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INTER AMERICAN BAR ASSOCIATION STUDENT AWARD FIRST PRIZE PAPER

The Domestic Applicability of International Treaties in the United States

I. INTRODUCTION

Following over a century of precedent, United States courts refuse to enforce the provisions of treaties which conflict with later Congressional acts.[1] Case law and commentary uniformly support the "last-in-time" doctrine virtually without exception.[2] The most recent *Restatement of Foreign Relations Law* summarizes well established principles:

> An act of Congress that is enacted after a rule of international law or an international agreement is in force for the United States supersedes an inconsistent provision of international law or agreement as law of the United States, if the purpose of Congress to supersede the earlier provision is clearly expressed or if the act and the earlier provision cannot be reconciled.[3]

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1. The earliest recorded Supreme Court opinion stating the last-in-time rule is The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871) borrowing the analysis of a lower court in Taylor v. Morton, 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,799). Two recent decisions applying the rule at the appellate level involved a conflict between a 1953 friendship treaty with Japan and the 1964 Civil Rights Act. Spiess v. Itoh, 643 F.2d 353 (5th Cir. 1981) and Avigliano v. Sumitomo Shoji America Inc., 638 F.2d 552 (2d Cir. 1981).

2. 87 C.J.S. TREATIES, § 18 (1954); S. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT (2d ed. 1916) [hereinafter cited as CRANDALL, TREATIES]; E. CORWIN THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1964 ed.) [hereinafted cited as CORWIN, CONSTITUTION]; R. MACBRIDE, TREATIES VERSUS THE CONSTITUTION (1955); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1955) [hereinafter cited as HENKIN, FOREIGN AFFAIRS]. There has been one major challenge to the rule: P. Potter, *Relative Authority of International Law and National Law in the U.S.*, 19 A.J.I.L. 315 (1925) [hereinafter cited as Potter, *National Law*]. PERGLER, JUDICIAL INTERPRETATION OF INTERNATIONAL LAW IN THE UNITED STATES (1928) responded to Potter, but there has been little subsequent support or comment.

3. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (revised) § 135 (Tent. Draft No. 1, 1980) [hereinafter cited as RESTATEMENT].

This paper challenges that prevailing maxim and supports an alternative norm of Constitutional law, a principle of treaty priority. Article VI of the United States Constitution, designates the Constitution, laws and treaties as the supreme law of the land, without indicating any hierarchy or relative superiority. In *Marbury v. Madison,*[4] Marshall reasoned that the Constitution could not be altered by the terms of a law which is in conflict. Moreover, treaties may not conflict with the express provisions of the Constitution and are invalid should they clash. For a century, U.S. courts have wrongly concluded that laws and treaties, both inferior to the Constitution, are on a par with each other. To the contrary, basic principles of Constitutional law dictate that Congress may not violate self-executing treaties by statute. U.S. officials must comply with the procedures for termination, withdrawal, suspension or amendment provided in the treaty or by international law. U.S. courts should follow a principle of treaty priority and enforce self executing treaties against violations by either Congress or the President.

In support of that alternative principle of treaty priority this paper examines the origin, evolution and application of the last-in-time rule. After identifying points of agreement with prevailing authority, the text affirms a principle of treaty priority which challenges five key elements of the last-in-time rationale.

II. Last-in-Time: Origins and Evolution

A. *Origins*

In the absence of any controlling precedent, the lower court which first applied the last-in-time doctrine based its decision on original analysis. In *Taylor v. Morton,* plaintiffs claimed that import duties under the Tariff Act of 1842 violated an 1832 treaty with Russia.[5] Writing for the Circuit Court, Justice Curtis acknowledged that the language of article VI established no clear priority between laws and treaties. Reasoning that the legislature had the power to repeal prior laws, the Court concluded that the power was not limited to the President and Senate. Congress could effectively repeal treaties by a declaration of war, so the power to annul might also be exercised by enacting contrary legislation. If bound

4. 5 U.S. (1 Cranch) 137 (1804).
5. 23 F. Cas. 784 (C.C. Mass. 1855) (No. 13,799), *aff'd.*, 67 U.S. (2 Black) 481 (1862).

to foreign powers irrevocably by treaty obligations, the nation would surrender an essential attribute of sovereignty.

In a 1925 article, Pitman Potter attacked the court's rationale observing: "There is no 'prerogative' to violate treaties in any circumstances. Under appropriate circumstances treaties may be abrogated in proper form by proper authorities."[6] The court in *Taylor v. Morton* simply accepted the allegations of inconsistency between treaty and statute without attempting to reconcile their provisions. Potter argues further that the court erroneously regarded the Congressional act abrogating the 1788 treaty with France as a precedent for its decision. The revocation, he insisted, had no legal effect in international law. One other lower court adopted the last-in-time rationale before the Supreme Court accepted the rule in 1871.[7]

An 1866 treaty provided: "Every Cherokee shall have the right to sell any products of his farm without restraint . . . paying any tax for sales outside the (Indian) territory." Congress subsequently enacted a tax on distilled spirits and tobacco "produced anywhere within the exterior boundaries of the U.S." In *Cherokee Tobacco,* Justice Swayne recalled Marshall's holding that treaties with "domestic dependent nations" lacked the force of agreements with foreign states.[8] The Court then simply embraced the *Taylor v. Morton* opinion, reasoning that if Congress could alter treaties with foreign powers, the same power must surely apply to dependent nations.

If the Court had wished to resurrect the dependent nation formulation Marshall had abandoned in later cases, that ground alone would have been sufficient basis for the decision without establishing a last-in-time precedent.[9] Perhaps the Court used the last-in-time doctrine so that unlike Marshall's earlier holding, the Cherokee treaty would override inconsistent state laws. Yet even that result did not require accepting a last-in-time rule for agreements with foreign nations. The doctrine would have been limited to Indian treaties. Moreover, only four justices joined the "majority" es-

6. *In re* Potter, *supra* note 2, at 320.

7. Clinton Bridge, 5 F. Cas. 1060 (C.C. Iowa 1867) (No. 2,900), *aff'd.* 77 U.S. (10 Wall.) 454 (1872).

8. The Cherokee Tobacco, *supra* note 1.

9. The following year, Congress deprived the Indian tribes of their status as foreign nations in legislation which provided that no further treaties would be negotiated. *See* 1 MOORE, A DIGEST OF INTERNATIONAL LAW 37 (1906).

tablishing the last-in-time precedent. Two justices dissented and three others abstained. The dissenters argued that Congress never intended to breach the recent Cherokee Treaty and challenged Swayne's argument that a tax free zone in Indian Territory would defeat the purpose of the act.

The Court's uncritical acceptance of the lower court rationale contrasts sharply with Marshall's careful analysis justifying supremacy of the Constitution over statutes in *Marbury v. Madison*. The opinion unnecessarily sustained a rule negating treaties with a foreign sovereign for a decision involving American Indians. The Court neither considered the intent of the framers nor forecast the possible consequences of the new rule. A minority of justices on a divided court determined that collection of a tobacco tax in Cherokee territory justified a doctrine that Congress could violate treaties with foreign states. Such casual disregard for international agreements under the Articles of Confederation had so embarrassed the new nation's leaders that they formed "a more perfect union" which made treaties the supreme law of the land.[10] Over a century of later case law now supports the *Cherokee* precedent, much of it citing without review a judically created error in Constitutional doctrine.

B. *Indian Treaties*

The Supreme Court helped break the trail of broken treaties in four later cases involving direct conflict between Indian treaties and Congressional acts. Applying an 1890 statute granting statehood, the Court permitted Wyoming to regulate Indian hunting in violation of an 1869 treaty.[11] The Cherokee lost two more decisions stripping them of treaty lands and the right to self government based on Congressional acts of the 1890's.[12] Most recently, in 1979, Justice Marshall held that 28 U.S.C.A. § 1360 granting state courts partial jurisdiction over Indians superseded an 1855 treaty with the Yakima.[13]

The Indian decisions have unfortunately reinforced and strengthened the last-in-time doctrine and are often cited without

10. Potter, *supra* note 2.
11. Ward v. Race Horse, 163 U.S. 504 (1896).
12. Thomas v. Gay, 169 U.S. 264 (1898); Stephens v. Cherokee Nation, 174 U.S. 445 (1899).
13. Washington v. Confederated Bands and Tribes, 439 U.S. 463 (1979).

reference to the unique national relationships.[14] If the last-in-time rule has any justification in American jurisprudence, the Court should limit its application to Indian treaties.[15]

C. *Application of the Rule*

Apart from the five decisions involving Indian treaties reported above, the Supreme Court has found irreconcilable conflict between treaty and statute in very few other decisions. The Court's frequent restatement of the last-in-time rule as *obiter dicta* in many other cases where the justices reconciled treaty and statute carry little precedential value. Ironically, the most frequently cited formulation of the docrine appears in *Whitney v. Robertson,* a case where the last-in-time rule did not determine the result.[16]

1. Chinese Exclusion. The most significant treaty litigation involving the largest number of foreign nationals resulted from Congressional efforts to bar Chinese laborers from the U.S. between 1880 and 1910. China and the U.S. ratified the Burlingame Treaty in 1868 and modified it in 1880. As a most favored nation, China's citizens could travel and work in the U.S. free of discrimination. Approximately one hundred thousand Chinese laborers settled in the West, living apart in culturally distinct communities.

Growing resentment against the unskilled, low paid aliens prompted the first exclusionary legislation in 1882. Chinese laborers leaving the U.S. had to apply for certificates to re-enter. Then to prevent re-entry, Congress revoked the certificates previously granted in 1888. Following a blanket prohibition on all immigration by Chinese laborers in 1892, the U.S. negotiated a new treaty in 1894 terminating what remained of the old agreement.[17]

In two major last-in-time decisions, the Supreme Court sus-

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14. BAKER, JOHN MARSHALL: A LIFE IN LAW at 739 reports that Marshall himself encouraged Justice Thompson to dissent from his dependent nation formulation, later apologized for his opinion and then narrowed its scope in a subsequent decision.

15. In Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) the Court held that Georgia state law could have no force in Cherokee territory.

16. Whitney v. Robertson, 124 U.S. 190 (1888). Several New York merchants challenged a Congressional act granting Hawaiian sugar duty-free entry. The Court determined that the United States' unique relationship with Hawaii as well as the special concessions granted by the King of the island territory distinguished it from most favored nation treatment under commercial agreements.

17. CRANDALL, TREATIES, *supra* note 2, at 470-81. In 1978, President Carter continued the tradition by terminating the U.S. treaty with Taiwan, although in that case Senator Goldwater and others sought unsuccessfully to honor the agreement with China.

tained Congressional acts denying individual rights under the 1880 treaty. In 1889, the Court upheld the exclusion of Chinese laborers with re-entry permits.[18] Under the 1892 law, the Court also sustained the deportation of a Chinese immigrant unable to obtain the testimony of a white witness to prove the required length of residence.[19] Numerous other decisions involving Chinese immigrants did not require application of the last-in-time rule, although the Court formally recognized the doctrine. In several cases, the Court read the statute narrowly to protect Chinese rights under the treaty.[20] In other cases, the Court narrowly construed the treaty so that enforcement of the statute caused no direct conflict.[21]

The nation could have achieved the same result without elevating to a principle of Constitutional doctrine, a Congressional right to violate international law. China proved an obliging ally, accepting new terms proposed by the United States in 1894. Thereafter, the Court found no treaty bar to further deportation under the earlier statute.[22] By nullifying state laws which violated China's treaty rights,[23] the Court applied a double standard that permitted Congress to breach not only the treaty but the Constitution as well. In the often praised *Yick Wo* decision, the Court extended equal protection guarantees of the 14th amendment to Chinese laundries by striking down discriminatory state laws in California.[24] Congress also violated the supreme law of the land, the treaty, and the Court could have enforced that law until the treaty was properly modified or teminated. Renegotiation of the Chinese treaty in accord with the rules of international law and Constitutional requirements involved only minimal delay. The last-in-time rationale was used to justify unconstitutional acts of

18. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

19. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

20. In Chew Heong v. United States, 112 U.S. 536 (1884) the Court reconciled the Chinese restriction acts of May 6, 1882 (22 Stat. 58) and July 5, 1884 (23 Stat. 115) with the Treaty of 1880 allowing a laborer who had left before the permits were required or issued to return without a certificate after the law took effect. *See also* United States v. Gue Lim, 176 U.S. 459 (1900) where the Court allowed a merchant who had a certificate to return to the United States with his wife and children who did not have certificates.

21. United States v. Lee Yen Tai, 185 U.S. 213 (1902). Since the treaty did not expressly prohibit deportation, and stated a general willingness of China to cooperate in resolving potential disputes, the Court sustained a deportation order under the Act.

22. *Id.* at 216.

23. Baker v. City of Portland, 2 F.Cas. 472 (C. C. Oregon, 1879) (No. 777); *see also* CRANDALL, TREATIES, *supra* note 2, at 472.

24. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

racial prejudice and parochial nationalism.

2. Peace Treaties. In two cases the Court upheld Congressional acts rescinding peace treaty commitments. Ironically, the Nation's founders had framed a Constitution at least in part to honor similar treaty obligations. Their descendants, victorious in two later wars, rationalized that the last-in-time rule excused violation of alien property and treaty rights. The Treaty of Guadelupe-Hidalgo which ended the Mexican-American War guaranteed Spanish land grants in territory acquired by the U.S. Under an 1851 Congressional act, a land claims board disregarded prior titles in awarding a disputed ranch. The Court's extreme formulation of the last-in-time rule in *Botiller v. Dominguez* defeats the purpose of the Constitution's framers and violates the express language of articles III and VI: "The United States Supreme Court has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard."[25]

A similar decision emasculated the treaty ending the Spanish-American War. Acting under Congressional authorization, the military governor for Puerto Rico removed a local officer from a position guaranteed by the treaty.[26] As a result of its military successes, the U.S. became a major world power but lost sight of fundamental legal principles. The unfortunate violation of two peace treaties brought little gain to the U.S. for the cost to a national tradition of honoring treaties and principles of sound jurisprudence.

3. Commercial Agreements. The other major Supreme Court decisions determined by the last-in-time rule involved a Congressionally mandated head tax of fifty cents on all aliens entering the U.S. The Court determined the 1882 act superseded any prior friendship treaties barring discrimination against foreign nationals.[27] Applying the familiar rationale, the opinion upheld the legislature's power to repeal statutes and judged laws and treaties had equal force. As in the few other decisions where the rule actually determined the result, the costs appear to outweigh any potential benefit. Congress might have found means compatible with the friendship treaties by charging U.S. citizens the same tax or by

25. Botiller v. Dominguez, 130 U.S. 238 (1889).
26. Alvarez y Sanchez v. United States, 216 U.S. 167 (1910).
27. Head Money Cases, 112 U.S. 580 (1884).

abandoning the levy to honor treaty commitments.

At no time have the courts sanctioned Congressional violation of a treaty because a vital national interest was at stake. Rather, the courts have sacrificed the nation's interest in the rule of law for ends that could have been achieved by alternative means or for insignificant benefits not worth the cost.

D. *Qualifying the Rule*

Recognizing that uncritical application of the last-in-time rule could damage the national interest, the Court has established two qualifications. First, the U.S. does not escape its international obligations under a treaty when Congress enacts contrary provisions. The legislature violates but does not abrogate the pact; only the foreign state affected, not the U.S. courts, can enforce a remedy. Just as Italy remained liable to the U.S. under terms of a treaty it had violated, so American officials remain liable after Congress has nullified the treaty's effect as domestic law.[28] The *Restatement* provides: "[t]he superseding of a rule of international law or a provision of an international agreement as domestic law of the United States by a subsequent act of Congress does not relieve the United States of its international obligation or of the consequences of violation."[29] That formulation hypocritically affirms international law while rendering treaties unenforceable in U.S. courts, contrary to the mandate of articles III and VI.

Second, Congress must clearly intend to supersede the treaty, so that repeals by implication are never favored. "Treaties are to be construed liberally and courts don't lightly attribute to Congress the intent to abrogate."[30] Justice Harlan in *Chew Heong v. U.S.* made the most forthright declaration of principle: "Aside from the duty of the Constitution to respect treaty stipulations . . . the honor of the Government and people of the U.S. is involved in every inquiry." Harlan cites Vattel's argument that there would no longer be any commerce between mankind if they did not

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28. Charlton v. Kelly, 229 U.S. 447 (1913) dealt with the Italian treaty.

29. RESTATEMENT, *supra* note 3, at § 135.

30. United States v. Payne, 264 U.S. 446 (1924). The Indian Allotment Act giving individual Indians parcels of grange land was not meant to preclude allotments under the 1855 Treaty allowing individuals to receive timberland. *See also* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) where the Termination Act of 1954 ending federal supervision of the tribe was reconciled with an 1854 treaty granting Indians hunting rights, thus barring state regulation of these rights.

think themselves obliged to keep faith with each other: "Courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."[31]

The Court's strained effort to mitigate while saving the last-in-time rule appears particularly tortured in *Cook v. U.S.* The 1922 Prohibition Act claimed U.S. jurisdiction over vessels smuggling liquor twelve to twenty-five miles from shore. In 1924, treaties with England and Panama limited jurisdiction to U.S. coastal waters. Although Congress reenacted the 1922 law in 1930, the Court found no intent to abrogate the treaty and barred prosecution under the statute outside the three-mile limit.[32] The Court has also enforced several Indian treaties by concluding that Congress had not intended to breach those agreements with new law.[33]

Two circuits have recently reviewed plaintiffs' claims of employment discrimination under the 1964 Civil Rights Act against a defense by Japanese employers based on a 1953 Friendship Treaty. Both courts sustained the firms' treaty rights to employ Japanese nationals in managerial positions by qualifying the last-in-time rule. In *Spiess v. Itoh,* the fifth circuit concluded that Congress did not expressly intend to revoke the treaty so that its provisions survived the later act.[34] By contrast, the second circuit in *Avigliano v. Sumitomo Shoji* decided the act did supercede the treaty, but suggested that Japanese citizenship might be a *bona fide* occupational qualification allowed by the law.[35]

The language and rationale qualifying the last-in-time rule also support the principle of treaty priority. Congress rarely makes its intent explicit. The 1883 Import Act provided that nothing "shall in any way change or impair the force and effect of any treaty between the U.S. and any other government, or any laws passed for execution of a treaty, so long as such treaty shall remain in force in respect to the subjects embraced in the act.[36] Usually

31. Chew Heong v. United States, 112 U.S. 539 (1884).

32. Cook v. United States, 288 U.S. 102 (1933). The main question involved was whether section 581 of the Tariff Act of 1930 was modified as applied to British vessels suspected of being engaged in smuggling liquors into the United States by the United States-British Treaty of May 22, 1924 (43 Stat. 1761).

33. *See supra* note 28.

34. 643 F.2d 353 (5th Cir. 1981).

35. 638 F.2d 552 (2d Cir. 1981). *See also* Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972).

36. Tariff Act of 1883, Section 11 (22 Stat. at Large 525), cited in Netherclift v. Robert-

the courts are left guessing with no clear indication whether an apparent conflict was intended or deliberate. Justices differ on the Congressional purpose and reach inconsistent decisions. The clearest and only Constitutional method for a Congress to alter treaty law is to follow the agreement's provisions or general principles of international law.

III. The Treaty Priority Alternative

Published commentary in U.S. law journals, legal encyclopedias and treatises uniformly accepts the last-in-time rule as one element in a broad analytic framework.[37] The principle of treaty priority challenges only one aspect of prevailing doctrine and supports the following well established rules of treaty construction.

A. *Points of Agreement with Prevailing Authority*

1. Supremacy Over State Law. Treaties are always supreme over state constitutions and statutes, whether those are enacted prior to or after the international agreement.[38]

2. Self-Executing Treaties. Self-executing treaties prevail over prior Congressional statutes whenever a direct conflict exists.[39]

3. Non Self-Executing Treaties. Treaties which are not self-executing require Congressional acts of implementation that may be repealed or amended by later statutes. According to the *Restatement:* "[a]n international agreement is 'non-self-executing' if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, or in those rare cases where implementing legislation is constitutionally required."[40] Article I, section 9 of the Constitution

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son, 27 F. 737, 739 (C.C.N.Y. 1886).

37. Few have disputed that authority. Potter, in *National Law, supra,* note 2, endorsed the principle of treaty priority in 1925; R. Falk, The Role of Domestic Courts in the International Legal Order (1964) centers primarily on the development of customary international law. R. Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms,* 1 N.Y.L. Sch. Law Rev. 153 (1978) calls for a reexamination of the last-in-time rule and cites a speech by Burgenthal endorsing treaty priority. The Reporter's notes to the *Restatement, supra* note 3, mention some support for giving effect to prior treaties, particularly multilateral agreements.

38. Ware v. Hylton, 9 U.S. (3 Dall.) 199 (1796); Haunstein v. Lynham, 100 U.S. 483 (1880); Missouri v. Holland, 252 U.S. 416 (1920); Zschernig v. Miller, 389 U.S. 429 (1968).

39. Whitney v. Robertson, 124 U.S. 190 (1888); Foster and Elam v. Neilson, 27 U.S. (2 Pet.) 253 (1829); Cook v. United States, 288 U.S. 102 (1933).

40. Restatement, *supra* note 3, at 151, para. 4.

provides: "no money shall be drawn from the Treasury but in consequence of appropriations made by law." Thus, treaties dependent on appropriations can never be self-executing. Similarly, international agreements creating international crimes or requiring certain punishment would need Congressional statutes "before an individual could be tried or punished."[41] On the other hand, extradition treaties which impose a duty directly on the courts, and commercial agreements which bar discriminatory legislation by Congress are immediately self-executing. Multilateral conventions and human rights treaties may be self-executing in some respects while requiring implementing legislation for other provisions.

4. Constitutional Supremacy. The treaty priority principle does not set international agreements above the Constitution, but only above later acts of Congress. As stated in *Reid v. Covert,* valid treaties must comply with the express provisions of the Constitution.[42] None have ever been found to violate that supreme law.

The principle of treaty priority, like the last-in-time rule, finds no conclusive support in the "plain meaning" of article VI. While Potter read the article to mean treaties need not even conform to the Constitution, Corwin suggests the supreme laws may have been listed in descending order of priority — Constitution, laws and last, treaties.[43] Generally, the case law and published commentary properly acknowledge that the ambiguous language can support different interpretations.[44] The Constitutional rationale invariably embraces a larger set of logical and legal principles where the treaty priority principle challenges the last-in-time rule on five key points.

B. *Points Disputed and Principles Affirmed*

1. Expression of the Sovereign Will. The last-in-time rule claims to follow the maxim: *leges posteriores contraries abrogant,* the last expression of the sovereign will must control. Congressional acts approved by both houses and the President provide a more reliable expression of the sovereign will than agreements negotiated by the President and ratified by the Senate.

41. *Id.* at 48.

42. Reid v. Covert, 354 U.S. 1 (1957).

43. CORWIN, CONSTITUTION, *supra* note 2, at 473 n. 65.

44. *See* Justice Curtis' opinion in Taylor v. Morton, *supra* note 1; HENKIN, FOREIGN AFFAIRS, *supra* note 1 at 163: "The equality of law of treaties and statutes seems hardly inevitable; surely there is no basis for it in the Supremacy Clause."

In response, the treaty priority principle argues that the last expression of the sovereign will does not supersede provisions of the U.S. Constitution, unless the current sovereign powers amend that charter in accord with Constitutional procedures. However undemocratic it may appear to bind twentieth century representatives of fifty states by decisions of a few made two hundred years ago, the nation wisely respects those Constitutional limits. The drafters considered and rejected proposals to involve the House in treaty ratification and created a Constitutional system that entrusts some elements of sovereign power to the Senate and President.

Frequently authorities using the "sovereign will" argument to justify Congressional violation of treaties, nevertheless insist the House cannot refuse to implement a treaty after ratification.[45] Whatever Constitutional imperative mandates House implementation would also prohibit a later breach by Congress. The claim that failure to implement is distinguishable from a later breach appears inconsistent, as both have the same effect under international law.

2. Surrender of Legislative Power. If treaties become domestic law that Congress cannot repeal by ordinary statute, then our government must obtain the consent of foreign states to legislate. Absent the protection of a last-in-time rule, a nation surrendering such authority over its own law would cede an essential attribute of sovereignty.

Since the treaty priority principle applies only to self-executing treaties, no such loss of sovereignty could result under agreements requiring Congressional implementation (as defined by U.S. officials). Furthermore, self-executing treaties remain subject to construction and enforcement by national courts. Most important, treaties don't strip a nation of the right to escape from intolerable international obligations. The U.S. government has repeatedly abrogated or modified international agreements using a variety of lawful methods, some of which did not require another state's consent.

Some treaties terminate automatically after a fixed period. Article VI of the 1894 Immigration Treaty with China provides "this convention shall remain in force for a period of ten years." Other treaties, such as the Nuclear Test Ban of 1963, allow for unilateral termination by either party after notice. The *Restatement* indi-

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45. HENKIN, FOREIGN AFFAIRS, *supra* note 2, at 168.

cates that the U.S. President can denounce an "agreement which contains no provision for termination . . . [if] it is established the parties intended to admit the possibility of denunciation or withdrawal or a right of denunciation or withdrawal may be implied by the nature of the agreement."[46] Further, the U.S. can terminate or suspend an agreement following breach by another party[47] or as a result of a fudamental change of circumstances not foreseen by the parties which transforms the extent of obligations.[48]

In the past, Congress has effectively directed the President to terminate a treaty,[49] and the executive branch has also revoked commitments without Congressional instruction.[50] In several instances, Presidents sought authorization from Congress to terminate[51] and in other cases refused a Congressional directive to abrogate.[52] In neither situation was a change in law dependent on the consent of another nation. A declaration of war by Congress also effectively suspends the operation of treaties with enemy states for the duration of the conflict. The treaty priority principle upholds the U.S. sovereign power to revoke treaties, but insists that the government abrogate, not violate such agreements in accord with principles of law. Honoring established termination procedures has not injured the national interest.

As a result of its diplomatic prowess, the U.S. can frequently negotiate more favorable terms without strong objection from a weak, obliging treaty partner. In 1879, President Grant vetoed a Congressional directive that he renegotiate the Burlingame Treaty with China; the following year he submitted a revised treaty to the Senate for ratification. Similarly, President Taft, when pressed by

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46. RESTATEMENT, *supra* note 3, at §§ 340 and 352.

47. *Id.* at § 345.

48. *Id.* at § 346.

49. CORWIN, *supra* note 2, at 474; the La Follette-Furuseth Seaman's Act of 1915 directed President Wilson "within ninety days after passage of this act, to give notice to foreign governments that so much of any treaties as might be in conflict with the provisions of the act would terminate on the expirations of the periods of notice provided for in such treaties."

50. President Carter terminated the U.S. treaty with Taiwan in 1978.

51. CORWIN, *supra* note 2, at 474. An 1846 joint resolution requested by the President gave him discretion to notify the British government of the abrogation of the 1827 Convention on the occupation of the Oregon territory.

52. *Id.* Wilson disregarded the Jones Merchant Marine Act of 1920 stating he "did not deem the direction contained in section 34 . . . an exercise of any constitutional power possessed by Congress." *See* Reeves, *The Jones Act and the Denunciation of Treaties*, 15 A.J.I.L. 33 (1921); and HENKIN, *supra* note 2, at 419.

the House, successfully renegotiated the Russian Treaty of 1832.[53] In reviewing the various treaties nullified by the last-in-time rule, none appeared to create an irrevocable bond to a situation that adversely affected a vital national interest.

The principle of treaty priority does not impair U.S. sovereignty. The last-in-time rule, by contrast, dishonors the nation, as U.S. officials rationalize treaty violations to other states. A 1957 State Department response, for example, struggled to explain to the Swiss government why its nationals in the U.S. were compelled to do military service despite an exemption in an 1850 Convention that remained in force.[54]

Two European states with no less concern for their national sovereignty nevertheless have Constitutional provisions giving treaties priority over subsequent legislation. In contrast to the ambiguity of article VI in the U.S. Constitution, article 55 of the 1955 French Constitution and articles 65-66 of the Netherlands Constitution give treaties effect over later statutes.[55]

3. Non-Justiciable Political Questions. The courts have long recognized and respected foreign policy as the preserve of the executive. The decision to violate a treaty is a policy matter not a legal question subject to resolution by the courts. Disputes between the executive and Congress on foreign policy or differences with other nations are non-justiciable political questions, so it is argued the courts should refuse jurisdiction. As creatures of U.S. national government, the courts are not agents of the international legal order. As such, they must not enforce the rights of alien powers against our own officials. Unity is essential for national survival.[56]

In response, Lillich attacks the "dualist approach": "[t]he courts ultimately must reassess the precedents by which international law although doctrinally incorporated into the law of the United States, actually is accorded second class status."[57] The U.S. claims to be governed by the rule of law, yet asserts as a legal prin-

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53. CRANDALL, TREATIES, *supra* note 2, at 474 n.2.

54. 1 WHITEMAN, DIGEST OF INTERNATIONAL LAW, 567-68 (1963). The Universal Military Training Act required all foreign nationals who declared an intent to become U.S. citizens to serve in the military.

55. *Supra* note 3 (Reporter's Notes to § 135).

56. L. Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino,* 64 COL. L. R. 805 (1964).

57. R. Lillich, *The Proper Role of Domestic Courts in the International Legal Order,* 11 VA. J. INT'L L. 9, 12-18 (1970).

ciple the right to violate international law. However rationalized, the last-in-time rule baldly asserts that disregard for legally valid treaty commitments cannot be remedied under the U.S. system. The nation cannot benefit from such a double standard, but must experience the same disrepute which afflicted the states under the Articles of Confederation.

The Reporter's notes to the *Restatement* indicate that despite his oath of office, the President may disregard treaty duties as well.[58] The principle of treaty priority insists to the contrary that courts have a constitutional mandate to enforce treaties as the supreme law. The executive and legislative branches have ample alternative means to terminate treaty commitments independent of judicial review.

By enforcing treaty laws against U.S. officials who violate those obligations, courts do not become agents of other nations. Rather, the judicial branch upholds U.S. Constitutional principles against violations by current officials. Just as the Supreme Court assured aliens in the U.S. of equal protection under the 14th amendment, so too, the courts must apply due process norms to treaty violations. The President must faithfully execute the laws of Congress or the Constitution. So too, the courts must require compliance with treaty law. The Court's opinion in the *Chinese Exclusion* case defies Constitutional law: "This court is not a censor of the morals of the other departments of the government."[59] Article VI makes treaties far more than moral commands. The principle of treaty priority would guard the U.S. legal system from political abuse by public officials in the most legitimate exercise of judicial review.

4. Customary International Law. Since "violation of a treaty is essentially a violation of the principle of customary international

58. *See* HENKIN, *supra* note 2, at 168. In Canadian Transport Co. v. United States, 430 F. Supp. 1168 (1977), the District Court endorsed the executive's right to breach a treaty. The plaintiff had been blocked by the Coast Guard from landing at Hampton Roads (Norfolk, Va.) under the U.S. Special Interest Vessel Program because Polish nationals were aboard. The plaintiff sought redress under the Convention on Facilitation of International Maritime Traffic of 1967 but was denied relief. The district court judge reasoned that treaties depend on the interest and honor of government parties for enforcement. If these fail, then infractions become the subject of international negotiations and reclamations or possibly war. "It is obvious that with all this, the courts have nothing to do and can give no redress." 430 F. Supp. at 1172.

59. 130 U.S. 581, 602-03 (1889).

law requiring that treaties be observed,"[60] then Congress may escape the obligation by enacting contrary municipal law. Courts only follow customary international law until modified by Congress.

In practice, U.S. courts have invalidated provisions of statutes which contravened the law of nations. In *U.S. v. Smith,* the Supreme Court sustained the conviction of international pirates under a U.S. criminal law, but ruled Congress had improperly classified murder as an act of piracy, exceeding the narrower limits under international law.[61] In *ex parte Quirin,* the Court found the U.S. Articles of War conformed both to the U.S. Constitution and to the international laws of war.[62] In *Lauritzen v. Larsen,* the Court followed international maritime law rather than conflicting jurisdictional provisions of the Jones Act.[63] The *Restatement* confirms "[c]ases arising under international law or international agreements of the United States are within the Judicial Power of the United States, and subject to statutory limitations, are within the jurisdiction of the federal courts."[64] Congress may not routinely legislate away customary international law obligations to honor treaties. The President has a duty to take care that the laws, including treaties, are faithfully executed.

5. *Stare Decisis* v. First Principles. The last-in-time principle, it is argued, was derived early and has become firmly rooted as well established law. With few exceptions, every legal treatise encyclopedia and court decision for over a century has affirmed the doctrine. *Stare decisis* reversal now would be disruptive.

In response, the historical overview presented above demonstrates that the last-in-time rule did not emerge early in U.S. history. Corwin states that it first appeared in an 1854 opinion of the Attorney General.[65] Justice Curtis' lower court opinion followed a year later, and the Supreme Court did not affirm the rule until 1871. The delegates to the Constitutional Convention and the first

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60. Henkin, *supra* note 2, at 460.

61. 18 U.S. (5 Wheat.) 153 (1820).

62. 317 U.S. 1 (1942).

63. 345 U.S. 571, 578 (1953). In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) the second circuit found torture a violation of the law of nations and upheld jurisdiction in a case involving aliens using U.S. courts for tort action. In Letelier v. Republic of Chile, 488 F. Supp. 665 (D.C.D.C. 1980) the court found that the Foreign Sovereign Immunities Act did not bar prosecution for murder.

64. RESTATEMENT, *supra* note 2, at § 131, para. 2.

65. CORWIN, CONSTITUTION, *supra* note 2, at 470 n. 57 (citing 6 Ops Att'y Gen. 291).

legislators, cabinet members and judges never implemented the last-in-time rule despite numerous opportunities during the nation's first half century. To the contrary, many early leaders so firmly stressed the binding nature of treaty commitments that their acts lend considerable support to a principle of treaty priority. Ninteenth century positivists uprooted the treaty law principles planted by the founders. Changing attitudes toward international law today dictate a return to the basic principles embodied in the Constitution and honored by the framers.

Substitution of the treaty priority alternative would actually simplify rather than disrupt judicial decision making. Courts presently lack clear guidance on whether or not Congress intended to violate a prior treaty. As a result, the courts offer split decisions which are often inconsistent. No such uncertainty would complicate decision making under a treaty priority rule that required unambiguous Congressional action. The courts would still retain considerable discretion in deciding whether treaties are self-executing and how the terms would be applied.

The last-in-time decisions reviewed above should dispel unsettling fears that new precedent would reverse a century of important case law. Fewer than a dozen Supreme Court decisions actually cite the last-in-time rule as a basis for the holding. In the very first, and fully half the remainder, the Court dealt with Indian treaty disputes that could have been decided on alternate grounds. In the few cases where Congress intentionally violated treaties, the benefits hardly justify the attendant sacrifice to the rule of law. How much did the U.S. gain by keeping a ranch for U.S. ownership, terminating the employ of a Puerto Rican official, levying a head tax on arriving aliens and by excluding Chinese immigrants? Often, treaty renegotiation might have produced the same result with minimal delay. In cases involving vital national interests, the U.S. has alternative, under-utilized means to terminate, suspend or withdraw from treaty commitments.

IV. CONCLUSION

The last-in-time rule was wrongly decided at its inception and has been infrequently applied in practice. That doctrine unnecessarily violates a fundamental principle of U.S. Constituional law. The U.S. judiciary should give treaties priority over later Congressional acts until the government has terminated or modified its legal obligations under the terms of the agreement or rules of inter-

national law.

For a century, U.S. judges have erroneously rationalized violation of law by U.S. officials. The last-in-time rule elevates to a Constitutional principle a doctrine without regard for the rule of law or national honor. The treaty priority alternative would re-establish fundamental first principles while confirming America's willingness to honor its agreements. U.S. courts must recognize that the Constitution creates a legal system in which Americans are governed by law not only among themselves but also in their relations with others.

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