed up the Rehnquist Revolution's federalism project more poignantly than the reluctant revolutionary Justice Kennedy:

> [f]ederalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[162]

155. United States v. Lopez, 514 U.S. 549 (1995).
156. *See id.* at 567.
157. Printz v. United States, 521 U.S. 898 (1997).
158. CHEMERINSKY, *supra* note 154, at 324.
159. *Id.*
160. United States v. Morrison, 529 U.S. 598 (2000).
161. CHEMERINSKY, *supra* note 154, at 264.
162. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995).

Nevertheless, despite the soaring rhetoric, the revolution suffered a major setback in *Gonzalez v. Raich*.[163] The Court held that intrastate production of a commodity, such as marijuana sold in interstate commerce, is economic activity and, therefore, could have a cumulative effect on interstate commerce.[164] Surprisingly, it was Justice Scalia that disengaged from the Rehnquist Revolution's supreme phalanx in *Gonzalez*, and not Justices Kennedy and O'Connor who had always been the more reluctant revolutionaries.[165] In an uncharacteristically bellicose tone, Justice O'Connor decried the majority for ignoring the first principles of the Rehnquist Court, "We enforce the 'outer limits' of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government."[166] Since *Gonzalez*, the Court has not reviewed another major case challenging the constitutionality of Congress's commerce clause power.

However, the setback for the federalism revolution caused by *Gonzalez v. Raich* did not prevent the Supreme Court, under the leadership of Chief Justice Roberts, from continuing its march toward empowering the states. Both *Sanchez-Llamas* and *Medellín* insulate states not only from the federal government but international law as well. Nevertheless, it is important to note that the seismic shift in the power structure between the state and the federal government that occurred during the Rehnquist Revolution occurred because the federal government sought to regulate in the realm of things which were truly local.[167] *Medellín* extends beyond the truly local and is international in its scope.

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163. Gonzalez v. Raich, 545 U.S. 1 (2005).

164. *See* CHEMERINSKY, *supra* note 154, at 272.

165. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); *see also* Lawrence v. Texas, 539 U.S. 558, 560 (2003). Both Kennedy and O'Connor declined to overturn Roe v. Wade, 410 U.S. 113 (1973), even though both of them had been in the majority opinion of Webster v. Reproductive Health, 492 U.S. 490 (1989). Justice O'Connor even went so far in an earlier opinion as to declare that "the *Roe* framework is on a collision course with itself." City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 458 (1983). In *Lawrence,* Justice O'Connor and Justice Kennedy were instrumental in overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), a case they had both joined in the majority opinion, merely more than a decade before.

166. *Gonzalez*, 545 U.S. at 42.

167. *Lopez*, 514 U.S. at 567 ("[T]he Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.") (citations omitted).

VI. TOWARDS A TRANSFORMATIVE JURISPRUDENCE

Despite the fundamental differences between local issues and ones of international magnitude, the Roberts Court continues to classify legal questions with international ramifications in the context of federalism. By doing so, the Roberts Court has, and will likely continue, to devolve power from the national government over to the states at the expense of not only the federal government but the international community as well. This important development prompts a final postulate.

What stands in the way of a transformative jurisprudence that incorporates international law into what the justices in the *Pacquette Habana* rightfully recognized was "our law"?[168] The answer is rather simple; it does not require a new legal doctrine to emerge, providing a medium for judges to transcend their statist parochialisms in favor of comity with the international community. Such radical departures would be unwise and pernicious to constitutional governance. However, the shift could occur if judges return not so much to old doctrines and antiquated atavism, but instead, adopted first principles that have guided judges since the founding of the republic. Yet, these first principles are not always readily identifiable, and even if they were, reaching consensus is an arduous process. One may argue, if the Roberts Court relinquished the mantel of the Rehnquist Revolution, this may mark a return to the primitive. Would the restoration of the belief that the federal government has broad enough powers through the Supremacy Clause to bind the states in matters of treaties and other compulsory foreign judgments signal a retreat for new federalism? Sovereigntists would answer in the affirmative while internationalists respond in the negative.

In the end, both groups ultimately confuse the issue as a zero sum game, where a benefit for one inexorably triggers a detriment to the other. Law should supersede these notions of mutual exclusivity, and instead find common ground in principled judgments. *Medellín* stands as a starting point for this dialogue, not the culmination of it. Admittedly, "to insist one's own time and place is at the core of the change is almost always problematic, tarnished by a suspect autocentrism that gives undue weight to the significance of changes that coincide with one's mortality and prefer-

168. The Pacquete Habana, 175 U.S. 677, 700.

ences a vantage point of space and time."[169]

In spite of this natural human propensity, a recognition that the Roberts Court stands at the precipice of a transformative period, along with a return to first principles incorporates the wisdom of Chief Justice Rehnquist. The late Chief Justice correctly recognized the essential role States fulfill in protecting liberty, and Congress at the acquiescence of the Supreme Court had exceeded its commerce clause powers. His successor might do well to return from the wilderness of federalism's new frontier and draw upon the wisdom of his predecessor who recognized the need for reasoned change. Especially when the issues cut deeper than the truly local and extend into the international.

169. RICHARD FAULK, LAW IN AN EMERGING GLOBAL VILLAGE: A POST WESTPHALIAN PERSPECTIVE 5-6 (1998).