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### Judging International Judgments

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# Judging International Judgments

MARK L. MOVSESIAN\*

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## INTRODUCTION

It is possible today, as it never has been before, to speak intelligibly of international courts.<sup>1</sup> In recent decades, and particularly since the 1990s, states have created scores of adjudicative and quasi-adjudicative bodies with power to resolve disputes under international law.<sup>2</sup> These

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1. See, e.g., YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 3 (2003) (describing the evolution of international courts in recent decades); Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC’Y INT’L L. PROC. 160, 160 (2000) (discussing the “explosion of new international courts and tribunals”).

2. See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 436–38 (2003). For a useful compilation, see The Project on International Courts and Tribunals, *The International Judiciary in Context: A Synoptic Chart* (2004), <http://www.pict->

new tribunals differ dramatically from traditional dispute settlement regimes.<sup>3</sup> They are much more institutionalized—much more “court-like”—than conventional arbitration panels.<sup>4</sup> Moreover, while traditional arbitration tended to involve financial or relatively unimportant territorial claims, the new tribunals increasingly issue rulings on matters of core domestic authority: criminal law and punishment, environmental protection, and religious expression.<sup>5</sup> By common consent, the rise of these new tribunals is one of the most “remarkable” legal developments of the postwar era.<sup>6</sup>

A large and growing body of work seeks to make sense of the new international courts.<sup>7</sup> One question, in particular, has sparked contro-

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pcti.org/publications/synoptic\_chart/Synop\_C4.pdf.

3. The history of modern international dispute settlement begins with the Jay Treaty of 1795 between the United States and Great Britain, which established a bilateral commission to arbitrate claims for the payment of pre-revolutionary debts. See Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1868–69 (describing arbitration provisions of Jay Treaty). Another early example is the commission established to arbitrate claims arising from the capture of British merchant ships by American naval vessels during the Civil War. See A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 897–98 (2000). The Permanent Court of Arbitration (PCA)—really a roster of arbitrators available for settling interstate disputes—also played a brief but significant role in the early twentieth century. See Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1290–91 (2004); see also Philippe J. Sands, *The Future of International Adjudication*, 14 CONN. J. INT'L L. 1, 2 (1999). For the PCA's current role in selecting ICJ judges, see *infra* text accompanying notes 221–24.

4. Martinez, *supra* note 2, at 436 (internal quotation marks omitted).

5. See, e.g., Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1151–52 (2005) (explaining that modern international law, which international courts apply, “replicates many central concerns of the domestic regulatory state”). On the routine nature of traditional state to state arbitration, see Ginsburg & McAdams, *supra* note 3, at 1328 (“The majority of international disputes which have in the past been settled by arbitration or by some other legal procedure have been either pecuniary claims or disputes about national frontiers in remote and sparsely inhabited regions.”) (citation omitted).

6. See, e.g., SHANY, *supra* note 1, at 3 (discussing the “remarkable transformation” of international dispute settlement in recent decades).

7. See, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103, 144–51 (2005); Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003); Alford, *supra* note 1; Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405 (2003); Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 38 GEO. WASH. INT'L L. REV. (forthcoming 2008); Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999) [hereinafter Bradley, *Dualist Constitution*]; Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003) [hereinafter Bradley, *Inter-*

versy. What effect should rulings of international courts—one might call them “international judgments”—have in domestic courts? In the United States, debate has centered on a series of rulings by the International Court of Justice (ICJ) on the application of the Vienna Convention on Consular Relations (VCCR).<sup>8</sup> The VCCR, a multilateral treaty that the United States ratified in 1969, grants foreign nationals the right to seek the assistance of their consulates in the event that local authorities arrest them.<sup>9</sup> An Optional Protocol to the VCCR gives the ICJ jurisdiction over disputes relating to the interpretation and application of the treaty.<sup>10</sup> Since the late 1990s, the ICJ repeatedly has ruled that the United States has violated the VCCR.<sup>11</sup> In its 2004 *Avena* judgment, the ICJ ruled that, where American courts had convicted foreign nationals and sentenced them to “severe penalties,” the United States must remedy its violations by providing judicial review and reconsideration of the convictions, notwithstanding procedural bars under local law.<sup>12</sup>

The United States withdrew from the Optional Protocol after *Avena*, thereby eliminating the possibility of future adverse judgments in

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*national Delegations*]; William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1 (2002); Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002); Ginsburg & McAdams, *supra* note 3; Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) [hereinafter Helfer & Slaughter, *Supranational Adjudication*]; Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1 (2006); Martinez, *supra* note 2; Andreas L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783 (2004); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); Weisburd, *supra* note 3; Young, *supra* note 5. For a recent debate, see Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) [hereinafter Posner & Yoo, *Judicial Independence*]; Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005); Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957 (2005).

8. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. Scholars have given the VCCR litigation a great deal of attention. *See, e.g.*, Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755 (2006).

9. VCCR, *supra* note 8, art. 36. On American ratification, see Ku, *supra* note 7, at 9.

10. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol].

11. *See* Ku, *supra* note 7, at 9–16.

12. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 69–70 (Mar. 31).

VCCR cases.<sup>13</sup> It remains party to scores of other agreements granting the ICJ jurisdiction to resolve disputes, however, and the domestic force of ICJ rulings, and international judgments generally, remains a vital question.<sup>14</sup> Last year, in the much anticipated *Sanchez-Llamas v. Oregon*, a divided Court issued its most definitive ruling yet on subject.<sup>15</sup> *Sanchez-Llamas* concerned the weight that domestic judges should give to *Avena* and other judgments that the ICJ had issued before the United States' withdrawal from the Optional Protocol. More specifically, the case concerned the effect that the ICJ's interpretations of the VCCR should have in American courts.<sup>16</sup>

Both Chief Justice Roberts, writing for the Court, and Justice Breyer, writing for the minority, agreed that the ICJ's judgments merited "respectful consideration."<sup>17</sup> They disagreed, though, on what "respectful consideration" required. The Chief Justice maintained that, while the Court should pay attention to the ICJ's views, it had a responsibility to reach its own conclusions about the VCCR. Notwithstanding the ICJ's interpretation, the treaty did not preclude application of local procedural-bar rules.<sup>18</sup> Justice Breyer, by contrast, argued that "respectful consideration" required greater deference to the ICJ. Even assuming its judgments did not bind American courts, the ICJ had interpreted the VCCR reasonably. Given its comparative expertise in international law and the desirability of uniform interpretation, the Court should have adopted its reading of the treaty.<sup>19</sup>

It is tempting to dismiss this debate on the precise definition of "respectful consideration" as minor. But the split in *Sanchez-Llamas* reflects a more profound disagreement on the proper way to integrate in-

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13. See Ku, *supra* note 7, at 34–35.

14. See *id.* at 35 (noting that the United States "remains party to at least seventy treaties" granting the ICJ authority to resolve disputes). As this Article was going to print, the Supreme Court granted certiorari in another VCCR case. See *ex parte* Medellin, 2006 WL 3302639 (Tex. Crim. App.), *cert. granted sub. nom.* Medellin v. Texas, 75 U.S.L.W. 3398 (U.S. Apr. 30, 2007) (No. 06-984).

15. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006). The case sparked an unusually large number of amicus briefs from academics on both sides of the controversy. See *infra* text accompanying notes 118–21.

16. The case did not involve the enforcement of any ICJ orders themselves. See John Harrison, *International Adjudicators and Judicial Independence*, 30 HARV. J.L. & PUB. POL'Y 127, 128 (2006). For more on this point, see *infra* text accompanying notes 115–17.

17. *Sanchez-Llamas*, 126 S. Ct. at 2683 (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998)); *Sanchez-Llamas*, 126 S. Ct. at 2700 (Breyer, J., dissenting). For more on *Breard*, see *infra* text accompanying notes 68–80.

18. *Sanchez-Llamas*, 126 S. Ct. at 2683–87.

19. *Id.* at 2699–2705 (Breyer, J., dissenting).

ternational and domestic judiciaries. To understand the case—to appreciate what it portends for the treatment of international judgments more generally—one has to grasp the deeper arguments that lie beneath the surface.<sup>20</sup> Each of the two main opinions reflects one side of a larger debate that has raged for the last decade. The Court’s opinion reflects what might be called a dualist approach: in the absence of a domestic act of incorporation, international judgments have only “information,” not “disposition,” value for domestic courts.<sup>21</sup> International judgments can supply good arguments and helpful analysis for domestic courts to use in their own treatment of legal problems, but they cannot influence a case, the way domestic precedent can, by virtue of their status as judicial pronouncements.<sup>22</sup> By contrast, the dissent adopts the comity model that has gained considerable academic currency in recent years. That model calls for an informal, cooperative relationship between international and national judiciaries—a “dialogue” or “community of courts.”<sup>23</sup> On this view, international judgments lack binding authority, but domestic courts should defer to them, where possible, in the interests of justice and global uniformity.

This Article will show why the dualist approach affords the superior means of accommodating the sort of international judgment at issue in *Sanchez-Llamas*. Scholars sometimes dismiss dualism as blunt and pa-

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20. *Sanchez-Llamas*, and the VCCR litigation more generally, also has implications for the proper role of the Court in the American constitutional system, particularly with regard to the reception of international law. I leave those constitutional questions for others. See, e.g., Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59; Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 326 (2006).

21. Cf. John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 310 (2006) (distinguishing between “informational” and “dispositional value” of legal authority).

22. See *id.*

23. SLAUGHTER, *supra* note 7, at 68 (describing the system as a “community of courts”); Ah-dieh, *supra* note 7, at 2034 (proposing “a model of ‘dialectical review’—a pattern of judicial review, yet one with *dialogue* at its core”). Other pieces that incorporate comity ideas in their treatment of international judgments include Alford, *supra* note 7, at 715–31 (discussing the “foreign judgment model” and its applicability to certain international judgments); Burke-White, *supra* note 7, at 3 (arguing that “the emerging system of international criminal justice can be conceived as a community of courts” that comprises national and supranational tribunals); Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7, at 282 (describing “the concept of a global community of law, constituted...by overlapping networks of national, regional, and global tribunals”); Harold Hongju Koh, *Paying Decent Respect to International Tribunal Rulings*, 96 AM. SOC’Y INT’L L. PROC. 45, 48 (2002); Martinez, *supra* note 2, at 434 (arguing for the application of “anti-parochial, prodialogic canon[s] when deciding procedural issues in transnational cases”); Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT’L L. 708 (1998); Waters, *supra* note 7, at 489–90 (endorsing a “transnational judicial dialogue” among courts worldwide).

rochial.<sup>24</sup> In this context, though, dualism promotes a workable balance between the advantages and disadvantages of international courts. International courts offer both a promise and a threat: a promise of more uniform, predictable, and—to the extent international judges have comparative expertise—better reasoned international law, and a threat of decisions imposed by relatively unaccountable, unfamiliar, and inflexible actors.<sup>25</sup> The dualist approach maximizes the promise while minimizing the threat. By granting international judgments information value, it allows domestic courts to weigh the benefits of uniformity, predictability, and expertise and, when appropriate, to adopt the reasoning of international courts. At the same time, by denying international judgments disposition value, it prevents relatively illegitimate actors from issuing rulings that bind domestic populations in circumstances, like the VCCR cases, that implicate sensitive local issues.<sup>26</sup> The dualist approach thus minimizes the occasion for nationalist backlashes that can only lessen the beneficial influence of international courts.

The comity model also advances the promise of international courts.<sup>27</sup> Unlike the dualist approach, though, it does not mitigate the threat of illegitimate action. Although its advocates speak in terms of judicial dialogue, the model's logic leads inevitably to a regime in which international judgments have more than information value for domestic courts. (This should come as no surprise; if international judgments had only information value, the comity model would add nothing to dualism.) In fact, the model contemplates a strong presumption in favor of deferring to international courts. As a practical matter, domestic courts would routinely adopt the reasoning of international tribunals,

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24. See, e.g., Louis Henkin, *Implementation and Compliance: Is Dualism Metastasizing?*, 91 AM. SOC'Y INT'L L. PROC. 504, 517 (1997) (arguing that dualism is based on an "anachronistic...isolationism and unilateralism"). See generally Bradley, *Dualist Constitution*, *supra* note 7, at 531 (discussing rejection of dualist thought "in the American international law academy").

25. Cf. Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 77 (2000) (discussing legitimacy concerns raised by the delegation of domestic authority to international organizations).

26. See Curtis Bradley & Lori Fisler Damrosch, *Medellin v. Dretke: Federalism and International Law*, 43 COLUM. J. TRANSNAT'L L. 667, 683 (2005) (comments of Prof. Bradley) (discussing constitutional concerns that would exist if ICJ rulings were given direct effect in VCCR cases).

27. See Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 37, 62 (Thomas M. Franck & Gregory H. Fox eds., 1996) [hereinafter INTERNATIONAL LAW DECISIONS] (arguing that "regular and interactive transjudicial communication" between national and supranational courts would enhance "the quality of judicial decision-making...worldwide").

and international judgments would have something very close to disposition value for domestic courts.

The strength of the pro-deference presumption appears in two examples that advocates give to illustrate the model: European regional courts and the American regime for enforcing foreign judgments.<sup>28</sup> The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) lack formally hierarchical relationships with European national courts.<sup>29</sup> Nonetheless, European national courts accept the authority of both tribunals, deferring to their interpretations as a matter of course.<sup>30</sup> Similarly, notwithstanding the absence of a formal obligation, American courts “almost always enforce” the judgments of foreign courts, on a comity theory, without raising serious legitimacy concerns.<sup>31</sup> If these two examples serve as any guide—and supporters clearly believe they do—the comity model contemplates a systematic deference by domestic courts to international tribunals.

Because the model would in practice be so close to a disposition value regime, it could not overcome the legitimacy threat that international courts pose. Moreover, the European and foreign judgments examples do not translate well outside their own contexts. In Europe, the receptiveness of domestic courts to ECJ and ECtHR judgments is a function of a larger drive toward regional integration, which is itself a function of a shared European culture and history.<sup>32</sup> No similar com-

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28. For discussions of the European experience, see SLAUGHTER, *supra* note 7, at 80–85; Ahdieh, *supra* note 7, at 2153–61; John B. Attanasio, *Rapporteur’s Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, in INTERNATIONAL LAW DECISIONS, *supra* note 27, at 373, 379–82; Mark Gibney, *On the Need for an International Civil Court*, 26 FLETCHER F. WORLD AFF. 47, 55 (2002); Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7, at 290–98; Lenore Jones, *Opinions of the Court of the European Union in National Courts*, in INTERNATIONAL LAW DECISIONS, *supra* note 27, at 221; Martinez, *supra* note 2, at 445–47, 498. For discussions of the foreign judgments example, see Alford, *supra* note 7, at 715–31; Koh, *supra* note 23, at 46, 48; Martinez, *supra* note 2, at 499; Slaughter, *supra* note 23, at 708.

29. See Ahdieh, *supra* note 7, at 2157 (contrasting the relationship between the ECJ and European national courts with the hierarchy that exists between the United States Supreme Court and the Courts of Appeals); John Cary Sims, *Compliance Without Remands: The Experience Under the European Convention on Human Rights*, 36 ARIZ. ST. L.J. 639, 645 (2004) (“The [ECtHR] is not empowered to give any direction at all to the national courts.”).

30. See GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 353–55 (2d ed. 2002) (discussing the ECJ); Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT’L L.J. 359, 378 (2005) (discussing the ECtHR).

31. Mark D. Rosen, *Should “Un-American” Foreign Judgments be Enforced?*, 88 MINN. L. REV. 783, 791 (2004).

32. See J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 31 (2d ed. 1993) (arguing that the ECtHR “can appeal to a common



mitment to political integration exists at the global level, and there is much less perception of shared values, particularly with respect to the sort of divisive local questions that international courts increasingly address.<sup>33</sup>

Similarly, while American courts regularly enforce foreign judgments, those judgments tend to arise in the context of private commercial disputes where comity arguments work well.<sup>34</sup> In other contexts, foreign judgments receive less favorable treatment. For example, American courts typically avoid enforcing foreign public law judgments and judgments that violate fundamental constitutional principles.<sup>35</sup> Moreover, the foreign judgments regime relies, at least in part, on reciprocity arguments that are out of place in the context of international judgments.<sup>36</sup> Finally, enforcing a foreign judgment is a much smaller intrusion on a domestic legal system than the broader sort of deference that the comity model envisions.<sup>37</sup> The foreign judgments example does not suggest that domestic courts would feel comfortable deferring in a systematic way to the reasoning of international judgments.<sup>38</sup>

Despite its seemingly obscure preoccupation with the definition of “respectful consideration,” then, *Sanchez-Llamas* is an important case. It suggests that the American response to the growing prominence of international courts will be a moderate and sensible one. In rejecting the comity analysis favored by academics and urged by the dissent, the Court avoided a model that would raise serious legitimacy concerns and create unnecessary friction between domestic and international institutions. In endorsing a dualist approach, the Court preserved a space for local control and ensured that international courts will continue to fill, but not exceed, their proper and important role: providing persuasive analysis that domestic judges can use to promote uniformity, predictability, and justice on a global scale.

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set of cultural values”); Alvarez, *supra* note 7, at 430 (discussing the importance of regional “integrative goals” to the success of the ECtHR and the ECJ).

33. See Alvarez, *supra* note 7, at 430.

34. See William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L.J. 161, 161 (2002) (noting that courts “routinely enforce” foreign judgments respecting private law).

35. See *id.*; see also Molly S. Van Houweling, *Enforcement of Foreign Judgments, The First Amendment, and Internet Speech: Notes for the Next Yahoo! v. LICRA*, 24 MICH. J. INT’L L. 697, 699–701 (2003).

36. See Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT’L L. 327, 353 (2004) (discussing different views on the reciprocity requirement).

37. For further discussion, see *infra* text accompanying notes 361–62.

38. See Bradley & Damrosch, *supra* note 26, at 683–84 (comments of Prof. Bradley).

This Article proceeds as follows. Part I describes *Sanchez-Llamas*, situating the case in the context of the wider VCCR controversy of which it is a part. Part II explores the deeper arguments that lie below the surface in the case. Part II(A) shows how the Court's opinion reflects a dualist approach and discusses the legitimacy arguments that support that approach. It shows how dualism allows domestic judges to balance the competing demands of international order and domestic authority. Part II(B) explores the comity model that the dissent endorses and explains why the Court was right to reject it. Part III concludes.

### I. *SANCHEZ-LLAMAS* AND THE VCCR LITIGATION

*Sanchez-Llamas* is the most recent in a complex series of cases, dating back about a decade, in which American courts have considered the effect of ICJ judgments in disputes under the VCCR. To understand *Sanchez-Llamas*, one needs some background on the ICJ and on that series of cases. I offer that background here, before moving on to a description of *Sanchez-Llamas* itself.

#### A. *The ICJ: An Introduction*

One of the oldest international courts, the ICJ is "the principal judicial organ of the United Nations."<sup>39</sup> It comprises a bench of fifteen judges elected, for renewable nine year terms, in a complex process involving the General Assembly and the Security Council.<sup>40</sup> The judges are "independent"<sup>41</sup> and "represent[...the main forms of civilization and...the principal legal systems of the world."<sup>42</sup> All UN members—191, at present count—are parties to the Court's charter, known as the Statute.<sup>43</sup>

Only states may appear as parties before the Court.<sup>44</sup> States can submit disputes either on an ad hoc basis or under a categorical consent to

39. U.N. Charter art. 92. The Court was established in 1945 as "the successor to the Permanent Court of International Justice," which was itself established in 1920 by the League of Nations. BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 284 (4th ed. 2003).

40. Statute of the International Court of Justice, arts. 3, 4, 13, June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter ICJ Statute].

41. International Court of Justice, Members of the Court, <http://www.icj-cij.org/court/index.php?p1=1&p2=2> (last visited May 1, 2007).

42. ICJ Statute, *supra* note 40, art. 9.

43. U.N. Charter art. 93, para. 1 ("All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.").

44. ICJ Statute, *supra* note 40, art. 34, para. 1.

the Court's general jurisdiction.<sup>45</sup> Of these two alternatives, the former has been a much more significant source of the Court's jurisdiction.<sup>46</sup> States that wish to refer particular disputes to the ICJ typically do so, under Article 36(1) of the Statute, by way of a clause granting the Court jurisdiction in the context of a specific treaty.<sup>47</sup> Hundreds of bilateral and multilateral treaties grant the Court authority to resolve disputes about their construction and application, including agreements relating to criminal punishment, the environment, race and sex discrimination, and certain security matters.<sup>48</sup> The United States is a party to at least 70 such treaties, including, until very recently, the VCCR.<sup>49</sup> Collectively, these treaties commit the United States to accept ICJ jurisdiction over disputes with "virtually every nation in the world."<sup>50</sup> While some of the treaties deal with innocuous subjects like road conditions, others relate to high profile political concerns like narcotics trafficking and terrorism.<sup>51</sup>

The Court decides disputes by applying the standard sources of international law: treaties, custom, "the general principles of law recognized by civilized nations," and, as "subsidiary" means, "judicial decisions and the teachings of the most highly qualified publicists of the various nations."<sup>52</sup> Judgments are not subject to appeal, but they bind only the

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45. ICJ Statute, *supra* note 40, art. 36. In addition to its contentious jurisdiction, the Court has authority to render advisory legal opinions to certain international organizations. See U.N. Charter art. 96.

46. See Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 58, 58 (Lori Fisler Damrosch ed. 1987). Only sixty-five states presently accept the Court's compulsory general jurisdiction, most of them with important reservations. See International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (providing a compilation of declarations) (last visited May 1, 2007); MALCOLM N. SHAW, *INTERNATIONAL LAW* 979 (5th ed. 2003) (stating that the "majority" of declarations are "conditional"); *id.* at 981 (explaining that reservations "are usually an attempt to prevent the Court becoming involved in a dispute which is felt to concern vital interests"). Only one permanent Security Council member, Great Britain, presently consents to compulsory general jurisdiction. Posner & Yoo, *Judicial Independence*, *supra* note 7, at 38.

47. See ICJ Statute, *supra* note 40, art. 36, para. 1 ("The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for...in treaties or conventions in force.").

48. Morrison, *supra* note 46, at 61. For a list, see International Court of Justice, *Treaties*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4> (last visited May 1, 2007).

49. Ku, *supra* note 7, at 35.

50. Morrison, *supra* note 46, at 68.

51. *Id.* at 66.

52. ICJ Statute, *supra* note 40, art. 38, para. 1. Some of these sources, particularly custom, allow the judges a great deal of discretion, a matter that has concerned some commentators. See John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary Interna-*

parties and only with regard to the particular case.<sup>53</sup> The UN Charter provides that states must comply with judgments in any case in which they are parties, but does not prescribe the effect of judgments in domestic courts.<sup>54</sup> If a losing party fails to comply, the prevailing party may apply to the Security Council for assistance; the Council “may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”<sup>55</sup> Despite this grant of authority, “requests for enforcement are rare and the Security Council has never acted to enforce an ICJ decision.”<sup>56</sup>

There are signs that its caseload is growing, but the ICJ has not been an active tribunal.<sup>57</sup> Moreover, while hard data is elusive, states’ compliance with the Court’s judgments seems somewhat spotty.<sup>58</sup> One recent study puts the overall compliance rate at 68 percent; the rate in ad hoc disputes is apparently higher.<sup>59</sup> As an empirical matter, compliance is most likely in cases where neither party objects to ICJ resolution.<sup>60</sup> Not surprisingly, these turn out to be low stakes disputes that the parties do not view as particularly important.<sup>61</sup> States tend to reject ICJ jurisdiction over disputes that implicate significant interests.<sup>62</sup> Ironically, the

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*tional Law: The Example of the WTO*, 44 VA. J. INT’L L. 229, 243 (2003) (discussing the “problem of unrepresentativeness” in ICJ judges’ “power to create customary international law”).

53. ICJ Statute, *supra* note 40, art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”), art. 60 (“The judgment is final and without appeal.”).

54. U.N. Charter art. 94, para. 1 (“Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.”).

55. *Id.* at para. 2.

56. Ginsburg & McAdams, *supra* note 3, at 1308.

57. As of 2004, there had been a total of 129 cases filed with the Court since its establishment, a number that works out to about two cases per year. *See id.* at 1309. On the recent growth of the Court’s docket, see Alford, *supra* note 1, at 160.

58. *See* SHAW, *supra* note 46, at 996 (noting that “the record of compliance with judgments is only marginally satisfactory”); Ginsburg & McAdams, *supra* note 3, at 1310 (discussing “difficulty of establishing compliance as an empirical matter”).

59. Ginsburg & McAdams, *supra* note 3, at 1310–11; *see* Posner & Yoo, *Judicial Independence*, *supra* note 7, at 38 (discussing the Ginsburg & McAdams study). Another recent study of cases from 1987 to 2004 finds a “full compliance” rate of 60 percent. Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT’L L. 434, 460 (2004).

60. *See* Ginsburg & McAdams, *supra* note 3, at 1313; *see also* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 129 (4th ed. 2003) (noting that an ICJ decision seems “most often respected when all states concerned have voluntarily come to the Court”). Indeed, the ICJ sometimes avoids issuing merits judgments in cases involving recalcitrant parties. *Id.* at 134.

61. *See* Ginsburg & McAdams, *supra* note 3, at 1328; *see also* JANIS, *supra* note 60, at 129–30 (discussing ad hoc jurisdiction).

62. *See* SHAW, *supra* note 46, at 981 (discussing general jurisdiction).

most celebrated examples of resistance involve liberal democratic states—the sort of regimes that might seem most likely to comply with international obligations.<sup>63</sup>

### B. *The VCCR Litigation*

The VCCR is a multilateral agreement that relates generally to consular relations and functions. Article 36 affords three rights to a foreign national in the event that local law enforcement officers arrest him.<sup>64</sup> At the foreign national's request, local authorities must notify his consulate of his arrest "without delay." Local authorities must also forward "without delay" any communication the foreign national wishes to make to his consulate. Finally, local authorities must inform the foreign national of these rights, once again "without delay." The foreign national must exercise his rights "in conformity with" the host country's "laws and regulations," but those laws and regulations "must enable full effect to be given to the purposes for which the rights...are intended."<sup>65</sup> An Optional Protocol grants the ICJ compulsory jurisdiction over any disputes arising out of the interpretation and application of the treaty.<sup>66</sup> The United States ratified the VCCR, and became a party to the Optional Protocol, in 1969.<sup>67</sup>

The VCCR litigation, a series of cases that has preoccupied the international law academy for the better part of a decade, began in 1998, when Paraguay brought an action in the ICJ alleging that the United States had violated the treaty by failing to inform a Paraguayan national, Angel Breard, of his rights under Article 36.<sup>68</sup> Virginia had convicted Breard of capital murder and sentenced him to death.<sup>69</sup> At the time of his arrest and trial, Virginia authorities had not informed Breard of his rights to seek consular assistance; Breard apparently learned of these rights after his appeal and state habeas action already had run.<sup>70</sup> Shortly before his scheduled execution date, Paraguay brought its action in the

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63. See Ginsburg & McAdams, *supra* note 3, at 1311, 1314. If anything, Ginsburg and McAdams write, the evidence supports a negative correlation between democracy and compliance. *Id.* at 1314.

64. VCCR, *supra* note 8, art. 36(1)(b). The rights apply to a foreign national "arrested or committed to prison or to custody pending trial or...detained in any other manner." *Id.*

65. VCCR, *supra* note 8, art. 36(2).

66. Optional Protocol, *supra* note 10, art. I.

67. Ku, *supra* note 7, at 9, 10.

68. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 249 (Apr. 9).

69. Breard v. Greene, 523 U.S. 371, 373 (1998).

70. *Id.*

ICJ, and the ICJ issued a provisional order directing the United States to “take all measures at its disposal to ensure” that Breard’s execution be stayed pending the ICJ’s final decision on Paraguay’s claims.<sup>71</sup>

In a *per curiam* opinion issued on the date set for execution, the United States Supreme Court denied Breard’s request for a stay.<sup>72</sup> The Court reasoned that Breard’s VCCR claims were procedurally barred under federal law; by failing to raise them in the Virginia courts, Breard had forfeited his right to raise them in later federal proceedings.<sup>73</sup> It was “unfortunate,” the Court wrote, that the ICJ lacked time to decide the dispute between Paraguay and the United States, but its decision would not bind American courts anyway.<sup>74</sup> “[W]hile we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such,” the Court wrote, the application of the VCCR in the United States was a matter for American judges to decide.<sup>75</sup> The Court noted that the State Department had asked Virginia’s governor to stay Breard’s execution in light of the ICJ order and added that, if the governor wished to postpone the execution, “that is his prerogative.”<sup>76</sup>

Governor Jim Gilmore decided not to wait. While he understood the difficulties that ignoring the ICJ’s order could create for Americans abroad, his “first duty” was to provide for the safety of Americans and foreign nationals residing in Virginia.<sup>77</sup> That responsibility could not be “transferr[ed]” to the ICJ, which had “no authority to interfere with our criminal justice system.”<sup>78</sup> Breard’s guilt was unquestioned, and the American courts that had heard his VCCR claims had denied them.<sup>79</sup> The execution went ahead as scheduled, and Paraguay and the United States eventually reached a diplomatic settlement.<sup>80</sup>

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71. *Vienna Convention on Consular Relations*, 1998 I.C.J. at 258.

72. *Breard*, 523 U.S. at 378–79. Paraguay also had sought to intervene. *Id.* at 374.

73. *Id.* at 375–76. The Court also ruled that a federal statute enacted after the VCCR, the Antiterrorism and Effective Death Penalty Act of 1996, precluded an evidentiary hearing in Breard’s case, thus making presentation of his VCCR claims impossible. *See id.* at 376–77.

74. *Id.* at 378.

75. *Id.* at 375.

76. *Id.* at 378.

77. Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (Apr. 14, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 AM. J. INT’L L. 666, 674 (1998).

78. Charney & Reisman, *supra* note 77, at 674.

79. *See id.* at 674–75.

80. Ku, *supra* note 7, at 12.

American violations of the VCCR came up again in *LaGrand*, an action Germany brought at the ICJ in 1999.<sup>81</sup> Arizona authorities had arrested, tried, and convicted two German nationals, Karl and Walter LaGrand, of capital murder without informing them of their rights under Article 36.<sup>82</sup> The LaGrands learned of their rights only after their appeals and state habeas actions had run; when they tried to raise their VCCR claims in a subsequent federal habeas action, the federal courts ruled that the claims were procedurally barred.<sup>83</sup> Shortly before the date scheduled for Walter LaGrand's execution, the ICJ issued a provisional order for a stay to allow it to hear Germany's claim,<sup>84</sup> once again, the Supreme Court declined to enforce the ICJ's order.<sup>85</sup> Citing her duty to uphold state law, Arizona's governor refused to grant a reprieve, and Walter LaGrand's execution went ahead as scheduled.<sup>86</sup>

Unlike Paraguay, Germany continued to press its claim at the ICJ, and in 2001 the ICJ issued a merits judgment.<sup>87</sup> The ICJ rejected the idea that domestic procedural default rules could prevent the assertion of VCCR claims in American courts.<sup>88</sup> Article 36 conferred individually enforceable rights that American authorities had ignored;<sup>89</sup> under the circumstances, application of the procedural default rule denied those rights "full effect."<sup>90</sup> Moreover, the United States had an obligation to remedy violations that had injured German nationals. "[W]here the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties," the ICJ wrote, the United States must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the

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81. See William J. Aceves, *LaGrand (Germany v. United States)*, 96 AM. J. INT'L L. 210, 210 (2002).

82. *Id.*

83. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 476–77 (June 27).

84. *LaGrand Case (F.R.G. v. U.S.)*, Request for the Indication of Provisional Measures, 1999 I.C.J. 9, 16 (Mar. 3).

85. *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (per curiam).

86. See Mani Sheik, Comment, *From Breard to Medellín: Supreme Court Inaction or ICJ Activism in the Field of International Law?*, 94 CAL. L. REV. 531, 544–45 (2006). Karl LaGrand had been executed before Germany commenced its action at the ICJ. Aceves, *supra* note 81, at 210.

87. *LaGrand*, 2001 I.C.J. at 466.

88. See *id.* at 495–98.

89. *Id.* at 494.

90. *Id.* at 498 (quoting VCCR art. 36, para. 2). The ICJ stressed that the procedural default rule itself was not problematic, only its application in the circumstances. *Id.* at 497, 513.

[VCCR].”<sup>91</sup> The ICJ left the method for carrying out this obligation to the United States.<sup>92</sup>

Three years later, the ICJ reaffirmed *LaGrand* in *Avena*, an action that Mexico brought on behalf of its nationals on death row in the United States.<sup>93</sup> The ICJ reaffirmed its earlier holding on the procedural default rule, noting that the United States had not revised the rule since *LaGrand* nor attempted to prevent its application in situations where local authorities’ violations of the VCCR themselves had precluded foreign nationals from raising their claims in a timely fashion.<sup>94</sup> Moreover, the ICJ clarified that the “review and reconsideration” it had called for in *LaGrand* referred to judicial proceedings, not executive clemency hearings, as the United States had maintained.<sup>95</sup> Finally, the ICJ indicated that its reasoning did not relate solely to Mexicans, but extended generally to all foreign nationals subject to “severe penalties” in the United States.<sup>96</sup>

The action now shifted back to the United States. Shortly after Mexico had brought its action in *Avena*, the ICJ had issued a provisional order directing the United States to prevent the execution of Mexican nationals whose VCCR rights had been violated.<sup>97</sup> One of the Mexicans, Osbaldo Torres, on death row in Oklahoma, petitioned the Supreme Court for a stay of execution on the basis of the ICJ’s order; as it had in *Breard* and *LaGrand*, the Court denied the petition.<sup>98</sup> Before the date set for Torres’s execution, though, the ICJ handed down its final judgment in *Avena*, and Oklahoma’s governor decided—surprisingly, given the earlier responses by Virginia and Arizona—to commute Torres’s sentence to life without parole.<sup>99</sup> Governor Brad Henry explained that there

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91. *Id.* at 513–14.

92. *Id.* The ICJ also ruled that the United States had violated Germany’s rights under the VCCR, *id.* at 491–92, and that its earlier provisional order had been legally binding on the United States, *id.* at 506.

93. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31). More than fifty Mexican nationals, in ten different states, were involved. See Sean D. Murphy, *U.S. Position Before International Court of Justice in Mexican Death Penalty Case*, 97 AM. J. INT’L L. 434, 434–35 (2003).

94. *Avena*, 2004 I.C.J. at 56–57.

95. *Id.* at 63–66.

96. *Id.* at 69–70. The court also ruled on other issues, including the burden of proof as to the dual nationality of the detainees, *id.* at 41–42; the timing of notification, *id.* at 43, 49; and the necessity for suppression of any evidence obtained prior to notification, *id.* at 61. As to this last point, the court declined to order suppression. *Id.*

97. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 42 I.L.M. 309, 319 (Feb. 5, 2003).

98. *Torres v. Mullin*, 540 U.S. 1035 (2003).

99. Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death



were extenuating circumstances in Torres's case, but the urgings of the State Department and the *Avena* judgment itself were the decisive factors.<sup>100</sup> Indeed, Governor Henry noted the ICJ's ruling that Torres's VCCR rights had been violated; as a result of American treaty commitments, he stated, "the ruling of the ICJ [was] binding on U.S. courts."<sup>101</sup>

Meanwhile, another Mexican on death row in Texas, Jose Medellin, was also seeking to rely on *Avena*. When lower federal courts dismissed as procedurally barred a habeas action he had brought to challenge his conviction, Medellin sought review in the Supreme Court, arguing that *Avena* precluded application of procedural default rules to his VCCR claims. The Supreme Court granted certiorari, and the stage seemed set for a definitive ruling on the effect of ICJ judgments.<sup>102</sup> In the end, a decision never came. A month before the date set for argument, President Bush issued a short memorandum stating that the United States would comply with *Avena* "by having State courts give effect to the decision," with respect to the Mexican nationals the case covered, "in accordance with general principles of comity."<sup>103</sup> In response, Medellin brought a new state habeas action.<sup>104</sup> In light of these developments, which poten-

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Row Inmate Torres, (May 13, 2004) [http://www.governor.state.ok.us/display\\_article.php?article\\_id=301&article\\_type=1](http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1) [hereinafter Henry Press Release]. Earlier that day, a state court had granted Torres a stay of execution and a hearing on his VCCR claims. *Id.*; see *Oklahoma Court of Criminal Appeals: Osbaldo Torres v. The State of Oklahoma* (May 13, 2004), 43 I.L.M. 1227 (2004). The court did not issue an opinion explaining its reasons. One judge wrote a special concurrence arguing that Oklahoma courts must give "full faith and credit" to the *Avena* decision. *Id.* at 1229 (Chapel, J., concurring). Two judges dissented, arguing that *Avena* was not binding on Oklahoma courts. *Id.* at 1234 (Lumpkin, J., dissenting).

100. See Henry Press Release, *supra* note 99.

101. *Id.*

102. *Medellin v. Dretke*, 544 U.S. 660, 661–62 (2005). The Court's action sparked a flurry of activity in the international law academy. Leading scholars filed amicus briefs on both sides in *Medellin*, urging enforcement or non-enforcement of ICJ orders on a variety of theories. See, e.g., Brief of International Law Experts as Amici Curiae in Support of Petitioner, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 176453; Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as Amici Curiae in Support of Respondent, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No.04-5928), 2005 WL 497763.

103. Memorandum for the Attorney General, in Brief for the United States as Amici Curiae Supporting Respondent, *Medellin v. Dretke*, 544 U.S. 660 app. 2 (2005) (No. 04-5928), 2005 WL 504490 [hereinafter Bush Memorandum]; see also *Medellin*, 544 U.S. at 663 (discussing Bush memorandum). The Bush memorandum raises significant constitutional questions that I do not address here. For a good discussion, see Bradley, *supra* note 20.

104. *Medellin*, 544 U.S. at 663–64. In November 2006, the Texas Court of Criminal Appeals dismissed this action, holding that *Avena* did not bind American courts and that the Bush memorandum was unconstitutional. *Ex parte Medellin*, 2006 WL 3302639 (Tex. Crim. App.), *cert. granted sub. nom. Medellin v. Texas*, 75 U.S.L.W. 3398 (U.S. Apr. 30, 2007) (No. 06-984). The

tially mooted the central issues in the case, a divided Court dismissed the writ of certiorari as improvidently granted.<sup>105</sup>

The Bush memorandum proved to be the first of a two-part strategy. About a week later, the Administration announced that the United States was withdrawing from the Optional Protocol, thus ending ICJ jurisdiction over VCCR claims against it.<sup>106</sup> A State Department spokesman explained that the United States had not anticipated, when it joined the Optional Protocol, that the ICJ would use its jurisdiction to intervene in domestic criminal proceedings.<sup>107</sup> “We have a system of justice that provides people with due process and review of their cases,” the spokesman argued, “[a]nd it’s not appropriate that there be some international court that comes in and can reverse decisions of our national courts.”<sup>108</sup>

### C. Sanchez-Llamas: *A Summary*

This, then, was the situation seven years after the VCCR litigation had begun with *Breard*: a series of high profile cases, involving four states, the Supreme Court, and the Executive Branch, had failed to settle the status of ICJ judgments in American courts. While the Bush Administration’s withdrawal from the Optional Protocol precluded the possibility of further adverse judgments in VCCR cases, it did not resolve the domestic effect of decisions, like *LaGrand* and *Avena*, that the ICJ already had announced. Moreover, the United States remained party to scores of other treaties that granted the ICJ jurisdiction over their interpretation and application.<sup>109</sup> The effect of ICJ judgments thus remained an open, and important, question.

*Sanchez-Llamas v. Oregon* provided a definitive answer.<sup>110</sup> *Sanchez-Llamas* was a consolidated case addressing the VCCR claims of two

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Supreme Court will hear this case next term.

105. *Medellin*, 544 U.S. at 666–67. Four justices—Stevens, O’Connor, Souter, and Breyer—dissented from the dismissal.

106. See Letter from Condoleeza Rice to Kofi Annan (Mar. 7, 2005), *quoted in* Frederic L. Kirgis, Addendum to ASIL Insight, President Bush’s Determination Regarding Mexican Nationals and Consular Convention Rights (Mar. 2005), <http://www.asil.org/insights/2005/03/insights050309a.html>.

107. Daily Press Briefing, U.S. Dep’t of State, Mar. 10, 2005 (comments of Adam Erel, Deputy Spokesman), <http://www.state.gov/r/pa/prs/dpb/2005/43225.htm> [hereinafter Daily Press Briefing].

108. *Id.*

109. See *supra* text accompanying notes 49–51.

110. 126 S. Ct. 2669 (2006).

foreign nationals whom American courts had convicted of murder. Both argued that the VCCR conferred individually enforceable rights that American authorities had violated.<sup>111</sup> In support, they cited the ICJ's rulings in *LaGrand* and *Avena*—rulings that merited “respectful consideration” under *Breard*.<sup>112</sup> One of the petitioners argued further that *LaGrand* and *Avena* required the Court to reconsider *Breard*'s holding that procedural default rules applied to VCCR claims.<sup>113</sup> Since *Breard*, he noted, the ICJ twice had determined that procedural default rules could not bar VCCR claims. The Court “should not diverge from the ICJ's construction without ample reason.”<sup>114</sup>

*Sanchez-Llamas* did not involve the enforcement of ICJ judgments as such.<sup>115</sup> Unlike their counterparts in *Breard*, *LaGrand*, *Torres*, and *Medellin*, the petitioners in *Sanchez-Llamas* did not rely on stay orders the ICJ had issued with respect to them.<sup>116</sup> Their claim was a broader one: not that American courts should give effect to particular ICJ judgments, but that American courts should defer more generally to the reasoning of the ICJ. They argued, in other words, that American courts should adhere to the ICJ's interpretations of the VCCR even in cases involving different claimants. It was this broader assertion, and not the comparatively narrow question of enforcing individual ICJ judgments, that was at issue in *Sanchez-Llamas*.<sup>117</sup>

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111. *Id.* at 2677.

112. *Breard v. Greene*, 523 U.S. 371, 375 (1998). For petitioners' arguments on this point, see Brief for Petitioner Moises Sanchez-Llamas at 26–28, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566) [hereinafter *Sanchez-Llamas Brief*]; Brief for Petitioner Mario A. Bustillo at 30–31, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 05-51).

113. *Sanchez-Llamas*, 126 S. Ct. at 2682–83. The other petitioner argued that the trial court should have suppressed his statements to the police because local authorities had not informed him of his VCCR rights. *Id.* at 2678. Because the ICJ judgments did not require suppression, see *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 61 (Mar. 31), the Court did not need to address the effect of ICJ rulings in addressing (and rejecting) this claim. See *Sanchez-Llamas*, 126 S. Ct. at 2678–82.

114. Reply Brief for Petitioner Mario A. Bustillo at 11, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 05-51).

115. See Bradley, *supra* note 20, at 94; cf. Young, *supra* note 5, at 1231 (distinguishing between binding ICJ judgments and ICJ interpretations).

116. One of the petitioners, Mario Bustillo, was a Honduran, and thus not covered by any of the earlier ICJ orders. The other, Moises Sanchez-Llamas, was a Mexican, but was not among the 51 Mexicans expressly covered by the *Avena* order. See Bradley, *supra* note 20, at 93. His lawyers asserted in passing that the *Avena* judgment should apply to him, but they focused their argument on the “respectful consideration” point. See *Sanchez-Llamas Brief*, *supra* note 112, at 9, 27. That is the point that the Court's opinion ultimately addressed.

117. See Bradley, *supra* note 20, at 94; Harrison, *supra* note 16, at 128.

Like *Medellin* before it, *Sanchez-Llamas* drew enormous attention from the international law academy.<sup>118</sup> Several leading scholars filed amicus briefs in the case. One such brief, filed by nine noted ICJ experts in support of petitioners, maintained that *LaGrand* and *Avena* announced binding rules of decision that American courts must follow.<sup>119</sup> Another brief in support of petitioners, filed for several former high-ranking American diplomats by Dean Harold Koh, maintained that American courts should defer to the ICJ judgments, in the same way they generally deferred to foreign judgments, in the interests of “comity and uniform treaty interpretation.”<sup>120</sup> Finally, some scholars filed an amicus brief in support of respondents, arguing that comity concepts were out of place in relation to international tribunals like the ICJ.<sup>121</sup>

Writing for a five person majority, Chief Justice Roberts ruled against the petitioners.<sup>122</sup> Even assuming that the VCCR conferred individually enforceable rights—a matter he did not decide—petitioners were not entitled to relief.<sup>123</sup> *LaGrand* and *Avena* did not require the Court to reconsider its earlier holding with respect to procedural default rules.<sup>124</sup> While the ICJ judgments merited “respectful consideration” under *Breard*,<sup>125</sup> they were not “conclusive on our courts.”<sup>126</sup> The Constitution gave federal courts the ultimate authority to determine the meaning of treaties; the United States had ratified the Optional Protocol on the basis of that understanding.<sup>127</sup> Moreover, “[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to” bind domestic courts.<sup>128</sup> ICJ interpretations did not bind the ICJ itself in subsequent cases.<sup>129</sup> Indeed, while the UN Charter required states

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118. See *supra* note 102 (discussing academics’ briefs in *Medellin*).

119. Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners at 1, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (Nos. 04-10566 and 05-51).

120. Brief of Former U.S. Diplomats as Amici Curiae in Support of Petitioners Mario A. Bustillo and Moises Sanchez-Llamas at 6, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 05-51 and 04-10566). The brief also suggested that ICJ opinions were binding on the Court as a matter of international law, but did not pursue that argument. See *id.*

121. Brief of Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the U.S. as Amici Curiae in Support of Respondents, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 04-10566 and 05-51).

122. Justices Scalia, Kennedy, Thomas, and Alito joined the Court’s opinion.

123. *Sanchez-Llamas*, 126 S. Ct. at 2677–78.

124. *Id.* at 2683.

125. *Id.* (internal quotation marks omitted).

126. *Id.* at 2684.

127. *Id.*

128. *Id.*

129. *Id.*

to comply with ICJ rulings in cases in which they were parties, it did not contemplate judicial enforcement at all. The “remedies” were “quintessentially *international*”; non-compliance was a matter for the Security Council.<sup>130</sup>

In addition, the Chief Justice noted, the United States had withdrawn from the Optional Protocol. The views of the Executive Branch traditionally carried “great weight” in treaty interpretation, and it was “doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction” the United States “no longer recognized.”<sup>131</sup> While the Executive Branch had decided to “discharge its international obligations” by “having state courts give effect to...*Avena*” in cases involving Mexican nationals, it had “not taken the view that the ICJ’s interpretation of Article 36 [was] binding on our courts.”<sup>132</sup> Indeed, the Executive Branch had filed an amicus brief arguing that the ICJ rulings were *not* binding on American judges—except insofar as the President had decided, based on his own constitutional and statutory authority, that such judgments should be enforced.<sup>133</sup>

Even granting its rulings “respectful consideration,” the ICJ had interpreted the VCCR incorrectly.<sup>134</sup> *Breard* was right: procedural default rules could block the assertion of claims under the treaty. The ICJ had reasoned that such rules could prevent domestic courts from giving “full effect” to the purposes for which the VCCR had granted rights to foreign nationals, as the VCCR required.<sup>135</sup> But this reasoning “overlook[ed] the importance of procedural default rules in an adversary system,” like the United States’, “which relief[d] chiefly on the parties to raise significant issues and present them to the courts in the appropriate manner at the appropriate time.”<sup>136</sup> Procedural default rules were fundamental to such a system; they extended to most of the claims criminal defendants might raise, including bedrock constitutional claims.<sup>137</sup> If the ICJ’s interpretation of the treaty were correct, VCCR claims would be

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130. *Id.* at 2684–85.

131. *Id.* at 2685.

132. *Id.* (quoting Bush memorandum).

133. See Brief for the United States as Amicus Curiae Supporting Respondents at 43–46, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 05-51 and 04-10566) [hereinafter U.S. Amicus Brief].

134. *Sanchez-Llamas*, 126 S. Ct. at 2685.

135. *Id.* (quoting VCCR art. 36, para. 2).

136. *Id.*

137. See *id.* at 2686, 2688.

entitled to an exception available for “almost no other right.”<sup>138</sup> Such a reading was implausible, especially given the VCCR’s requirement that foreign nationals exercise their rights “in conformity with the laws and regulations of the receiving State.”<sup>139</sup>

Justice Ginsburg wrote separately to concur in the Court’s judgment.<sup>140</sup> She did not take an express position on the effect of the ICJ judgments.<sup>141</sup> Even if procedural default rules were problematic in some circumstances, she believed, they were not problematic in *Sanchez-Llamas*.<sup>142</sup> For example, the ICJ had indicated that procedural default rules could not be applied in situations where local authorities’ conduct itself had caused the default.<sup>143</sup> *Sanchez-Llamas* did not present such a situation. Petitioner conceded that his lawyer had known of his VCCR claim at trial; nothing the local authorities had done had prevented the lawyer from raising the VCCR claim in the initial proceeding.<sup>144</sup> Even on the ICJ’s theory, there was no reason to order reconsideration of petitioner’s conviction.

Justice Breyer dissented in an opinion that Justices Stevens and Souter joined, and that Justice Ginsburg joined in part.<sup>145</sup> Unlike the Court, which did not reach the question, he concluded that the VCCR conferred individually enforceable rights on foreign nationals.<sup>146</sup> Moreover, Justice Breyer believed that the VCCR precluded the application of local procedural default rules in some circumstances. While he spent some time on the treaty itself,<sup>147</sup> most of his discussion on this point dealt with the proper effect of the ICJ rulings. He argued that the Court

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138. *Id.* at 2688.

139. *Id.* at 2686 (quoting VCCR art. 36, para. 2).

140. *Id.* at 2688 (Ginsburg, J., concurring in the judgment).

141. Justice Ginsburg did join part II of Justice Breyer’s dissent, on the individually enforceable rights point, which relies in part on the ICJ opinions. *Id.* at 2688 (Ginsburg, J., concurring in the judgment). Most of Justice Breyer’s discussion on the effect of ICJ judgments is in part III of his opinion, though, and Justice Ginsburg did not join that part. *Id.* (Ginsburg, J., concurring in the judgment).

142. *Id.* at 2690 (Ginsburg, J., concurring in the judgment). Justice Ginsburg agreed with the Court that allowing procedural default rules to apply to important constitutional claims, but not to VCCR claims, “would be extraordinary.” *Id.* at 2689 (Ginsburg, J., concurring in the judgment).

143. *Id.* at 2690 (Ginsburg, J., concurring in the judgment).

144. *Id.* (Ginsburg, J., concurring in the judgment).

145. *Id.* at 2690 (Breyer, J., dissenting). I do not discuss Justice Breyer’s analysis of the suppression issue, which did not concern the effect of ICJ opinions.

146. *Id.* at 2693–98 (Breyer, J., dissenting). This part of Justice Breyer’s opinion, which Justice Ginsburg joined, discusses the effect of ICJ opinions only in passing. *See id.* at 2696–97 (Breyer, J., dissenting).

147. *See id.* at 2698–99 (Breyer, J., dissenting).

had failed to give *LaGrand* and *Avena* the “respectful consideration” that *Breard* required.<sup>148</sup>

Justice Breyer assumed that ICJ opinions did not formally “bind” the Supreme Court.<sup>149</sup> But “respectful consideration” suggested that the Court should adopt an interpretation “consistent with the ICJ’s reading of the Convention.”<sup>150</sup> Uniformity was “an important goal of treaty interpretation” and the ICJ “provide[d] a natural point of reference for national courts seeking that uniformity.”<sup>151</sup> Moreover, the ICJ had “expertise in...treaty interpretation” and international law generally.<sup>152</sup> Indeed, Justice Breyer provided a list of more than forty cases in which the Supreme Court and lower American courts purportedly had “looked to the ICJ for guidance” in the past.<sup>153</sup> (As the Court noted, and as I shall explain, this list was greatly exaggerated.)<sup>154</sup> Here, by contrast, the Court had adopted an interpretation of the VCCR that differed from the ICJ’s. The Court had thereby created a “conflict” that Justice Breyer called “unprecedented.”<sup>155</sup>

To give the ICJ opinions “respectful consideration,” Justice Breyer argued, the Court must “read [them] in light of the [VCCR]’s underlying language and purposes and ask whether, or to what extent, they require modification” of local procedural rules.<sup>156</sup> The Court had failed to read the ICJ opinions fairly. It had “overlook[ed] what the ICJ actually said, overstate[d] what it actually meant, and [was] inconsistent with what it actually did.”<sup>157</sup> Read narrowly, *LaGrand* and *Avena* only precluded application of procedural default rules in limited circumstances: where the actions of local authorities had prevented a foreign national from raising a VCCR claim in a timely way and no effective remedy remained.<sup>158</sup> Other, broader readings of the opinions were possible, but this narrow understanding was a “perfectly reasonable” one.<sup>159</sup> By fail-

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148. *Id.* at 2703 (Breyer, J., dissenting).

149. *Id.* at 2700 (Breyer, J., dissenting).

150. *Id.* at 2697 (Breyer, J., dissenting).

151. *Id.* at 2700 (Breyer, J., dissenting).

152. *Id.* (Breyer, J., dissenting).

153. *Id.* at 2701–02 (Breyer, J., dissenting).

154. *Sanchez-Llamas*, 126 S. Ct. at 2685 n.5.

155. *Id.* at 2702 (Breyer, J., dissenting).

156. *Id.* at 2703 (Breyer, J., dissenting).

157. *Id.* at 2702 (Breyer, J., dissenting).

158. *See id.* at 2702–03 (Breyer, J., dissenting).

159. *Id.* at 2703 (Breyer, J., dissenting).

ing to adopt that understanding, the Court had denied the ICJ judgments “respectful consideration.”<sup>160</sup>

In his opinion for the Court, the Chief Justice had chided Justice Breyer for giving less than “respectful consideration” to the Court’s own earlier holding in *Breard*.<sup>161</sup> But Justice Breyer responded that *Breard* did not pose an obstacle to adopting the ICJ’s views. Several factors distinguished the earlier case. For example, *Breard* had dealt with procedural default in federal courts, not state courts;<sup>162</sup> it was a rushed per curiam decision that the Court had reached in “the few hours available between the time a petition for certiorari was filed and a scheduled execution.”<sup>163</sup> By adopting a small qualification—namely, that procedural default rules could be blocked in some circumstances—one could read *Breard* as consistent with *LaGrand* and *Avena*.<sup>164</sup> “[I]n any event,” Justice Breyer concluded, the ICJ’s subsequent rulings were significant legal developments that justified reconsidering *Breard* under standard *stare decisis* principles.<sup>165</sup>

## II. UNDERSTANDING *SANCHEZ-LLAMAS*

Because the Court and the dissent agree that ICJ rulings merit “respectful consideration,” one might dismiss the split in *Sanchez-Llamas* as minor. But that would be a superficial reading of the case. The Chief Justice and Justice Breyer use the same phrase, but they envision radically different approaches to international judgments. In fact, each of the main opinions in *Sanchez-Llamas* reflects one side of the larger debate that has occupied the academy for the past decade. The Court’s opinion reflects a dualist approach, under which international judgments have “information” rather than “disposition value” for domestic courts. By contrast, the dissent adopts the comity model that has gained considerable academic currency in recent years. Under this model, domestic courts defer to international judgments, where possible, in the interests of justice and global uniformity. In this Part, I show how the main opinions in *Sanchez-Llamas* reflect the wider scholarly debate and argue that the Court was correct to reject the comity model.

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160. *Id.* (Breyer, J., dissenting).

161. *Sanchez-Llamas*, 126 S.Ct. at 2683 n.4.

162. *Id.* at 2703–04 (Breyer, J., dissenting).

163. *Id.* at 2704 (Breyer, J., dissenting).

164. *See id.* (Breyer, J., dissenting).

165. *Id.* (Breyer, J., dissenting).



### A. *The Court's Opinion and the Dualist Approach*

The Court's opinion analyzes the effect of an ICJ judgment as follows. Under the Constitution, American courts have the ultimate authority to determine the meaning of a treaty the United States has made with a foreign country. If the ICJ expresses views on the question, American judges should pay attention. But an ICJ judgment does not "control[]" domestic courts.<sup>166</sup> If American judges disagree with the ICJ's interpretation of a treaty, they may disregard it. To be sure, as a UN member, the United States has an international obligation to comply with an ICJ judgment in a case to which it is a party; by failing to enforce an ICJ judgment in a particular case, the United States would expose itself to remedies at the UN.<sup>167</sup> But the ICJ's interpretation of a treaty does not bind American courts more generally.<sup>168</sup>

Dualism—which, despite substantial academic criticism, remains "[t]he prevalent theoretical approach to the relationship between international and municipal law"<sup>169</sup>—provides an underpinning for this analysis. Dualism teaches that international and domestic regimes exist on separate planes.<sup>170</sup> Each operates independently of the other; each has "power to settle the effect of any outside rule of law... within it."<sup>171</sup> In the domestic sphere, domestic actors alone have power to determine the effect of international obligations. In the absence of a domestic decision to adopt it—what scholars call an act of incorporation—an international obligation lacks domestic force.<sup>172</sup> In the context of international judgments, dualism suggests that the reasoning of an international tribunal cannot provide a rule of decision that acts as binding precedent for domestic judges.

To understand the domestic effect of international judgments under dualism, it is helpful to distinguish between two types of authority that sources might have for a court resolving a legal question. First, a source might have "information value."<sup>173</sup> The source might offer data for a

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166. *Sanchez-Llamas*, 126 S. Ct. at 2684.

167. *Id.* at 2684–85.

168. *See id.* at 2684.

169. JANIS, *supra* note 60, at 85.

170. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 151–52 (2001); *see also* Jan Klabbers, *International Law in Community Law: The Law and Politics of Direct Effect*, 21 Y.B. EUR. L. 263, 273 (2002) ("Dualists...argue typically that international and domestic law are separate spheres of law, not hierarchically organized in any way.").

171. JANIS, *supra* note 60, at 85.

172. BEDERMAN, *supra* note 170, at 151–52.

173. *See* McGinnis, *supra* note 21, at 310 (discussing "informational value" of authority).

court to use in making its decision: relevant facts, historical background, or trenchant analysis. In determining how much information value a particular source might have, the court would naturally consider a number of factors, including, importantly, the level of expertise that the source reflected. A treatise by a particularly renowned scholar, for example, would have more information value than an article by someone without much background in the field. The source would not, however, create any obligations on its own. It would have value only to the extent it represented a sound approach to the problem.

Second, a source might have “disposition value.”<sup>174</sup> The source might influence the outcome of a case by virtue of its own inherent authority. For example, in the United States, an applicable federal statute determines the result of a case, not because it is wise or well written, but because Congress has enacted it. Similarly, a Supreme Court opinion binds lower courts, not because of the quality of its reasoning, but because it represents the decision of the nation’s highest judicial power. A source has disposition value, then, by virtue of its status, irrespective of other qualities. A court must defer to the source, regardless of what the court thinks of its reasoning, because of the source’s own “intrinsic weight.”<sup>175</sup>

On a dualist understanding—absent an act of incorporation—international judgments can have only information value. Domestic courts can adopt the reasoning of particular international judgments, just as they can adopt the reasoning of other sources, if they find it persuasive. They can fall in line with what they see as superior analysis, greater learning, or more substantial experience. But international judgments lack disposition value. They cannot influence the outcome of domestic litigation, the way domestic precedents can, by virtue of their own authority. They cannot dispose of a case on the basis of their status as superior judicial pronouncements.

One can readily see how dualism informs the Court’s opinion in *Sanchez-Llamas*. For the Chief Justice, giving ICJ judgments “respectful consideration” meant looking to them for information value. If the ICJ’s interpretation of the VCCR were sound, the Court could endorse it; if not, the Court could reject it. As it turned out, the Court believed that the information value of the ICJ judgments was small. After examining the opinions in *LaGrand* and *Avena*, the Court concluded that the ICJ

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174. *Id.*

175. *Id.*

had wrongly interpreted the VCCR.<sup>176</sup> As a result, it rejected the ICJ's interpretation and stuck to its own earlier analysis in *Breard*. Giving greater weight to the ICJ's views—holding that they were “controlling” even though the Court did not agree with them—would have been equivalent to granting the ICJ judgments a kind of disposition value, a result that dualism rejects.<sup>177</sup>

Scholars sometimes dismiss dualism as reductive or parochial.<sup>178</sup> But the Court's opinion represents a sensible and moderate approach to the sort of international judgments at issue in the case. To see why, one has to appreciate that international courts present both promises and risks. On the plus side, international courts offer at least three potential benefits. First, they can promote uniformity in treaty interpretation.<sup>179</sup> In the context of a multilateral treaty like the VCCR, a single tribunal with the power to render binding interpretations can prevent states from adopting divergent readings.<sup>180</sup> Uniformity promotes predictability, which itself serves a vital function in a legal regime.<sup>181</sup> If governments want to comply with a treaty's requirements, they need to know for sure what those requirements are. Similarly, private parties attempting to conform to a treaty need to know how the treaty applies to them. Divergent national opinions can only create obstacles for such parties, especially if they engage in international commerce.<sup>182</sup> Particularly in that context, inter-

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176. *Sanchez-Llamas*, 126 S. Ct. at 2685.

177. *See id.* at 2684 (arguing that ICJ opinions are not “controlling on [American] courts”).

178. *See, e.g.*, Henkin, *supra* note 24, at 517 (arguing that dualism is based on an “anachronistic...isolationism and unilateralism”). *See generally* Bradley, *Dualist Constitution*, *supra* note 7, at 531 (discussing the rejection of dualist thought “in the American international law academy”).

179. *See* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1936–41 (2005) (discussing value of international uniformity in treaty interpretation).

180. *See* Bradley & Damrosch, *supra* note 26, at 693 (comments of Prof. Damrosch) (discussing the “virtue” of uniformity created by ICJ interpretation of the VCCR); Van Alstine, *supra* note 179, at 1938–39 n.367 (criticizing the Supreme Court's failure to honor the ICJ's ruling in *Breard*).

181. *See* Karin L. Kizery, Comment, *Minding the Gap: Determining Interest Rates Under the U.N. Convention for the International Sale of Goods*, 65 U. CHI. L. REV. 1279, 1280 (1998) (noting that the “uniformity” of the Convention for the International Sale of Goods “makes [international] transactions more predictable”).

182. *See* Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT'L REV. L. & ECON. 446, 448 (2005) (“Commercial interests...require legal certainty and predictability so that parties involved in international trade are able to price the risks, including legal risks, that their contracts entail.”); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 746 (1999) (discussing problems that divergent national rules pose for international commerce).

national tribunals can help reduce legal uncertainty that might otherwise retard international transactions.<sup>183</sup>

Second, international courts can help promote compliance by correcting for power imbalances among treaty signatories.<sup>184</sup> For example, in the VCCR context, smaller nations have comparatively little leverage to prevent or redress treaty violations by larger countries like the United States. Smaller countries may lack the capacity to retaliate diplomatically for American violations; in the great scheme of things, the usefulness of a friendly relationship with the United States probably outweighs the benefits of expelling American consuls or denying them access to American arrestees.<sup>185</sup> If ICJ interpretations bound American courts, that might improve the chances for compliance.<sup>186</sup> Whatever the realities of international politics, American courts would have to implement American treaty obligations, at least as the ICJ understood them.

Third, to the extent that international judges have greater expertise than their domestic counterparts, international courts can help improve the quality of reasoning in international law.<sup>187</sup> International judges might well have a comparative advantage when it comes to international law.<sup>188</sup> International law often seems opaque to those who lack experience with it, and, until relatively recently, most American judges did not have to deal very much with international materials.<sup>189</sup> Moreover, inter-

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183. Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 731 (1998) ("The very purpose of...commercial law conventions, after all, is to develop and bring uniformity to the law governing international transactions."). Cf. Susan Choi, *Effects of International Arbitral Tribunals in National Courts (I)*, in INTERNATIONAL LAW DECISIONS, *supra* note 27, at 147, 170 (arguing that recognition of "the needs of the commercial system for predictability" in dispute resolution might cause national courts to enforce the awards of international arbitration panels).

184. For a discussion of a similar argument in the WTO context, see Mark L. Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 17 (2003).

185. See McGuinness, *supra* note 8, at 840-41.

186. Cf. Martinez, *supra* note 2, at 500 (suggesting that national courts' failure to enforce international court judgments "would undermine cooperative international frameworks and encourage noncompliance with international law").

187. See, e.g., Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 51 (2006) ("Within a broader institutional and legal framework, international courts have the ability and expertise to take principles negotiated and developed by states and increase their precision and applicability to contemporary circumstances.").

188. See Martinez, *supra* note 2, at 493.

189. See, e.g., Beth Stephens, *Litigating Customary International Human Rights Norms*, 25 GA. J. INT'L & COMP. L. 191, 191 (1995/1996) (discussing the unfamiliarity of international law for American judges).

national law has become more specialized and technical in recent years;<sup>190</sup> generalist domestic judges often lack time to give it the sustained attention it requires. To be sure, as international law becomes a larger part of their work, domestic judges will likely develop expertise to match that of international courts.<sup>191</sup> For the moment, though, the comparative expertise of international jurists offers another reason to defer to international judgments.

On the other hand, international courts raise significant concerns about legitimacy. First, they suffer from a “democratic deficit.”<sup>192</sup> Members of international tribunals are selected with very little popular participation.<sup>193</sup> Typically, international organizations far removed from national communities appoint international judges. These organizations use selection procedures that are “opaque” or even secretive—characteristics held over from diplomatic dispute-settlement.<sup>194</sup> National delegations can represent the views and interests of their constituents, but, for reasons I will explain, this representation may be quite attenuated. Moreover, many nations that participate in international organizations are themselves not democracies, or even aspiring democracies.<sup>195</sup> The sometimes substantial input of these countries in judicial selection hardly advances democratic accountability.

Of course, domestic courts also suffer from a democratic deficit. In the United States, for example, citizens do not directly choose federal judges; indeed, the Constitution creates filters precisely to limit popular

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190. See Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919, 923 (1999).

191. See Lucy Reed, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?*, 96 AM. SOC'Y INT'L L. PROC. 219, 230 (2002) (“As they become more familiar with international law, domestic lawyers and judges become more comfortable applying it in a variety of cases.”).

192. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 908 (2005) (noting that “increased power” of international courts to review national decisions raises “legitimacy...concerns,” including “democratic deficits in the operation of international courts”); cf. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2010–11 (2004) (discussing anti-democratic implications of international tribunals).

193. See Douglas Lee Donoho, *Democratic Legitimacy in Human Rights: The Future of International Decision-Making*, 21 WIS. INT'L L.J. 1, 51 (2003).

194. Danner, *supra* note 187, at 49–50 (discussing argument that “international judges...are relatively unaccountable” and “subject to opaque selection procedures”); see also Donoho, *supra* note 193, at 51 (noting that international judicial “appointments are essentially still a function of international relations”).

195. Cf. McGinnis, *supra* note 21, at 315 (discussing how the absence of “democratic bona fides” on the part of some signatories of international treaties exacerbates the democratic deficit of much international law).

participation in the selection process. But accountability problems loom much larger at the international level.<sup>196</sup> For example, while American citizens do not have direct influence on domestic judicial selection, they at least know the actors. Voters can punish politicians who stray too far from their views on judicial nominees; indeed, judicial appointments increasingly figure in national election campaigns.<sup>197</sup> By contrast, international judicial selection is much more remote. Citizens are much less likely to understand the ins and outs of international organizations and monitor their representatives at global forums.<sup>198</sup> As a result, their ability to influence international judicial selection is much more circumscribed.

Second, international courts lack the ties of civic identity, history, and legal culture that often make the decisions of domestic courts acceptable to national communities.<sup>199</sup> Domestic courts function as parts of encompassing political structures to which people feel significant loyalty.<sup>200</sup> For example, the United States Supreme Court draws its authority from the United States Constitution, America's organic political text. By contrast, international courts are elements of global arrangements that seem quite distant to most people.<sup>201</sup> As a result, international courts cannot appeal, the way domestic courts can, to a sense of civic responsibility—an obligation to comply with judicial rulings, even if one disagrees with them, by virtue of one's duty as a citizen.<sup>202</sup> Similarly, international judges cannot draw on historical memory the way

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196. See Donoho, *supra* note 193, at 51 (contrasting international judicial selection with federal judicial appointments in the United States).

197. See, e.g., Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 719–20 (2006) (discussing the politicization of Supreme Court appointments).

198. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN L. REV. 1175 (2007).

199. See Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review*, 20 MICH. J. INT'L L. 775, 816 (1999) (discussing the nature of the WTO).

200. Cf. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401, 410 (2006) (arguing that, in contrast to international courts, domestic courts generally are “deeply woven into the social fabric”).

201. See, e.g., Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 603 (2005) (noting that “[a]n international institution” like the International Criminal Tribunal for Rwanda might “constitute ‘a rather distant reality’” for local populations) (citation omitted).

202. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 228 (2004) (discussing contemporary American “acceptance of judicial authority”).

their domestic counterparts can. Citizens often know and respect the important role that domestic courts have played in national controversies; consider the role that *Brown v. Board of Education* plays in the American psyche.<sup>203</sup> International courts, by contrast, can draw on no such sense of shared experience with national populations.

Moreover, unlike domestic judges, international judges may not share much in the way of legal culture with the parties that appear before them. Domestic judges and the lawyers who argue cases before them are products of a single legal culture. They have had similar educations and share pretty much the same starting assumptions; their reasoning moves, for the most part, along similar lines.<sup>204</sup> By contrast, international judges come from a range of legal systems.<sup>205</sup> Apart from very basic notions about respect for the rule of law—a principle itself open to divergent understandings—these systems may well have different starting assumptions, modes of reasoning, and professional norms.<sup>206</sup> The potential for misunderstanding and conflict is much greater. At the very least, international judgments are more likely than domestic judgments to seem alien and misguided to local populations.

Third, compared to domestic courts, international courts have less ability to adapt their jurisprudence to specific local conditions. Even domestic litigation is a blunt tool for addressing social problems,<sup>207</sup> but domestic judges have advantages that international judges lack. They can draw on their familiarity with local conditions to avoid decisions that pose unnecessary obstacles to government actors.<sup>208</sup> They can take account of social and political realities in gauging whether rulings will upset expectations or cast doubt on settled principles. One cannot expect international judges, who after all are pretty far removed from local

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203. *See id.* at 229.

204. *See* Frederick Schauer, Book Review, *The Determinants of Legal Doubt*, 89 MICH. L. REV. 1295, 1297 (1991) (reviewing KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (Paul Gewirtz ed.) (Michael Ansaldi trans., 1989)).

205. *See* Donoho, *supra* note 193, at 52.

206. *See* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 459–60 (2000) (discussing the absence of a “common legal culture” at the international level); *see also* Rubinfeld, *supra* note 192, at 1975 (arguing that “constitutionalism” means opposite things to Americans and Europeans: Americans tend to think of constitutionalism as resting ultimately on democratic consent, while Europeans think of it primarily as a check on democracy).

207. *See* James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 808 (1993).

208. *See* Yuval Shany, *How Supreme Is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 BROOK. J. INT'L L. 341, 350 (2006).

concerns, to exercise the same sensitivity.<sup>209</sup> International judges must decide abstract questions on the basis of broadly worded treaties that cannot fully account for local exigencies.<sup>210</sup> They have less capacity to tailor their decisions to fit local circumstances.

The fact that international courts increasingly rule on sensitive local subjects only heightens these concerns. Since the end of the Second World War, the reach of international law has extended to areas once thought to be core domestic prerogatives, for example, civil and political rights, criminal law and punishment, economic regulation, environmental protection, and public health and safety.<sup>211</sup> In areas like these, law often expresses deep social norms.<sup>212</sup> Moreover, opinions vary greatly from region to region and from country to country. For example, developing countries, whose standards of living are relatively low, often place a higher value on economic growth, and a lesser value on environmental protection, than developed countries.<sup>213</sup> Traditional cultures tend to be more comfortable with the death penalty, and less comfortable with Western concepts of family and gender, than more liberal and secular societies.<sup>214</sup> More and more, international judgments affect areas where the legitimacy deficit seems most acute.

The dualist approach allows domestic courts to mediate these benefits and risks in the context of particular cases. Domestic courts can weigh the benefits of uniformity, predictability, and comparative expertise. When appropriate, they can adopt the reasoning of international tribunals. At the same time, the dualist approach helps prevent situations in which relatively illegitimate international actors make decisions that bind local populations, particularly when those decisions implicate sen-

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209. See Shany, *supra* note 192, at 920 n.78 (noting that national courts are “in principle better placed than an international court to evaluate local needs and conditions”) (citation omitted).

210. See John O. McGinnis & Mark L. Movsesian, *Against Global Governance in the WTO*, 45 HARV. INT’L L.J. 353, 361 (2004).

211. See, e.g., William H. Taft, IV, *A View from the Top: American Perspectives on International Law After the Cold War*, 31 YALE J. INT’L L. 503, 503 (2006) (discussing “the growth of international law and its influence in the decades following World War II”); see also Young, *supra* note 5, at 1151–52 (explaining that modern international law, which international courts apply, “replicates many central concerns of the domestic regulatory state”).

212. See, e.g., Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 421–25 (1999) (discussing the expressive value of criminal law).

213. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 553–54 (2000) (explaining why countries at different levels of development “rationally choose different regulatory standards”).

214. See Barbara Stark, *Baby Girls from China in New York: A Thrice-Told Tale*, 2003 UTAH L. REV. 1231, 1254 (discussing the “inherent tensions in human rights law, especially when human rights norms conflict with traditional cultural values”).



sitive local concerns.<sup>215</sup> By denying international judgments disposition value, it minimizes the occasion for nationalist backlashes that can only lessen the beneficial contributions of international courts.<sup>216</sup>

*Sanchez-Llamas* demonstrates the value of the dualist approach. Few advantages would have followed from adopting the ICJ's view that the VCCR barred local procedural default rules. The interests in uniform treaty interpretation were slight. Uniformity is important primarily because it promotes predictability, allowing governments and regulated parties to plan their conduct. But governments, including the United States', knew that a failure to notify foreign detainees of their Article 36 rights violated the treaty; the United States had conceded as much before the ICJ.<sup>217</sup> And private planning was not a relevant issue. The ability to bypass procedural default rules if local authorities failed to notify their consulates of their arrest surely did not influence the decisions of foreign nationals like *Avena* and the LaGrand brothers to travel to the United States and commit crimes there.

Nor was there reason to think that the ICJ had a comparative advantage over domestic courts in understanding the VCCR. The treaty did not require specialized knowledge; its text and negotiating history were equally accessible to international and domestic judges.<sup>218</sup> Finally, there was no evidence that adopting the ICJ's reasoning would have led to greater compliance by the United States. The United States was already taking steps to improve compliance with Article 36, including efforts to educate local police departments that even the ICJ termed "considerable."<sup>219</sup> The President already had ordered state courts to implement *Avena* in cases involving Mexican nationals.<sup>220</sup> If giving ICJ judgments disposition value would have added any incentives for American implementation of the VCCR, they could only have been marginal.

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215. Cf. Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 695 (1999) (suggesting that international tribunals may lack legitimacy to "second-guess local decisions" in sensitive human rights matters).

216. For a study of one example of a nationalist backlash against an international tribunal, see Helfer, *supra* note 7.

217. See, e.g., *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 473 (June 27).

218. The *Sanchez-Llamas* Court, for example, adverted to the VCCR's text and drafting history, as well as the "contemporary practice of other signatories," in reaching its conclusion about the VCCR's application. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685 (2006).

219. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 68 (Mar. 31). For a description of these efforts, see U.S. Amicus Brief, *supra* note 133, at 25 n.8.

220. See Bush Memorandum, *supra* note 103.

By contrast, granting disposition value to the ICJ judgments would have raised significant legitimacy concerns. The ICJ suffers from a serious democratic deficit. Its judges are selected in a complex process far removed from popular oversight. Potential judges are nominated, in lists of up to four names, by “national groups” at the Permanent Court of Arbitration at the Hague.<sup>221</sup> Although national governments appoint them, these groups do not necessarily take instruction from home. For example, the American group occasionally operates independently of domestic political influence.<sup>222</sup> Rather, the group “consults with professional bodies like the American Society of International Law in making its recommendations, and its members are sometimes visited by representatives of foreign states who wish the U.S. national group to join in nominating one of their nationals.”<sup>223</sup> Indeed, the ICJ Statute omits domestic political authorities from the resources it recommends that national groups consult in making nominations, referring them instead to high court judges and professors of international law.<sup>224</sup>

Once the national groups have drawn up their lists, the General Assembly and Security Council elect the Court’s members, voting separately and by simple majority.<sup>225</sup> Domestic governments do have a say at this stage of the process. National delegations interview candidates and vet their past opinions; a fair amount of horse trading takes place.<sup>226</sup> Still, popular input is lacking. For example, American citizens, even well informed American citizens, pay little attention to the selection process. Americans voice general support for the United Nations, but they know little about the organization’s internal workings; it is hard to imagine them following the ins and outs of politicking over ICJ judges.<sup>227</sup>

The lack of democratic accountability undoubtedly would have hurt the ICJ’s credibility with American citizens. Moreover, the Court’s

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221. ICJ Statute, *supra* note 40, art. 4.

222. See Davis R. Robinson, *The Role of Politics in the Election and Work of Judges of the International Court of Justice*, 97 AM. SOC’Y INT’L L. PROC. 277, 279 (2003).

223. *Id.*

224. ICJ Statute, *supra* note 40, art. 6.

225. SHAW, *supra* note 46, at 961–962.

226. See *id.* at 961; Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271, 278–79 (2003).

227. See, e.g., Jane E. Stromseth, Book Review and Note, 94 AM. J. INT’L L. 797, 798 (2000) (reviewing EDWARD C. LUCK, *MIXED MESSAGES: AMERICAN POLITICS AND INTERNATIONAL ORGANIZATION 1919–1999* (1999)) (discussing Luck’s view that “although Americans generally favor U.S. involvement in the United Nations, they have limited knowledge of that organization and its activities”).

composition would have made it seem quite alien. The United Nations customarily allocates spaces on the Court unofficially by region—Africa; Asia; Latin America; Western Europe, the United States and Commonwealth countries; and Eastern Europe—with five slots going to the permanent members of the Security Council.<sup>228</sup> At the time of *Avena*, the Court had members from China, Egypt, Jordan, Madagascar, Russia, Sierra Leone, and Venezuela.<sup>229</sup> These were no doubt accomplished jurists, but they represented legal cultures quite remote from the United States'. Given the composition of its bench, the ICJ could not plausibly rely on ties of history and legal culture to impart credibility to its views about the application of the VCCR.

The diversity of legal backgrounds also would have opened the ICJ to the criticism that it lacked familiarity with the American justice system. Indeed, the *Sanchez-Llamas* Court argued that the ICJ had misunderstood, and failed to adapt its reasoning to, the American experience. In holding that the VCCR preempted local procedural default rules, the Chief Justice wrote, the ICJ had confused the American adversary system with the inquisitorial regimes that exist in other countries. An inquisitorial regime relies on a magistrate to collect evidence; in such a regime, “the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself.”<sup>230</sup> In the American system, by contrast, the parties themselves have the responsibility “to raise significant issues and present them to the courts in the appropriate manner at the appropriate time.”<sup>231</sup> Procedural default rules were thus an essential part of the American system; indeed, they applied to fundamental constitutional protections like *Miranda* claims.<sup>232</sup> Holding that procedural default rules could not apply to VCCR claims was “inconsistent with the basic framework of” American criminal justice.<sup>233</sup>

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228. Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 603 (2005).

229. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 14 (Mar. 31) (describing the composition of the Court). The complete bench at the time of the *Avena* judgment consisted of President Shi (China), Vice President Ranjeva (Madagascar), and Judges Guillaume (France), Koroma (Sierra Leone), Vereshchetin (Russia), Higgins (United Kingdom), Parra-Aranguren (Venezuela), Kooijmans (Netherlands), Rezek (Brazil), Al-Kasawneh (Jordan), Buerghenthal (United States), Elaraby (Egypt), Owada (Japan), Tomka (Slovakia), and Sepúlveda (Mexico).

230. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2686 (2006).

231. *Id.* at 2685.

232. *Id.* at 2687.

233. *Id.* at 2686.

Finally, one must consider that *Sanchez-Llamas*, like the other VCCR cases before it, involved criminal punishment for serious offenses—and, at least indirectly, the death penalty.<sup>234</sup> One can hardly imagine subjects more sensitive, or more at the core of traditional governmental authority, than these. In these areas, domestic communities would be especially likely to see ICJ judgments as unacceptable intrusions. Indeed, the suggestion that its judgments might bind American courts with respect to such matters already had caused a backlash against the ICJ. As we have seen, the governors of Virginia and Arizona refused to comply with the ICJ's orders to stay the execution of foreign nationals, the former stating that he would not “transfer[]” authority over the state's criminal process to the international court.<sup>235</sup> Following *Avena*, the Bush Administration withdrew from the Optional Protocol entirely, objecting that it was “not appropriate” for the ICJ to intervene in the American criminal justice process.<sup>236</sup> The ICJ had its supporters too,<sup>237</sup> but it seems fair to predict that deferring to the ICJ in *Sanchez-Llamas* would have sparked further opposition to the tribunal and to international courts more generally.

In sum, the potential benefits of adopting the ICJ's reasoning were slight and the potential costs substantial. Given this lopsided balance, the Court correctly rejected the ICJ's arguments and stuck to its own views about the VCCR. Of course, one might object to the dualist approach. Three potential objections seem particularly relevant. First, one might question whether domestic judges should have the ultimate say on whether to adopt the reasoning of the ICJ. After all, the United States had committed to ICJ jurisdiction in the Optional Protocol, and one might think that its decision to do so was the only act of incorporation that dualism requires.<sup>238</sup> Allowing domestic courts to decide whether to go along with eventual ICJ judgments might seem to take dualism a step

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234. See McGuinness, *supra* note 8, at 757.

235. See *supra* text accompanying notes 77–79 (discussing actions of the Virginia governor); text accompanying note 86 (discussing actions of the Arizona governor).

236. Daily Press Briefing, *supra* note 107. As Scott and Stephan argue, the Bush Administration's decision reflects dismay at the idea that the Supreme Court might actually hold that ICJ opinions bind American courts. See ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN* 176–77 (2006).

237. See *supra* text accompanying notes 99–101 (discussing reaction of the Oklahoma governor to the ICJ stay order in the *Torres* litigation).

238. Cf. Bradley & Damrosch, *supra* note 26, at 676–77 (comments of Prof. Damrosch) (discussing effect of United States' agreement to the Optional Protocol).

too far—to be a bad faith attempt to renege on American commitments.<sup>239</sup>

Second, the dualist approach, as I have described it, might seem too indeterminate. Information value seems a vague concept; unless one specifies the precise factors to consider in deciding whether to adopt the reasoning of an international tribunal, the phrase leaves domestic judges pretty much at sea. Given the already vague nature of much international law, this indeterminacy could pose a serious problem.<sup>240</sup> Finally, even if they were acting competently and in good faith, one might question whether domestic judges have the capacity to appreciate fully the benefits of deferring to the ICJ. Their narrow worldview and lack of expertise—their parochialism—might cause them to discount the value of cooperation and create unnecessary obstacles to the international tribunal.<sup>241</sup>

These are plausible objections, but they do not pose insurmountable problems for the Court's approach. As to the first, one must appreciate the nature of the "act of incorporation" the United States took when it consented to ICJ jurisdiction. When the United States ratified the Optional Protocol, it understood that any eventual ICJ decisions would have effect internationally, not domestically.<sup>242</sup> Allowing domestic courts to decide for themselves whether to adopt the ICJ's reasoning does not renege on any American commitment, properly understood. On the contrary, allowing ICJ judgments to have disposition value would violate the United States' legitimate expectations.

The second two objections really relate to the capacity of domestic judges to do their jobs in a sensible way. One should not overtax judges, but the dualist approach does not impose particularly onerous burdens. True, several factors might influence a decision to adopt the reasoning of a particular international judgment, including the intrusiveness of the issue, the reputation and experience of the tribunal, and the participation of the United States.<sup>243</sup> Given the nature of the judicial enterprise, it is

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239. Cf. Vicki C. Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303, 362 n.316 (2006) (arguing that the refusal to apply *Avena's* reasoning to persons not covered by the judgment would reflect "a thin and formalist conception of equality and the rule of law").

240. See generally Young, *supra* note 5, at 1248 (discussing the indeterminacy of international law).

241. See Martinez, *supra* note 2, at 444 (discussing problems that judicial parochialism could cause for the international judicial system).

242. See Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006) (discussing the "quintessentially international" nature of the remedies for non-compliance with ICJ decisions).

243. Cf. Bradley, *supra* note 20, at 110 (discussing role of US participation in deciding

impossible to catalog and rank all the factors ahead of time. But indeterminacy is true of many legal doctrines,<sup>244</sup> and there is no reason to think that this particular decision is too vague to give to domestic judges. Moreover, some court will have to decide what role international judgments should have domestically. If not a domestic court, the ultimate decision maker will be the international tribunal itself. International courts have their own deficiencies, and correcting mistakes they make will not be so easy.<sup>245</sup> Given the legitimacy problems I have discussed, allowing domestic judges the final say on adopting the reasoning of international judgments seems the safer option.

### B. *The Dissent and the Comity Model*

As we have seen, Justice Breyer used the same phrase as the Court to describe the proper treatment of ICJ judgments: “respectful consideration.”<sup>246</sup> But for him the phrase suggested a more profound obligation. While the Court believed that it could disregard the ICJ’s arguments if it found them unpersuasive, he maintained that the Court should have adopted an interpretation “consistent with the ICJ’s reading of the Convention.”<sup>247</sup> Given the important interest in uniform treaty interpretation and the tribunal’s comparative expertise in international law, the Court should have avoided a clash with the ICJ; it should have endorsed the ICJ’s reading of Article 36, even if that meant qualifying its own earlier ruling in *Breard*. Instead, the Court had rejected the ICJ’s views, thereby creating an “unprecedented” conflict with the international tribunal.<sup>248</sup>

Although he does not expressly refer to it, Breyer’s reasoning reflects the comity model that has gained considerable academic currency in recent years.<sup>249</sup> Different versions of the model exist; supporters do not focus on the same tribunals or stress precisely the same factors. Nonetheless, there are enough similarities to make a composite picture possi-

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whether ICJ’s reasoning should bind American courts).

244. See, e.g., Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1469 (1997) (discussing work of H.L.A. Hart).

245. See *supra* text accompanying notes 192–214 (discussing the legitimacy problems of international courts).

246. *Sanchez-Llamas*, 126 S. Ct. at 2700 (Breyer, J., dissenting).

247. *Id.* at 2697.

248. *Id.* at 2702.

249. See *supra* note 23 (discussing scholarship that employs comity ideas in analyzing international judgments).

ble. At its core, the model contemplates a cooperative relationship between international and national tribunals—a “dialogue”<sup>250</sup> or “community of courts.”<sup>251</sup> As participants in this dialogue, international courts do not coerce domestic courts into enforcing their judgments.<sup>252</sup> Rather, they persuade them by the power of their reasoning, their comparative expertise, and their engagement in the shared enterprise of judging.<sup>253</sup>

Supporters believe that the comity model promotes the benefits of international courts while avoiding legitimacy concerns. By working with their international counterparts, domestic courts can encourage uniformity and stability in international law;<sup>254</sup> by engaging in a “jurisgenerative dialogue,”<sup>255</sup> they can benefit from international courts’ expertise and improve the quality of their own reasoning.<sup>256</sup> Moreover, because the model does not oblige domestic courts to enforce international judgments, legitimacy concerns do not arise. A domestic court that adopts the reasoning of an international court on a comity theory does not cede its proper authority.<sup>257</sup> Rather, it decides, as an equal member of an adjudicative community, to embrace the solution suggested by a sister tribunal.

This emphasis on dialogue and community might lead one to think that the model involves nothing more than earnest conversation among judges. But supporters envision something more rigorous. Although international judgments do not bind domestic courts, the presumption is that domestic courts will systematically, if informally, defer to them. Some work makes this expectation explicit. For example, Martinez writes that national courts should not “depart from” international judgments “without clearly articulating reasons for doing so.”<sup>258</sup> Some work suggests the presumption only implicitly, in the examples given to support the model. Two examples have particular prominence in the litera-

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250. Martinez, *supra* note 2, at 466; *see also* Ahdieh, *supra* note 7, at 2049–50 (discussing the concept of judicial dialogue).

251. SLAUGHTER, *supra* note 7, at 68; *see also* Burke-White, *supra* note 7, at 91 (describing the “vertical” but not “strictly hierarchical” relationships that “regulate the interactions between national and supranational courts” in a “global community of courts”).

252. *See* Slaughter, *supra* note 23, at 708–11.

253. *See* SLAUGHTER, *supra* note 7, at 68–69; Slaughter, *supra* note 27, at 55; *see also* Burke-White, *supra* note 7, at 95–96 (discussing the group identity of judges).

254. *See* Koh, *supra* note 23, at 48.

255. Martinez, *supra* note 2, at 466.

256. *See* Slaughter, *supra* note 27, at 62–63.

257. *See* Koh, *supra* note 23, at 46–47.

258. Martinez, *supra* note 2, at 495.

ture: European regional courts and the American regime for the enforcement of foreign judgments.

In Europe, comity supporters focus on two regional courts, the ECJ and the ECtHR.<sup>259</sup> These two courts are entirely independent, the creatures of different regional associations. The ECJ is the judicial organ of the European Union (EU), a 25 member umbrella association with wide-ranging regulatory powers.<sup>260</sup> The Court's jurisdiction extends primarily to economic matters, but it has limited authority over some aspects of criminal procedure, human rights, and immigration issues as well.<sup>261</sup> The ECtHR exists under the auspices of the Council of Europe, a 47 member organization that serves as a forum for the negotiation of treaties among its members.<sup>262</sup> The most important of these treaties is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which commits signatories to an extensive list of human rights.<sup>263</sup>

The ECJ has achieved a remarkable degree of influence in the EU by means of the so called "preliminary ruling mechanism."<sup>264</sup> Article 234 of the EC Treaty authorizes the Court to issue preliminary rulings on questions of European law that arise in national courts.<sup>265</sup> Courts of last

259. For sources discussing the European example in the comity literature, see *supra* note 28.

260. CARTER ET AL., *supra* note 39, at 322 (stating that the EU is an "umbrella term"). Established in 1993, the EU covers three economic associations dating to the 1950s: the European Economic Community, also known as the European Community (EC); the European Coal and Steel Community, and the European Atomic Energy Community. JANIS, *supra* note 60, at 298. In addition to these economic associations, the EU contemplates two other "pillars": a common approach to foreign and security concerns, and cooperation in justice and home affairs. See CARTER ET AL., *supra* note 39, at 508–09.

261. See CARTER ET AL., *supra* note 39, at 327.

262. Council of Europe, About the Council of Europe, [http://www.coe.int/T/e/Com/about\\_coe/](http://www.coe.int/T/e/Com/about_coe/) (last modified May 11, 2007). The Council's membership comprises the twenty-five EU countries, several post-Communist states in Central and Eastern Europe, and two states (Azerbaijan and Turkey) outside the Council's European core. See Council of Europe, The Council of Europe's Member States, [http://www.coe.int/T/E/Com/About\\_Coe/Member\\_states/default.asp](http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp) (last modified May 2007).

263. See JANIS, *supra* note 60, at 263–64.

264. KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW 9 (2001). On the importance of the preliminary ruling mechanism in establishing the ECJ's influence, see Karen Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in *THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE* 227, 228 (Anne-Marie Slaughter et al. eds., 1998); Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7, at 291–92.

265. Treaty Establishing the European Community, art. 234, Dec. 24, 2002, O.J. (C 325) 33 [hereinafter EC Treaty], available at <http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/12002E.html>. Specifically, this jurisdiction extends to questions concerning the interpretation of the EC Treaty, the validity and interpretation of acts of



resort must refer such questions to the ECJ; lower courts may do so if they believe they need the ECJ's views in order to decide a case.<sup>266</sup> Article 234 does not expressly require the referring court to comply with the ECJ's ruling; it does not establish appellate review.<sup>267</sup> Nonetheless, its logic implies that the referring court must comply, and referring courts in fact do comply in the large majority of cases.<sup>268</sup> Indeed, national courts view the reasoning of the ECJ as binding more generally.<sup>269</sup> "[D]espite the absence of a formal rule of *stare decisis*... Article 234 rulings constitute binding precedents for national courts in later cases."<sup>270</sup>

For supporters, this "informal hierarchical relationship"<sup>271</sup> provides an encouraging example of how the comity model might work in practice. Helfer and Slaughter offer an important account, one that Slaughter has developed further in a recent book.<sup>272</sup> They detail the factors that have made ECJ "judgments as effective, for the most part, as national court rulings."<sup>273</sup> One important factor has been the Court's careful strategy of cooperation with national courts,<sup>274</sup> a strategy that has fostered an "increasingly intertwined" jurisprudence, despite the occasional "tug of war."<sup>275</sup> Similarly, Martinez believes that the cooperative relationship between the ECJ and national judiciaries provides a "striking" illustration of "the self-organizing power of courts."<sup>276</sup> She extols the "long process of dialogue between national courts and the ECJ over the

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EC institutions and the European Central Bank, and the interpretation of the statutes of certain European organizations. *Id.*

266. *Id.*

267. See PHILIP RAWORTH, INTRODUCTION TO THE LEGAL SYSTEM OF THE EUROPEAN UNION 198 (2001); Attanasio, *supra* note 28, at 379.

268. See BERMANN ET AL., *supra* note 30, at 354–55. On the occasional reluctance of national courts to refer matters to the ECJ and enforce its judgments, see Karen J. Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, 54 INT'L ORG. 489, 505–06, 514 (2000). See also Attanasio, *supra* note 28, at 380 (discussing the "reluctance" of some national courts to follow ECJ decisions).

269. See The Court of Justice of the European Communities, [http://curia.europa.eu/en/instit/presentationfr/index\\_cje.htm](http://curia.europa.eu/en/instit/presentationfr/index_cje.htm) (last visited Apr. 12, 2007) (asserting that a judgment in a preliminary ruling binds the national court that made the reference and also "other national courts before which the same problem is raised").

270. BERMANN ET AL., *supra* note 30, at 354.

271. RAWORTH, *supra* note 267, at 199.

272. SLAUGHTER, *supra* note 7; Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7.

273. Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7, at 276.

274. See *id.* at 309–11.

275. SLAUGHTER, *supra* note 7, at 84.

276. Martinez, *supra* note 2, at 445.

parameters of their relationship” that has led to the current orderly arrangement.<sup>277</sup>

The ECtHR also enjoys deference from national courts despite a lack of formal appellate authority. The ECHR does not require national courts to defer to ECtHR judgments; under the convention, the domestic effect of the Court’s judgments is a matter for domestic law.<sup>278</sup> Notwithstanding the absence of a formal obligation, however, national courts routinely fall in line with ECtHR rulings, even if they must alter their own case law to do so.<sup>279</sup> National courts not only comply with specific judgments, they also “strive” more generally to conform to the ECtHR’s reasoning in cases in which their states were not parties.<sup>280</sup> As one commentator writes, national courts “normally follow the interpretation given to the [ECHR] by the [ECtHR].”<sup>281</sup>

Comity supporters point to the ECtHR’s success with enthusiasm. Here again, Helfer and Slaughter provide an important analysis. They applaud the fact that the Court has “established itself as the final interpreter of the [ECHR]’s provisions” and has “witnessed its rulings change the shape of domestic law, through...judicial decision.”<sup>282</sup> They credit it with adopting a cooperation strategy similar to the ECJ’s—“a genuine vertical dialogue between national judges and [ECtHR] judges.”<sup>283</sup> This strategy has helped make the ECtHR’s judgments “as effective as those of any domestic court.”<sup>284</sup> To be sure, national judiciaries “will not follow” the Court if it “moves too far out of line with a prevailing domestic democratic consensus.”<sup>285</sup> Nonetheless, Helfer and

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277. *Id.* As an example of dialogue, Martinez cites the interaction between the German Constitutional Court and the ECJ in the *Solange* cases. *Id.* at 445–46. For other discussions of the cooperative or dialogic character of the interactions between the ECJ and national courts, see Ahdieh, *supra* note 7, at 2157, and Jones, *supra* note 28, at 221, 244.

278. See Sims, *supra* note 29, at 645 (“The [ECtHR] is not empowered to give any direction at all to national courts.”); see also Ress, *supra* note 30, at 374.

279. See Ress, *supra* note 30, at 374, 378–79; Sims, *supra* note 29, at 640.

280. Holly Dawn Jarmul, *Effects of Decisions of Regional Human Rights Tribunals on National Courts*, in INTERNATIONAL LAW DECISIONS, *supra* note 27, at 247, 284.

281. Carl Baudenbacher, *Globalization and the Judiciary*, 40 TEX. INT’L L.J. 353, 353 (2005); see also SLAUGHTER, *supra* note 7, at 80 (noting that the ECtHR “has become a source of authoritative pronouncements on human rights law for national courts,” even when “its role as interpreter of the [ECHR] has not been recognized as a matter of domestic law”).

282. Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7, at 293.

283. SLAUGHTER, *supra* note 7, at 80; see Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7, at 297–98.

284. Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7, at 296 (internal quotation marks omitted).

285. SLAUGHTER, *supra* note 7, at 82.

Slaughter note with approval, the overall “rate of compliance by states with the [ECtHR]’s rulings is extremely high.”<sup>286</sup>

Some commentators also believe that the American system for enforcing foreign judgments offers an illustration of how comity might work on a global scale.<sup>287</sup> No treaty or federal law covers the subject.<sup>288</sup> Nonetheless, at least since the Supreme Court decided *Hilton v. Guyot* in 1895,<sup>289</sup> American courts routinely have enforced the judgments of foreign courts. In *Hilton*, French plaintiffs attempted to enforce a French judgment they had won against American defendants in a commercial dispute. The Court explained that the French judgment did not bind American courts. Nonetheless, American courts could enforce it as a matter of “comity,” which the Court defined as “the recognition which one nation allows within its territory to the...judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”<sup>290</sup> Indeed, American courts generally should enforce foreign judgments, as long as the foreign court had afforded basic procedural protections.<sup>291</sup> “[T]he merits of the case should not...be tried afresh” in American courts “upon the mere assertion...that the [foreign] judgment was erroneous in law or in fact.”<sup>292</sup>

In the century or so since *Hilton*, its comity analysis has become “canonical.”<sup>293</sup> As long as foreign courts respect minimal jurisdictional and due process requirements, American courts “almost always enforce” their judgments without reexamining the merits.<sup>294</sup> They do so even

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286. Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7, at 296. For another discussion of the ECtHR and national courts, see Ahdieh, *supra* note 7, at 2154–55.

287. For sources discussing the foreign judgments analogy, see *supra* note 28.

288. See Silberman, *supra* note 36, at 352 (discussing the absence of applicable federal law); U.S. Department of State, Bureau of Consular Affairs, “Enforcement of Judgments,” [http://travel.state.gov/law/info/judicial/judicial\\_691.html](http://travel.state.gov/law/info/judicial/judicial_691.html) (last visited Apr. 12, 2007) (discussing the absence of an applicable treaty). Negotiations on an international convention, begun in 1992, have hit an impasse. For a discussion of the obstacles, see Linda J. Silberman & Andreas F. Lowenfeld, *The Hague Judgments Convention—And Perhaps Beyond*, in *LAW AND JUSTICE IN A MULTISTATE WORLD* 121, 122–23 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002).

289. 159 U.S. 113 (1895).

290. *Id.* at 164.

291. *Id.* at 202–03.

292. *Id.* at 203. The *Hilton* Court ultimately decided not to enforce the French judgment in question because French courts would not reciprocate with regard to American judgments. *Id.* at 227–28. For more on the reciprocity requirement, see *infra* text accompanying notes 357–60.

293. Rosen, *supra* note 31, at 794.

294. Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1869–70 (2005); Rosen, *supra*

with respect to claims they would have rejected, as an original matter, as against public policy.<sup>295</sup> Although American law allows courts to reject foreign judgments that violate public policy, this is a “very narrow[]” exception,<sup>296</sup> one that American judges reserve for “rare case[s],” such as situations “where the original claim is repugnant to fundamental notions of what is decent and just” in the domestic forum.<sup>297</sup>

Some scholars believe that the foreign judgments analysis should be applied more generally to international judgments. Roger Alford offers the most thorough treatment of this argument.<sup>298</sup> He maintains that the rationales that support the comity model in the context of foreign judgments—“predictability, stability, and respect for the rule of law,”<sup>299</sup> as well as judicial economy<sup>300</sup>—apply equally in the context of certain international judgments.<sup>301</sup> In the absence of a “binding mandate” in a treaty or statute, American courts should enforce certain international judgments on a *Hilton* theory;<sup>302</sup> he gives the ICJ judgment in *Avena* as an example.<sup>303</sup> Indeed, he predicts, just as “federal courts traditionally recognize foreign judgments liberally... one would expect that in most cases international tribunal decisions would satisfy the *Hilton* criteria.”<sup>304</sup>

Scholars like Alford, Helfer, Martinez and Slaughter make subtle arguments. They do not maintain that the European and American analogies are exact; indeed, as I show below, the analogies are deeply flawed.<sup>305</sup> But, for the moment, the important point is not whether European regional courts or the American foreign judgments regime provide precise support for the comity model on a global scale. Rather,

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note 31, at 791–92.

295. Rosen, *supra* note 31, at 793–94.

296. Berman, *supra* note 294, at 1870; Rosen, *supra* note 31, at 793.

297. Rosen, *supra* note 31, at 793 (internal quotation marks omitted). American courts do not enforce foreign judgments that are inconsistent with fundamental constitutional requirements, for example. For more on this, see *infra* text accompanying notes 349–51.

298. Alford, *supra* note 7, at 715–31. Alford offers this treatment in the context of a much larger work that discusses other possible approaches to international judgments as well. See *id.* at 683–85 (briefly describing the “full faith and credit,” “arbitration,” “*Charming Betsy*,” “*Paquete Habana*,” “special master,” and “no deference” models).

299. *Id.* at 719.

300. *Id.* at 725.

301. *Id.* at 719–20.

302. See *id.* at 716, 725, 730.

303. *Id.* at 729.

304. *Id.* at 730. For other discussions of the foreign judgments model, see Koh, *supra* note 23, at 46–48; Martinez, *supra* note 2, at 499; Slaughter, *supra* note 23, at 708.

305. See *infra* text accompanying notes 330–61.

it is that the European and American regimes contain strong pro-deference presumptions. If the comity model were to work out along similar lines at the global level, the judicial “dialogue” it entailed would result, over time, in routine deference by domestic courts to international judgments.

### C. *The Comity Model and its Discontents*

The dissent in *Sanchez-Llamas* does not speak in terms of judicial dialogue or community. It does not refer to presumptions. Nonetheless, its analysis closely tracks the comity model. The model’s influence appears in the dissent’s rejection of formal authority for ICJ opinions; its stress on the desirability of coordinated treaty interpretation; and its identification of the ICJ as a “natural point of reference” for domestic courts.<sup>306</sup> It also explains the dissent’s assertion that the Court should have adapted its interpretation of the VCCR to conform to the ICJ’s reading, even if that meant qualifying its own earlier opinion in *Breard*, and the dissent’s dismay at the “unprecedented” nature of the conflict the Court had created with the ICJ.<sup>307</sup> In the past, Justice Breyer suggested, American courts had deferred routinely to the ICJ’s views on international law; to back his claim, he cited forty cases in which American courts purportedly had “looked to the ICJ for guidance.”<sup>308</sup> The implication was clear: the *Sanchez-Llamas* Court should not have departed from this pattern of deference without strong reasons for its action.

The Court was right to reject the dissent’s analysis. To begin, the dissent greatly exaggerates the extent to which *Sanchez-Llamas* represents a departure from past practice. The string cite of decisions in which American courts “[had] repeatedly looked to the ICJ for guidance” on international law seems impressive,<sup>309</sup> but when one takes the time to read the cases, one discovers that none of them involves a situation remotely like *Sanchez-Llamas*. Rather, they refer to ICJ opinions only in passing for propositions of international law; some of them appear to view ICJ opinions as having the same authority as law review articles.<sup>310</sup> Several address prosaic questions like internal boundary dis-

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306. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2700 (2006) (Breyer, J., dissenting).

307. *Id.* at 2702 (Breyer, J., dissenting).

308. *Id.* at 2701 (Breyer, J., dissenting).

309. *Id.* (Breyer, J., dissenting).

310. *See id.* at 2684 n.5.

putes and the definition of inland waters and historic bays.<sup>311</sup> None addresses the question whether American judges must, or even should, defer to the ICJ on sensitive local issues that the judges themselves view differently. At most, the decisions look to ICJ judgments for information value, and they are entirely consistent with the dualism of *Sanchez-Llamas*.

More fundamentally, the comity model does not represent an advance over the dualist approach. Like the dualist approach, it allows domestic courts to reap the benefits of international courts. Unlike that approach, though, it fails to avoid legitimacy concerns.<sup>312</sup> The model's strong pro-deference presumption suggests that, despite the lack of formal obligation, domestic courts would systematically follow international judgments.<sup>313</sup> As a practical matter, international judgments would have something akin to disposition value for domestic courts. Despite its supporters' claims, the model would thus do little to address complaints about unaccountable, alien, and inflexible tribunals issuing rulings that bind local populations.

Comity supporters might counter that this objection overstates the uniqueness and rigidity of the presumption. First, a pro-deference presumption is not entirely novel. The Supreme Court has indicated that, in determining the meaning of a treaty, American courts should look to the interpretations that other national courts have adopted.<sup>314</sup> Indeed, the Court has stated, "the opinions of...sister signatories [are] entitled to considerable weight."<sup>315</sup> "Considerable weight" sounds like a kind of presumption—certainly it suggests more deference to foreign views

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311. See, e.g., *United States v. Maine*, 475 U.S. 89 (1986) (dispute between Massachusetts and the United States over title to Nantucket Sound); *United States v. Louisiana*, 470 U.S. 93 (1985) (dispute between states and the United States over title to Mississippi Sound); *The Louisiana Boundary Case*, 394 U.S. 11 (1969) (dispute between the United States and Louisiana over submerged land in the Gulf of Mexico).

312. See *supra* text accompanying notes 215–16 (explaining how the dualist approach avoids legitimacy concerns that surround international courts).

313. See *supra* text accompanying notes 258–305 (exploring the comity model's pro-deference presumption).

314. Indeed, in *Sanchez-Llamas* itself, Chief Justice Roberts noted that the petitioner had "point[ed] to nothing...in the contemporary practice of other signatories" to counter the Court's reading of the VCCR. 126 S. Ct. 2669, 2685 (2006).

315. *Air France v. Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978)). For an excellent discussion of the Court's views on this matter, see Van Alstine, *supra* note 179, at 1936–42. Van Alstine argues that the pro-deference presumption should be particularly powerful with regard to ICJ judgments. *Id.* at 1938. Martinez discusses the "sister signatories" doctrine but does not tie it expressly to international tribunals. See Martinez, *supra* note 2, at 512–13.

than mere “respectful consideration”—but one does not hear complaints about threats to democratic legitimacy. Even Justice Scalia, in other contexts a quick defender of the priority of American interpretation,<sup>316</sup> has endorsed the Court’s approach. In a recent treaty interpretation case, he chided his colleagues for not taking the views of sister signatories seriously enough.<sup>317</sup>

Second, supporters might contend that opponents ignore the essential flexibility of the comity model. If the pro-deference presumption proved too exacting—if it led to something like disposition value for international judgments—domestic courts could weaken it. Or they could refrain from applying the presumption in cases involving sensitive local issues like criminal punishment. By dampening the force of the presumption, domestic courts could prevent the comity model from becoming a regime of informal but “ritual deference”—an outcome that comity supporters themselves reject.<sup>318</sup>

International courts could themselves play a role in preventing a comity regime from becoming too centralized. Here again, European arrangements provide comity supporters with examples. In the EU, the principle of subsidiarity teaches that European institutions should take action only when domestic authorities cannot do so effectively on their own—“only if and in so far as the objectives of the proposed...action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or the effects...be better achieved by the Community.”<sup>319</sup> In the Council of Europe, the “margin of appreciation” doctrine gives national governments some discretion in determining how best to meet the requirements of the ECHR.<sup>320</sup> The ECtHR retains a general supervisory role over the treaty, but domestic authorities, who are in a better position to understand local conditions, have room to ac-

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316. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting) (arguing that the Court should not have looked to foreign sources in deciding constitutionality of the juvenile death penalty); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (criticizing the Court for looking to foreign sources in deciding constitutionality of laws criminalizing homosexual conduct).

317. *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting).

318. *Slaughter*, *supra* note 23, at 711 (arguing that comity does not suggest “subordination or even the more subtle constraints of ritual deference”).

319. EC Treaty art. 5; see also George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 334 (1994). The principle applies in areas where the EU does not have “exclusive competence.” EC Treaty art. 5.

320. See MERRILLS, *supra* note 32, at 151; Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT’L L. 95, 129–30 (2003).

commodate conflicting demands of human rights and public order.<sup>321</sup> International courts could apply doctrines like these at the global level to preserve local autonomy over sensitive issues.<sup>322</sup>

These arguments are unpersuasive. First, with respect to sister signatories, it is a stretch to construe the Court's doctrine as creating a pro-deference presumption of the sort the comity model entails. The Court has never defined, precisely, what it means by "considerable weight."<sup>323</sup> While the phrase might suggest a presumption in favor of the views of foreign courts, it might also connote a less accommodating approach. In fact, when one examines its decisions, one discovers that the Court does not act as though a presumption exists. Sometimes it defers to foreign court views and sometimes it does not; if a presumption exists, the Court's application of it certainly has been "uneven."<sup>324</sup> One could easily explain the Court's decisions in dualist terms: the Court adopts the reasoning of foreign courts when it believes there are good reasons for doing so—promoting uniform treaty interpretation, for example—but goes its own way when it believes those reasons are lacking. The Court's views on sister signatory interpretations thus do not really provide support for the comity model.

Second, with regard to flexibility, nothing in the comity literature suggests that the presumption would be a weak one. As I have explained, both explicitly and implicitly, the model contemplates a strong pro-deference bias.<sup>325</sup> Indeed, a weak presumption would drain the model of practical importance. If the presumption were weak—if domestic courts felt only a slight obligation to defer to international judgments—the model would tend to collapse into dualism, which already allows domestic courts to look to international judgments for information value and to adopt the reasoning of international courts when they find it persuasive.<sup>326</sup> If the comity model is to have real world signifi-

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321. See Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7, at 316.

322. See SLAUGHTER, *supra* note 7, at 29–30 (arguing that subsidiarity could operate in a decentralized global order); Burke-White, *supra* note 7, at 86–90 (discussing subsidiarity in the context of international criminal law); Shany, *supra* note 192, at 908–09 (discussing margin of appreciation doctrine in context of international courts).

323. Van Alstine, *supra* note 179, at 1936–37.

324. *Id.* at 1937; see also David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1022 (1994) (discussing cases in which the Rehnquist Court "expressly declined" to adopt foreign views on treaty interpretation).

325. See *supra* text accompanying notes 258–305.

326. See *supra* text accompanying note 215.



cance, it must provide for a more systematic deference to international courts.

Third, doctrines like subsidiarity and the margin of appreciation seem too vague to constrain international courts in the long run. Even in the European context, critics complain about how malleable these doctrines are. Subsidiarity seems largely a hortatory notion. The doctrine does not provide a very meaningful check on European legislation; it does not even apply to ECJ decisions.<sup>327</sup> In the ECtHR context, the margin of appreciation doctrine has more bite, but it too is ill defined and unpredictable.<sup>328</sup> The ECtHR has implemented the doctrine in a notoriously uncertain way; as one commentator notes, the Court has not applied it “identically to every article” of the ECHR, “nor even to different parts of [the] same article.”<sup>329</sup> The doctrine’s capacity to provide a principled check on the Court’s decisions seems questionable.

Moreover, doctrines imported from the European experience would not translate well globally. And here we come to a fundamental problem with the comity model: its reliance on misplaced analogies. The most important factors in the success of the ECJ and the ECtHR lack counterparts at the global level. The ECJ has been able to draw on a commitment to political integration. The leaders who established the first European economic communities in the 1950s saw them as the beginnings of a political union that would make future European wars unthinkable.<sup>330</sup> That vision has motivated generations of European politi-

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327. See Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 54 (2003) (“The ECJ has not applied the principle to itself with respect to its own exercises of judicial authority.”); Mattias Kumm, *To Be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty*, 11 COLUM. J. EUR. L. 481, 501 (2005) (explaining that the ECJ addresses subsidiarity “only in a cavalier fashion”); Franz C. Mayer, *Competences—Reloaded? The Vertical Division of Powers in the EU and the New European Constitution*, 3 INT’L J. CONST. L. 493, 508 (2005) (“Subsidiarity does not apply to ECJ decisions.”); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1680 (2002) (“European courts generally have... been reluctant to interpret subsidiarity as a strong limit on Community power.”). A protocol to the recent European Constitutional Treaty arguably strengthens the subsidiarity principle. See Kumm, *supra*, at 501–02.

328. See, e.g., Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 125 (2004) (doctrine leads to “unpredictable (and often arbitrary) results”); Oren Gross, “*Once More Unto the Breach*”: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT’L L. 437, 495–96 (1998) (discussing problems caused by the doctrine’s vagueness).

329. MERRILLS, *supra* note 32, at 151.

330. See JANIS, *supra* note 60, at 299; Jones, *supra* note 28, at 221.

cians and explains the seemingly inexorable trend—inexorable until recently, at least—toward greater power for European institutions, including the ECJ.<sup>331</sup> It accounts in large part for the Court's success in finding receptive audiences for its assertions of authority.<sup>332</sup> Without it, it seems doubtful that the ECJ's dialogue with national courts, however skillful, would have achieved the same result.

The Council of Europe does not aspire to political integration, but it does rely on the sense of shared identity that makes integration possible. From its inception, it has committed itself to promoting a common European identity, first as a means of arresting the spread of totalitarianism, later as a means of ensuring “democratic principles” on the continent.<sup>333</sup> One significant element in that identity is a commitment to a particular model of human rights. On many issues the ECtHR addresses, a common outlook exists, at least among political leaders.<sup>334</sup> Indeed, even Council members on Europe's periphery, which do not necessarily share European values, have an interest in going along with the ECtHR. Compliance with the Court's decisions may be the price of admission to other projects about which these nations care deeply.<sup>335</sup>

Recent events suggest that the European commitment to integration has begun to wane; some scholars speak of a “backlash” against both the ECJ and the ECtHR.<sup>336</sup> Even so, the sense of common destiny still

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331. See Alter, *supra* note 268, at 491 (arguing that, in establishing the EU, “[m]ember states set out to create a supranational political entity”). On the recent retrenchment, see Florian Sander, *Subsidiarity Infringements Before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism?*, 12 COLUM. J. EUR. L. 517, 519 (2006) (discussing French and Dutch rejection of constitutional treaty).

332. See, e.g., Attanasio, *supra* note 28, at 380.

333. See Council of Europe, About the Council of Europe, [http://www.coe.int/T/e/Com/about\\_Coe/](http://www.coe.int/T/e/Com/about_Coe/) (last modified May 11, 2007) (explaining that the Council was established, among other reasons, to “promote awareness and encourage the development of Europe's cultural identity and diversity”); see also JANIS, *supra* note 60, at 261–62 (discussing aims of the Council's founders).

334. MERRILLS, *supra* note 32, at 30–31. As Merrills argues, the court's “relatively homogeneous audience” makes writing persuasive opinions much easier because, “in justifying its conclusions, the court can appeal to a common set of cultural values.” *Id.* at 31. Merrills wrote this in 1993, before the expansion of the Council of Europe, but the proposition still stands, at least for the Council's core members.

335. See SCOTT & STEPHAN, *supra* note 236, at 131 (noting the “implicit linkage between compliance with the European Convention and attaining or retaining membership in good standing in the European Union”).

336. See, e.g., Alter, *supra* note 268, at 512–13 (describing how “the success of EU legal integration may have instigated a larger backlash” against the ECJ); Alvarez, *supra* note 7, at 430 (noting that “there is some evidence of backlash” in European politics against both the ECJ and the ECtHR).

exists, certainly among political leaders—and nothing like it appears at the global level.<sup>337</sup> The European experience thus says little about the prospects for international courts. Consider again, in this regard, subsidiarity and the margin of appreciation. Given the shared legal and social culture in Europe, the need for exceptions to centralized rules is comparatively small.<sup>338</sup> In the nature of things, subsidiarity and the margin of appreciation will come up relatively rarely, and the space they carve out for local institutions will be relatively narrow.<sup>339</sup> At the global level, by contrast, much less commonality exists, particularly with regard to the sensitive issues that international courts increasingly address, and there is no commitment at all to political integration.<sup>340</sup> The doctrines would be much more controversial in that context. The arguments for exceptions would be more frequent and the claims for local autonomy broader. In the global context, the doctrines would not be as effective in reducing friction as they are in Europe.

The other major analogy, the American foreign judgments regime, is inapposite as well. Although American courts routinely enforce foreign judgments, those judgments tend to relate to private commercial disputes.<sup>341</sup> In that context, comity arguments work well.<sup>342</sup> Enforcing foreign judgments promotes predictability and finality, two important advantages for international commerce.<sup>343</sup> It also advances the long term interests of American business, even when the judgments go against American defendants. Foreign firms will be more likely to enter into contracts with American firms if they know that, should disputes arise, American judges will not insist on retrying cases that foreign plaintiffs already have litigated, and won, at home.<sup>344</sup>

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337. See, e.g., Alvarez, *supra* note 7, at 430.

338. See *supra* text accompanying note 334 (discussing cultural commonality in Europe).

339. See Sander, *supra* note 331, at 537 (noting that ECJ decisions on subsidiarity are “quite rare”).

340. See Alvarez, *supra* note 7, at 430.

341. See Dodge, *supra* note 34, at 161.

342. See Rosen, *supra* note 31, at 794 (discussing arguments for comity in international commercial context).

343. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629–31 (1985) (discussing international comity in the context of commercial arbitration); see also Koh, *supra* note 23, at 48 (discussing how comity promotes predictability and stability in international transactions).

344. See Rosen, *supra* note 31, at 804 (describing benefits of enforcement of foreign judgments).

Moreover, private commercial disputes normally have little impact on domestic policy choices.<sup>345</sup> In the typical international business litigation, the United States has little interest in whether a particular plaintiff or defendant prevails. Enforcing the judgment merely requires one private party to pay another; neither outcome will have much impact on domestic regulatory programs, and commercial law varies relatively little from country to country.<sup>346</sup> When foreign judgments *do* affect more than simply private commercial relations, American courts are much less receptive.<sup>347</sup> For example, American courts do not enforce foreign penal or revenue judgments, in large part to avoid potential conflicts with foreign countries over regulatory policies.<sup>348</sup> Moreover, notwithstanding the narrowness of the public policy exception, American courts do not enforce foreign judgments that trench on fundamental constitutional values.<sup>349</sup> For example, in a much discussed 2001 case, a federal court held that a French judgment forbidding the sale of Nazi paraphernalia over the internet could not be enforced in the United States, even under *Hilton's* comity analysis.<sup>350</sup> Enforcing the French judgment, the court reasoned, "would be inconsistent with the First Amendment."<sup>351</sup>

To be sure, the foreign judgments example does suggest that domestic courts would feel comfortable enforcing international judgments in private commercial matters, and, in fact, domestic courts routinely do enforce international commercial arbitration awards (though here too there is a narrow public policy exception).<sup>352</sup> The example also helps explain why domestic courts generally enforce investment arbitration awards.<sup>353</sup> International investment panels typically cannot require a

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345. See, e.g., Attanasio, *supra* note 28, at 390–91 (discussing commercial arbitration awards).

346. See Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 218 (2005) (discussing the convergence of contract law principles across countries).

347. See Dodge, *supra* note 34, at 161.

348. See *id.* at 165–70 (discussing doctrines against enforcing such judgments); *id.* at 173 (discussing Learned Hand's explanation of these doctrines).

349. See Rosen, *supra* note 31, at 785; Van Houweling, *supra* note 35, at 699–701.

350. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F.Supp.2d 1181, 1192–93 (N.D. Cal. 2001), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir. 2006) (en banc), *cert. denied*, 126 S. Ct. 2332 (2006).

351. *Id.* at 1194.

352. See Attanasio, *supra* note 28, at 378, 390–91; Choi, *supra* note 183, at 148.

353. For discussions of investment arbitration, see John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, 100 AM. J. INT'L L. 429 (2006); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006); Young, *supra* note 5, at 1170–77. For an application of comity ideas to international in-

state to change its laws or to refrain “from applying [a] challenged measure;”<sup>354</sup> they can only order a state to pay money damages to an injured investor, and even in those circumstances the state may be able to rely on doctrines like sovereign immunity to avoid payment.<sup>355</sup> Like commercial awards, international investment awards typically lack a significant direct impact on domestic policy choices.

The foreign judgments example does not suggest, however, that domestic courts would systematically defer to international judgments that do have a significant impact on sensitive local issues. In that context, the example simply lacks relevance. Moreover, at least traditionally, the enforcement of foreign judgments has turned on reciprocity.<sup>356</sup> An American court would enforce a foreign judgment only if the foreign court would enforce an American judgment, thus creating an incentive for foreign courts to allow American judgment creditors to execute on assets in the foreign country.<sup>357</sup> International courts are not in a position to help American plaintiffs in this way and reciprocity arguments are thus out of place. While reciprocity does not have the importance in American practice it once did,<sup>358</sup> it remains an important requirement for the enforcement of foreign judgments in other countries,<sup>359</sup> and its total absence in the context of international courts provides another reason why the *Hilton* analogy is misplaced.

Finally, and perhaps most importantly, the enforcement of foreign judgments differs categorically from the comity model in terms of the intrusion it contemplates on domestic courts. As I have explained, enforcing a foreign judgment has only a small, discrete impact on a legal system;<sup>360</sup> the foreign judgment affects only the parties to a particular case. The comity model, by contrast, envisions a more general reorganization of domestic law: the reasoning of international judgments would

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vestment awards, specifically in the context of NAFTA chapter 11, see Ahdieh, *supra* note 7.

354. Knox, *supra* note 353, at 429.

355. *Id.*; see M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 304–05 (2000) (discussing availability of the sovereign immunity defense under ICSID Convention).

356. See Martinez, *supra* note 2, at 512. The reciprocity requirement appears in *Hilton* itself. *Hilton v. Guyot*, 159 U.S. 113, 228 (1895).

357. See Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1661 (1968).

358. See Silberman, *supra* note 36, at 353.

359. See Committee on Foreign and Comparative Law, Association of the Bar of the City of New York, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 RECORD 378, 400 (2001), available at <http://www.abcny.org/Publications/record/summer01.pdf>.

360. See *supra* text accompanying note 346.

bind domestic courts in future cases involving different parties.<sup>361</sup> As a result, the foreign judgments analogy has little bearing on the problems that the comity model would raise.

The failings of the comity model feature prominently in *Sanchez-Llamas*. Consider the “dialogue” between the ICJ and Justice Breyer. The ICJ judgments addressed criminal punishment for serious offenses, and, at least indirectly, the death penalty.<sup>362</sup> These were surely matters at the core of domestic responsibility. Yet the ICJ did not temper its rulings out of a concern for subsidiarity or the margin of appreciation. It insisted that procedural default rules could not bar judicial reconsideration of foreign nationals’ convictions, notwithstanding the role that such rules traditionally play in the American justice system, and notwithstanding the fact that the United States already had taken considerable steps to improve local compliance with VCCR requirements.<sup>363</sup> For his part, Justice Breyer did not think the sensitive nature of the issues involved required him to weaken the pro-deference presumption. Indeed, he castigated the Court for creating an “unprecedented” conflict with the ICJ, suggesting, with his long string cite, that *Avena* and *LaGrand* deserved no less deference than earlier ICJ opinions on the boundaries of historic bays.<sup>364</sup> As one would have predicted, in practice the “cooperation” between international and domestic judiciaries turned out to be something closer to the sort of “ritual deference” that the comity model theoretically rejects.<sup>365</sup>

Moreover, even on a comity theory, deferring to the ICJ would have raised serious legitimacy concerns. Unlike in Europe, no shared commitment to political integration could have encouraged compliance with the ICJ’s views.<sup>366</sup> Nor could the ICJ have relied on a sense of common culture to smooth its way with American audiences.<sup>367</sup> Finally, unlike the low profile commercial disputes that provide the context for cases like *Hilton*, *Sanchez-Llamas* involved a salient issue that already had

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361. Cf. Bradley, *supra* note 20, at 94 (distinguishing between enforcing a judgment and adopting a court’s reasoning).

362. See McGuinness, *supra* note 8, at 757.

363. See *supra* text accompanying note 219.

364. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2701–02 (2006) (Breyer, J., dissenting). For more on this point, see *supra* text accompanying notes 309–11.

365. See Slaughter, *supra* note 23, at 711 (arguing that comity does not suggest “subordination or even the more subtle constraints of ritual deference”).

366. See *supra* text accompanying notes 330–31 (discussing drive for political integration in Europe).

367. See *supra* text accompanying notes 228–29.

caused the United States to withdraw from the jurisdiction of the ICJ. Deferring to the ICJ would not have required one private party to pay money to another; it would have involved the retrial of a criminal defendant convicted of a serious offense. For Justice Breyer to argue that “respectful consideration” nonetheless required American courts to defer to the ICJ shows how incongruous the model is in this context.

Of course, comity advocates might hope that the model would itself ameliorate some of these concerns over time. If domestic judges routinely deferred to them, judgments like *LaGrand* and *Avena* would seem less remote and alien. Judicial dialogue could lead, gradually, to a consensus on legal norms, even in areas as sensitive as criminal law and human rights.<sup>368</sup> This argument seems backwards, though. When it comes to judicial authority, legitimacy yields deference, not the other way around.<sup>369</sup> People do not find court decisions acceptable because they acquiesce in them; people acquiesce in court decisions because they find them, for one reason or another, acceptable. Outside the commercial context, the global consensus necessary to support the comity model does not yet exist. It seems doubtful that the model itself could create it. It seems more probable that the model would cause friction that would make a gradual convergence of norms even less likely.

### III. CONCLUSION

For comity supporters, *Sanchez-Llamas* is an occasion for regret. The Court rejected the model that they have been assiduously constructing for the past decade. Yet, as I have tried to show here, the Court was right to do so. The dualist approach offers a better way of integrating international and domestic courts. It allows domestic judges to balance the competing demands of global order and local autonomy while avoiding serious legitimacy concerns. In adopting the dualist approach, the *Sanchez-Llamas* Court not only cast doubt on the long term prospects of comity scholarship. It also assured that the American approach to international judgments will be a sensible one.

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368. See SLAUGHTER, *supra* note 7, at 78–79 (discussing how judicial dialogue can lead to global consensus on various legal issues, especially “basic human rights”); Slaughter, *supra* note 27, at 64 (arguing that “increased transjudicial communication” could lead to wider and “enhanced protection of universal human rights”).

369. See KRAMER, *supra* note 202, at 231.