Avena and the World Court’s Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas’s Independence from the World

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INTRODUCTION

On March 31, 2004, the International Court of Justice (“ICJ” or “World Court”) issued its ruling in Avena and Other Mexican Nationals (Mex. v. U.S.).1 The World Court held that various states within the United States had violated the rights of fifty-one Mexican nationals. The states had failed to notify the Mexican citizens of their rights, under the Vienna Convention on Consular Relations,2 to contact Mexican consulates. By unanimous vote, the World Court then required that the United States “shall provide, by means of its own choosing, review and reconsideration of the conviction[s] and sentence[s]” at issue.3 Mexico, in turn, indicated that it expected the United States to abide by the World Court decision.4

The Avena decision was not well received in Texas. The state, which

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4. Cragg Hines, A Sound Decision Vs. the Likely Upshot, HOUSTON CHRON., Apr. 1, 2004, at A28 (“Of course we have full confidence that the United States will comply with the court’s ruling,” Arturo Dajer, a legal adviser in Mexico’s foreign ministry told a news conference in Mexico City . . . .”).
sentenced sixteen of the Mexican nationals affected by the ruling, has a long and complex relationship with the death penalty. Immediately following the ruling, Texas Attorney General Greg Abbott indicated that he would seek an interpretation from the U.S. Department of State in an effort to guide his own and Texas's actions with respect to the decision. General Abbott indicated that, absent recommendations from the federal government, his office had no plans to ask for new trials, new sentencing, or stays of execution. Going further, a spokesman for Texas Governor Rick Perry stated, "Obviously the governor respects the world court's right to have an opinion, but the fact remains they have no standing and no jurisdiction in the state of Texas." Similarly, Paco Felici, a spokesman for the Texas Attorney General, boldly proclaimed, "We do not believe the World Court has jurisdiction in these matters."

On February 28, 2005, the Bush Administration announced that it would instruct state courts to provide new hearings to the Mexican nationals whose cases were addressed in Avena. Texas officials, however, remained intransigent. The office of Attorney General Abbott released a statement challenging the Administration: "We respectfully believe the executive determination exceeds the constitutional bounds for federal authority."

This Article focuses on the reaction of Texas state officials for several reasons. First, the authors are born Texans and law professors and legislators in

5. Dane Schiller & Maro Robbins, Mexico Wins in World Court, SAN ANTONIO EXPRESS-NEWS, Apr. 1, 2004, at 1A.
6. Id. On June 30, 2004, we requested an update from the U.S. Department of State regarding the status of Texas's request for an interpretation and/or guidance from the Department of State. See Letter from Reynaldo Anaya Valencia to Peter Mason, June 30, 2004 (on file with author). By letter dated July 6, 2004, the Department of State informed the authors that as of that date, Texas had yet to make a formal request for an interpretation and/or guidance on the Avena decision. See Letter from Peter Mason to Reynaldo Anaya Valencia, July 6, 2004 (on file with author) ("With regard to communications between Texas government officials and the State Department, there have been a number of discussions between Texas and State Department officials both before and since the International Court of Justice issued its judgment in Avena. The State Department initiated some of these discussions and others were initiated by Texas. We continue to discuss the judgment with a variety of Texas official in an informal basis." (emphasis added)).
8. Schiller & Robbins, supra note 5; see also Hines, supra note 4 (quoting Mr. Felici as saying: "We don't believe the world court has standing. Our business is conducted in the state courts and federal U.S. courts.").
9. See Brief for the United States as Amicus Curiae Supporting Respondent at 38-48, Medellin v. Dretke, cert. granted, 125 S. Ct. 686 (2004) (No. 04-5928). In a Memorandum for the Attorney General, President Bush stated, "[T]he United States will discharge its international obligation under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals... 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." Id. app. 2.
that state and want to see their beloved home state depicted in a more favorable light. Second, the death penalty has a particularly significant history in Texas, and the state has one of the highest execution rates in the world. Third, Texas borders Mexico, was formerly part of Mexico, and has a large population of people of Mexican ancestry. Fourth, the reactions of Texas state officials to the Avena decision have been among the most notable in the nation. Fifth, the best opportunity to resolve this matter lies with a Texas case, Medellin v. Dretke, currently before the United States Supreme Court; the Court is expected to hand down a decision in June 2005. Finally, the conduct of Texas officials reflects a nationwide reluctance to abide by the Vienna Convention, which in turn underscores apprehension about the authority of international law more generally.

The Avena ruling turned on a treaty obligation of the United States government. Under the Vienna Convention, the United States and 165 other countries committed themselves to a regime intended to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." The treaty attempts to assure consistent, reciprocal behavior among the signatory states in matters regarding their consulates and consular employers stationed abroad. The Avena decision dealt with services that consulates provide to their nationals who have been arrested and incarcerated for criminal offenses in the receiving state. Indeed, one of the prime purposes of any consulate is to assist nationals who encounter difficulty in foreign lands.

Avena involved foreign nationals who were convicted of various crimes in U.S. courts, including heinous murders. Presumably these individuals received as much due process as U.S. citizens in similar cases. The consular function, however, is not simply an unavailing courtesy. Indeed, having one's consulate notified of arrest and receiving its assistance are rights that evolve from the same concerns and principles that underlie procedural rights within the U.S. criminal justice system. Nation-states enter into treaties like the Vienna Convention because they recognize the significance of such rights. They promise to allow the kind of consular activities described, and in return receive assurance that their own nationals will benefit from the same protections.

Unfortunately, subdivisions in federal systems, such as provinces or states,
do not always uphold reciprocal agreements arranged by their central
government to protect national interests. In the United States, the problem
stems from state sovereignty, which derives from the Tenth and Eleventh
Amendments of the Constitution. In essence, the fifty states are repositories of
all powers not explicitly granted to the federal government. Law enforcement
is traditionally among those powers.

Of course, under the Supremacy Clause, all federal laws, including
treaties, are placed above state laws, and any perceived state interest must be
subordinated to the national interest. Reality can become complicated in those
situations where the state's police powers pose an almost insurmountable
obstacle to incursions of the federal government. But where the federal
government is acting within its plenary powers, as it is when it reaches
agreements with other nations, state prerogatives, even when deeply embedded
in the residual Tenth Amendment powers, should eventually submit to the
federal will.

Consequently, Texas is obliged to follow the Vienna Convention as
interpreted in *Avena*. First, *Avena* is now the prevailing interpretation of the
treaty to which the United States is a party. Second, under the Vienna
Convention and the Statute of the International Court of Justice, the United
States is required to abide by the rulings of the World Court. If the United
States is not going to comply, that decision should be made in Washington,
D.C., not in Austin.

15. In a number of limited cases, U.S. states do enter into agreements with foreign entities, but for
most matters of "state," as national interests are characterized, political subdivisions do not have the
resources or authority to interact with foreign countries. Constitutional framer Rufus King described the
role of the several states of the Union in foreign affairs in the following way:

‘The states were not 'sovereigns' in the sense contended for by some. They did not possess the
peculiar features of sovereignty,—they could not make war, nor peace, nor alliances, nor
treaties. Considering them as political beings, they were dumb, for they could not speak to any
foreign sovereign whatever. They were deaf, for they could not hear any propositions from
such sovereign. They had not even the organs or faculties of defence or offence, for they could
not of themselves raise troops, or equip vessels, for war.’ 5 Elliot's Debates, 212.

16. U.S. CONST. amend. X.
17. U.S. CONST. art. VI., cl. 2.
18. For a consideration of this principle in foreign affairs, see generally *Curtiss-Wright*, 299 U.S. at
20. As the highest court under the United Nations system with jurisdiction to hear matters involving
treaties, there is no other competing interpretation from another tribunal or entity recognized by the
world community.

21. The Bush Administration, in fact, recently decided to withdraw the United States from the
Vienna Convention’s Optional Protocol, which gave the ICJ authority to determine when the rights of
nationals have been violated. See Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST,
Mar. 10, 2005, at A1. The Administration’s decision, however, “does not affect the rest of the Vienna
Convention,” id., nor does it alter the obligation of the United States to comply with the ICJ’s ruling in
*Avena* as it applies to the fifty-two death penalty cases at issue therein. The Administration has admitted
as much, instructing state courts to provide the required review and reconsideration. See supra notes 9-
For all of these reasons, this Article argues that Texas should neither minimize nor ignore the ruling of the World Court. Given Texas's contentious history with the death penalty, it is in the state's best interest to abide by the *Avena* decision and provide meaningful "review and reconsideration" of the cases at issue. In short, if Texas hopes to maintain any semblance of a moral high ground on the issue of the death penalty, and—perhaps more importantly—if Texas expects to maintain and strengthen business, political, and cultural relationships with Mexico, it is in Texas's best interests to respond to the World Court decision in a careful, thoughtful and deliberative way, rather than in a dismissive manner.

This Article also contends that the federal government, through the Justice and State Departments should be proactive in observing state behavior. As noted, enforcement of the Vienna Convention has been contentious for years, most notably in the late 1990s. The federal government could have imposed a clear obligation on the states not to interfere with American foreign policy, perhaps backed with the threat of litigation. Instead, in at least two death penalty cases, the federal government requested only that state officials be cognizant of the Convention.22

Part I of this Article discusses the various public policy reasons why Texas should provide meaningful "review and reconsideration" of the sixteen Texas death sentences addressed in the *Avena* decision. Part I also considers the policy implications of following the *Avena* decision. Part II provides a broad overview and brief history of the Texas death penalty in order to illustrate that the Vienna Convention is only one of the latest of the many contentious issues that continue to plague the state's capital punishment system. Texas officials' failure to follow the dictates of the Vienna Convention takes on added significance in light of the vagaries of the Texas death penalty. Having considered the various public policy reasons militating in favor of Texas's compliance with the *Avena* decision, Parts III and IV analyze the two strands of law affecting the *Avena* case: international and domestic. Part III addresses the *Avena* decision, the Vienna Convention, and the United States' compliance obligations. Part IV considers the international law issues in *Avena* and the possible impact of a Supreme Court decision in *Medellin*, especially with respect to the concept of federal nation-states in international law. Finally, Part V examines how principles of United States constitutional law, particularly federalism, affect U.S. obligations under international law.

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10 and accompanying text.

22. The State Department is reported to have asked then-Governor George Bush to give attention to the issue of notification regarding an inmate awaiting execution in 1997. Kamen, *supra* note 11. In the ICJ case of *Germany v. United States (LaGrand)*, 2001 I.C.J. 466 (June 27), the ICJ made clear its disappointment with State Department efforts to prevent the execution of an Arizona inmate following an order of provisional measures issued by the ICJ shortly before the execution was conducted.
I. PUBLIC POLICY REASONS FOR TEXAS’S COMPLIANCE WITH THE AVENA DECISION

There is a panoply of public policy reasons why Texas should comply with the Avena decision. The reasons fall into two basic categories: the significance of maintaining a strong Texas-Mexico relationship and the importance of fostering an international legal society.

A. Texas-Mexico Relations

As a state that shares a 1200-mile international border with Mexico, Texas has a special relationship with its neighbor to the south, driven by a commonality of people, history, custom, culture, language, and more recently, by strong commercial interdependence. A recent study from the Inter-American Development Bank found that Latin American immigrants in Texas were expected to send more than $3 billion in remittances to their countries of origin in 2004, with Mexico receiving 91% of this amount.23 Citizens of Texas and Mexico often interact informally along the Texas/Mexico border, and the governments of Texas and Mexico have taken steps to formalize this relationship.

Since 1971, Texas has maintained a “State of Texas Mexico Office” in Mexico City, which “works to strengthen trade, investment and tourism ties between Texas and Mexico” and “provides Texas businesses and communities with a voice in Mexico, as well as contacts to facilitate doing business in Mexico.”24 While some may wonder what would cause a state to establish an official presence in a foreign country, the State of Texas Mexico Office’s own justification provides a simple answer:

As Texas’ closest foreign neighbor and partner in the North American Free Trade Agreement, Mexico is the largest foreign market for Texas merchandise export. In 1998, Texas merchandise exports to Mexico totaled $36.6 billion. Roughly one-third of all Texas exports are destined for Mexico. Moreover, Texas accounts for nearly half of total U.S. exports to Mexico. Texas’ transportation infrastructure serves as the principal conduit for trade between Mexican and U.S. economic centers, and the state’s relationship to Mexico is further strengthened by strong

23. See INTER-AMERICAN DEV. BANK, SENDING MONEY HOME: REMITTANCES FROM THE LATIN AMERICA TO US, 2004 (2004), available at http://www.iadb.org/mif/v2/ files/map2004survey.pdf (last visited Apr. 26, 2005); David Hendricks, Remittances to Mexico Are Huge Piece of Big Pie, SAN ANTONIO EXPRESS-NEWS, June 30, 2004, at 1E (noting that Mexican workers in the United States sent home $13.3 billion in remittances in 2003, which was third only to maquiladoras ($18.4 billion) and oil exports ($15 billion) in terms of foreign exchange between Mexico and the United States, and concluding that “Mexico, thanks to its proximity to the United States, receives the most remittances of all of the world’s nations”); Hernan Rozemberg, Texas Migrants Send $3 Billion Home, SAN ANTONIO EXPRESS-NEWS, May 18, 2004, at 1A.
Executive Order 98-01, signed by then-Texas Governor George W. Bush and then-Texas Secretary of State Alberto Gonzalez, on July 22, 1998, further acknowledges the important ties between Texas and Mexico. It declares that "Texas greatly values its relationship with Mexico and regards a friendly and cooperative relationship with Mexico as being of immense importance to Texas," and it designates the Texas Secretary of State as the "Chief Liaison to Mexico and the Border Region of Texas." The Texas governor frequently travels to Mexico to visit Mexican officials for the specific purpose of fostering economic and social/political ties.

These close social, political, historical, and economic ties between Texas and Mexico should make it incumbent on Texas to treat its southern neighbor with dignity and respect, and to provide meaningful "review and reconsideration" of the sixteen Texas cases at issue in Avena. Many government officials and citizens in Mexico strongly oppose the death penalty in the United States and, more specifically, its application to Mexican nationals. Mexican President Vicente Fox cancelled an August 2002 trip to

27. Alberto Gonzalez, who would later become a Texas Supreme Court Justice, went on to serve as White House Counsel to President George W. Bush, and recently became the first Hispanic United States Attorney General.
30. See, e.g., Dane Schiller, Texas Gov Trying to Win Trust in Mexico, SAN ANTONIO EXPRESS-NEWS, June 25, 2004, at 1A ("During his visit, [Governor] Perry met with Mexican President Vicente Fox, two Cabinet members and the governors of the border states of Nuevo Leon, Tamaulipas and Coahila.").
31. See, e.g., Dane Schiller, Justice Doesn't Always Translate Across Border, SAN ANTONIO EXPRESS-NEWS, Apr. 27, 2004, at 1A (noting that President Fox's "disdain" for the death penalty in the United States "follows a long political traditional in Mexico").
32. Id. (noting that President Fox has proposed that the death penalty be eliminated in Mexico and "has vowed to fight its application in the United States," stating that "Mexicans long have been outspoken about capital punishment in the United States, and media reports here often portray Mexicans who face it as having been framed or unfairly judged by a racist system").
Texas on the eve of Texas’s execution of a Mexican national, Javier Suárez Medina, to demonstrate how seriously he opposed the death penalty. At least one news agency characterized the move as an “unequivocal repudiation” of the execution of a Mexican citizen. A phone call from President Bush to President Fox, a few days after the Avena decision, also reflected the significance of the death sentences in relations with Mexico. Their “seven-minute conversation [was] part of the two leaders’ mutual promise to stay in close contact.” Phone calls, however, will not assuage Mexican concerns about use of the death penalty against Mexican nationals. Peter Ward, Executive Director of the Mexico Studies Center at the University of Texas at Austin, has declared:

Diplomatically, [the death penalty] represents an open and running sore for U.S.-Mexico relations.... This distracts from normal relations.... And when the execution goes ahead in spite of the president’s and often the Pope’s personal appeals, then it is viewed as a slap in the face and an indication of arrogance and indifference to world opinion.

The notion that Texas should abide by the dictates of the Vienna Convention and the Avena decision is not without political support. Indeed, the 2004 Texas Democratic Party platform explicitly calls for recognition of “[t]he right to consular notification, to provide non-U.S. citizens arrested in Texas their right under international law to contact their consulates.” Furthermore, on May 31, 2004, the San Antonio Express-News published a scathing editorial in which it concluded:

Texas has 16 Mexican citizens on death row. Because Gov. Rick Perry has been unresponsive, the World Court’s ruling is unlikely to have any effect on these cases. That is a mistake. .... This nation would be in a stronger position to exert pressure on Mexico if states abide by the World Court ruling and review the 51 death row cases—beginning with those in Texas.... While the World Court has no power to enforce [the Vienna Convention], the United States ignores it at the peril of its citizens.

33. See Mexico’s Application Instituting Proceedings at 12, Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31) (No. 128) (“As a result of the execution of Mr. Suarez, the President of Mexico cancelled his announced official visit to Texas to formally protest the violation of international law. In a press release issued on the day of the execution by the Office of the President, the position of Mexico on Article 36 was reiterated.”), available at http://www.icj-cij.org/icjwww/idocket/imus/imusapplication_20030109.PDF (last visited Apr. 26, 2005); see also Susana Hayward, Fox Calls Off Visit to Lone Star State: Action Taken to Protest Texas’ Execution of Cop-Killer, SAN ANTONIO EXPRESS-NEWS, Aug 15, 2002, at IA.

34. Hayward, supra note 33.


36. Schiller, supra note 31 (quoting Peter Ward).


38. Editorial, Our Turn: To Protect Americans, U.S. Must Heed Court, SAN ANTONIO EXPRESS-NEWS, May 31, 2004, at 6B (emphasis added). The editorial also proclaimed, “If the United States expects its citizens arrested in Mexico to be able to contact U.S. consular officials without delay, then this nation should heed a recent World Court ruling to review the cases of 51 Mexican nationals on
Echoing these sentiments, Stephen M. Schwebel, a judge on the World Court from 1981-2000 and its president from 1997-2000, has declared:

No country has more at stake in performance under the [Vienna] treaty than does the U.S., many thousands of whose citizens travel the world. When Americans abroad are arrested, the importance of assuring that they can contact a U.S. consul in order to communicate with their families and benefit by the assistance of legal counsel is obvious. But it is reciprocal. If police and courts in the U.S. routinely ignore their obligations under that convention, how can it be expected that U.S. nationals will enjoy its protection?\textsuperscript{39}

It is this expectation of “reciprocal” treaty obligations that underlies all of the public policy arguments supporting Texas’s compliance with the \textit{Avena} decision. If Texas expects and desires good relations with Mexico, in which notions of fairness, justice, and adherence to the rule of law are respected by both sides, then Texas must act accordingly.

A recent lawsuit by Texas farmers and irrigation officials against the Mexican government illustrates this point. In the summer of 2004, several Texas farmers and irrigation officials filed a $500 million lawsuit against Mexico for allegedly violating a 1944 water treaty entered into by the United States and Mexico.\textsuperscript{40} The lawsuit arose from years of conflict between the United States and Mexico regarding the treaty and water disputes.\textsuperscript{41} Given Texas’s geographical location and the importance of water to the South Texas region, it is clear why these issues are so vital to the state.\textsuperscript{42} Indeed, Texas...
officials attempted to resolve the dispute in Mexico City before the farmers filed suit.\textsuperscript{43} Despite the efforts of U.S. and Texas officials, however, the farmers and irrigation officials proceeded with their private action. They claimed that, after years of frustration with both U.S. and Mexican officials, they had “run out of options.”\textsuperscript{44}

As of September 2004, the U.S. Department of State had taken no official position on the litigation, but had expressed its desire to continue to “pursue a resolution through diplomacy.”\textsuperscript{45} Texas officials, however, have not been so reticent. On September 8, 2004, the Texas Senate Select Committee on Water Policy made news around the State when it went on the record in support of the lawsuit and promised to urge federal officials to make settling the suit a top priority.\textsuperscript{46} Texas State Senator Eddie Lucio (D-Brownsville), a member of the Water Policy Committee, unequivocally declared, “I’m going to be voicing this concern and being critical of our administration in Washington if they don’t get up and call Mexico to the carpet on this. I intend to carry any piece of legislation that is necessary.”\textsuperscript{47} Other top Texas officials have expressed public support for the litigation, including Texas’s two Republican U.S. Senators, two Democratic members of the U.S. House of Representatives, and Texas Agriculture Commissioner Susan Combs.\textsuperscript{48}

The lawsuit by “angry Texas farmers” and irrigation officials against the government of Mexico helps to focus the issue of compliance with the \textit{Avena} decision. Put simply, if Texas and Texans expect Mexico to act as a good neighbor and adhere to the 1944 Water Treaty, then Texans must also appreciate and respect the similar importance of the death penalty to Mexico and Mexicans and abide by the Vienna Convention and the \textit{Avena}.\textsuperscript{49} In short,
what is ultimately called for is reciprocity of respect and understanding.

B. Fostering International Legal Society

As important as reciprocal respect is the need for the United States to overcome its fears of an international legal society. Texas officials’ response to the Avena decision is rooted in a very “American” suspicion of outside involvement in national sovereign functions.\(^5\) Government officials and citizens tend to view the criminal justice system and the rulings and punishments meted out under that system as an internal affair. While this is not an unusual sentiment, the difference between the United States and other sovereign nations is one of degree: the United States, of late, has been fiercely protective of its sovereignty. Its concern is not without basis. As the U.S. memorial in the Avena case points out, Mexico has not committed to the same level of compliance with the Vienna Convention that it seeks to impose on the United States.\(^5\)

The United States, however, undertook certain obligations when it signed the Statute of the International Court of Justice (ICJ) and the Vienna Convention. Treaties, like contracts, are meant to limit range of options available to signatories. By entering into a treaty, the parties exchange ultimate freedom—in the case of states, sovereignty—for something in return.\(^2\) By signing the Vienna Convention, the United States secured a commitment that its citizens and diplomatic agents would be protected.\(^3\) Indeed, membership in the Vienna Convention brings many benefits to U.S. consular interests worldwide, and the notification provision of Article 36 continues to be a godsend to countless American travelers abroad. If the Convention benefits the United States because other nations comply with its term, then the United States must reciprocate and comply as well.

The ICJ took up the Avena case because the United States specifically approved the Vienna Convention’s Optional Protocol. The ICJ’s jurisdiction was not thrust upon the United States by powers unsympathetic to U.S. interests. Even if the ICJ makes a decision that the United States dislikes, it is not acting ultra vires. When the United States entered into the relevant treaties, it agreed to be bound by the provisions of those documents and, by extension, ICJ decisions like Avena.

\(^5\) See generally Luck, supra note 13, at 41-75.
Some critics of the ICJ have tried to distort the debate by declaring that, if the United States complies with all ICJ decisions, the ICJ will essentially become a court of criminal appeal. The reality, however, is that the ICJ cannot use coercion, physical or otherwise, to enforce its rulings. Moreover, the United States has the ability to opt out of the ICJ, either totally or provisionally, as it did in the case of *Nicaragua v. United States*.

There, in a dispute involving U.S. paramilitary actions in Nicaragua during the Sandinista regime, the United States believed that the ICJ erred when it ruled that Nicaragua had standing to sue under a procedural device in the Statute of the International Court of Justice known as the Optional Clause. As a result, the United States temporarily withdrew its consent to suit before that body.

The United States recently made a similar decision in response to the *Avena* case. Decision should be made by federal government, not the states. Critics responded harshly to the withdrawal, but it still presents a viable option if the United States believes that the ICJ has overstepped its bounds with the *Avena* ruling.

On March 7, 2005, Secretary of State Condoleezza Rice sent a two-paragraph letter to U.N. Secretary-General Kofi Annan informing him that the United States was withdrawing from the Vienna Convention’s Optional Protocol. While that withdrawal may mean that the United States “will not have to bow to the ICJ again,” it does not alter the country’s obligation to follow ICJ rulings, including *Avena*, that have already been handed down. Indeed, the Bush Administration has indicated its intention to abide by the *Avena* judgment. And if the United States wishes to enjoy the goodwill and mutual benefit secured by the Convention, it must continue to adhere to the Convention’s provisions even if it is not subject to the authority of the ICJ.

II. AN OVERVIEW OF THE DEATH PENALTY IN TEXAS

To understand the complex challenge the *Avena* decision poses for the state of Texas, widely considered “the nation’s foremost executioner,” observers must first examine the historical and contemporary significance of capital punishment in Texas. As is true of all states with a death penalty statute, the

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57. Lane, *supra* note 21.

58. *See supra* note 9 and accompanying text.

The history of the death penalty in Texas can best be understood in relation to Furman v. Georgia. The landmark 1972 Supreme Court decision declared all existing death penalty statutes unconstitutional. Furman, however, did not entirely prohibit the use of capital punishment; instead it declared the death penalty unconstitutional as presently administered. In Furman's aftermath, numerous states quickly revamped their capital punishment systems. Texas was one of the first states to reform its capital punishment system in an effort to comply with Furman, passing new legislation in 1973. The state conducted its first post-Furman execution in 1982.

The history of the Texas death penalty divides into pre-Furman and post-Furman eras. The pre-Furman history separates further into two significant periods: 1819-1923, and 1923-72. Efforts to curb illegal lynching and centralize the administration of the death penalty marked the 1819-1923 period. Watershed legislation in 1923 accomplished those goals. During the 1923-72 period, 361 men were executed in Texas under the new centralized regime. A July 1964 moratorium suspended all executions until the Furman ruling. The post-Furman era, referred to as the "modern death penalty era" in Texas, includes all capital activity since 1972.

A. Capital Punishment in Texas Pre-Furman (1818-1923)

Texas has a long tradition of capital punishment. Mental images abound of frontier public executions and brutal illegal lynchings. Executions and lynchings were deemed necessary to preserve the boundary between order and chaos. Violent ends for violent individuals appeared just and orderly. "'You had to draw the line somewhere,' it was said."

In their groundbreaking book, The Rope, the Chair, and the Needle: Capital Punishment in Texas, 1923-1990, authors James W. Marquart et al. note that "[s]tate legislatures were quick to oblige" with the Furman Court's desire for new "more structured statutory guidelines," and that by 1976, only four years after Furman, "new or revised capital punishment statutes had been passed in thirty-five states".


For a thorough treatment of the legislative history regarding Texas's efforts to revamp its death penalty statute in response to Furman, see Michael Kuhn, Note, House Bill 200: The Legislative Attempt To Reinstate Capital Punishment in Texas, 11 HOUS. L. REV. 410 (1974). This new death penalty statutory scheme was subsequently upheld in 1976 by the U.S. Supreme Court in Jurek v. Texas, 428 U.S. 262 (1976).

60. 408 U.S. 238 (1972).
61. JAMES W. MARQUART ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990, at 129 (1994) (noting that "[s]tate legislatures were quick to oblige" with the Furman Court's desire for new "more structured statutory guidelines," and that by 1976, only four years after Furman, "new or revised capital punishment statutes had been passed in thirty-five states").
63. MARQUART ET AL., supra note 61, at 130; Newton, supra note 62, at 4; Tex. Dep't of Criminal Justice, supra note 62.
65. MARQUART ET AL., supra note 61, at ix.
Punishment in Texas, 1923-1990, Professors James W. Marquart, Sheldon Ekland-Olson, and Jonathan R. Sorenson powerfully chronicle that prior to 1923, public hangings and illegal lynchings in Texas were brutal and routine and were carried out by local communities throughout the state. The killings' frequency began to subside by 1900. In 1923, state Senator J.W. Thomas introduced a bill to reform Texas executions. Thomas won his seat by advocating such reform in the aftermath of an incident in which three African-Americans accused of a crime were literally "burned at the stake." Senate Bill 63, motivated by the desire for more modern, humane, and centralized executions, abandoned the hangman's rope in favor of the electric chair and removed all executions from the "emotional atmosphere" found in local communities to the remote prison location of Huntsville, Texas. Though it aspired to make the death penalty regime more humane, the Act nevertheless provided:

From and after the taking effect of this Act whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution, not less than thirty days from the date of sentence, as the court may adjudge, by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of such convict until such convict is dead.

The state also constructed a "Death Row," consisting of nine cells and one shower, at the Huntsville prison, and it installed an electric chair there (subsequently known as "Old Sparky") on December 1, 1923. The state conducted its first executions by electrocution under the new statute shortly after midnight on February 8, 1924. Five men, all African-American, were executed.

66. Id. at ix, 1-12; see also Newton, supra note 62, at 3 ("Capital punishment has a prominent place in this State's history, which simply reflects the generally violent climate historically associated with Texas justice. Until 1924, when Texas began executing people in the newly-acquired electric chair located in the state prison in Huntsville, the death penalty was largely a local concern, administered by hanging at the county level.").

67. MARQUART ET AL., supra note 61, at 12, 13, 190.

68. For example, Section 14 of Senate Bill 63 specifically provided:

The fact that our present method of putting to death condemned convicts by hanging the condemned in the counties where the judgment of death is obtained, frequently creates great disturbance in the county, and the further fact that the system is antiquated and has been supplanted in many states by the more modern and humane system of electrocution create an emergency and an imperative public necessity . . . .


69. Id. at 13-15.

70. Id., app. A, at 197 (quoting S.B. 63) (emphasis added).

71. Id. at 15.

72. Id. at 19. Charles Reynolds was the first to be electrocuted under the newly revised Texas statute, followed by Ewell Morris, George Washington, Mack Matthews, and finally Melvin Johnson. Tex. Dep't of Criminal Justice, electrocutions, at http://www.tdcj.state.tx.us/stat/prefurman/electrocutions.htm (last updated May 7, 2002).

73. MARQUART ET AL., supra note 61, at 19.
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B. Capital Punishment in Texas Pre-Furman (1923-1972)

In the decades following the enactment of Senate Bill 63, executions in Texas, and throughout the United States, increased and decreased for a variety of complex reasons. In the 1960s, anti-capital punishment movements began to take hold and lobby successfully for execution moratoriums. Texas enacted a moratorium in July 1964 that remained in place until the Supreme Court’s decision in Furman.\footnote{Id. at ix ("This hiatus in executions reflected widely discussed concerns with justice. Broadly drawn, the question was, had moral standards evolved to such a point that capital punishment was no longer tolerable, was no longer a punishment fit for any crime, was unconstitutional regardless of how it was carried out?").} One commentator notes, "In those years before Furman v. Georgia, the Texas death penalty was used almost exclusively against the young, the ignorant and impoverished, racial minorities, and the mentally disturbed; at the same time, practically every victim was white."\footnote{Newton, supra note 62, at 3 (footnote omitted). Between 1923 and 1972, the total number of convicts sentenced to death in Texas was 506. Id. at 3. Of this number, 288 (56.9 percent) were African-American, 171 (33.8 percent) were Anglo, 46 (9.1 percent) were Hispanic, and 1 (0.2 percent) were "other." Tex. Dep’t of Criminal Justice, Racial and Gender Breakdown of Death Row Offenders 1923-1973, at http://www.tdcj.state.tx.us/stat/prefurman/racial.htm (last updated June 25, 2001). A total of 361 of the individuals sentenced to death were actually executed by electrocution during this period. MARQUART ET AL., supra note 61, at 21. Of those actually executed, 229 (63 percent) were African-American, 107 (30 percent) were Anglo, 24 (7 percent) were Hispanic, and 1 (0.2 percent) was "other." Id.; Tex. Dep’t of Criminal Justice, Racial Breakdown of Electrocuted Offenders, at http://www.tdcj.state.tx.us/stat/prefurman/electrocutionsracial.htm (last updated June 2, 2001). During this period, eighty-two percent of the African-Americans sentenced to death were eventually executed, compared to sixty-one percent of the Anglos and fifty percent of the Hispanics. MARQUART ET AL., supra note 61, at 24. With respect to clemency, there were similar disparities: forty-six percent of Hispanic offenders’ sentences were commuted, compared to only thirty-four percent of the white offenders’ and twenty percent of the African-American offenders’ sentences. Id. With regard to race of victim, eighty percent of the individuals sentenced to death were convicted of offenses involving white victims, whereas only fifteen percent of these crimes involved African-American victims and only five percent involved Hispanic victims. Id. In situations in which white victims were killed, seventy-three percent resulted in executions, compared to sixty-two percent of cases involving African-American victims and forty-six percent involving Hispanic victims. Id. Only three of the 510 individuals who received the death sentence between 1923 and 1972 were female, but no women were actually executed during this time period. Id. at 23. The average age of those executed was thirty years. Approximately fifty-two percent had less than a sixth grade education, while a full ninety percent were not high school graduates; ten percent had never attended school. Id. at 23.} Echoing this sentiment, Professors Marquart, Ekland-Olson and Sorensen further conclude, "Statistics such as these would eventually become the fulcrum for reversing capital punishment statutes in the 1970s."\footnote{MARQUART ET AL., supra note 61, at 24.}

C. Capital Punishment in Texas Post-Furman (1972-Present)

As mentioned above, after Furman, the Texas legislature quickly adopted "a unique capital sentencing scheme" that it hoped would be responsive to the Supreme Court’s concerns.\footnote{Newton, supra note 62, at 7; see also MARQUART ET AL., supra note 61 at 130-31.} The new system’s “uniqueness” stemmed from
the fact that, while most jurisdictions required juries in capital cases to weigh both aggravating and mitigating circumstances when considering a sentence of death, Texas juries were only asked to answer three narrow questions termed "special issues":

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.\(^7\)

A jury's unanimous, affirmative answer to all three "special issues" automatically resulted in a death sentence. However, if ten or more jurors gave a negative answer on any one "special issue," a life sentence resulted.\(^7\)

A constitutional challenge to the new statutory scheme, specifically the "special issues" component and its mandatory nature and rigidity, was swift but ultimately unsuccessful. In Jurek v. Texas, the Supreme Court upheld the new legislation.\(^8\) Jurek was the first Texas death penalty case post-Furman to reach the U.S. Supreme Court, but it was by no means the last. At least six additional rulings—Franklin v. Lynaugh,\(^8\) Penry v. Lynaugh ("Penry I"),\(^8\) Penry v. Johnson ("Penry II"),\(^8\) Graham v. Collins,\(^8\) Johnson v. Texas,\(^8\) and Tennard v. Dretke—have addressed continuing challenges to Texas's use of "special issues" in its capital punishment scheme.

Since Furman, the Supreme Court has addressed other aspects of the Texas death penalty system as well. In the 1980 case of Adams v. Texas,\(^8\) the Court,

\[\text{\footnotesize{78. TEx. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981).}}\]
\[\text{\footnotesize{79. See MARQUART ET AL., supra note 61, at 13; TEx. DEFENDER SERV., supra note 64, at 3 n.18; Newton, supra note 62, at 7.}}\]
\[\text{\footnotesize{80. 428 U.S. 262 (1976).}}\]
\[\text{\footnotesize{81. 487 U.S. 164 (1988) (rejecting a constitutional challenge asserting that the exclusion of certain mitigating evidence by narrow "special issues" inquiry violated the Eighth Amendment).}}\]
\[\text{\footnotesize{82. 492 U.S. 302, 322-25 (1989) (holding the Texas "special issues" rule unconstitutional because framework was not broad enough to consider and give effect to mitigating evidence of mental retardation and childhood abuse).}}\]
\[\text{\footnotesize{83. 506 U.S. 461 (1993) (finding on technical grounds no constitutional violation for exclusion of mitigating evidence not included in Penry I, including positive character traits, youth, and deprived childhood).}}\]
\[\text{\footnotesize{84. 509 U.S. 350 (1993) (upholding the constitutionality of the Texas death penalty statute and finding that mitigating evidence of a defendant's youth was within "effective reach" of a capital sentencing jury).}}\]
\[\text{\footnotesize{85. 532 U.S. 782, 784 (2001) (clarifying that "the key under Penry I is the jury's ability to "consider and give effect to" the defendant's mitigating evidence (quoting Penry I, 492 U.S. at 319)).}}\]
\[\text{\footnotesize{86. 124 S. Ct. 2562, 2572 (2004) ("[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence .... Reasonable jurists could conclude that the low IQ evidence Tennard presented was relevant mitigating evidence. Evidence of significantly impaired intellectual functioning is obviously evidence that might serve as a basis for a sentence less than death.").}}\]
\[\text{\footnotesize{87. 448 U.S. 38 (1980).}}\]
in an 8-1 decision, held Texas Penal Code Section 12.31(b) unconstitutional. That provision required capital jurors swear an oath that the possibility of rendering a death sentence would not impact their deliberations. In 1981, in *Estelle v. Smith*, the Court held that Texas's practice of having prosecution psychiatrists conduct obligatory ex parte interviews with defendants violated the defendant’s Fifth and Sixth Amendment constitutional rights. The rulings in *Adams* and *Estelle* ultimately invalidated numerous Texas death sentences.

In 1983, in *Barefoot v. Estelle*, the Supreme Court refused to ban psychiatrists from testifying about the defendant’s “future dangerousness,” and refused to bar the use of psychiatrists altogether. The 1988 and 1989 cases of *Satterwhite v. Texas* and *Powell v. Texas* expanded and clarified the Supreme Court’s prior holdings on the use of psychiatric testimony in capital trials. In *Herrera v. Collins*, a 1993 case exploring the limits of habeas relief, the Supreme Court held that a defendant could be executed, despite his claim of “actual innocence,” if the defendant’s trial was “fair” and the defendant was permitted to seek clemency. *Herrera* “received international condemnation” and “ranks as one of those infamous Supreme Court opinions, like *Lochner* and *Plessy*, that is utterly repugnant to any basic sense of fairness.”

The Supreme Court’s next occasion to consider the Texas death penalty as applied came in 2003 in *Miller-El v. Cockrell*. That case centered on the alleged “formal policy” of the Dallas County District Attorney to use peremptory challenges to exclude racial and ethnic minorities from juries. The Court did not rule on the merits of Miller-El’s claims but rather held that the Fifth Circuit had wrongfully denied a “certificate of appealability” because reasonable minds could have differed about whether the prosecution’s use of peremptory strikes was purposeful discrimination. The Court remanded the case for further proceedings. After granting the certificate of appealability, the Fifth Circuit considered Miller-El’s claims on the merits in *Miller-El v. Dretke* and again denied relief.

88. *Id.* at 42.
90. *Id.* at 468 (“A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.”).
91. See MARQUART, ET AL., supra note 61, at 137; TEX. DEFENDER SERV., supra note 64, at 1 n.6 (noting that *Penry, Estelle, and Adams* “invalidated well over 100 death sentences”); Newton, supra note 62, at 11.
96. Newton, supra note 62, at 34.
98. 361 F.3d 849 (5th Cir. 2004).
More recently, on February 24, 2004, in *Banks v. Dretke*, the Supreme Court overruled a Fifth Circuit decision holding that a Texas death row defendant had both waited too long to raise issues of prosecutorial misconduct and raised the issues in the wrong forum. The Court declared forcefully that "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State’s possession, it is ordinarily incumbent on the State to set the record straight." These Supreme Court pronouncements on the Texas death penalty are not the end of the story. Miller-El, following his second denial by the Fifth Circuit, once again appealed to the Supreme Court and, on June 28, 2004, the Court granted certiorari. And, on December 10, 2004, the Supreme Court agreed to hear *Medellin v. Dretke*.

Thus, beginning with *Jurek*, and continuing largely unabated throughout the subsequent three decades, the “modern era” of the Texas death penalty has been the source of much of the Supreme Court’s death penalty jurisprudence. According to Robert Kepple, director of the Texas District and County Attorney’s Association, “Because Texas has a lot of death penalty cases, naturally a lot of major cases decided by the Supreme Court have been—and are going to be—from Texas.” But other commentators have been much more direct and critical. According to one, “[T]he State of Texas, the bellwether of the modern death penalty... has been a breeding ground for unfairness in the administration of capital punishment, which has evoked national and international condemnation.” Writing in 1994 and citing twenty-seven scholarly sources in support of his thesis, Brent E. Newton observed, “Vehement scholarly criticism of *post-Furman* Texas capital sentencing procedures has been voiced repeatedly on a wide variety of grounds. Indeed, with [one] possible exception... scholarly treatment of Texas sentencing procedures has been unequivocal in its condemnation.”

Since Newton’s pronouncement, the study, commentary, and condemnation of the Texas death penalty has remained unrelenting. A 1994 report from the Death Penalty Information Center declared, “The death penalty in Texas is in a state of crisis.” Six years later, the Texas Defender Service proclaimed the Texas death penalty “a thoroughly flawed system... in desperate need of reform.” And a 2002 law review article concluded:

100. Id. at 675-76.
102. 371 F.3d 270 (5th Cir. 2004), cert. granted, 125 S.Ct. 686 (2004).
105. Newton, supra note 79, at 6-7 n.31.
106. DIETER, supra note 59.
107. TEX. DEFENDER SERV., supra note 64, at Executive Summary (Conclusion).
It is not enough to turn the key, the people of Texas want to wield the terrible swift sword. They do not want to lock the murderer safely away in prison, feeding him, filling the cavities in his teeth, and dosing him with generic Prozac to relieve his depression. The people of Texas want his head on a pike at the entrance to their city. Clearly, problems with the Texas death penalty remain.

D. Texas Death Row Characteristics in the Aftermath of Furman

Despite the Texas legislature’s swift enactment of a post-Furman death penalty statute in 1973, Texas did not conduct an execution until December 7, 1982, when it executed Charlie Brooks, Jr. As of April 20, 2005, the state had executed 341 individuals during the “modern era” alone. Of this number, 173 (fifty-one percent) were white, 117 (thirty-four percent) were African-American, 49 (fourteen percent) were Hispanic, and 2 (one percent) were categorized as “other.” Those 341 executions account for thirty-six percent of the total post-Furman executions nationwide. Texas has executed more than three-and-a-half times as many people as Virginia, the state with the next highest number of post-Furman executions. Between 2000 and 2004, Texas executed forty, seventeen, thirty-three, twenty-four, and twenty-three individuals, respectively. Although Texas is only one of the thirty-eight states with a death penalty, during each of those five years, Texas has accounted for approximately one-quarter to almost one-half of all executions nationwide.
According to the Texas Department of Criminal Justice, as of April 21, 2005, there were 445 individuals on death row in Texas. Of this number, 180 (40.4 percent) were African-American, 135 (30.3 percent) were white, 125 (28.1 percent) were Hispanic, and 5 (1.1 percent) were categorized as “other.” Only nine of the current 444 death row inmates were female. Significantly, twenty-six of these individuals were not U.S. citizens, and sixteen of them were citizens of Mexico. Thus, Mexican nationals account for sixty-two percent of the current Texas death row inmates who are not U.S. citizens.

E. The Current Requirements for a Sentence of Death in Texas

Texas death penalty trials are “bifurcated” into two phases: a “guilt/innocence phase” and a “sentencing phase.” In Texas, once a person has been convicted of a “capital offense,” the trial proceeds to the sentencing phase. In the case of a defendant convicted of a “capital felony” for whom the prosecutor is not seeking the death penalty, state law requires that “the judge shall sentence the defendant to life imprisonment.” Thus, those cases never actually enter the “sentencing phase,” illustrating the immense power that...
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the prosecutor wields in determining who does and does not get the death penalty. If the prosecutor is seeking the death penalty, the jury is required to answer the modern "special issues,"126 which are revised and revamped from the original "special issues" enacted in 1973. The current procedure is the same as that discussed above in Section II.C.

A death sentence is automatically appealed to the Texas Court of Criminal Appeals,127 the court of last resort for criminal matters in the State. The defendant may also seek habeas corpus relief in both state and federal courts.128

As one source noted:

Post-conviction review is [the] crucial . . . method of ensuring that capital trials are fair and that death sentences are appropriate. It is a proceeding intended to prevent wrongful executions, to find any new evidence proving innocence and to root out cases of prosecutorial misconduct, shoddy police work, mistaken eye-witnesses, false confessions and sleeping trial lawyers.129

However, current chances for meaningful review or reversal of a Texas death sentence are slim to non-existent. Indeed, one study found that "[t]hough two out of three capital cases nationwide are overturned for error[,] the reversal rate in Texas since 1995 approaches zero."130 Unsurprisingly, critics have roundly attacked the post-conviction process. After conducting a major study of the post-conviction process in state proceedings, the Texas Defender Service found that "an intolerably high number of people are being propelled through the state habeas process with unqualified attorneys and an indifferent [Texas] Court of Criminal Appeals."131 It declared: "The habeas process in Texas, intended as a vital safety net to catch mistakes, is instead a failed experiment."132

All sixteen of the Texas Avena cases are situated against this complex and deeply troubled system of post-conviction review.133 In several of the sixteen

126. Id. § 37.071(2)(b)(e).
127. Id. § 37.071(b).
128. See TEX. DEFENDER SERV., supra note 64, at 3.
130. Id. The study continues: "The [Texas Court of Criminal Appeals] reversed only eight of the 270 death sentences it reviewed on direct appeal between 1995 and 2000—the lowest reversal rate of any state. Prior to 1995, Texas reversed about one-third of all the death punishments." Id.
131. Id. at vii-viii.
133. The sixteen Mexican nationals on death row in Texas who were the subject of the Avena decision are (1) Juan Carlos Alvarez, (2) César Roberto Fierro Reyna, (3) Hector Garcia Torres, (4) Ignacio Gómez, (5) Ramiro Hernández Llanas, (6) Ramiro Rubi Ibarra, (7) Humberto Leal García, (8) Virgilio Maldonado, (9) Angel Maturino Resendiz, (10) Jose Ernesto Medillín Rojas, (11) Roberto Moreno Ramos, (12) Daniel Angel Plata Estrada, (13) Rubén Ramírez Cardenas, (14) Felix Rocha Díaz, (15) Oswaldo Regalado Soriano, and (16) Edgar Arias Tamayo. In both its Application Instituting Proceedings and its Memorial submitted to the World Court in the Avena case, Mexico provides an excellent summary of the factual, procedural, and historical background of the cases at issue. See Mexico's Application Instituting Proceedings, supra note 33, at 25-34 (discussing all sixteen cases from Texas); Memorial of Mexico at 41-44 (Chapter III), 93-95 (Chapter IV), Avena and Other Mexican
In light of the *Avena* decision and the demands of federal officials, it is incumbent upon Texas officials to provide the required "review and reconsideration" of these cases.

III. THE VIENNA CONVENTION AND THE AVENA DECISION

Governments brought consular officials onto the diplomatic scene to provide governmental representation in commercial and individual matters in foreign countries, and to handle other matters of national interest that might not rise to the level of matters of state. Because the consular function is not limited to matters of state, consulates are usually placed regionally in receiving states to support the economic and personal interests of visitors from the sending state.

The Vienna Convention entered into force in 1963, and the United States joined the treaty in 1969. During the drafting and negotiating period, Article 36, dealing with consular information and notification, arguably received the most attention and caused the most controversy. The issues dominating the debate included whether

1. a sending state should be informed of the arrest of one of its nationals, irrespective of the individual's wishes;
2. as a matter of principle, when an alien enters a country, she has accepted its jurisdiction and cannot then claim a greater degree of protection than nationals of the host nation; and
3. notification would create an excessive administrative burden upon those countries with a great deal of alien immigration.

Ultimately the drafters agreed with the United States delegation that "no country could disregard its obligation in certain circumstances to inform consuls of the sending state of the arrest of its nationals." This was, as a U.S. delegate explained, intended "to protect the rights of the national concerned." Compromise language, offered by the United Kingdom,

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134. See Mexico's Application Instituting Proceedings, *supra* note 33, at 25-34.
136. *Id.*
140. *Id.* at 364-65.
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eventually became the text of Article 36.142

The United States acknowledges in its regulations its responsibility under the Convention to notify consular officials when federal law enforcement officials make arrests of foreign nationals.143 The U.S. government also

142. Article 36 of the Vienna Convention, supra note 2, states:

COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE

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

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

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

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

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

143. This regulation ("Notification of Consular Officers upon the arrest of foreign nationals") reads in its entirety:

(a) This statement is designed to establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department on charges of criminal violations. It conforms to practice under international law and in particular implements obligations undertaken by the United States pursuant to treaties with respect to the arrest and detention of foreign nationals. Some of the treaties obligate the United States to notify the consular officer only upon the demand or request of the arrested foreign national. On the other hand, some of the treaties require notifying the consul of the arrest of a foreign national whether or not the arrested person requests such notification.

(1) In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have his consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney.

(2) In all cases (including those where the foreign national has stated that he does not wish his consul to be notified) the local office of the Federal Bureau of Investigation or the local Marshal's office, as the case may be, shall inform the nearest U.S. Attorney of the arrest and of the arrested person's wishes regarding consular notification.

(3) The U.S. Attorney shall then notify the appropriate consul except where he has been informed that the foreign national does not desire such notification to be made. However, if there is a treaty provision in effect which requires notification of consul, without reference to a demand or request of the arrested national, the consul shall be notified even if the arrested person has asked that he not be notified. In such case, the
Yale Law & Policy Review acknowledges that the responsibility extends to the states. Consequently, Mexico maintains an active program of legal consultation and defense through its various consulates in the United States. Nevertheless, sending countries, including Mexico, have found it difficult to obtain remedies for imprisoned foreign nationals, particularly in death penalty cases, through the U.S. court system. Although it is impossible to tell how many cases involving foreign nationals are handled in compliance with the Vienna Convention, it is fair to say that a significant number, including death penalty cases, are not.

A. Treatment of the Vienna Convention by U.S. Courts

U.S. criminal courts have been adamant and uniform in their position that violations of the Vienna Convention cannot be remedied in criminal cases. A simple search of the Lexis/Nexis database on February 17, 2005, using keywords “Article 36” and “Vienna Convention on Consular Relations” yields 202 results, including interlocutory, procedural, and final decisions, as well as civil cases stemming from the arrests of foreign nationals. Of those, defendants received relief in only two cases, once in the form of suppression of evidence, and once where a conviction was reversed and remanded due to the ineffective assistance of counsel, which was based in part on counsel’s failure to inform the defendant of his rights under the Vienna Convention. The courts give several reasons for their general reluctance to provide relief, some of which seem contrived, and all of which betray a distinct discomfort with international law playing a role in the U.S. system of criminal justice.

U.S. Attorney shall advise the foreign national that his consul has been notified and inform him that notification was necessary because of the treaty obligation.

(b) The procedure prescribed by this statement shall not apply to cases involving arrests made by the Immigration and Naturalization Service in administrative expulsion or exclusion proceedings, since that Service has heretofore established procedures for the direct notification of the appropriate consular officer upon such arrest. With respect to arrests made by the Service for violations of the criminal provisions of the immigration laws, the U.S. Marshal, upon delivery of the foreign national into his custody, shall be responsible for informing the U.S. Attorney of the arrest in accordance with numbered paragraph 2 of this statement.


145. See Memorial of Mexico, supra note 133, at 11 (Chapter III).

146. This claim is necessarily speculative, but it is based on the fact that the Avena case has 54 examples of violations that were actually discovered. It is likely that many more violations involving nationals from other countries go unreported.

147. Results on file with the authors.


149. Ledezma v. State, 626 N.W.2d 134 (Iowa 2001).
1. **Procedural Default**

Procedural default refers to the situation in which a criminal defendant fails to raise issues relevant to his or her defense at the appropriate time, as proscribed by the rules of the jurisdiction (state or federal) in which he or she is being tried. In consular notification cases, authorities typically fail to inform the foreign national, upon arrest, that the Vienna Convention provides him the right to contact a consulate. Later, usually during appeals or habeas corpus proceedings (frequently with a new lawyer), the defendant will discover the Vienna Convention. Understandably, the defendant desires that courts consider the issue because, like *Miranda* rights, access to a consulate’s staff could have assisted the defendant’s defense in many ways; a ruling that the failure to notify violated the defendant’s legal rights could conceivably result in a reversal of the guilty verdict—or at least a new trial. However, when defendants’ lawyers attempt to raise the issue before an appellate court, the court typically uses the procedural default rule to bar consideration of the issue.

2. **No Individual Rights Created by the Vienna Convention**

In this line of cases, courts have accepted evidence of a Vienna Convention violation—or the United States or a state have conceded the violation—but have nevertheless denied relief, claiming that the Vienna Convention provides relief only to nation-states, not individuals. Courts provide two grounds for this conclusion. First, they have looked to the Preamble of the Vienna Convention, which states that “the purpose of such 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.” This language has been read to mean that consular privileges, and not individual privileges, constitute the sole purpose of the convention. Second, courts have given

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152. Indeed, this is the exact argument and form of remedy that Mexico sought in the *Avena* case. See Mexico’s Application Instituting Proceedings, *supra* note 33, at 2, 42-45; Memorial of Mexico, *supra* note 133, at 5-6 (Chapter I), 146-73 (Chapter VI).


156. See, e.g., *Li*, 206 F.3d at 66 (Selya, J., concurring):

Of course, there are references in the [treaty] to a “right” of [consular] access, but these references are easily explainable. The contracting States are granting each other rights, and
substantial weight to the State Department’s pronouncements on these matters. Since the 1970s, the State Department’s consistent position has been that “the Vienna Convention will [not] require significant departures from the existing practice within the several states of the United States.”

The Department claims that no other signatory state remedies violations through its criminal justice system, suggesting that the United States need not do so either.

3. Rights Under the Vienna Convention Do Not Rise to the Level of Fundamental Rights

In several cases, defendants sought to use the exclusionary rule to suppress evidence after the authorities failed to inform them of the accessibility of consulate assistance. The defendants have not been successful. Many courts see the right to notify one’s consulate upon arrest as a courtesy; they do not view it as rising to the level of the fundamental rights typically protected in the American criminal justice system. Courts often base their denials on U.S. constitutional law and other U.S. caselaw. However, the cases they invoke typically involve U.S. citizens, not foreign nationals, which means they are unlikely to give due weight to the critical role that consular access may play, in similar situations, for foreign nationals. The courts’ use of precedent assures that the exclusionary rule will never be an appropriate remedy for a defendant from another country who is not informed of the availability of consular

157. Id. at 64 (opinion of the court) (quoting a letter from the Department of State to all fifty state governors after the Vienna Convention’s ratification in 1970).
158. Id. at 65 (citing Department of State Answers to the Questions Posed by the First Circuit).
161. The Supreme Court has struggled for generations to determine the content of the liberties, in addition to those enumerated in the Fifth and Fourteenth Amendments, that are included within the concept of “due process.” At first, moderation and conservatism resulted in the “incorporation” of few rights into the concept of due process, especially in the criminal context. Eventually, the list grew to include most of the Bill of Rights. But the Court never had the occasion to review rights unique to foreign individuals. The fact that the notion of fundamental rights developed in this domestic vacuum does not necessarily exclude rights unique to foreigners such as consular notification.
assistance from his home country.

In marked contrast to the decisions of U.S. courts, an advisory opinion by the Inter-American Court of Human Rights, requested by the Mexican government in a case preceding *Avena*, found that the consular notification provision of the Vienna Convention is both an individual right and a minimal guarantee of international human rights law.\(^\text{162}\) The Inter-American court based this conclusion on the International Covenant on Civil and Political Rights.\(^\text{163}\) The Covenant\(^\text{164}\) recognizes the concept of due process of law, and it enumerates a list of rights of criminal defendants which coincides closely with fundamental rights in criminal cases under the United States Constitution.\(^\text{165}\)


\(^{163}\) Id. at 54-60.


\(^{165}\) Id. art. 14:

(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

**(a)** Not to be compelled to testify against himself or to confess guilt.

(g) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(h) Everyone convicted of a crime shall have the right to his conviction and
Under such a due process regime, the court reasoned:

[It] is obvious that notification of one’s right to contact the consular agent of one’s country will considerably enhance one’s chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried in accord with the law and with respect for the dignity of the human person.\(^\text{166}\)

To the Inter-American court, then, consular notification is the key that unlocks all of the recognized due process rights, and, as such, is itself a fundamental due process right.\(^\text{167}\)

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sentence being reviewed by a higher tribunal according to law.

(i) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

(j) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

166. Inter-American Court Advisory Opinion on Consular Assistance, *supra* note 162, at 60.

167. The Inter-American Court stated that the seriousness of death as a penalty translates into the internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases. It is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive.

Id. at 63.

The Mexican government pled on several different grounds that the United States was in violation of its obligations under the Vienna Convention. Though the opinion was advisory, the court limited its discussion of remedy to the remedy that would obtain between nation-states, specifically, “those pertaining to the international responsibility of the state and the duty to make reparations.” *Id.*

Because an individual remedy was not contemplated by the court, it might be argued that the rights dealt with in the opinion might not be quite so individualized as the court claimed. Another reason to be skeptical of the opinion and its use of the International Covenant on Civil and Political Rights is best described by the U.S. Supreme Court in a recent decision: “[A]lthough the Covenant does bind the United States as a matter of international law, the United States [Senate] ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.” Sosa v. Alvarez-Machain, 124 S.Ct. 2739, 2767 (2004) (citing 138 CONG. REC. 8071 (1992)). The status of the Covenant would also exclude obligations litigated in state courts.

The Inter-American Court attempted to address this issue implicitly by noting that the principle is recognized in other inter-American and universal instruments; without stating as much, the Court’s implication was that the principle had reached the status of customary law. See Inter-American Court Advisory Opinion on Consular Assistance, *supra* note 162, at 63. However, the Court’s evidence of custom was weak. It referenced the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, G.A. Res. 1042, Organization of American States, 20th Sess., O.A.S. T.S. No. 73, 29 I.L.M. 1447 (1990), and the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, U.N. ESCOR, Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984). *Id.* at 63 nn.95-96. However, the dominant view is that resolutions of inter-governmental bodies do not constitute law in a legislative sense and that more would be required than a couple of resolutions to evidence the necessary opinio juris required to establish the existence of custom.
Avena and the World Court

B. The Avena Decision: Background and Meaning

Deeply frustrated, the Mexican government left the U.S. court system for the international system, searching for more favorable consideration of its legal position. It was not the first country to do so. Two cases involving the United States and Article 36 preceded Avena to the ICJ. The first, Paraguay v. United States, was filed and withdrawn after the Paraguayan prisoner, Angel Breard, was executed in Virginia in April of 1998. The second, Germany v. United States, resulted in an opinion which was crucial in the ICJ's opinion in Avena.

1. Paraguay v. United States (Breard)

The state of Virginia convicted Angel Francisco Breard, a Paraguayan citizen, of murder in 1993, and sentenced him to death. After filing a motion for habeas corpus in federal court, Breard raised Article 36 concerns for the first time; local law enforcement officials, he claimed, failed to inform him of his right to notify Paraguay's regional consular officials of his arrest. Breard claimed that he was thus deprived of the opportunity to receive advice that would have led him to plead guilty, thereby avoiding the death penalty. Both the district court and the Fourth Circuit Court of Appeals denied the claim. The U.S. Supreme Court heard the case April 14, 1998—the day of his scheduled execution. Paraguay had instituted proceedings before the ICJ on April 3, and on April 9, the ICJ had noted jurisdiction and issued an order stating:

The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order.

The ICJ order notwithstanding, the Supreme Court declined to issue an order staying the execution so that it could consider the merits of Breard's claim. The Court, in a per curiam opinion, provided two bases for its decision: first, because Breard did not assert his Vienna Convention claim in

170. Breard, 523 U.S. at 373.
171. Id. at 377. It should be noted that Breard did admit to the killing of a Virginia woman and claimed that the murder was brought on by Satanic influences. Breard's argument amounted to a claim that given his admission, he might have fared better had he been advised to plead in a manner consistent with the admission.
172. The habeas petition was rejected at the district court level in Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996), and by the Fourth Circuit Court of Appeals in Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998).
state court, as required by federal and state law, he could not raise the claim on federal habeas review; second, the subsequently enacted Antiterrorism and Effective Death Penalty Act (AEDPA)\(^{175}\) prevented him from showing that the treaty violation prejudiced his rights.\(^{176}\) The Court held that the Vienna Convention, as a treaty, stands on full parity with legislation, and that the “later in time” rule, which gives pre-emptive force to the most recent legislation where conflict occurs, applied. The AEDPA in effect codified procedural default for parties first claiming violation of treaty rights at the habeas corpus stage of proceedings.\(^{177}\) Breard claimed that, had he been properly advised by consular personnel, he would have pled guilty and accepted a life sentence, rather than defending his not-guilty plea, but the Court found that claim too speculative to be persuasive.\(^{178}\) Breard was executed later that night.

The dissenters, Justices Stevens, Breyer, and Ginsburg, would have stayed the execution in order to fully examine the substantive issues. Justice Breyer noted that Breard claimed a viable excuse for not raising the issue earlier: the issue presented was a novel one.\(^{179}\) Instead of allowing for a briefing on this and other points, the Court—Justice Breyer argued—provided only a cursory treatment of the issue of procedural default and U.S. obligations under the Vienna Convention. To him, that is unfortunate, because the Court essentially ignored the language that it quoted from the Vienna Convention.\(^{180}\) Specifically, while the Convention does allow for its provisions to be carried out in a manner that conforms to national law, it further states that “said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”\(^{181}\) Thus, certain minimum protections are mandatory under the Convention, regardless of applicable national law, and preempting the Vienna Convention obligations under the procedural default doctrine is a violation of the treaty. The Court majority erred in its rush to judgment.\(^{182}\)

The Supreme Court, however, may have provided some language helpful to those seeking to incorporate Article 36 of the Vienna Convention into U.S. criminal procedure: “The Vienna Convention... arguably confers on an

\(^{176}\) Breard, 523 U.S. at 376.
\(^{177}\) Id.
\(^{178}\) Id. at 377.
\(^{179}\) Id. at 380-81.
\(^{180}\) Id. at 375.
\(^{181}\) Vienna Convention, supra note 2, art. 36(2).
individual the right to consular assistance following arrest..."183 This language perhaps undermines the position, adopted by many courts, that the Vienna Convention confers no individual rights.

2. Germany v. United States (LaGrand)184

In 1984, Arizona tried and convicted German citizens Karl and Walter LaGrand for first degree murder; they were sentenced to death. At the time of the killing, the LaGrands had been living in the United States for more than a decade, having arrived in the States as young children.185 According to the U.S. memorial in the case, the LaGrands were, in speech and demeanor, Americans, not Europeans.186 Following their arrest, no one informed the LaGrands of the Vienna Convention’s provisions for consular notification and access.187 Indeed, it was not until 1998 that anyone formally notified the LaGrands, though by that time the matter was already the subject of appeals to overturn their death sentences.188 By 1995, the LaGrands had begun federal habeas corpus appeals citing the failure of law enforcement officials to notify them of the provisions of the Vienna Convention. The district court rejected the claim based on procedural default, the Ninth Circuit affirmed, and, in November 1998, the U.S. Supreme Court denied certiorari.189

On February 24, 1999, following other legal maneuvers, Arizona executed Karl LaGrand. On March 2, Germany instituted proceedings before the ICJ and asked the to take court to prevent the United States from allowing Walter LaGrand’s execution. The ICJ granted those measures on March 3.190 Under the Supreme Court’s original jurisdiction for state parties, Germany also requested that the Court honor the ICJ’s provisional measures by granting a stay of the execution scheduled for that day. The Supreme Court denied the stay, citing U.S. sovereign immunity, Eleventh Amendment state sovereign immunity, and the tardiness of the German action.191

183. Breard, 523 U.S. at 376.
185. Id. at 475.
186. Counter-Memorial of the United States of America, supra note 144, ¶ 16.
187. LaGrand, 2001 I.C.J. 466 at 475.
188. As noted in the Supreme Court opinion denying a stay of execution, the German government learned of the LaGrand detentions and death penalty in 1992, seven years before it got involved in litigation. Federal Republic of Germany v. United States, 526 U.S. 111, 112 (1999).
191. Federal Republic of Germany, 526 U.S. at 111. The Court’s per curiam one-paragraph opinion seethes with understated outrage over the suggestion that the Court is not the court of last resort over matters in the United States. In fact, Germany had treated the ICJ as an appellate court, which rankled
In ICJ proceedings following Walter LaGrand's execution, the United States acknowledged that it violated the Convention, setting the stage for discussion of the proper remedy. Initially, the ICJ ruled that, under the circumstances, the United States should have stayed the execution of Walter LaGrand, in compliance with the ICJ's request for provisional measures. The ICJ's authority for that request arose under Article 41 of the Statute of the International Court of Justice. None of the United States' actions in the LaGrand case—from the executive branch's non-committal communications to the Arizona governor to its Supreme Court brief stating that the order of provisional measures was not binding—fulfilled the country's obligation. In a tacit acknowledgment of the limits of its authority, the ICJ stated that its order was not result-oriented, but that it did expect the federal government to do everything in its power to prevent the execution.

One of Germany's main complaints was that the U.S. procedural default rule obstructed any effective remedy in the case. The ICJ agreed that procedural default prevented the United States from fulfilling its obligations to give, under Article 36(2) of the Vienna Convention, "full effect" to "the rights" under Article 36(1). Though the Vienna Convention requires the exercise of rights "in conformity with the laws and regulations of the receiving State," the ICJ recognized (as the United States had urged) that such conformity was subject "to the proviso . . . that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this

the Supreme Court. Germany's delay was rather extraordinary and no doubt also contributed to Court's ire.

Of course, under international law, whenever the United States enters into a treaty with a dispute-settlement provision, the country has in fact waived sovereign immunity, and there really is nothing in U.S. constitutional law to dispute that position. This is not to say that national high courts are relegated to the position of intermediate appellate courts (unless done so explicitly, as in the case of the European Union, where national high courts are, for certain matters, intermediate courts). The statement in the per curiam was an unfortunate gaffe done in the heat of the moment.

192. The United States acknowledged the violation in its Memorial:
The United States of America bears responsibility for such non-performance of U.S. obligations under the Convention by Arizona. Accordingly, the United States acknowledges that, as a result of the failure to inform Walter and Karl LaGrand of their right to consular notification, there was a breach of a legal duty owed by the United States to the Federal Republic of Germany under the Vienna Convention.

Counter-Memorial of the United States of America, supra note 144, ¶ 6.


194. Article 41 provides, in relevant part:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.


195. LaGrand, 2001 I.C.J. at 506-08.
Article are intended.196 Because the procedural default rule blocked consideration of the evidence of the Vienna Convention violation, the ICJ, in contrast to the U.S. Supreme Court, ruled that the Vienna Convention violation had, in fact, prevented Germany from assisting the LaGrands much earlier in their case.197

Germany further asked the ICJ to rule that the United States undergo significant legal and practical reform to prevent future violations of Article 36.198 The United States objected to the request for a mandatory guarantee,199 and the ICJ did not fully accept the German position.200 The ICJ did point out that the United States had an obligation to prevent such violations in the future, while acknowledging that “the choice of means must be left to the United States.”201

3. Mexico v. United States (Avena)

The Avena case culminated from a series of events that deeply frustrated the Mexican government. Mexico, which maintains an extensive consular system designed to assist Mexican nationals,202 had successfully defended its nationals in U.S. courts on several occasions.203 Yet, following executions of three Mexican nationals in cases involving the failure to notify of the right to consular access,204 Mexico took its case to the international stage. It first brought the general issue of Article 36 notification and access provisions to the Inter-American Court of Human Rights.205

The 1999 Inter-American decision gave Mexico the intellectual high ground but it did not produce tangible results; dozens of Mexican nationals who had not received notice of their rights to contact the consulate remained in U.S. prisons. Fifty-two of them faced the death penalty for murder convictions.206 In

196. 2001 I.C.J. at 497 (quoting Vienna Convention, supra note 2, art. 36(2)). The United States argued that the “in conformity” and “full effect” language of Article 36(2) applied only to matters dealing with the “rights” of consular officials under Article 36(1) and not to criminal procedures pertaining to “individual rights.” Counter-Memorial of the United States of America, supra note 144, ¶ 78-81. This is at odds with the position of the Supreme Court in Breard, which declared procedural default to be one of the rules to which the “rights” of 36(1) had to conform (while ignoring the full-effect portion). Breard v. United States 523 U.S. 371, 375 (1998).

197. LaGrand, 2001 I.C.J. at 497-98.

198. Id. at 471-74.

199. Id. at 509-10.

200. Id. at 512-13.

201. Id. at 513.

202. See Fleischman, supra note 53, at 366 (quoting from an affidavit by a former Mexican civil servant).

203. See id. at 368-374.


205. See supra notes 162-167 and accompanying text.

206. Mexico originally submitted its filings before the ICJ on behalf of fifty-four individuals. This
January 2003, Mexico brought suit against the United States in the ICJ, for systemic violations of U.S. obligations under Article 36 of the Vienna Convention.

The United States defended itself differently in Avena than it did in LaGrand. In particular, the United States would not concede that, in each of the contested cases, it had violated Article 36. Instead, the United States mounted its defense on several different grounds. First, it characterized the circumstances of the cases as diverse, and suggested that it had acted appropriately in light of the facts of each case. Because consular officials serve in part as a cultural bridge for the detainee, the United States argued that when a detainee had spent significant time in the United States, it is hard to measure the usefulness of this part of the consular duties. "At least forty-six of the fifty-four cases before the Court" involved detainees who had spent significant time in the United States. Additionally, the United States argued that the consular officer role in providing legal assistance is described as optional (which it is), and that detainees have the right to reject consular notification. In its attempt to use the sheer number of cases and circumstances as a defense, the United States further asserted that there is no general obligation to involve consular officials at the beginning of an arrest and investigation.

Second, the United States sought to define the term "without delay" in its notification obligation to mean "as soon as reasonably possible under the circumstances." Without clearly specifying what law enforcement behavior it was defending, the United States sought to undercut the Mexican claim that the obligation to inform foreign nationals "without delay" meant immediately after arrest and prior to the beginning of the investigative process—at a time similar to the Miranda warnings.


207. Counter-Memorial of the United States of America, supra note 51, at 69-78 (Chapter VI).

208. Id. at 70-71.

209. Id. The United States also claimed that a significant portion of the fifty-two parties in the suit were American nationals or dual nationals. Because the United States could not furnish precise information establishing American nationality of several of the fifty-two individuals, the Court maintained the presumption of Mexican nationality for all fifty-two. See Avena, 2004 I.C.J. at 1, ¶ 57.

210. Counter-Memorial of the United States of America, supra note 51, at 73-74 (Chapter VI).

211. Id. at 74-75.

212. Id. at 74-76.

213. Id. at 79-81. Conceivably, the United States could distinguish the cases at issue in Avena from LaGrand, where the United States did not officially inform the LaGrands of their rights until 1998, fourteen years after their convictions.
United States responded that it complied with the ICJ’s *LaGrand* decision in that *LaGrand* left review and reconsideration of such claims to a method of the United States’s “own choosing.”214 The United States argued that the clemency process of review and reconsideration in the various states gave full effect to Article 36.215 It was surprising that the United States relied on judicial appeals and clemency processes in its *Avena* memorial, because the ICJ had considered those procedures in *LaGrand* and found them wanting.216 The United States also proposed that if the ICJ ultimately found it to be in violation, it should be allowed to conduct review and reconsideration of the cases through its own system and not have to vacate, apply the exclusionary rule, or provide other guarantees requested by Mexico.217

The ICJ ultimately ruled in favor of Mexico. With respect to the Mexican nationals involved, the court found that the United States violated paragraphs 1(a), 1(b), and 1(c) of Article 36 both by failing to inform detainees of their rights and by failing to notify Mexican consulates of the detentions.218 The ICJ reasoned that the three sections of Article 36(1), addressing rights of access, notification and information, and visitation, respectively, should be interpreted together when considering detainees rights.219 The ICJ also held that the United States should provide consular notification “once it is realized that the person is a foreign national.”220 Because of the United States’ highly ethnically diverse population, the court suggested that officials request nationality identification upon detention, in a manner paralleling the “Miranda Rule”—a practice that the ICJ noted already exists in several U.S. jurisdictions.221

The ICJ also determined that the United States had failed to undertake the procedural default reforms that it ordered in *LaGrand*.222 The court, echoing *LaGrand*, argued that the procedural default rule prevented Article 36 from having full effect within the United States, as required under paragraph 2, by preventing defendants from raising Article 36 claims at various points during criminal proceedings.223 Yet, because judicial procedures were still ongoing in most of the cases, the ICJ did not find that the procedural default rule had

214. *Id.* at 105-06.
215. *Id.* at 112-14. Mexico characterized the process as ineffectively responsive to Convention claims. Memorial of Mexico, *supra* note 133, at 87 (Chapter IV).
216. *See supra* notes 192-197 and accompanying text.
217. The United States argued that the rights outlined in Article 36 were not fundamental due process rights that would, under U.S. practice, merit “exclusion of statements from use in evidence for breach of Article 36.” Counter-Memorial of the United States of America, *supra* note 207, at 129-30 (Chapter VI).
219. *Id.* ¶ 61.
220. *Id.* ¶ 63.
221. *Id.* ¶ 64.
222. *Id.* ¶113.
223. *Id.*
already caused a violation, stating that it would be premature to do so.\textsuperscript{224} It therefore denied Mexico’s request for annulment of all contested convictions and exclusion of evidence, and guarantees, through reform, that the violations of Article 36 would cease. The court also declined to hold that Article 36 rights constituted fundamental rights that necessitated the exclusion of evidence resulting from their violation,\textsuperscript{225} because nothing in the \textit{travaux préparatoires} of the Vienna Convention indicated that they were.\textsuperscript{226} However, in three of the cases at issue, including that of Osbaldo Torres, for whom Oklahoma had already set an execution date, the court held that the use of the procedural default rule violated Article 36(2)’s full-effect requirement.\textsuperscript{227}

For the most part, what the ICJ did was clarify or perhaps simply restate its decision in \textit{LaGrand}. It explained that “review and reconsideration” as defined in \textit{LaGrand} would be an effective remedy in the instant case. As such, the ICJ held that the United States should consider fully the violations of the Vienna Convention and “guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process.”\textsuperscript{228} Also, according to the court, “review and reconsideration should be both of the sentence and of the conviction.”\textsuperscript{229} The ICJ rejected the U.S. position that clemency proceedings, which typically involve the executive branch, fulfilled its obligation under the Vienna Convention as interpreted by the \textit{LaGrand} decision, declaring that “it is the judicial process that is suited to this task.”\textsuperscript{230} The ICJ’s decision was directed to the United States, but, as will be explained later, is imputable to the states under federalism and foreign policy principles in the U.S. Constitution.\textsuperscript{231}

The ICJ’s decision has had an effect on the cases at issue in the litigation—including the sixteen cases from Texas. In addition to the \textit{Medellin} case, an Oklahoma case received significant attention as a result of the position taken by the governor and the top criminal court in that state. The case of Osbaldo Torres was one of the three cases in which the ICJ held that the United States had failed to provide review and reconsideration. Torres was scheduled to die on May 18, 2004.\textsuperscript{232} On May 13, 2004, the Oklahoma Court of Criminal Appeals granted a stay of execution and remanded the case for evidentiary hearing to determine “(a) whether Torres was prejudiced by the State’s violation of his Vienna Convention rights in failing to inform Torres, after he

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\textsuperscript{224} \textit{Id.}.
\textsuperscript{225} \textit{Id.} \textsuperscript{50}.
\textsuperscript{226} \textit{Id.} \textsuperscript{124}.
\textsuperscript{227} \textit{Id.} \textsuperscript{114}.
\textsuperscript{228} \textit{Id.} \textsuperscript{138}.
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.} \textsuperscript{142}
\textsuperscript{231} \textit{See infra} Section V.B.
\end{flushleft}
was detained, that he had the right to contact the Mexican consulate; and (b) ineffective assistance of counsel. On that same day, Governor Brad Henry granted Torres clemency for the murders of Francisco Morales and Maria Yanez, following the recommendation of the Oklahoma Pardon and Parole Board.

Significantly, both Governor Henry and Susan B. Loving, the Chairperson of the Pardon and Parole Board, received letters from the Legal Advisor of the U.S. Department of State, William H. Taft IV. Both letters explained the ICJ decision and its remedy. Mr. Taft requested that the Board and the governor "give particular attention to the representations of the Government of Mexico on Mr. Torres' behalf." While the State Department has not stated categorically that it views the ICJ decision binding on Oklahoma, its suggestions in the Torres case were strong ones couched in careful diplomatic terms.

The Torres case may provide a roadmap for the future. States wishing to heed the judgment of the ICJ can, through their court systems, order review and reconsideration hearings to determine whether a defendant was harmed by the failure to provide consular notification and access under the Vienna Convention. The ICJ did explain that state clemency proceedings were insufficient to fulfill the requirement. However, in the Torres, the state appellate court had ordered an evidentiary hearing before the governor commuted the death sentence to life. Whether or when retrial may be required in future cases remains an open question. But review and reconsideration does place the issue back into the hands of state justice systems, which must adopt adequate measures to deal with any conviction and sentencing errors attributable to violations of the Convention.

4. Medellin v. Dretke

The case of Medellin v. Dretke typifies in many respects the death penalty cases at issue in Avena. It involves violent and heartbreaking killings, specifically, the rape and murder of teenage girls as part of a gang ritual. The

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233. Id.
236. Id.
238. Too often, "scholarly debates" over criminal-justice issues lose sight of the actual circumstances of the cases. It is important to recall why Medellin was arrested in the first place: Charged with capital murder and held without bond were: ... Jose Ernesto Medellin, 18 ...
defendant did not receive advice regarding consular assistance during the early years of his case. In fact, the Mexican government did not learn of Medellin until several years after his conviction and death sentence. Medellin sought a writ of habeas corpus from federal district court that was denied. His appeal to the Fifth Circuit Court of Appeals was similarly denied. Medellin then requested a writ of certiorari, which the Supreme Court granted in December 2004.

The Supreme Court agreed to review two issues in Medellin:

1. In a case brought by a Mexican national whose rights were adjudicated in the Avena Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the Avena holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?

2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the LaGrand and Avena Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

The first question, if answered in the affirmative, would impose the ICJ judgment on U.S. courts hearing cases involving Medellin and the others named in the Mexican complaint. This outcome would effectively nullify the principle of procedural default in those cases. But once the cases at issue in Avena have been subjected to review and reconsideration, no further action with respect to Vienna Convention obligations would be required.

The second question, if affirmatively answered, could potentially affect policy beyond the fifty-two Avena cases since the U.S. Supreme Court would...
be attempting to establish an interpretation of the Vienna Convention that is uniform and respectful of the ICJ through comity principles. By enshrining the *Avena* case in a Supreme Court decision, *Avena* would acquire something that ICJ opinions alone do not possess—the status of precedent within the United States.

Both questions speak to the Vienna Convention specifically and do not directly address broader issues of international law in the United States. However, two ideological opposites on the Court have indicated a willingness to use such international sources in treaty interpretation. Justice Stephen Breyer all but telegraphed his position on the Vienna Convention (or at least reiterated his preference for further hearing in *Breard*) in a speech before the American Society of International Law’s Annual Meeting in 2003. Speaking generally in support of the use of international and foreign law sources in U.S. litigation and judicial decisionmaking, Breyer stated in a reference to *Breard*:

> Although I have not seen many traditional public international law issues arise in the course of my daily work, I know that there are issues, for example in death penalty cases, where international treaties and decisions of international courts may eventually prove relevant. In one recent death penalty case, the Court rejected a treaty-based defense on procedural grounds, leaving open the possibility of such a defense in a case where there was no procedural default. The number of treaties relevant to domestic legal disputes seems to be rising.243

Justice Antonin Scalia, speaking before the same group the following year, stated that he too would not be averse to citing foreign sources in interpreting treaties:

> When federal courts interpret a treaty to which the United States is party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole object of the treaty, which is to establish a single agreed-upon regime governing the actions of all the signatories, will be frustrated.244

Although Scalia spoke of the courts of other signatories, and not necessarily of international tribunals, his sentiment does relate directly to the second issue before the court: the need for uniformity in treaty interpretation.

Nevertheless, a favorable outcome on either *Medellin* question could still leave open two obstacles to the implementation of the Vienna Convention. Under the first *Medellin* question, future cases not covered by the *Avena* decision may continue to turn on the issue of procedural default. An affirmative answer to the second question would close the hole left open by the first. However, comity and consistency of treaty interpretation are limited to subjects that have been specifically addressed by the international tribunal, and also presuppose the existence of a treaty in the first place. Thus, *Medellin* will not

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address the applicability of norms outside of international treaties or of other developments in international law that may implicate the outcome of cases in the United States. In addition, if *Medellin* follows *Avena*’s focus on review and reconsideration in light of the procedural default doctrine, it will not consider other aspects of the consular right, or of any other right that might impact criminal proceedings. For international law to gain further acceptance in domestic litigation, more needs to be done.

IV. U.S. Obligations Under International Law

*Medellin* highlights some basic tensions between international law and domestic law (or municipal law, as domestic law is called in the international law discourse). Though this broad and controversial subject is largely beyond the scope of this Article, it is important to understand the dynamic underlying much of the maneuvering behind the *Avena* case, including the politics masquerading as legal theory expounded by the Texas governor’s office.

A. The Role of the ICJ in the U.S. Legal System

This Article suggests that the reception U.S. officials give to *Avena* has significance beyond the subjects of consular notification and access. The notion of international law as U.S. law derives from the constitutional status of treaties in the United States under Article IV of the U.S. Constitution and the Supreme Court case of *The Paquete Habana*, which declared international law to be “part of our law.” The ICJ has now spoken three times on the obligations of the United States under the Vienna Convention (including its provisional decision in *Breard*), but only the Oklahoma courts have recognized the importance of its rulings. It is time for other state and federal courts, as well as policy makers, to acknowledge and adhere to the law as interpreted by that international tribunal.

This is not to say that decisions of the ICJ should be treated the same way as the precedents of domestic courts. The ICJ does not have the sort of judicial review powers that the U.S. Supreme Court established in *Marbury v.*

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245. 175 U.S. 677 (1900).
246. *Id.* at 700. More specifically, the Court stated:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

*Id.*
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Madison. There, Chief Justice John Marshall stated, “It is emphatically the province and duty of the judicial department to say what the law is.” Nor is it necessary to argue for ICJ supremacy over domestic courts akin to the constitutionally granted supremacy of the U.S. Supreme Court over “inferior” courts. Though stare decisis—the notion that a decision determines the outcomes of future cases—fosters predictability and stability, it is not sanctioned by the statute that creating the ICJ. Not only is the ICJ not obliged to use prior decisions as mandatory precedent; it is prohibited from doing so. Furthermore, the ICJ is not, as some would claim, particularly well suited to serve as a “supreme court” of international law.

Nevertheless, in the cases arising out of Avena, there is a good reason for the federal and state authorities to follow the ICJ’s ruling in Avena, and LaGrand before it: the ICJ was the forum chosen by the United States as a signatory of the Vienna Convention’s Optional Protocol. By joining the Optional Protocol, and by the Statute of the International Court of Justice itself, parties agree to adhere to the rulings of that forum. The United States cannot defeat that obligation simply by withdrawing from the Optional Protocol after the ICJ has delivered its ruling.

Following the ICJ’s decision in Avena would not require U.S. courts to contravene settled doctrine. Though the Supreme Court has twice considered the issue of consular notification, the matter has not been definitely resolved. Although the federal and state courts were virtually of one mind in ignoring the Vienna Convention despite admitted violations of the treaty, they have used several different theories to justify rendering the Vienna Convention ineffective within U.S. borders. By contrast, the ICJ has now delivered clear judgments on consular notification on two separate occasions, and the United States has either explicitly or implicitly accepted its obligation to adhere to both decisions.

247. 5 U.S. (1 Cranch) 137 (1803).
248. Id. at 177.
251. See infra Section V.B.
252. See supra note 194, art. 59.
254. See infra Part III.
255. See supra note 194, at 59 (stating that a decision by the court is binding upon the parties before it).
257. See supra Part III.
258. In its brief in Avena, the United States acknowledged its obligation to abide by the ICJ’s ruling in LaGrand. Counter-Memorial of the United States of America, supra note 207, at 61-64 (Chapter V).
B. Beyond the ICJ—International Legal Development in U.S. Law

While the Medellin case focuses on the ICJ’s approach to consular access, international law development does not rest on tribunal decisions alone. International law is also created outside of specific court decisions. Its development relies upon other sources to establish general legal norms, including customary law and codification through multilateral treaties. The Statute of the International Court of Justice outlines the array of sources from which international law is determined:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Because international law is the law of the United States, these sources should help inform decisions involving international matters in U.S. courts.

This broader proposition is controversial. It would call for the wholesale incorporation of international law principles into U.S. law, something is a frightening thought to many people. But nation-states do have some protection under international law against such an onslaught. Based upon the principle of international sovereignty, states may opt out of customary international law development by consistent objection to a particular principle. And certainly, a state always has the option of not entering into a treaty that might bind its behavior in the future.

If these safeguards are thought to be insufficient, and if resistance to incorporating international law norms into U.S. law continues, then the language of the Court in The Paquete Habana may ring hollow. Should international legal norms involving human rights, criminal justice, and the like be applicable to U.S. cases? The Medellin approach, of taking narrow and specific issues framed for a particular case, cannot resolve that more general question, but perhaps no single case should. Nevertheless, it remains important to reflect upon the place of international law in the resolution of domestic cases.

As noted supra Subsection III.B.3, letters from the Legal Advisor of the Department of State to the Governor of Oklahoma and to the chair of that state’s Board of Pardon and Parole strongly suggested that Oklahoma seriously consider the ICJ position in a death penalty matter involving a Mexican national.

259. Statute of the International Court of Justice, supra note 194, art. 38.

260. See RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW OF THE U.S § 102 cmt. b (1987) ("A principle of customary law is not binding on a state that declares its dissent from the principle during its development.").
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V. INTERNATIONAL LAW IN A FEDERAL CONSTITUTIONAL SYSTEM

The opinions of the ICJ in LaGrand and Avena both refer to the actions of states within the United States as acts of the United States itself.261 In LaGrand, the failure of the Governor of Arizona to prevent the execution of Walter LaGrand following the ICJ's order for provisional measures was surely as problematic as the federal government's lukewarm recommendation to the governor.262 The fact that the United States is a federal union did not forestall the ICJ from finding the United States liable for what were primarily state violations of the Vienna Convention in both Avena and LaGrand. There is little question that the United States itself is bound both to the Vienna Convention and the Statute of the International Court of Justice.263 Moreover, neither Texas

261. In LaGrand, the ICJ noted that "the fact that the United States repeated in all phases of these proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation under Article 36 of the Vienna Convention." LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 512 (June 27) (emphasis added). Indeed, inasmuch as both cases involved state law enforcement procedures and not federal law enforcement procedures, there can be no doubt that the actions of the states were attributable to the United States.

262. A stronger view is that the ICJ implicated the Governor of Arizona directly in its provisional order in LaGrand. Consider the following language in its order:

28. Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States . . . .


Under this view, the ICJ is asserting that Arizona has a direct obligation to act in conformity with international undertakings of the United States. Though this is a plausible view, it is not preferred. Instead, the ICJ is simply recognizing the basic federal structure of the United States. In Missouri v. Holland, 252 U.S. 416 (1920), the U.S. Supreme Court determined that international obligation of the federal government are binding within the states.

263. The Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, requires states to abide by their treaty obligations and prohibits reliance on internal laws as an excuse for breach. Accordingly, a federal state may not invoke its federal system and the division of authority among the national and sub-national governments as a reason for non-compliance. As stated in the Draft Articles on State Responsibility:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

nor its forty-nine sister states are recognized apart from the United States in international law.\textsuperscript{264}

A related question is whether Texas has an obligation to abide by international law within the context of international society. Since Texas arguably has little identity under international law, the state has no concomitant obligations outside of its place within the federal union. However, as a member of the United States, Texas does have obligations, limitations, and responsibilities under the U.S. Constitution. Texas must also concern itself with justiciability issues, specifically whether a treaty is regarded as self-executing within the United States. In light of these considerations, the claim that the ICJ’s decision in \textit{Avena} has no impact on Texas is simply untenable.

A. Powers Reserved to the States Under the Tenth Amendment

The obligation of the several states of the union to abide by the federal government’s international law obligations is a matter of national constitutional law. In the present case, state and federal courts would be required to respond to an individual’s Vienna Convention claim only if the treaty is regarded as self-executing. In other words, is a particular treaty the source of rights cognizable in domestic courts?\textsuperscript{265} Since its ratification, the State Department

\textsuperscript{264} Questions have arisen regarding whether parties other than sovereign states can conclude international treaties. In the context of the Vienna Convention, an apparently tongue-in-cheek remark by Alberto Gonzales, then the legal advisor to Texas Governor George W. Bush, raised the issue. Gonzales stated in a letter to the U.S. State Department regarding a pending execution: “Since the State of Texas is not a signatory to the Vienna Convention on Consular Relations, we believe it is inappropriate to ask Texas to determine whether a breach . . . occurred in connection with the arrest and conviction.” See \textit{Alan Berlow, Lone Star Justice}, SLATE.COM, at http://slate.msn.com/id/2102416 (June 15, 2004).

The international law answer would seem to be that in certain limited circumstances, federated entities might conceivably conclude treaties. For example, Article 6 of the Vienna Convention on the Law of Treaties, \textit{supra} note 263, states that it is possible for subjects other than states to conclude treaties. However, those “other subjects of international law” to which the treaty makes reference may be limited to international organizations given that the ICJ’s earliest definition of that term dealt with a case involving the status of the United Nations. 1949 I.C.J. 182. See \textit{Reparation for Injuries Suffered in the Service of the United Nations}, 1949 I.C.J. 182 (Apr. 11). For an alternative view, see \textit{Jan Wouters & Leen De Smet, The Legal Position of Federal States and Their Federated Entities in International Relations—The Case of Belgium} 5 (Inst. for Int’l Law, Working Paper No. 7, 2001), available at http://www.law.kuleuven.ac.be/iir/eng/wp/WP7e.pdf (last visited Apr. 26, 2005).

This is not to say that federated entities cannot enter into arrangements or compacts with foreign entities. The validity of such agreements might ultimately rest on the vagaries of municipal law. In the United States, the Compact Clause, U.S. CONST. art. I, § 10, cl. 3, as interpreted in the Supreme Court case of \textit{Virginia v. Tennessee}, 148 U.S. 503 (1893), would allow Congress to scrutinize such compacts on the basis of their effect on the just supremacy of the United States.

\textsuperscript{265} The Constitution declares that treaties are part of the law of the land. U.S. CONST. art. VI, cl. 2. The language would indicate that treaties are, immediately upon ratification, part of the corpus of laws that can create obligations within the United States. The term “self-executing” implies as much. Chief Justice John Marshall clarified the matter, however, by implying what Professor Louis Henkin calls an exception to the constitutional principle. \textit{Louis Henkin, Foreign Affairs and the Constitution} 199 (2d ed. 1996). Chief Justice Marshall laid out his constitutional theory of treaty effectiveness in \textit{Foster v. Neilson}:

\begin{quote}
Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded
\end{quote}
has regarded the Vienna Convention as self-executing.\textsuperscript{266}

One of the longstanding debates within U.S. constitutional law involves the sharing of power between the states and the national government. The debate stems from the Tenth Amendment, which declares, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."\textsuperscript{267} The passage seems straightforward enough, except for the fact that the scope of the delegated powers is contested. The listed powers of the legislative and executive branches are subject to implied powers that allow legislation and rulemaking for the purpose of implementing those listed powers.\textsuperscript{268} For two centuries, the U.S. Supreme Court has grappled with the scope of federal power to implement the delegated powers, and this remains the most intractable controversy in constitutional law. As a result, the scope of federal power is difficult to determine and is frequently subject to speculation.

Moreover, the \textit{Avena} decision implicates the general police power of the states to protect the citizenry from criminal behavior. This power is not enumerated as a power of the federal government under the Constitution and, accordingly, is "reserved to the States." Each state has the power to enforce its laws against threats to property and persons through incarceration, and, in the case of capital murder, through execution. Federal activity in the area of law enforcement is limited to Congress's implied powers. However, the states' police powers come into question where they intersect with an international treaty or are a matter of interest to U.S. foreign policy. The Supreme Court's decision in the landmark case of \textit{Missouri v. Holland}\textsuperscript{269} helped settle the confusion that arose when international obligations implicated domestic activities.

\textsuperscript{266} The State Department acknowledged as much in testimony before the Senate during ratification hearings. \textit{See} S. EXEC. REP. NO. 91-9, app. at 2, 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser to the Department of State).

\textsuperscript{267} U.S. CONST. amend. X.

\textsuperscript{268} \textit{See} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{269} 252 U.S. 416 (1920).
Holland involved a treaty between the United States and the United Kingdom dealing with migratory birds flying between the United States and Canada. The treaty, implemented by federal legislation, restricted the hunting of certain birds, a prohibition that came into conflict with Missouri law, over whose territory some of the birds traveled. Missouri challenged the congressional legislation. Justice Oliver Wendell Holmes, writing for the 7-2 majority, characterized legislation implementing treaties as superior to state laws and powers inasmuch as treaty law is the supreme law of the land. Of course, congressional legislation dealing solely with domestic matters is also the supreme law of the land, but it is nevertheless subject to scrutiny as to whether it infringes on state powers. Holmes, however, portrayed the treaty power and implementing legislation as being about something more. He described legislation implementing treaties as based upon treaties that were made under the constitutional authority of the United States. The import of that reasoning is that where a treaty is ratified under constitutional procedure, the substantive aspects of a treaty, and its implementing legislation, need not pass constitutional muster. It was subsequently determined in Reid v. Covert that what Holmes meant to say was that implementing legislation need not pass Tenth Amendment muster; Holland, as had been feared for decades, did not provide a wholesale immunization of treaties and implementing legislation from constitutional scrutiny.

B. The Federal Government's Authority over Texas in Avena

The state of Texas, as a result of the constitutional architecture that places federal international obligations above the states' reserved powers, is bound by the Vienna Convention, a treaty signed and ratified by the United States. The dictates of the Convention, however, are partly the result of litigation and the interpretation by the ICJ. Conceivably, Texas could claim that it acknowledges its obligations under the Vienna Convention itself, but that the ICJ does not have the authority to enforce its interpretation on the Lone Star State. Such a possibility, however, is addressed in the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, a part of the Vienna Convention. The United States signed both the

270. In Chief Justice Marshall's words: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." McCulloch, 17 U.S. (4 Wheat.) at 423.

271. See Curtis A. Bradley, The Treaty Power and American Federalism, 97 MICH. L. REV. 390, 434-45 (1998). For reasons discussed in Section V.C, Professor Bradley may not have fully considered the distinction between the two powers in the Constitution having to do with the sourcing "authority."

272. Reid v. Covert, 354 U.S. 1, 16 (1956) (plurality opinion of Black, J.).

273. In fact, this appears to be Texas's argument at present.
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Convention and the Optional Protocol, and the Protocol specifically authorizes the final settlement of disputes regarding treaty matters by the ICJ. 274

The same constitutional reasoning applicable to the substantive part of the Vienna Convention applies to the Optional Protocol. Because of the supremacy of the treaty to any of the police powers that Texas may claim, the state is bound by the ICJ judgment in the Avena case. The recent decision of the federal government to withdraw from the Optional Protocol does not alter this reality. The ICJ delivered the Avena decision at a time when the United States was obliged to follow its edicts. While the United States may no longer be required to adhere to future ICJ judgments, the fifty-two cases at issue in Avena must still be handled in accordance with the ruling of the ICJ. The federal government appears to recognize as much, since it directed the states to provide full review and reconsideration of those cases. 275

Ultimately, the question of whether Texas must follow Avena revolves around whether a constitutional principle announced eighty-five years ago in Holland still has resonance in what could be a particularly contentious test of wills between the federal government and the states. At the heart of the dispute are two basic issues: first, whether implementing legislation is required to enforce the Vienna Convention and/or the judgment of the ICJ, and, second, whether the federalist structure could withstand federal intervention in what is perhaps the most basic of state functions, law enforcement.

C. Implementing Legislation and the Enforcement of Self-Executing Treaties

Missouri v. Holland dealt with a treaty that was not self-executing and thus required implementing legislation. The Court ruled that legislation pursuant to a treaty is not bound by the limits of the Tenth Amendment. The Vienna Convention, by contrast has been acknowledged to be a self-executing treaty. 276 Certainlty, the fact that the Convention is a self-executing treaty makes an even stronger case for moving beyond federal and state rivalries. As one authority notes generally on the subject of self-executing treaties:

By virtue of the Supremacy Clause, treaties of their own force nullify inconsistent state laws and earlier federal laws, and the judicial mechanisms available generally to enforce laws in the United States are available to enforce treaties. 277

274. Article I of the Optional Protocol provides:
Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

275. See supra notes 9-10, 21 and accompanying text.

276. See supra note 266.

Other commentators have invoked the Supremacy Clause when addressing the authority of treaties over state legislation.\textsuperscript{278}

Several of the leading treaty cases do not rest the supremacy of treaty law on the existence of implementing legislation, whether or not an agreement is self-executing. \textit{United States v. Belmont},\textsuperscript{279} for example, considered a federal policy that was embodied in neither a treaty nor congressional legislation. In that case, an executive agreement sought to address claims arising from the nationalization of private property by the new government of the Soviet Union. The state of New York had a policy against the nationalization of assets in the state and supported withholding sums from the settlement process. New York’s policy was found to conflict with the U.S. policy embodied in what was known as the "Litvinov Assignment" of Soviet nationalized assets to the United States for orderly disbursement among American claimants. Ruling in favor of the United States, the Supreme Court stated that "the external policies of the United States are to be exercised without regard to state laws or policies."\textsuperscript{280}

This holding was further reiterated several years later under virtually the same circumstances in \textit{United States v. Pink},\textsuperscript{281} which also involved New York financial policy in light of the same Litvinov Assignments.

Elsewhere, in \textit{Zschernig v. Miller},\textsuperscript{282} the Court found a state inheritance law that effectively discriminated against legatees of communist countries to interfere with U.S. foreign policy. The state law in \textit{Zschernig} did not conflict with a specific legislative or executive statement of federal policy as was the case in Belmont. Together, \textit{Belmont} and \textit{Zschernig} provide clear examples of the breadth of the federal government’s role in foreign affairs—a role cognizable with or without treaties and with or without implementing legislation.\textsuperscript{283}

The Supreme Court has held fast to the notion of federal supremacy in matters of foreign affairs, whether through the Supremacy Clause or through the treaty power. Claims that \textit{Holland} is an old case with limited significance today ignore the Court’s recent reaffirmation of the \textit{Holland} principle in \textit{United States v. Lara},\textsuperscript{284} where the Court recognized that “treaties made pursuant to that power can authorize Congress to deal with ‘matters’ with which otherwise ‘Congress could not deal.’”\textsuperscript{285}

Of course, the Court’s willingness to uphold federal authority vis-à-vis the

\begin{itemize}
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\item \textsuperscript{278} HENKIN, supra note 265, at 156-65.
\item \textsuperscript{279} 301 U.S. 324 (1937).
\item \textsuperscript{280} \textit{Id.} at 331.
\item \textsuperscript{281} 315 U.S. 203, 217 (1941).
\item \textsuperscript{282} 389 U.S. 429 (1968).
\item \textsuperscript{284} 541 U.S. 193 (2004).
\item \textsuperscript{285} \textit{Id.} at 201 (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920)).
\end{itemize}
states in matters of foreign policy does not mean that existing doctrine cannot be read narrowly to limit its applicability in other situations. The question becomes whether all categories of state action can or should be subsumed under the federal government's foreign policy interests where state policy and federal foreign policy conflict. The interference in Zschernig and, conceivably, in Belmont and Pink could be characterized as overt: Oregon's probate laws were designed to disapprove of communism during the Cold War and New York's financial policies likely served the same purpose during the early days of the Soviet Union.

The issue of Texas's compliance with the ICJ's Avena decision is of a different character. The state's criminal justice system is insular; it does not criticize another regime, or attempt to exert influence in foreign affairs. Foreign affairs may have thrust upon Texas an obligation to provide consular notice and information, an obligation that it refused to acknowledge in the cases at issue in Avena. But the state's behavior was rooted in laws and procedures that it adopted without regard to foreign policy. The motives of state officials who chose not to provide the required review and reconsideration is up for speculation. However, a plausible argument can be made that their decision merely followed the state's standard criminal justice procedures. As such, it does not necessarily represent a commentary on a foreign system or an attempt to insert the state into international relations in the same manner as the state actions at issue in Zschernig, Belmont, and Pink.

Missouri v. Holland would appear to address this argument, given that a Missouri law for the regulation of bird hunting is not itself an attempt to thrust the state of Missouri into international affairs, though, according to Justice Holmes, the effect was to do just that. But in Holland, the U.S.-UK treaty covered the precise subject of the state law, and the state law directly clashed with the treaty, essentially making it a matter of conflict preemption. In the sixteen Texas cases at issue in Avena, the state's criminal laws do not necessarily conflict with U.S. policy on the issue of consular notification, though Texas's enforcement of those laws might. However, the state's failure to conform to the Vienna Convention and abide by the ICJ's ruling is an act of omission, not an express conflict or an overt policy. Nor does established precedent rely upon a device like the Optional Protocol of the Vienna Convention, which is merely a jurisdictional agreement giving the ICJ authority to settle disputes under the treaty. Thus, the question becomes: is this an appropriate area for the Supremacy Clause of the Constitution to "trump" the

286. See United States v. Samples, 258 F. 479 (W.D. Mo. 1919), aff'd sub nom. Missouri v. Holland, 252 U.S. 416 (1920). The case involved an arrest of two hunters in Missouri by a federal game warden for killing certain birds in violation of the Migratory Bird Treaty Act of July 3, 1918, 40 Stat. 755. Apparently, the hunting would not have violated Missouri law, and the hunters challenged the federal legislation while the state of Missouri sought to restrain enforcement of the law in Missouri.
Tenth Amendment, or is the business of trumping reserved for special cases?

There are two views on this question. One is that the scope of the Tenth Amendment has already been narrowed as much as it can be when it comes to foreign policy. A second view the Tenth Amendment is irrelevant in determining the legitimacy of treaties and implementing legislation under the constitutional scheme.

1. Tenth Amendment as a Limitation on the Treaty Power

One could argue that the current trend of the Supreme Court's jurisprudence toward a revival of pre-New Deal federalism may have undermined some of the authority of the Holland decision. Whether the Supreme Court goes quite that far is sport for Court watchers. However, the Court in Holland does describe a radical notion of federal power, in which the treaty power is not subject to any limitations, save for limitations regarding individual liberties as announced in Reid. Critics contend that the treaty power (and legislation implementing it) should be subject to the same Tenth Amendment limitations as other congressional legislation pursuant to the enumerated powers of Congress under Article I.

If legislation adopted under the treaty power was treated like other legislation, the treaty power itself would be restricted. In the Commerce Clause cases, which involve direct Tenth Amendment tensions, the Supreme Court has reduced the scope of permissible federal legislation. Instead of a catch-all power for Congress to engage in social legislation premised upon the economic impact of social, the Court under Chief Justice William Rehnquist has narrowed the commerce power to one that authorizes legislation in commercial and economic subject matters. If the Commerce Clause cases offer the right analogy, it is conceivable that a reconstituted approach to the treaty power would narrow its scope to traditional matters of international affairs, as opposed to matters that affect international affairs in some way. Even in Holland,

289. In the two major cases signaling a sea-change in the Court's interpretation of the Commerce Clause, United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), the Supreme Court dealt with Congress's authority under the Commerce Clause. The question in each case was whether Congress had the power to regulate an activity simply based upon the fact that the activity had some effect on commerce, whether or not the activity regulated was commercial. Lopez dealt with a national law prohibiting handguns near schools (a subject normally covered by state criminal laws), and Morrison considered a national law giving women the right to sue abusers and rapists in federal court. Because both areas of regulation (illicit travel with firearms and abuse of women) affected economic activity, four members of the court felt that it was an appropriate area of national legislation. However, the Court held otherwise, arguing that the activity regulated had to be itself a subject of commercial activity.
290. The fear has always been that the federal government would find some compliant nation-state and conclude a treaty covering matters not "traditionally international" so that Congress could enact implementing legislation that might be otherwise prohibited by constitutional limitations such as the
Justice Holmes did seem to operate under the assumption that the treaty power might be limited by some subject-matter restrictions: "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter [migratory birds] is only transitorily within the State and has no permanent habitat therein."291

On the other hand, Holmes did state that the treaty power was different from other powers of the federal government in that the power to conclude treaties came under the authority of the United States, whereas “[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution.”292 Justice Black’s plurality opinion in Reid v. Covert,293 in clarifying (or modifying) Holmes’ holding, appeared to question the crucial rationale for this extraordinary authority granted by the Treaty Clause. Black argued that the exclusive language regarding the source of the authority of the treaty power—"under the authority of the United States"—was meant to ensure that treaties entered into during the period of the Articles of Confederation would remain in force after the new Constitution went into effect.294 Nevertheless, the central holding of Holland remained intact despite the possibility that its textual rationale may have been weakened.295 Under both the Holmes and Black formulations, the permissible subject matter for treaties appears to have been understood liberally, and the precise limits of the treaty power remain vague.296

2. The Tenth Amendment Does Not Matter in Determining the Breadth of the Treaty Power

Professor Louis Henkin has argued for the supremacy of federal foreign relations policy over state interests. His view is essentially that valid federal
expressions of foreign policy include those that interfere with states' rights. In other words, the legitimacy of a federal action, be it a treaty, an implementing statute, or an executive agreement, does not depend on the relationship of the subject matter to state concerns. Henkin argues that the nation's entire foreign policy apparatus, the judicial doctrine on the subject, and the text of the Constitution all point in that direction.

Furthermore, despite a revival of federalist concerns in recent Supreme Court opinions, Henkin claims that there are "no hints of any [invisible] radiations" that would warrant state non-compliance with treaty obligations. Henkin is an absolutist on the issue of federalism: when it comes to matters of foreign policy, the federal government's interest should always prevail. Henkin found this to be particularly true with regard to the provisional measures issued by the ICJ in Paraguay v. U.S. However, his view is not totally consonant with Holmes' attempt to place some limits on this treaty power with the vaguely defined subject-matter distinction.

Neither the Holmes nor Henkin position excuse Texas's obligation to adhere to the Vienna Convention as interpreted in Avena. The Texas cases at issue in Avena involve foreign nationals and foreign offices operating within the borders of the state. It is hard to imagine something more international than that. Even if the constitutional validity of treaties rests on an international subject matter (whatever that is), the cases in Texas involve an international agreement—the Vienna Convention—that addresses a traditional subject of international cooperation—the treatment of foreign diplomats. There can be no doubt that the United States, if it chose to, could seek a court order requiring Texas and its sister states, to comply with the decision of the ICJ. Under U.S.
case law, the federal government would win. It is only a matter of political will.

It is difficult to make a legal argument for the intransigence of the state of Texas with regard to the ICJ. Neither international law nor constitutional law supports such an absolute refusal. Indeed, as Henkin characterizes the Zschernig decision, "[T]he states are bound to refrain from interfering in U.S. foreign affairs even if the executive branch has not asked the states to do so, has not taken any formal action." And the treaty power, even under a restrictive interpretation of existing case law, would support federal action against Texas under the present circumstances.

CONCLUSION

The failure of Texas to comply with the Vienna Convention is only the latest in a long line of controversies surrounding the state’s administration of its historically problematic and highly criticized capital punishment system. Both domestic and international law clearly demonstrate that Texas must comply with the Avena decision. Actual compliance with Avena's requirements—providing meaningful "review and reconsideration"—is neither onerous nor burdensome. Indeed, neither is general compliance with the Vienna Convention itself. As such, non-compliance is not only in violation of domestic and international law, but it is also without sound public policy justifications. In light of the fact that Mexico and Mexican citizens take the issue of the death penalty extremely seriously, and given that Texas wants Mexico to comply with its international treaty obligations, Texas needs to be sensitive to its neighbor to the south and comply with Avena and the requirements of the Vienna Convention. Meaningful "review and reconsideration" as mandated by Avena should and must be provided to the sixteen Mexican citizens currently on Texas's death row. As astutely noted by Richard Dieter, director of the Death Penalty Information Center, the ICJ has limited reach and limited powers to enforce its own order: "They’ve got no army, they’ve got no police. There’s no way (the order) will be enforced except by international pressure and pride." We hope this Article will serve as the first of many such pressures.

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ICJ's order does not provide an independent basis for this Court either to grant certiorari or to stay the execution.


303. Henkin, supra note 283, at 682.

304. Schiller & Robbins, supra note 5 (quoting Richard Dieter).