THE DYNAMIC LAST-IN-TIME RULE

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For more than a decade, controversy has raged over whether and when a U.S. state's execution of a convicted foreign national can be delayed by an International Court of Justice (ICJ) judgment under the Vienna Convention on Consular Relations (Vienna Convention). On several occasions—most recently on July 7, 2011—the Supreme Court has declined to stay such an execution, even though the foreign national was convicted without being informed of his rights under the Vienna Convention.

One doctrine raised to bar enforcement of the ICJ judgment was the last-in-time rule, which provides that when a statute and treaty conflict, the most recent instrument governs. A 2004 ICJ judgment held that the United States had violated the Vienna Convention rights of fifty-one Mexican nationals and further decreed that U.S. courts should remedy the violations by reconsidering those nationals' convictions. Such relief would have been barred, however, by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a statute enacted after the 1969 ratification of the Vienna Convention, but before the 2004 ICJ judgment. The Supreme Court suggested, though it did not conclusively decide, that AEDPA would trump the Vienna Convention under the last-in-time rule. In the Court's analysis, the Executive's decision to submit to the jurisdiction of the ICJ in the proceedings resulting in the 2004 judgment was legally irrelevant.

This Article argues that the Supreme Court's suggestion is incorrect—the Executive's decision to submit a dispute to an international tribunal under a valid treaty regime is a legally cognizable expression of the "dynamic" sovereign will. To establish this "dynamic last-in-time rule," this Article analyzes the constitutional interests underlying the last-in-time rule, and related doctrines for interpreting and enforcing treaties. It then demonstrates that the dynamic last-in-time rule serves those interests better than its traditional, static counterpart. In the context of a conflict under a dynamic treaty regime, the Executive's submission to international jurisdiction should trump previously enacted statutes. The result is greater fidelity to both constitutional principle and international obligation.

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INTRODUCTION

Where U.S. domestic law clashes with the nation's international obligations, "[t]he duty of the courts is to construe and give effect to the latest expression of the sovereign will."[1] One way this duty is carried out is by application of the last-in-time rule, which resolves conflicts between treaties and statutes by reference to their respective dates of enactment.[2] This rule is clear-cut and easy to apply in most traditional treaty disputes because there are only two relevant events: the ratification of the treaty and the enactment of the statute. Whichever is later in time controls.

But what if the relevant treaty regime deviates from the traditional, static model by including a mechanism for member nations to resolve treaty disputes by voluntarily seeking a binding resolution from an international tribunal?[3] What if Congress abrogates a substantive provision of such a dynamic treaty regime without withdrawing the Executive's authority to submit disputes to the tribunal, the Executive exercises that authority, and the international tribunal issues a decision that purports to resuscitate the abrogated substantive provision? These questions have already surfaced in a series of cases involving the United States' obligations under the Vienna Convention.[4] If, as scholars predict,[5] the use of dynamic treaties increases, these questions will arise again. How they are answered may determine the outcome of cases with significant implications for both individual litigants and the United States' international relations.

The Supreme Court has suggested that the Executive's decision to refer a treaty dispute to an international tribunal under a dynamic treaty regime makes no difference; the dates of treaty ratification and statute enactment remain the sole factors of consequence for purposes of applying the last-in-time rule.[6] Essentially, this means that the Executive's exercise of discretion, conferred under the dynamic treaty, to use its dispute resolution provisions is not legally cognizable as "the latest expression of the sovereign will."[7] Academic literature

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1. Whitney v. Robertson, 124 U.S. 190, 195 (1888).

2. *See, e.g.*, Breard v. Greene, 523 U.S. 371 (1998); The Cherokee Tobacco, 78 U.S. 616 (1870); Mike Townsend, Note, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L.J. 793, 797 (1989) (defining the last-in-time rule as a rule "under which a treaty may supersede a prior statute and a statute may supersede a prior treaty").

3. *See, e.g.*, Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 487 [hereinafter Optional Protocol].

4. *See infra* notes 37-88 and accompanying text.

5. *E.g.*, Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 324 (2005) (observing a "trend" of "new international law seek[ing] to regulate different areas of law," with "the administration and interpretation of new international law treaties . . . often [being] delegated to international institutions").

6. *See Breard*, 523 U.S. at 378. No court has resolved the question. *Id.*

7. Whitney v. Robertson, 124 U.S.190, 195 (1888).

on the subject has uncritically accepted this approach.[8]

This Article challenges the validity of this commonly accepted static application of the last-in-time rule in the context of dynamic treaty regimes. It argues that the Executive's decision to submit a treaty dispute to an international tribunal under the terms of a duly ratified treaty should be a legally cognizable act for purposes of the last-in-time rule. Thus, provided no other rule of domestic treaty interpretation and enforcement interferes, a domestic court may give effect to the decision of an international tribunal. It may do so despite the contradictory substantive provisions of a statute enacted between the time the treaty was ratified and the time the Executive submitted the underlying dispute to the international tribunal. This is the dynamic last-in-time rule.

The dynamic last-in-time rule is a subspecies of the last-in-time rule applicable in cases involving a particular sequence of treaty-based events. A real world example of this sequence of events is found in disputes arising from the United States' breach of the Vienna Convention. In 1969 (T1), the Executive, with the advice and consent of the Senate, ratified the Vienna Convention and its Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol).[9] Together, these agreements created a "dynamic treaty regime." Under the dynamic treaty regime, the United States undertook certain substantive international obligations regarding consular relations and agreed to voluntary and binding resolution of disputes by the ICJ.[10] In 1996 (T2), the United States enacted AEDPA, a domestic law (abrogating statute) restricting the power of the federal courts over habeas corpus petitions challenging state incarceration.[11] In 2003 (T3), Mexico initiated proceedings against the United States before the ICJ, alleging that the United States had systematically violated the Vienna Convention.[12] The Executive submitted to the ICJ's jurisdiction under the terms of the Optional Protocol. In 2004 (T4), the ICJ held that the United States had violated the Vienna Convention and decreed that the proper remedy was for the United States to review and reconsider the convictions of those foreign nationals affected by the United States' breach.[13]

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8. *See, e.g.*, Ku, *supra* note 5, at 337 (explaining that "[i]nternational institutions . . . may be authorized to issue binding interpretations of U.S. treaty obligations," and when faced with "conflicts between domestic law and U.S. treaty obligations to international institutions," courts have "invoked" the last-in-time rule and "will enforce federal law enacted later in time to the treaty's ratification").

9. Optional Protocol, *supra* note 3.

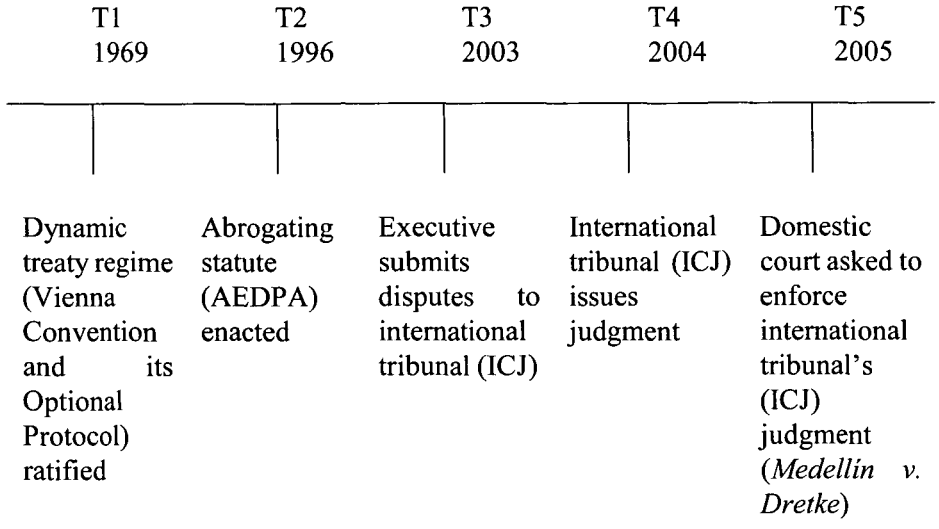
10. *See, e.g., id.*

11. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

12. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32390, VIENNA CONVENTION ON CONSULAR RELATIONS: OVERVIEW OF U.S. IMPLEMENTATION AND INTERNATIONAL COURT OF JUSTICE (ICJ) INTERPRETATION OF CONSULAR NOTIFICATION REQUIREMENTS 1 (2004).

13. *Id.*

This particular example of the sequence of treaty-based events with which the dynamic last-in-time rule is concerned was completed in 2005 (T5) when a Mexican national deprived of consular notification, convicted of murder, and sentenced to death by the state of Texas, asked the Supreme Court to enforce the ICJ's judgment and order judicial review and reconsideration of his conviction. Although AEDPA mentioned neither the Vienna Convention nor its Optional Protocol, it precluded review and reconsideration of the conviction in the circumstances presented. AEDPA thus irreconcilably conflicted with the rule generated via the Vienna Convention's dynamic processes. The full sequence of events, culminating with this irreconcilable conflict, may be visually represented as follows:



This Article is concerned with how the domestic court should apply the last-in-time rule in T5. The traditional, static approach would only take account of the events in T1 and T2 and apply the law as it stands in T2. In contrast, a court applying the dynamic last-in-time rule would take account of the events in T1 through T4 and apply the law as it stands in T4.

This Article leaves much untouched. It does not examine whether the last-in-time rule and related doctrines are justified from an originalist perspective,[14] are consistent with the text of the Constitution,[15] or are otherwise

14. *See* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985) (arguing that judicial acceptance of Congressional and presidential power to violate international law is inconsistent with the Founders' intentions).

15. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 303 (2005); Vasan Kesavan, *The Three Tiers of Federal Law*, 1 NW. U. L. REV. 1480, 1481-82 (2006); Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 150 (2001); Louis Henkin, *The*

normatively acceptable.[16] Rather, it argues that the proper application of existing doctrine in the dynamic treaty context requires a result at odds with apparent Supreme Court and academic intuition. Moreover, this Article is cognizant that the last-in-time rule—in both its traditional and dynamic expressions—is only one part in a complex domestic legal regime. It does not disturb the distinction between self-executing and non-self-executing treaties and does not require that domestic courts blindly accept any interpretation of a treaty adopted by an international tribunal. Nor does it question the political branches' sovereign power to abrogate the nation's obligation to comply with an international tribunal's decision by, for example, passing a new abrogating statute. Thus, although the dynamic last-in-time rule may initially seem radical, closer examination reveals it to be a relatively modest theory, requiring for its acceptance neither modification nor rejection of established principles of domestic treaty interpretation and enforcement.

This Article constructs the dynamic last-in-time rule in four parts. Part I provides a more detailed examination of the Vienna Convention disputes and provides necessary context for evaluating the dynamic last-in-time rule. Part II explains the basic contours of several interrelated doctrines that United States courts use to resolve conflicts regarding the domestic effect of treaties, including the doctrine of self-execution, the *Charming Betsy* canon, and the last-in-time rule. Part III considers the logic of these doctrines, revealing the unified set of fundamental, constitutionally-derived interests they are designed to vindicate. Crucially, the doctrines enable courts to navigate two dominant, frequently conflicting concepts: (1) the nation's unified, largely unfettered, sovereign power to conduct international relations and govern domestic affairs; and (2) the domestic constitutional division of that sovereign power among the three branches of our federal government. Finally, Part IV argues that the dynamic last-in-time rule, rather than rigid adherence to a traditional, static application of the last-in-time rule, more faithfully protects and promotes the fundamental interests discussed in Part III.

I. A DYNAMIC EXAMPLE: THE CONSULAR RELATIONS DISPUTES

The continuously bubbling disputes arising out of the Vienna Convention provide essential context for analyzing the dynamic last-in-time rule. This Part examines this dynamic treaty regime and the controversy it has engendered.

A. The Vienna Convention and its Optional Protocol

Signed in 1963 and ratified by the United States in 1969, the Vienna

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Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 HARV. L. REV. 853, 871-72 (1987).

16. *See* Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9 (1970).

Convention[17] is "a multilateral international agreement designed to codify customary international practice concerning consular relations,"[18] and "contribute to the development of friendly relations among nations."[19] The Vienna Convention seeks to "ensure the efficient performance of functions by consular posts on behalf of their respective States."[20] A key provision in this respect is Article 36, under which the United States and other member nations promise "to inform detained foreign nationals of their right to have their respective consular offices notified of their detention."[21] Consular notification is desirable because a State may take diplomatic measures once made aware that its national is being detained. Such measures may include ensuring the detained individual is treated fairly, providing or supporting a legal defense, arguing for leniency in sentencing in the event of conviction, or providing other assistance.[22] The benefits of consular notification vary depending on the protections the detaining or "receiving" State provides to foreign nationals, the degree of assistance the "sending" State extends to its nationals detained abroad, and the particular circumstances of the detention.[23]

The Optional Protocol lends this treaty regime its dynamic character.[24] Member nations that have signed on to the Optional Protocol may submit their disputes over the treaty's "interpretation or application" to the ICJ for compulsory, binding resolution.[25] The ICJ has operated as "the principal judicial organ of the United Nations" since 1945.[26] According to the United Nations Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party,"[27] but the

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17. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention]; *see also* Medellín v. Texas (*Medellín II*), 552 U.S. 491, 499 (2008) (citing Vienna Convention art. 36(1)) ("In 1969, the United States, upon the advice and consent of the Senate, ratified the Vienna Convention . . . and the Optional Protocol." (internal citations omitted)).

18. GARCIA, *supra* note 12, at 1; *see also* Steven Arrigg Koh, Note, *"Respectful Consideration" After* Sanchez-Llamas v. Oregon*: Why the Supreme Court Owes More to the International Court of Justice*, 93 CORNELL L. REV. 243, 250 (2007); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 612 (1997).

19. Vienna Convention, *supra* note 17, at pmbl.

20. *Id.*

21. GARCIA, *supra* note 12, at 1; *see also* Vienna Convention, *supra* note 17, art. 36(1)(b); *Medellín II*, 552 U.S. at 499 (explaining Article 36 and how it furthers the Vienna Convention's stated purpose).

22. *See* GARCIA, *supra* note 12, at 3.

23. *See id.*

24. *See* Vienna Convention, *supra* note 17, art. I; *see also Medellín II*, 552 U.S. at 500 ("The Optional Protocol provides a venue for the resolution of disputes arising out of the interpretation or application of the Vienna Convention.").

25. *See* Optional Protocol, *supra* note 3.

26. U.N. Charter art. 92.

27. *Id.* at art. 94, para. 1.

tribunal's jurisdiction in each case depends upon the consent of the parties.[28] Jurisdictional consent may be general, extending to "any question arising under a treaty or general international law,"[29] or may be specific, and thus limited to "a particular category of cases or disputes pursuant to a separate treaty."[30] Although the United States originally consented to the ICJ's general jurisdiction, it withdrew that consent in 1985.[31] By virtue of the Optional Protocol, however, the United States continued to "consent[] to the specific jurisdiction of the ICJ with respect to claims arising out of the Vienna Convention."[32]

B. Medellín v. Dretke

The paradigmatic example of a dynamic treaty regime dispute began on June 24, 1993, when two teenage girls were brutally gang raped and murdered in a park in Houston, Texas. That evening, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Peña were walking home when they encountered José Ernesto Medellín and several other members of the "Black and Whites" gang.[33] Medellín tried to talk to Elizabeth; when she tried to run, he threw her to the ground.[34] Hearing her friend cry out, Jennifer turned to help and was grabbed by other gang members. The men raped both girls for over an hour. When they finished, they murdered Elizabeth and Jennifer and "discarded their bodies in a wooded area" to avoid identification.[35] Medellín raped both girls[36] and "was personally responsible for strangling at least one of the girls with her own shoelace."[37] He was arrested less than a week after the murders.[38]

Although Medellín had lived in the United States since he was three years old, he was a Mexican national. Yet upon his arrest, the police did not inform him of his right under the Vienna Convention to notify the Mexican consulate of his detention. He was properly read his *Miranda* rights, and after signing a waiver of those rights, "gave a detailed written confession."[39] Medellín was

28. *See id.* at art. 36.

29. *Medellín II*, 552 U.S. at 500 (citing U.N. Charter art. 36, para. 2).

30. *Id.* (citing U.N. Charter art. 36 para. 1).

31. *See* U.S. Dept. of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction (Oct. 7, 1985), *reprinted in* 24 I.L.M. 1742 (1985).

32. *Medellín II*, 552 U.S. at 500.

33. *Id.* at 501. A thorough collection of filings and opinions generated during the multi-year saga of Medellín's habeas corpus litigation is maintained online by Debevoise & Plimpton LLP, the firm that represented Medellín. *See Debevoise Represents Mexican National In The Supreme Court*, DEBEVOISE & PLIMPTON LLP (Apr. 30, 2007), http://www.debevoise.com/vccr/.

34. *Medellín II*, 552 U.S. at 501.

35. *Id.*

36. Medellín v. Dretke, 371 F.3d 270, 274 (5th Cir. 2004).

37. *Medellín II*, 552 U.S. at 501.

38. *Id.*

39. *Id.*; *see also* Appendix to Brief for Respondent at 32-36, Medellín v. Texas, 552 U.S.

convicted and sentenced to death. These judgments were affirmed on appeal to the Texas Court of Criminal Appeals.

It was not until Medellín filed his state habeas petition that he argued—for the first time—that Texas had violated the Vienna Convention by failing to notify him of his right to consular access.[40] "The state trial court rejected this claim, and the Texas Court of Criminal Appeals summarily affirmed."[41] Medellín responded by filing a federal habeas petition. The District Court denied this petition, finding that Medellín's Vienna Convention claim was procedurally defaulted and meritless.

While Medellín's appeal was pending in the Fifth Circuit Court of Appeals, the ICJ issued a decision that brought the dynamic character of the Vienna Convention treaty regime to the fore.[42] This decision, *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena)*, involved Mexico's claim that the United States had violated the Vienna Convention by depriving fifty-one named Mexican nationals of their Article 36 consular access rights.[43] Medellín was named among these Mexican nationals.[44] Through the Executive, the United States actively participated in the ICJ's proceedings,[45] which resulted in the ICJ's judgment that the United States had violated the Vienna Convention and the named "Mexican nationals were [therefore] entitled to review and reconsideration of their state-court convictions and sentences in the United States."[46] In its judgment, "[t]he ICJ determined that the Vienna Convention guaranteed individually enforceable rights."[47] The tribunal further specified that the remedy of review and consideration was due regardless of whether there had been "any forfeiture of the right to raise Vienna Convention claims because of a failure to comply with generally applicable state rules governing challenges to criminal convictions," such as procedural default.[48]

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491 (2008) (No. 06-984) (reproducing Medellín's written waiver and confession).

40. Medellín v. Dretke (*Medellín I*), 544 U.S. 660, 662 (2005) (per curiam).

41. *Id.*

42. *Id.* at 662-63; *see* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

43. GARCIA, *supra* note 12, at 14; *see* Application of the United Mexican States in the case of Mexico v. United States of America (Avena and Other Mexican Nationals) (Jan. 9, 2003), *available at* http://www.icj-cij.org/docket/files/128/1913.pdf.

44. *Medellín I*, 544 U.S. at 663.

45. In a counter-memorial filed by the then-serving Legal Advisor for the Department of State, William H. Taft, IV, "the Government of the United States of America request[ed] that the Court adjudge . . . the claims of the United Mexican States" in the United States' favor. *See* Counter-Memorial of the United States of America in the case of Mexico v. United States of America (Avena and Other Mexican Nationals) ¶ 10.1 (Nov. 3, 2003), *available at* http://www.icj-cij.org/docket/files/128/10837.pdf.

46. Medellín v. Texas (*Medellín II*), 552 U.S. 491, 497-98 (2008).

47. *Medellín I*, 544 U.S. at 663.

48. *Medellín II*, 552 U.S. at 498; *see also Medellín I*, 544 U.S. at 663 (explaining the ICJ held "that the United States must 'provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals' to determine whether the violations 'caused actual prejudice,' without allowing procedural default

This latter determination was consistent with an earlier ICJ judgment in a case in which the United States also participated, *Germany v. United States of America (LaGrand Case)*.[49]

Despite the ICJ's intervening judgment in *Avena* that procedural default could not bar review and reconsideration of Medellín's Vienna Convention claims, the Fifth Circuit denied Medellín's application for a certificate of appealability.[50] The court based this denial in part on Medellín's procedural default.[51] The Fifth Circuit's "prior holdings that the Vienna Convention did not create an individually enforceable right" also supported the decision.[52]

C. Breard v. Greene

In denying Medellín's application for a certificate of appealability based on his procedural default, the Fifth Circuit relied on an opinion issued in the first Vienna Convention dispute to reach the Supreme Court, *Breard v. Greene*.[53] Like Medellín, Breard was a foreign national who was arrested, charged, tried, and convicted of attempted rape and capital murder.[54] Also like Medellín, Breard was not informed of his Vienna Convention rights during the course of his detention and did not raise his Vienna Convention claim until he filed his federal habeas petition.[55] The District Court held "that Breard procedurally defaulted the claim when he failed to raise it in state court and that Breard could not demonstrate cause and prejudice for this default."[56] The Fourth Circuit affirmed in January 1998,[57] and Breard filed a petition for certiorari in the Supreme Court.[58] Meanwhile, in April 1998, the Republic of Paraguay instituted proceedings against the United States in the ICJ, alleging

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rules to bar such review." (quoting *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. No. 128, ¶¶ 121-122, 153(a))).

49. LaGrande Case (Ger. v. U.S.) 2001 I.C.J. 104 (June 27).

50. *Medellín I*, 544 U.S. at 663 ("While acknowledging the existence of the ICJ's *Avena* judgment, the court gave [it] no dispositive effect.").

51. *Id.* (citing Breard v. Greene, 523 U.S. 371, 375 (1998)).

52. *Id.* (citing United States v. Jimenez-Nava, 243 F.3d 192, 195 (5th Cir. 2001).

53. *Breard*, 523 U.S. 371; *see* Carsten Hoppe, *Implementation of* LaGrand *and* Avena *in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights*, 18 EUR. J. INT'L L. 317, 320 (2007).

54. *See Breard*, 523 U.S. at 373.

55. *Id.*

56. *Id.* (citing Breard v. Netherland, 949 F. Supp. 1255, 1266 (E.D. Va. 1996)).

57. *See* Breard v. Pruett, 134 F.3d 615, 621 (1998).

58. *Breard*, 523 U.S. at 373. Running on a parallel track was a suit filed in 1996 against Virginian officials by the Republic of Paraguay, along with its Ambassador and Consul General to the United States. Paraguay alleged that the Virginian officials had violated the Vienna Convention in Breard's case. The district court dismissed for lack of subject matter jurisdiction on grounds of sovereign immunity, *see* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1272-73 (ED Va. 1996), and the Fourth Circuit affirmed, *see* Republic of Paraguay v. Allen, 134 F.3d 622, 629 (4th Cir. 1998). Paraguay then also filed a petition for certiorari to the Supreme Court. *Breard*, 523 U.S. at 374.

violations of the Vienna Convention in Breard's case.[59] When the ICJ issued an order noting jurisdiction and "requesting that the United States 'take all measures at its disposal to ensure that . . . Breard is not executed pending [a] final decision,'" Breard sought to enforce the order by filing a petition for an original writ of habeas corpus and a stay application in the Supreme Court.[60]

In a per curiam opinion issued the day Breard was scheduled to be executed, the Supreme Court held that Breard's argument that the Vienna "Convention is the 'supreme law of the land' and thus trumps the procedural default doctrine" was "plainly incorrect for two reasons,"[61] one being the last-in-time rule.[62] As the Court noted, the Vienna Convention "has continuously been in effect since 1969."[63] But in 1996, before Breard filed his federal habeas petition, Congress enacted AEDPA.[64] AEDPA provides, in relevant part, that "a habeas petitioner alleging that he is held in violation of 'treaties of the United States' will, as a general rule, not be afforded an evidentiary hearing if he 'has failed to develop the factual basis of [the] claim in State court proceedings.'"[65] The Court held that this rule, because it was enacted after the Vienna Convention was ratified, applied to Breard's claim. The rule precluded the hearing Breard needed to demonstrate that he was prejudiced by the Virginian officials' alleged violation of the Vienna Convention.[66]

The Court's opinion thus suggested—without explicitly holding—that the ICJ's proceedings were legally irrelevant for purposes of the last-in-time rule. The Court identified only the dates of treaty ratification and statute enactment as those dates relevant to the last-in-time analysis.[67] Only in discussing the diplomatic options available did the Court mention the ICJ proceedings, expressing regret that Paraguay had not initiated those proceedings earlier.[68]

D. Medellín I: A Time to Apply the Dynamic Last-in-Time Rule?

Breard's suggestion that an international tribunal's proceedings are irrelevant in applying the last-in-time rule in the context of a dynamic treaty became directly relevant in *Medellín v. Dretke (Medellín I)*.[69] Unlike in *Breard*,

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59. *Breard*, 523 U.S. at 374.
60. *Id.*
61. *Id.* at 375.
62. *Id.* at 376 (citing Reid v. Covert, 354 U.S. 1, 18 (1957)).
63. *Id.*
64. *Id.*; *see* 28 U.S.C. §§ 2253, 2254 (2005).
65. *Breard*, 523 U.S. at 376 (quoting 28 U.S.C. §§ 2254(a), (e)(2) (1998)).
66. *Breard*, 523 U.S. at 376.
67. *See id.*
68. *Id.* at 378 ("It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier.").
69. Medellín v. Dretke (*Medellín I*), 544 U.S. 660, 661-62 (2005) (per curiam) (explaining that the Court "granted certiorari . . . to consider . . . whether a federal court is bound by the [ICJ] ruling that the United States courts must reconsider petition José Medellín's claim for

the Supreme Court in *Medellín I* was confronted with a final ICJ judgment: *Avena*.[70] In *Avena*, the United States had submitted to the ICJ's jurisdiction and fully participated in the proceedings. Medellín himself was among the subjects of the case. Moreover, the ICJ's judgment appeared potentially self-executing because, as described by Medellín, it established a rule easily susceptible of judicial application. That is, "*Avena* [held] that the failure to accord Vienna Convention rights to Medellín and other similarly situated Mexican nationals necessitated review and reconsideration of their convictions and sentences by United States courts," notwithstanding procedural default doctrines that would ordinarily bar such review.[71] The Court granted certiorari to determine whether this judgment was binding on United States courts.[72]

Before the Supreme Court, the Attorney General of Texas, representing the Respondent, raised the last-in-time rule as a defense to the domestic enforcement of the *Avena* judgment. Relying on *Breard*, he argued that, by virtue of the last-in-time rule, AEDPA trumped the Vienna Convention as interpreted by the ICJ in *Avena*.[73] Curiously, Medellín simply ignored the argument on reply.[74]

The Court never resolved the question. It dismissed the writ as improvidently granted. After the Court granted certiorari, but before it could hear oral argument, President Bush issued a memorandum stating "the United States would discharge its international obligations under the *Avena* judgment by 'having state courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.'"[75] In response to this memorandum, Medellín filed a successive state application for habeas corpus, which the Court viewed as a potential vehicle for providing Medellín with the review and reconsideration required under *Avena*. These new developments, combined with "several threshold issues" identified by the Court as having the potential to "independently preclude federal habeas relief . . . and thus render advisory or academic consideration of the questions presented," led the Court to dismiss the writ as improvidently granted.[76]

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relief . . . without regard to procedural default doctrines." (internal citations omitted)).

70. *Id.* at 665 n.3 ("At the time of our *Breard* decision, . . . we confronted no final ICJ adjudication.").

71. *Id.* at 667 (Ginsburg, J., concurring).

72. *Id.* at 661-62.

73. *See* Brief for the Respondent at 5-6, 10-12, Medellín v. Dretke, 544 U.S. 660 (2005) (No. 04-5928), *available at* http://www.oyez.org/node/61853.

74. *See* Reply Brief for the Petitioner, Medellín v. Dretke, 544 U.S. 660 (2005) (No. 04-5928), *available at* http://www.oyez.org/node/61852; *see also* Brief for the Petitioner, *Medellín I*, 544 U.S. 660 (No. 04-5928), *available at* http://www.oyez.org/node/61851 (making no mention of the last-in-time rule in opening brief).

75. *Medellín I*, 544 U.S. at 663 (quoting George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as Amicus Curiae 9a).

76. *Id.* at 664.

E. The Controversy Continues: Medellín v. Texas *to* Leal v. Texas

Since 2005, the controversy over the domestic enforcement of *Avena* has continued without a satisfactory answer to the question of how the last-in-time rule should apply in the context of a dynamic treaty regime. In a March 7, 2005 letter to Secretary General Kofi Annan, Secretary of State Condoleezza Rice notified the U.N. that the United States "hereby withdraws" from the Optional Protocol.[77] In a 2006 case involving an individual not named in *Avena*, the Supreme Court held, contrary to *Avena*, that the Vienna Convention does not preclude the application of state default rules.[78] Meanwhile, the Texas state courts denied Medellín's second habeas petition, continuing to hold that procedural default barred his claim to enforce *Avena*, regardless of the Executive's memorandum. The Supreme Court affirmed over a vigorous dissent in *Medellín v. Texas (Medellín II)*.[79] The Court concluded that ICJ judgments, including *Avena*, are not directly enforceable in domestic courts under the terms of the Vienna Convention and its Optional Protocol.[80] It further held that the Executive's memorandum was a constitutionally invalid attempt to make the unenforceable *Avena* decision enforceable.[81]

Medellín was executed on August 5, 2008, without receiving the review and reconsideration of his conviction required under *Avena*.[82] He was not the last of the named Mexican nationals to meet that fate. In a per curiam opinion issued on July 7, 2011, the Supreme Court denied another application for stay of execution filed by a convicted Mexican national who had been a subject of the *Avena* judgment.[83] Humberto Leal Garcia, whose stay application was supported by the Obama Administration,[84] was executed the same night.[85]

II. THE DOMESTIC JUDICIAL ENFORCEMENT OF TREATIES

The domestic enforcement of U.S. treaty obligations is governed by

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77. *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases: Foes of Death Penalty Cite Access to Envoys*, WASH. POST (Mar. 10, 2005), http://www.washingtonpost.com/ac2/wp-dyn/A21981-2005Mar9.

78. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

79. *See* Medellín v. Texas (*Medellín II*), 552 U.S. 491 (2008).

80. *See id.* at 504-23.

81. *See id.* at 523-32.

82. *See, e.g.*, Allan Turner and Rosanna Ruiz, *Medellín Executed for Rape, Murder of Houston Teens*, HOUSTON CHRONICLE (Aug. 6, 2008), http://www.chron.com/disp/story.mpl/metropolitan/5924476.html.

83. Leal v. Texas, No. 11-5001, slip op. at 2, 4 (U.S. 2011).

84. Brief of United States as Amicus Curiae in support of Applications for a Stay, Leal v. Texas, No. 11-5001(Nos. 11-5001 (11A1), 11-5002 (11A2), and 11-5081 (11A21)), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/SG-amicus-in-Leal-execution-7-1-11.pdf.

85. *See, e.g.*, Jess Bravin, *Mexican Citizen Executed After Court Declines to Intervene*, WALL ST. J. (July 8, 2011), http://online.wsj.com/article/SB

several interrelated doctrines, including the doctrine of self-execution, the *Charming Betsy* canon, and the last-in-time rule.[86] Designed to resolve different—but closely related—issues and disputes, these doctrines are frequently invoked in combination[87] and have been crafted to vindicate a uniform body of interrelated interests. Although this Article is ultimately concerned with a particular application of the last-in-time rule, it is essential to examine that rule in the context of its sister doctrines and understand how the three doctrines interact. This holistic approach best illuminates the interests and policies that animate the legal regime governing the domestic judicial enforcement of international obligations. This context will in turn enable a structured, complete evaluation of the doctrinal validity of the dynamic last-in-time rule.

The doctrine of self-execution, the *Charming Betsy* canon, and the last-in-time rule enable domestic courts to answer a series of three questions that are together dispositive of a party's claim that a treaty prevents the application of a federal statute. First, does the treaty create a legal right an individual litigant may invoke in domestic litigation, or does it speak solely to the political relations between or among the nations party to the treaty? This is a question of treaty interpretation, and it is resolved by applying the doctrine of self-execution. Second, if the treaty creates an enforceable, individual legal right, does that right unavoidably conflict with the relevant federal statute? This question calls for application of the *Charming Betsy* canon, which requires the court to interpret the treaty and statute to avoid, if at all possible, a direct conflict. Third, if there is an unavoidable conflict between the treaty and statute, which governs? This final question requires the court to apply the last-in-time rule to resolve the conflict in accord with the most recent expression of the United States' sovereign will.

A. The Doctrine of Self-Execution

When faced with a treaty-based defense to the enforcement of a federal statute, a court must first determine whether the treaty establishes a rule susceptible of domestic judicial enforcement.[88] The ultimate inquiry is whether the treaty limits itself to imposing an obligation upon the political departments of government, or whether the treaty is written as a law that may be enforced by an individual litigant in court without further legislation. This question is

86. Detlev F. Vagts, *The United States and its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 313 (2001).

87. *See, e.g.*, Bartram v. Robertson, 15 F. 212, 213 (C.C.S.D.N.Y. 1883), *aff'd* 112 U.S. 116 (1887) (drawing on the fundamental principles of each of the primary doctrines in resolving a conflict between a federal statute and an earlier Danish treaty).

88. *See, e.g.*, Sanchez-Llamas v. Oregon, 548 U.S. 331, 337 (2006) ("*First*, does Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding?").

answered by applying the doctrine of self-execution.

Though frequently derided by scholars[89] and routinely misunderstood,[90] the doctrine of self-execution has deep roots in American jurisprudence.[91]

The doctrine of self-execution is grounded in the Constitution's establishment of a historically unique role for treaties as a matter of domestic law. It is a tool for determining a treaty's "horizontal effect," which Professor Akhil Amar defines as a treaty's "capacity to oust previous federal laws or substitute for a federal statute in certain delicate areas."[92] The starting premise of the doctrine of self-execution is that treaties are first and foremost contracts between (or among) sovereign nations.[93] In light of this traditional understanding of the fundamental nature of treaties, "some constitutional systems" require "the parliament to translate [treaties] into law, and to enact any domestic legislation necessary to carry out" the international obligations created by a treaty as a matter of domestic law.[94] The Supremacy Clause of the U.S. Constitution broke new ground by establishing a different rule for our

89. *See, e.g.*, David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 4 (2002) (arguing that the modern focus on the intent of treaty makers in determining self-execution "distorts that balance" earlier versions of the doctrine had struck "between competing rule of law and separation of powers principles"); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 760 (1988) (describing the doctrine of self-execution as a "judicially invented notion that is patently inconsistent with express language in the Constitution affirming that '*all* Treaties . . . shall be the supreme Law of the Land.'"). While early decision viewed "treaty undertakings a[s] generally, in principle, self-executing," LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 200 (2d ed. 1996), there is a modern "tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing," *id.* at 201. This shift appears to inspire much, but not all, of the modern scholarly ire. *See, e.g.*, *id.* (arguing that the shift in presumption is "counter to the language, and spirit, and history of Article VI of the Constitution").

90. HENKIN, *supra* note 89, at 203 ("The difference between self-executing and non-self-executing treaties is commonly misunderstood."); Carlos M. Vázquez, *Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 698-99 (1995) [hereinafter Vázquez, *Four Doctrines*] (examining the origins of self-execution in the nation's founding); *cf.* AMAR, *supra* note 15, at 305 ("If modern courts have tended to muddle through horizontal-effect issues via a vaguely contoured doctrine of non-self-execution, perhaps they may be excused for their imprecision because the framers themselves were of several minds and failed to offer crystalline guidance.").

91. *See, e.g.*, HENKIN, *supra* note 89, at 199 (noting one might reasonably question whether the doctrine of self-execution was "indeed . . . the purpose and purport of the Supremacy Clause," but that interpretation "has been established law from our national beginnings").

92. AMAR, *supra* note 15, at 305.

93. *E.g.*, Trans World Airlines v. Franklin Mint, 466 U.S. 243, 253 (1984) (stating "[a] treaty is in the nature of a contract between nations"); The Head Money Cases, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."); Chae Chan Ping v. U.S. (*Chinese Exclusion*), 130 U.S. 581, 600 (1889) ("A treaty . . . is in its nature a contract between nations"); Foster v. Neilson, 27 U.S. 253, 314 (1889); Townsend, *supra* note 2, at 795-96.

94. HENKIN, *supra* note 89, at 198.

constitutional system,[95] providing:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties* made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[96]

Although this provision's original aim may have been to establish the primacy of federal law over state law,[97] it has long been interpreted to establish the equality of treaties and federal statutes.[98] In the 1829 case of *Foster v. Neilson*,[99] the Supreme Court explained that "[o]ur constitution declares a treaty to be the law of the land" and thus requires the judiciary to treat it as "equivalent to an [] act of the legislature."[100]

But "[n]ot all treaties . . . are in fact law of the land of their own

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95. AMAR, *supra* note 15, at 306 (noting "the lack of any closely applicable historical model on either side of the Atlantic" for the Supremacy Clause's treatment of the horizontal effects of treaties).

96. U.S. CONST. art. VI, § 2 (emphasis added); *see also* The Cherokee Tobacco, 78 U.S. 616, 620 (1870) (beginning resolution of treaty-statute conflict with Supremacy Clause); HENKIN, *supra* note 89, at 198-99 (explaining that "[t]he Constitution . . . prescribes the place and the effect of treaties in the law of the United States," and beginning analysis with the Supremacy Clause).

97. *E.g.*, HENKIN, *supra* note 89, at 199 (explaining that the Supremacy Clause was "designed principally to assure the supremacy of treaties to state law"); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984) [hereinafter Henkin, *International Law as Law*] ("The Supremacy Clause was addressed to the states, and was designed to assure federal supremacy."). There has been much discussion in the literature regarding the history of the Supremacy Clause and what exactly the Framers had in mind when they included treaties in the list of sources of supreme law of the land. *See generally* John C. Yoo, *Globalism and the Constitution: Treaties, Non-self-execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); Martin S. Flaherty, *Response: History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); John C. Yoo, *Rejoinder: Treaties and Public Lawmaking: A Textual and Structural Defense of Non-self-execution*, 99 COLUM. L. REV. 2218 (1999).

98. *E.g.*, The Head Money Cases, 112 U.S. 580, 599 (1884) (explaining that "[t]he [C]onstitution gives [a treaty] no superiority over an act of [C]ongress"); *Chinese Exclusion*, 130 U.S. 581, 600 (1889) ("By the [C]onstitution, laws made in pursuance thereof, and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other."); Henkin, *International Law as Law*, *supra* note 97, at 1563 ("The language of the Supremacy Clause . . . has been read to imply that laws and treaties of the United States are not only supreme over state law, but are equal in status and authority to each other."). Professor Ku has challenged this traditional interpretation, arguing the Supremacy Clause's text alone establishes a hierarchy among the three types of federal law listed. *See* Ku, *supra* note 5, at 347-48.

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

100. *Id.* at 314.

accord."[101] If a treaty is drafted in the form of a contract, a court will conclude that "the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[102] Courts view the violation of such a non-self-executing treaty as a primarily political injury inflicted upon the other nation(s) party to the treaty.[103] Here, the proper method of redress is through diplomatic channels controlled by the political branches, particularly the executive branch. The Supreme Court has long found it "obvious that with all this the judicial courts have nothing to do and can give no redress."[104]

On the other hand, if a treaty "operates of itself without the aid of any legislati[on],"[105] then "its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."[106] This is the heart of the doctrine of self-execution. "[I]n a treaty that operates of itself, the undertaking by the United States automatically has the quality of law: the Executive and the courts are to give effect to the treaty undertaking without awaiting any act by Congress."[107] Whether a particular treaty "operates of itself" (i.e., is self-executing) is a matter of treaty interpretation.[108] Once—and only if—a court determines that a treaty is self-executing, the court "resorts to the treaty for a rule of decision for the case before it as it would to a statute."[109]

B. The Charming Betsy *Canon*

Even if a treaty is self-executing, it can provide a defense to a federal statute only if it establishes a rule at odds with the rule established by the relevant statute. In other words, a treaty-based defense is viable only where there is a direct and irreconcilable conflict between the treaty and the statute. Otherwise, enforcing the statute poses no impediment to simultaneously enforcing the domestic rule of law established by the treaty.[110] And this is precisely the outcome that American courts prefer. This long-standing judicial

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101. HENKIN, *supra* note 89, at 199.

102. *Foster*, 27 U.S. at 314; *see also Chinese Exclusion*, 130 U.S. 581, 600 (1889) ("A treaty . . . is often merely promissory in its character, requiring legislation to carry its stipulations into effect.").

103. The Head Money Cases, 112 U.S. at 598.

104. *Id.*

105. *Foster*, 27 U.S. at 314.

106. The Head Money Cases, 112 U.S. at 598-99.

107. HENKIN, *supra* note 89, at 199.

108. *E.g.*, Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) ("Whether an international agreement of the United States is self-executing is a matter of interpretation to be determined by the courts." (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 154 (1965)); *Foster*, 27 U.S. at 314; *see* Cook v. United States, 288 U.S. 102, 119 (1933).

109. The Head Money Cases, 112 U.S. at 599; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987).

110. HENKIN, *supra* note 89, at 214.

preference is embodied in the *Charming Betsy* canon,[111] which provides that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[112] Applying the *Charming Betsy* canon enables a court to determine whether a treaty and a statute are so "absolutely incompatible" that one "cannot be enforced without antagonizing the" other.[113] Moreover, it ensures that "[i]f both can exist" together, they will be given that effect.[114]

Although the *Charming Betsy* canon has enjoyed long-standing and continuous support from courts and scholars,[115] there are nuanced variations in how the canon has been characterized and applied over time. Some have treated it as a presumption[116] or clear statement rule,[117] designed to ensure that U.S. international obligations are respected unless the political branches have clearly and unequivocally dictated another policy. This is the strongest version of the canon. It prevents a statute from being read as inconsistent with a treaty or other international obligation unless Congress has "manifested [such intent] by express words or a very plain and necessary implication."[118] A weaker version

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111. Although it takes its name from Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804), the canon first appeared a few years earlier, in Talbot v. Seeman, 5 U.S. 1 (1801). Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L. J. 479 (1998). Professor Bradley explains that the genesis of the canon announced in *Talbot* and *Charming Betsy* is unknown, but may have been an earlier New York court opinion or English law. *See id.* at 487-88.

112. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804); *see generally* Vagts, *supra* note 86, at 322-23.

113. Johnson v. Browne, 205 U.S 309, 321 (1907).

114. *Id.*

115. Some scholars have argued the canon should be expanded and used to incorporate international law principles into domestic law. *See* Melissa A. Waters, *Using Human Rights Treaties to Resolve Ambiguity: The Advent of a Rights-Conscious* Charming Betsy *Canon*, 38 VICTORIA U. WELLINGTON L. REV. 237 (2007); Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

116. *See, e.g.*, The Cherokee Tobacco, 78 U.S. 616, 623 (1870) (Bradley, J., dissenting) ("hold[ing] to the presumption . . . that Congress did not intend" to abrogate treaty where such intention was not clearly expressed); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993) (characterizing the canon as a "presumption in favor of international law").

117. *E.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ."); *see also* Weinberger v. Rossi, 465 U.S. 25, 32 (1982) (applying the canon and finding that Congressional silence is not sufficient to abrogate a treaty); Trans World Airlines v. Franklin Mint, 466 U.S. 243, 252 (1984) (finding the 1978 repeal of the Par Value Modification Act did not render unenforceable the cargo liability limit of the Warsaw Convention because there was no clear evidence that Congress intended such an effect); Lem Moon Sing v. United States, 158 U.S. 538, 549 (1895) ("[I]t is the duty of the courts not to construe an act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction.").

118. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

views the canon as a simple manifestation of the fundamental principle of statutory construction that "[r]epeals by implication are never favored."[119]

As a practical matter, courts only have the opportunity to apply the *Charming Betsy* canon in cases involving conflicts between self-executing treaties[120] and statutes that lend themselves to more than one interpretation.[121] If the treaty is non-self-executing, there is no conflict. If the statute is unambiguous, there is less latitude to avoid conflict by resorting to tools of statutory construction, including the *Charming Betsy* canon. While courts apply the *Charming Betsy* canon with varying degrees of stringency, all can agree on its importance:[122] a court cannot even consider enforcing a treaty provision as a defense to a federal statute unless the two irreconcilably conflict.

C. The Last-in-Time Rule

The final doctrine—and the primary focus of this Article—is the last-in-time rule, which provides that when there is a direct and unavoidable conflict between a treaty and a statute, the later in time governs.[123] This rule operates in

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119. Johnson v. Browne, 205 U.S 309, 321 (1907); Ward v. Race Horse, 163 U.S. 504, 511 (1896); Bradley, *supra* note 111, at 488 and n.48.

120. HENKIN, *supra* note 89, at 209.

121. *See* Trans World Airlines, 466 U.S. at 252; O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 282 F.Supp 2d 1236, 1251 (D.N.M. 2002), *aff'd on reh'g*, 389 F.3d 973 (10th Cir. 2004), *and cert. granted sub nom.* Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 125 S. Ct. 1846 (2005).

122. *Compare* Breard v. Greene, 523 U.S. 371, 376 (1998) (applying the last-in-time rule to a conflict between the AEDPA and the Vienna Convention without mentioning the *Charming Betsy* canon), *with* United States v. Palestine Liberation Org., 695 F.Supp. 1456, 1465-66 (S.D.N.Y. 1988) (using the *Charming Betsy* rule to interpret the Anti-Terrorism Act of 1986 to leave intact U.S. obligations under the U.N. Headquarters Agreement even in the face of clear evidence that Congress intended to abrogate relevant treaty provisions); *see also* Vagts, *supra* note 86, at 323 ("Recent years have seen actions by the United States that both expand and contract the *Charming Betsy* rule."); Bradley, *supra* note 111, at 490 ("The precise *strength* of the canon today is somewhat uncertain."). Courts have also applied the canon in cases involving customary international law, though some have questioned the practice. *See, e.g.*, Jack M. Goldklang, *Back on Board the* Paquete Habana*: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143, 148 (1984).

123. *E.g.*, The Cherokee Tobacco (*Cherokee Tobacco*), 78 U.S. 616, 621 (1870) ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.") (footnotes omitted); The Head Money Cases, 112 U.S. 580, 599 (1884) ("[S]o far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."); *see also* SUTHERLAND STATUTORY CONSTRUCTION § 32:6 at 753 (stating it is well settled that "[b]ecause the Supremacy Clause fails to differentiate between treaties and acts of Congress for the purpose of giving either of them precedence . . . [t]he later in point of time prevails."); Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 394-96 & n.2 (1988) (exhaustively listing cases involving the last-in-time rule).

both directions, such that "a treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty."[124] The last-in-time rule first appeared in *Taylor v. Morton,* an 1855 opinion by Justice Curtis, sitting on the Circuit Court for the District of Massachusetts.[125] The Supreme Court adopted it fifteen years later in *The Cherokee Tobacco.*[126] Although courts invoke the last-in-time rule more often than they apply it,[127] the rule has enjoyed continuous judicial acceptance[128] but has increasingly been subject to scholarly attack.[129]

Practically speaking, the last-in-time rule is the final hurdle for a litigant asserting a treaty-based defense against a federal statute. That is, even if the treaty provides an enforceable individual right (i.e., is self-executing) that directly conflicts with the relevant federal statute (as determined by application of the *Charming Betsy* canon), the treaty will not provide a defense against

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124. *Cherokee Tobacco*, 78 U.S. at 621; *see also* United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902). The rule is bidirectional primarily in theory, for "[i]n practice, . . . the rule has operated almost entirely in one direction," with statutes overruling previous treaties. Vasan Kesavan, *The Three Tiers of Federal Law*, 1 NW. U. L. REV. 1480, 1481-82 (2006).

125. Taylor v. Morton 23 F. Cas. 784 (Curtis, Circuit Justice, C.C. Mass. 1855) (No. 13,799); *see generally* Ku, *supra* note 5, at 353-84 (tracing historical origins of the last-in-time rule).

126. *See Cherokee Tobacco*, 78 U.S. at 620, 621; *see also* Jaya Ramji, *Legislating Away International Law: the Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 150-51 (2001); Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 A.J.I.L. 313, 315-16 (2001).

127. *See, e.g.*, Moser v. United States, 341 U.S. 41, 45 (1951) ("Not doubting that a treaty may be modified by a subsequent act of Congress, it is not necessary to invoke such authority here, for we find in this congressionally imposed limitation on citizenship nothing inconsistent with the purposes and subject matter of the Treaty." (internal footnote omitted)).

128. Indeed, judicial acceptance of the rule has been not only consistent, but also, at times, enthusiastic. *See, e.g.*, The Head Money Cases, 112 U.S. at 598 (observing that "[i]t is very difficult to understand how any different doctrine can be sustained").

129. Ku, *supra* note 5, at 326 ("[D]espite its acceptance by courts, the last-in-time rule suffers from near unanimous criticism in the academy accompanied by periodic calls for its abandonment." (citing Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 50 (1970) and *The Nuremberg Trials and Objection to Military Service in Viet-Nam*, 63 AM. SOC. INT'L L. PROC. 140, 180 (1959) (remarks of Louis B. Sohn))); *see also* AMAR, *supra* note 15, at 303 ("By allowing federal treaties to repeal federal statutes and, symmetrically, statutes to repeal treaties, the modern judicial has paid insufficient heed to the text of Article VI itself, ignoring the apparent legal hierarchy implicit in that text." (internal footnote omitted)); Michael A. Namikas, Comment, *Up in Smoke?: The Last in Time Rule and* Empresa Cubana Del Tabaco v. Culbro Corp., 22 ST. JOHN'S J. LEGAL COMMENT. 643, 645 (2008) ("Rarely questioned by the courts themselves, the Last in Time rule has become outdated precedent in a global society increasingly reliant on multilateral treaties."); Kesavan, *supra* note 124, at 1485 ("This Article explores the constitutional relationship between statutes and treaties and debunks the accepted judicial doctrine of . . . the last-in-time rule."); *but see* Ku, *supra* note 5, at 326 ("This article offers the first comprehensive scholarly defense of the last-in-time rule.").

enforcement of that statute unless it is the more recent of the two.[130]

D. The Dynamic Last-in-Time Rule

This Article proposes a "dynamic last-in-time rule," envisioned as a subspecies of the last-in-time rule that applies only in appropriate cases involving an irreconcilable domestic conflict between a statute and a dynamic treaty. In this context, a dynamic treaty regime has two components: (1) substantive provisions defining the international obligations of the parties; and (2) dynamic provisions allowing the parties to submit treaty disputes to an international tribunal for voluntary, binding resolution. When the Executive acts under the dynamic provisions of such a treaty by submitting a dispute to the international tribunal, the resulting judgment should trump an earlier, conflicting statute, provided no other domestic rule of treaty interpretation intervenes. The dynamic last-in-time rule may remove one of the many hurdles litigants face when they seek to enforce an international tribunal's judgment domestically.

III. INTERESTS SERVED BY THE LEGAL REGIME GOVERNING THE DOMESTIC JUDICIAL ENFORCEMENT OF TREATY OBLIGATIONS

Evaluating the dynamic last-in-time rule requires knowledge of the basic contours of the doctrines described above and further requires an intimate understanding of the interests those doctrines vindicate. These interests have evolved organically as the doctrines have evolved and are as interrelated as the issues the doctrines are designed to resolve.

The first interest underlying the last-in-time rule and its sister doctrines is the protection of the nation's absolute sovereign power to govern its internal affairs and conduct its foreign relations. From an international perspective, the United States is a single nation endowed with all the powers attributed to any other sovereign nation. But the Constitution divides the authority to exercise this unitary sovereignty among three branches of government and endows the political departments with authority in the realm of foreign affairs. Thus, the second interest served by the rules is the preservation of the political branches' constitutional authority to exercise the nation's unitary sovereign power. The third and final interest is preserving the judiciary's constitutional role in cases and controversies that have foreign affairs implications. This role includes interpreting treaties, often in the first instance, enforcing self-executing treaty provisions, and, in appropriate circumstances, giving effect to the sovereign will of the political branches.

130. *See, e.g.*, Horner v. United States, 143 U.S. 577 (1891) (rejecting habeas petitioner's argument that statute criminalizing lottery by mail was invalid because it conflicted with an earlier treaty).

A. Incorporating International Law's Concept of Absolute Sovereignty

When faced with a conflict between a treaty and a statute, a domestic court begins with the Constitution's Supremacy Clause,[131] which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[132] By virtue of this provision, "treaties [are] part of our municipal law," as are the Constitution and duly enacted statutes.[133] This provision of the Constitution is exceptional. It sets the United States apart from most other nations which generally do not view treaties as part of their domestic or municipal law for any purpose.[134]

But the Supremacy Clause is insufficient alone to resolve treaty-statute conflicts because the status of treaties—along with the Constitution and duly-enacted statutes—as part of our municipal law, says nothing of the hierarchy of authority among these three types of law. Courts have long held, though not without some criticism, that the Supremacy Clause "has not assigned [the listed types of law] any particular degree of authority in our municipal law, nor declared whether laws so enacted shall or shall not be paramount to laws otherwise enacted."[135] Indeed, "[n]o such declaration is made, even in respect to the constitution itself."[136] Courts have accordingly concluded that "[t]he effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution."[137]

To fill the Supremacy Clause's silence, courts have used a comparative analysis of the fundamental nature of each type of law listed in that provision.[138] At the heart of this analysis is the concept that underlies and gives

131. *See, e.g.*, Taylor v. Morton, 23 F. Cas. 784, 785 (beginning analysis of conflict between treaty and statute with Supremacy Clause).

132. U.S. CONST. art. VI, § 2.

133. *Taylor*, 23 F. Cas. at 785.

134. HENKIN, *supra* note 89, at 198; *see* United States v. Rauscher, 119 U.S. 407, 417 (1886).

135. *Taylor*, 23 F. Cas. at 785.

136. *Id.*

137. The Cherokee Tobacco, (*Cherokee Tobacco*) 78 U.S. 616, 621 (1870); *see also* Chae Chan Ping v. U.S. (*Chinese Exclusion*), 130 U.S. 581, 600 (1888) ("By the [C]onstitution, laws made in pursuance thereof, and treaties made under the authority of the United States, are both declared to be supreme law of the land, and no paramount authority is given to one over the other."); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("Both [treaties and statutes] are declared by [the Constitution] to be the supreme law of the land, and no superior efficacy is given to either over the other.").

138. *E.g.*, *Taylor*, 23 F. Cas. at 785 (explaining that the first courts to face a claim of conflict between a statute and the Constitution decided which was paramount by examining the "nature and objects of each species of law, the authority from which each emanated, and the consequences of allowing or denying the paramount effect of" one over the other).

force and authority to law: sovereignty.[139] Although sovereignty is a complex and controversial concept, its essence is "[t]he supreme, absolute, and uncontrollable power by which any independent state is governed."[140] However, the American constitutional order puts an important twist on this traditional concept, vesting sovereignty in the people while authorizing a republican government to exercise sovereign power within the limits established by the people and enshrined in the Constitution.[141] Viewed from this perspective, it emerges that any conflict between the Constitution and a treaty or statute must be resolved in favor of the Constitution.[142] After all, the Constitution grants, defines, and limits the sovereign authority of the United States government, while treaties and statutes are tools the Constitution provides to enable the government to exercise that sovereign authority. Where a judge is faced with a conflict between "one command derived from the Constitution itself" and another command derived "from some other legal source, the supremacy clause and the Constitution's general structure of popular sovereignty dictate[] a clear answer: The Constitution . . . always trump[s]."[143]

The inquiry is more difficult when the Constitution is not involved; however, it is still relatively straightforward to resolve conflicts between one statute and another. As explained above, a statute is a constitutional device the legislature uses to exercise sovereign authority over domestic affairs. When Congress enacts a statute, it is limited only by the Constitution.[144] Courts have long held that the legislature possesses the authority to repeal statutes, either expressly or by implication, although the latter is disfavored.[145] "[I]n general, power to legislate on a particular subject, includes power to modify and repeal existing laws on that subject, and either substitute new laws in their place, or leave the subject without regulation, in those particulars to which the repealed laws applied."[146] A conflict between two statutes is thus a conflict between two legally equal enactments. And "the judicial rule when dealing with legally

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139. *See, e.g.*, Ku, *supra* note 5, at 335.

140. BLACK'S LAW DICTIONARY 1396 (6th ed. 1990); *see also* PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY THE PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 14 (2007) (defining sovereignty as "the exercise of power by the state").

141. *See* VERKUIL, *supra* note 140, at 14-16; AMAR, *supra* note 15, at 7-8.

142. *E.g.*, *Cherokee Tobacco*, 78 U.S. at 620-21 ("It need hardly be said that a treaty cannot change the constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government.").

143. AMAR, *supra* note 15, at 302; *see Cherokee Tobacco*, 78 U.S. at 620-21.

144. *See, e.g.*, Stephens v. Cherokee Nation, 174 U.S. 445, 486 (1898) ("[T]he United States is a sovereign nation, limited only by its own [C]onstitution." (citing Choctaw Nation v. United States, 119 U.S. 1, 27 (1886))).

145. *E.g.*, Edye v. Robertson (*Head Money Cases*), 112 U.S. 580, 599 (1884) (A statute "may be repealed or modified by an act of a later date"); Ku, *supra* note 5, at 384-85.

146. Taylor v. Morton, 23 F. Cas. 784, 785 (Curtis, Circuit Justice, C.C. D. Mass. 1855) (No. 13,799).

equal enactments is that the more recent enactment prevails over the earlier one."[147]

When a conflict arises between a treaty and a statute, "[i]t is only by a similar course of inquiry that we can determine" which is paramount.[148] Such conflicts are more challenging, however, because treaties have a dual nature, consisting of a dominant international component and a more narrow—and potentially nonexistent—domestic component.[149] While statutes regulate domestic affairs and rarely have international effect, treaties regulate international affairs but can also have domestic effects. This dichotomy finds its clearest expression in the doctrine of self-execution which courts use to differentiate between the international and domestic components of particular treaties. The doctrine is based on the judicial judgment that while "[a] treaty is primarily a compact between [or among] independent nations," enforced exclusively by "the interest and honor of the governments . . . part[y] to it . . . . [A] treaty may also contain provisions" that "partake of the nature of municipal law" by "confer[ring] certain rights upon the [contracting nations'] citizens or subjects" and may be enforced "between private parties in [those nations'] courts."[150]

The fundamental nature of a treaty's domestic component is the key to resolving a statute-treaty conflict in domestic litigation, and courts have long viewed this component as legally equal to a statute. Perhaps the least controversial manifestation of this principle holds that a statute implementing a treaty, like any other statute, "will be open to future repeal or amendment."[151] With respect to a treaty provision that has domestic effect by virtue of the doctrine of self-execution, however, courts have more controversially held that there is nothing "in its essential character, or in the branches of the government by which the treaty is made, which gives it . . . superior sanctity"[152] over a statute. The domestic component of a treaty is, legally speaking, just like a

147. AMAR, *supra* note 15, at 303; *cf.* Ku, *supra* note 5, at 326 ("[B]y giving treaties the status of domestic law, the drafters of the Constitution presumed that the *priores contrarias* doctrine would apply to conflicts between treaties and other forms of enacted law.").

148. *Taylor*, 23 F. Cas. at 785.

149. *See* Curtis A. Bradley, *Self-Execution and Treaty Duality* 2 (Duke Law Sch. Faculty Scholarship Series, Paper No. 162, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1340651.

150. *Head Money Cases*, 112 U.S. at 598; *see also, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."); Chae Chan Ping v. U.S. (*Chinese Exclusion*), 130 U.S. 581, 600 (1889) ("A treaty . . . is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect."); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("A treaty is *primarily* a contract between two or more independent nations, and is so regarded by writers on public law." (emphasis added)).

151. *Chinese Exclusion*, 130 U.S. at 600.

152. *Head Money Cases*, 112 U.S. at 599.

statute: it is a constitutional device used to exercise sovereign authority over domestic affairs. Accordingly, "the rule which [a self-executing treaty] gives may be displaced by the legislative power, at its pleasure."[153] If there is any conflict, whether between one statute and another or between a statute and a treaty, "the last expression of the sovereign will must control."[154]

The last-in-time rule and its sister doctrines are primarily concerned with the domestic aspect of absolute sovereign power. Here, courts have long adhered to the traditional international law principle that "'[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.'"[155] A "foreign sovereign" party to a treaty with the United States "has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done, is, exclusively, for the consideration of the United States."[156] The United States may enter into a treaty and thereby undertake an international obligation that bears on the nation's domestic affairs. But such a treaty does not grant a foreign government "any right to inquire" as to "[w]hether the treaty shall itself be the rule of action of the people as well as the government, [i.e. is self-executing, and] whether the power to enforce and apply it shall reside in one department [] or another."[157] That is, a treaty may oblige the United States to order its internal affairs in a particular fashion, but it cannot strip the government of its absolute sovereign power to do otherwise.

The nation's absolute sovereign power to order its internal affairs and conduct foreign relations should not be—but often is—confused with power to modify, suspend, or terminate the nation's international obligations. What a nation *can* do is not necessarily the same as what it *should* do. Thus it is wrong "to say, as is often said, that Congress can 'repeal' a treaty" by enacting a conflicting statute.[158] In such circumstances, "Congress is not acting upon the treaty."[159] It is exercising its power to "legislate[] without regard to the international obligations of the United States."[160] The resulting "legislation does not affect the validity of the treaty and its continuing international obligations for the United States, but it compels the United States to be in default."[161] The offending statute is essentially a constitutional device used by the legislature to exercise "the power—though not the right—of a state party to break a

153. *Taylor*, 23 F. Cas. at 785.

154. *Chinese Exclusion*, 130 U.S. at 600.

155. *Id.* at 604 (quoting The Schooner Exchange v. McFaddon & Others, 11 U.S. 116 (1812)).

156. *Taylor*, 23 F. Cas. at 785.

157. *Id.*

158. HENKIN, *supra* note 89, at 209.

159. *Id.*

160. *Id.*

161. *Id.* at 209-10.

treaty."[162] A domestic court will give legal effect to such an exercise of the nation's absolute sovereign power, but the United States remains liable for breaching its obligations under international law.

B. Giving Effect to the Political Departments' Exercise of the Nation's Constitutionally Separated Sovereign Power

The absolute sovereignty rationale cannot alone justify the domestic legal regime governing the judicial enforcement of treaty-based rules. Although international law views the United States as a unitary sovereign nation, the country is not, as a matter of domestic constitutional design, controlled by a unitary political authority. A crucial component of this separation of powers is the Constitution's grant of authority to the political branches to exercise the nation's sovereign power in foreign affairs. As Professor Louis Henkin has explained, "[i]n the governance of foreign relations, . . . the political authority of the United States is lodged in the Executive and Congress, and one or the other, surely the two together, can do on behalf of the United States whatever any other sovereign nation can do."[163] The legal regime governing the domestic enforcement of U.S. treaty obligations preserves and promotes this important part of the constitutional design.[164]

For foreign affairs and international law purposes, the United States is a unitary sovereign nation controlled by the federal government.[165] As the Supreme Court has explained, "[t]he United States, in their relation to foreign countries and their subjects or citizens are one nation,"[166] and for such purposes, "her government is complete" and "competent."[167] From this perspective, the federal government operates as the government of a single sovereign nation and accordingly "'is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other

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162. *Id.* at 211-12.

163. HENKIN, *supra* note 89, at 26. The converse is examined in the next section, *see infra* at Part III.C., is that the judiciary does not share in this sovereign political power, but may be called upon to give effect to the political decisions of the coordinate branches. *See, e.g.*, Botiller v. Dominguez, 130 U.S. 238, 247 (1889) (explaining that the 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").

164. *See generally* Bradley, *supra* note 111, at 484.

165. *See, e.g.*, Henkin, *International Law as Law*, *supra* note 97, at 1559 (explaining that "the United States . . . [is] the relevant national entity for international purposes," such that "[q]uestions of international law engage[] the responsibility of the United States towards other nations"); *cf.* THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (declaring the "United Colonies . . . [as] Free and Independent States . . . have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do").

166. Chae Chan Ping v. U.S. (*Chinese Exclusion*), 130 U.S. 581, 604 (1889).

167. *Id.* at 604-05 (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 413 (1821)).

nations.'"[168]

Domestically, however, our Constitution divides governmental authority among three branches of government, and the courts have long held that authority to exercise the raw sovereign power of international relations is vested in the political branches.[169] Thus, "[t]he powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, [which] are all sovereign powers," are vested in the executive and legislative branches and "restricted in their exercise only by the [C]onstitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."[170]

The conclusion that the raw sovereign power of international relations is vested in the political branches is grounded in a traditional understanding of the nature of sovereignty. From this perspective, questions regarding one sovereign's obligation to another sovereign "belong[] to diplomacy and legislation, and not to the administration of existing laws."[171] Thus, the authority to answer them "has not been confided to the judiciary, which has no suitable means to execute [such authority], but to the executive and legislative departments of the government."[172] In short, most issues raised by treaties—including questions of how to give effect to their obligations domestically and whether to abrogate their provisions— rest upon "the political department of the Government."[173] "If a wrong has been done [under the terms of a particular treaty,] the power of redress is with Congress, not with the judiciary, and [Congress], upon being applied to, it is to be presumed, will promptly give the proper relief."[174] If a foreign nation appeals to Congress but is dissatisfied with the response it receives, that nation may turn to the Executive for further relief or "take such other measures" in the realm of foreign relations "as it may deem essential for the protection of its interests."[175] Regardless of the path taken,

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168. *Chinese Exclusion*, 130 U.S. at 605 (quoting Knox v. Lee, 79 U.S. (12 Wall.) 457, 555 (1870)); *see also Rauscher*, 119 U.S. at 414 (explaining that exclusive power over the international affairs of the United States "has undoubtedly been conferred upon the federal government").

169. *E.g.*, Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative - 'the political' - departments.").

170. *Chinese Exclusion*, 130 U.S. at 604.

171. *Id.* at 602 (citing Taylor v. Morton, 23 F. Cas. 784, 787 (Curtis, Circuit Justice, C.C.D. Mass. 1855)).

172. *Id.*

173. Barker v. Harvey, 181 U.S. 481, 492 (1901); *see also* The Cherokee Tobacco, 78 U.S. 616, 621 (1871) ("The consequences [of treaty abrogation] give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance.").

174. *Cherokee Tobacco*, 78 U.S. at 621.

175. Whitney v. Robertson, 124 U.S. 190, 194 (1888); *see also Chinese Exclusion*, 130 U.S.

"[t]he courts can afford no redress."[176]

This constitutional allocation of authority serves an important practical purpose, recognizing that the political branches possess special competence to act in the best interests of the nation in the realm of foreign affairs. As the Supreme Court noted in the *Chinese Exclusion Case*, "[u]nexpected events may call for a change in the policy of the country."[177] The political departments maintain contact with foreign governments, have access to force, gather foreign intelligence, and can respond timely to changing political circumstances. In contrast, federal courts have the opportunity to act only in cases and controversies properly and voluntarily brought before them by interested litigants, are obligated to enforce existing substantive law, have a relatively narrow selection of remedies available, and must rely on the political branches to enforce their edicts.

Under international law, sovereign nations have the power (and, in some cases, the authority) to respond to changing political circumstances in ways the judiciary is ill equipped to handle. For example, another nation's violation of a treaty "may require corresponding action on our [nation's] part," for international law provides that "[w]hen a reciprocal engagement is not carried out by one of the contracting parties, the other may also decline to keep the corresponding engagement."[178] Because the judiciary "has no suitable means to exercise" this sovereign power,[179] courts have consistently held that "[t]he validity of [a] legislative release from the stipulations of [a] treat[y is], of course, not a matter for judicial cognizance."[180] Indeed, courts have historically been so reluctant to inhibit the sovereign's latitude to respond in such situations that they have held "[t]he question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts."[181] Such determinations are political questions.[182] As Professor Julian Ku has recognized, this "rule also shifts control over how and when to give treaties domestic effect to the more politically accountable branches."[183]

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at 606 ("The Government possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers.").

176. *Whitney*, 124 U.S. at 194; *see also* Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) ("[A]ll these matters . . . [are] solely within the domain of the legislative authority, and its action is conclusive upon the courts.").

177. *Chinese Exclusion*,130 U.S. at 601.

178. *Id.*; *see also* HENKIN, *supra* note 89, at 854.

179. *Taylor v. Morton*, 23 F. Cas. 784, 787 (Curtis, Circuit Justice, C.C. D. Mass. 1855) (No. 13,799); *see also Chinese Exclusion*, 130 U.S. at 602.

180. *Chinese Exclusion*, 130 U.S. at 602.

181. *Id.*

182. *See* Clark v. Allen, 331 U.S. 503, 514 (1947) ("[T]he question whether a state is in a position to perform its treaty obligations is essentially a political question.").

183. Ku, *supra* note 5, at 327.

The courts' oft-expressed concern with "due interdepartmental respect" when confronted with conflicts between treaties and statutes is a manifestation of the judiciary's fidelity to the Constitution's allocation to the political departments of raw sovereign power. This judicial balancing act finds its clearest expression in the *Charming Betsy* canon, which presumes that the political branches act in accord with international obligations while simultaneously recognizing that they are constitutionally authorized to exercise the nation's raw sovereign power to do otherwise.[184] In *Chew Heong v. U.S.*, the Court acknowledged that "the honor of the government and people of the United States is" at stake when the judiciary is faced with a question of conflict between a statute and a self-executing treaty.[185] "And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were [the court] to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted."[186]

This "unwilling[ness] to impute to the political branches an intent to abrogate a treaty without following [the] appropriate procedures" persists to modern times.[187] Sovereignty includes power to abrogate treaty obligations, but courts demand evidence of intent to exercise that power before enforcing a statute that abrogates a treaty obligation.[188] This cautious approach recognizes that international security and commerce require each nation to abide by its international obligations with the "most scrupulous good faith."[189] The *Charming Betsy* canon ensures courts err on the side of continuing fidelity to international obligations if there is ambiguity regarding Congress's intent. This ensures abrogation is not inadvertent[190] and also increases the likelihood that

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184. *See, e.g.*, United States v. Payne, 264 U.S. 446, 448 (1924) ("[W]hile [a statute], being later, must control in case of conflict, it should be harmonized with the letter and spirit of the treaty, so far as that reasonably can be done, since an intention to alter, and pro tanto abrogate, the treaty, is not to be lightly attributed to Congress."); United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902) ("[T]he purpose by statute to abrogate a treaty . . . or the purpose by treaty to supersede . . . an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty.").

185. Chew Heong v. United States, 112 U.S. 536, 540 (1884).

186. *Id.*

187. *Trans World Airlines*, 466 U.S. at 253 (1984).

188. *See id.* at 252; *see also* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (explaining while Congress is under "a moral obligation . . . to act in good faith in performing the [treaty] stipulations entered into on its behalf," the reality is that "the legislative power might pass laws in conflict with treaties," and "it [h]as never [been] doubted that the *power* to abrogate exist[s] in Congress").

189. *See Chew Heong*, 112 U.S. at 540. The Chinese reaction to the Court's decision in the *Chinese Exclusion Case* was "incredulous and angry," suggesting the harm to international relations that can be wrought when the Court interprets the law to abrogate existing treaty commitments. *See* Vagts, *supra* note 86, at 317-18.

190. *See, e.g., Trans World Airlines*, 466 U.S. at 252 (resisting finding abrogation in part because the repeal of the Par Value Modification Act was "unrelated" to the Geneva

Congress has considered if it is in the nation's best interests to abrogate a particular treaty obligation.

When a conflict between a treaty and a statute cannot be avoided, the last-in-time rule discharges the "duty of the courts . . . to construe and give effect to the latest expression of the sovereign will."[191] This duty vindicates the same robust notion of national sovereignty that underlies the Court's interpretation of the Supremacy Clause.[192] The point was vehemently articulated in *The Chinese Exclusion Case*:

> [I]f the power mentioned is vested in congress, any reflection upon its motives, or the motives of any of its members in exercising it, would be entirely uncalled for. This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct.[193]

The Court hastened to add that it did "not mean to intimate that the moral aspects of legislative acts may not be proper subjects of consideration."[194] Rather, it meant that such consideration was to take place in the "proper times and places, before the public, in the halls of congress, and in all the modes by which the public mind can be influenced."[195] In the Court's view, abuses of the foreign affairs power can be prevented best through the political process. In any event, "the province of the courts is to pass upon the validity of laws, not to make them, and when their validity is established, to declare their meaning and apply their provisions. All else lies beyond their domain."[196]

Interdepartmental respect also leads courts to give considerable weight to the political branches' treaty interpretations.[197] Thus, it has been observed that judicial deference to the Executive's position "is the single best predictor of interpretive outcomes in American treaty cases."[198] Courts also look to Congress's interpretation of a treaty, as revealed by implementing statutes, to resolve any doubt in interpreting a treaty.[199] Indeed, courts give Congress's

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Convention, and Congress had perhaps not been aware of any conflict between domestic law and international obligation).

191. Whitney v. Robertson, 124 U.S. 190, 195 (1888).

192. *See* The Cherokee Tobacco, 78 U.S. 616, 620-21 (1870).

193. Chae Chan Ping v. U.S. (*Chinese Exclusion*), 130 U.S. 581, 602-03 (1889).

194. *Id.* at 603.

195. *Id.*

196. *Id.*

197. *E.g.*, Charlton v. Kelly, 229 U.S. 447, 468 (1913) ("A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.").

198. David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1015 (1994).

199. *See, e.g.*, United States v. Rauscher, 119 U.S. 407, 423 (1886) (reasoning that "[i]f there should remain any doubt upon this construction of the treaty itself, the language of two

judgment so much weight that a change in an implementing statute may warrant a change in the courts' interpretations of the underlying treaty. For example, in *Lem Moon Sing v. United States*,[200] the Court held that a Chinese national had no right to reenter the United States, notwithstanding a previous case, *Lau Ow Bew v. United States*,[201] which held to the contrary.[202] The Court explained that a change in controlling statutes required the reversal. "[B]y the statutes in force when [*Lau Ow Bew*] was decided, the action of executive officers charged with the duty of enforcing the Chinese Exclusion Act . . . could be reached and controlled by the courts when necessary for the protection of rights given or secured by some statute or treaty relating to Chinese."[203] But the law was subsequently amended to make the executive's decision final and unappealable,[204] such that "the authority of the courts to review the decision of the executive officers was taken away."[205] The Court concluded that, to the extent that this procedural change resulted in a deprivation of "any right given by previous laws or treaties to reenter the country, the authority of Congress to do even that cannot be questioned."[206]

A final consequence of due interdepartmental respect is judicial deference to the political branches' determinations regarding how to allocate their concurrent authority[207] to exercise the nation's sovereign power.[208] The sovereign power of the United States is constitutionally allocated to *both* the

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[A]cts of [C]ongress [implementing the treaty], . . . must set this question [to] rest"); *see also id.* at 424 (explaining an implementing statute "is undoubtedly a congressional construction of the purpose and meaning of extradition treaties such as the one we have under consideration; and, whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons" subject to the treaty).

200. Lem Moon Sing v. United States, 158 U.S. 538 (1894).

201. Lau Ow Bew v. United States, 144 U.S. 47, 47 (1892).

202. *See Lem Moon Sing*, 158 U.S. at 548.

203. *Id.*

204. *See id.* at 548-49.

205. *Id.* at 549.

206. *Id.* The Court nonetheless noted that "it is the duty of the courts not to construe an act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction." *Id.* This case is an excellent example of how the three doctrines work together. Implementing statutes, which are required by the doctrine of self-executive, take center stage in the Courts' interpretation of the treaty, which is informed by the *Charming Betsy* canon, and an unavoidable conflict between the statute and treaty is resolved by the last-in-time rule's preservation of the Congress' sovereign authority. *See id.*

207. *See, e.g.*, Jack M. Goldklang, Correspondence, The President, The Congress, and Executive Agreements, 24 VA. J. INT'L L. 755, 756 (1984); *see generally* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983) (recognizing that Congress has the implied power to legislate in foreign affairs).

208. *See, e.g.*, Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the* Chadha *Case*, 79 AM. J. INT'L L. 912 (1985) (explaining that courts "often abdicate [their role as umpires] when the dispute concerns interpretation of a foreign relations law[,]" thereby effectively giving the Execuive the last word in interpreting "laws intended by Congress to authorize, but also to limit, executive discretion in the conduct of . . . U.S. foreign policy").

legislative and executive branches of government.[209] Where the political branches decide on a method for dividing responsibility for certain sovereign decisions, the courts have historically respected such arrangements. For example, in the *Chinese Exclusion* cases, the Court explained it is the "inherent and inalienable right of every sovereign and independent nation" to exercise absolute control over immigration and "that the power of [C]ongress to expel, [or] . . . exclude, aliens or any class of aliens from the country may be exercised entirely through executive officers."[210] Where a statute conveys upon the Executive the final authority to exercise such sovereign power, courts conclude the "question [of what the underlying treaty requires] has been constitutionally committed by Congress to named officers of the executive department of the government for final determination."[211]

C. Judicial Authority to Interpret the Law and Give Effect to the Latest Expression of the Sovereign Will

"It is emphatically the province and duty of the judicial department to say what the law is,"[212] and the Constitution explicitly provides "[t]hat 'judicial Power . . . extend[s] to . . . Treaties.'"[213] As the Supreme Court has recently explained, "[i]f treaties are to be given effect as federal law under our legal system," the judicial power and duty must include "determining their meaning as a matter of federal law."[214] The Supremacy Clause reinforces Article III's extension of the judicial power to treaties. Because "[t]he constitution of the United States declares a treaty to be the supreme law of the land," a treaty's "obligation on the courts of the United States must be admitted."[215]

The judiciary's constitutional authority "to say what the law is" with respect to treaties requires courts to interpret treaties, enforce self-executing provisions, and notice and give effect to shifts in the nation's treaty obligations. The first of these, the authority to interpret treaties, has long been established[216] and gives rise to the doctrine of self-execution and the *Charming Betsy* canon, both of which are essentially rules of construction. As with each manifestation of judicial authority respecting treaties, treaty interpretation implicates both

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209. *See infra* at Part III.C.

210. Wong Wing v. United States, 163 U.S. 228, 231 (1896).

211. *Lem Moon Sing*, 158 U.S. at 550.

212. Marbury v. Madison, 1 Cranch 137, 177 (1803).

213. Sanchez-Llamas v. Oregon, 548 U.S. 331, 353 (2005) (quoting U.S. CONST. art. III, § 2).

214. *Id.* at 353-54 (citing Williams v. Taylor, 529 U.S. 362, 378-79 (2000) ("At the core of [the judicial] power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law.")).

215. United States v. Schooner Peggy, 5 U.S. 103, 109 (1801).

216. *See, e.g.*, Johnson v. Browne, 205 U.S. 309, 317 (1907) (observing it is the court's "duty to determine" the application of a treaty relied upon by a litigant).

power and duty. The power to say what a treaty means comes with the obligation to enforce the treaty strictly according to its terms. This prevents the courts from usurping the political branches' sovereign authority. The Supreme Court has accordingly held that a treaty remedy "must lie, if anywhere, in the treaty itself."[217] To grant a different remedy than that found in the treaty "would in effect be supplementing th[e] terms [of the treaty] by enlarging the obligations of the United States under" it.[218] "This is entirely inconsistent with the judicial function,"[219] because it usurps the sovereign power of the political departments.[220] A less extreme example of the obligation accompanying the judiciary's power to interpret treaties is the courts' respect for the interpretations of the coordinate branches.[221]

The judicial authority to enforce self-executing provisions, like the authority to interpret treaties, conveys both power and duty. Having interpreted a treaty to contain a self-executing provision, a court is duty-bound to enforce it as if it were "an act of [C]ongress."[222] To ignore a treaty in such circumstances "would be a direct infraction of that law, and of consequence, improper."[223] This aspect of obligation is grounded in the same separation of powers concerns discussed above with respect to the judicial authority to interpret treaties. This is evident in the courts' recognition that they have the duty to enforce self-executing provisions even with respect to treaty provisions that negatively affect the rights of U.S. citizens. For "if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider

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217. *Sanchez-Llamas*, 548 U.S. at 346.

218. *Id.*

219. *Id.* at 346-47.

220. *Cf.* The Amiable Isabella, 19 U.S. 1, 71 (1821) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.").

221. *See Sanchez-Llamas*, 548 U.S. at 355 ("In addition, '[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.'" (quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)); *See also* Johnson v. Browne, 205 U.S 309, 317-18 (1907) (explaining that statutes implementing treaties were "undoubtedly a Congressional construction of the purpose and meaning of [such] treaties, . . . and, whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons" subject to the treaty. (quoting United States v. Rauscher, 119 U.S. 407, 423 (1886))).

222. United States v. *Schooner Peggy*, 5 U.S. 103, 110 ("But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress . . . ."); *see also Sanchez-Llamas*, 548 U.S. at 347 ("[W]here a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law."); *see generally Rauscher*, 119 U.S. at 419 (explaining that "the courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of . . . treat[ies]," and must therefore also "inquire, in the first place . . . into the true construction of the treaty.").

223. Schooner Peggy, 5 U.S. at 110.

whether it be a case proper for compensation."[224] "In such a case the court must decide according to existing laws," leaving questions of prudence and equity to the political branches.[225]

Duty overwhelms power in regards to the judicial obligation to take notice of and given effect to shifts in U.S. treaty relations. An example is *Schooner Peggy*, a Supreme Court case in which the lower court held the seizure of a French vessel lawful, but the United States concluded a treaty with France requiring restoration of the vessel while the case was pending on appeal to the Supreme Court.[226] The Court rejected an argument that it could "take no notice of the" treaty and "only enquire whether the sentence was erroneous when delivered,"[227] explaining that while treaty enforcement may often be the province of the Executive, the judiciary has both the power and duty to enforce self-executing treaty provisions in all cases in which such provisions determine the rights of the parties before the court.[228] "[I]n mere private cases between individuals," a court may take notice of an intervening change in the law, but "will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties."[229] But the calculus is different when the intervening change is to treaty obligations. Here, the judiciary is constitutionally obligated to effectuate to the sovereign's judgment that individual interests should be "sacrificed for national purposes."[230] This obligation also animates the *Charming Betsy* canon, ensuring fidelity to international obligations as the general rule, while giving effect to a sovereign judgment to the contrary.[231]

The most extreme outgrowth of the judiciary's duty to take notice of and give effect to shifts in the nation's treaty relations is the last-in-time rule.[232] This rule draws an exacting boundary between the judiciary's authority to say what the law is and the political departments' authority to exercise the nation's sovereign power in the realm of international relations:

> If the act of congress, because it is the later law, must prescribe the rule by which this case is to be determined, we do not inquire whether it proceeds upon a just interpretation of the treaty, or an accurate knowledge of the facts of likeness or

224. *Id.*
225. *Id.*
226. *Id.* at 107.
227. *Id.* at 109.
228. *See id.* at 109-10.
229. *Id.* at 110.
230. *Id.*
231. *See, e.g.*, Bartram v. Robertson, 15 F. 212, 215 (C.C.S.D.N.Y. 1883) ("Grant that every intendment should be implied in favor of the observance of treaty obligations, here is an explicit enactment which leaves no room for implication.").
232. *See, e.g., id.* ("The judiciary must take the legislation as it finds it. It may interpret and construe, when the language of legislation permits, but here its powers and duty end.").

> unlikeness of the articles, or whether it was an accidental or purposed departure from the treaty; and if the latter, whether the reasons for that departure are such as commend themselves to the just judgment of mankind. It is sufficient that the law is so written.[233]

Where applying the *Charming Betsy* canon reveals an irreconcilable conflict between a treaty and an act of Congress, the Court is "bound to follow the statutory enactments of its own government."[234] In such cases, objections to an abrogating statute that "relate, not to the power of Congress to pass the act, but to the expediency or justice of the measure, of which Congress, and not the courts, . . . are the sole judges."[235]

The core of the last-in-time rule is "[t]he duty of the courts . . . to construe and give effect to the latest expression of the sovereign will."[236] The rule releases the exercise of raw sovereign power in international relations from restraint or regulation by domestic law.[237] The point is not to ignore the profound moral questions raised by a decision to abrogate a treaty but rather to give effect to the Constitution's commitment to the political branches of the authority to determine such questions.[238] When faced with a conflict between a statute and a treaty, the judiciary's role is "to ascertain the meaning and result

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233. Taylor v. Morton, 23 F. Cas. 784, 785 (Curtis, Circuit Justice, C.C. D. Mass. 1855) (No. 13,799).

234. Botiller v. Dominguez, 130 U.S. 238, 247 (1889); *see also* Florida v. Furman, 180 U.S. 402, 437 (1900) ("[S]o far as [an] act of Congress was alleged to be in conflict with [a] treaty . . . that was a matter in which the court was bound to follow the statutory enactments of its own government."); *see generally* The Cherokee Tobacco, 78 U.S. 616, 620 (1870) (explaining that "[w]hen a statute is clear and imperative, . . . [i]t is the duty of courts to execute it," irrespective of whether it conflicts with earlier treaty provision).

235. Edye v. Robertson (*Head Money Cases*), 112 U.S. 580, 599 (1884); *see also* Stephens v. Cherokee Nation, 174 U.S. 445, 483-84 (1898) ("[I]t is 'well settled that an act of congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the government.'" (quoting Thomas v. Gay, 169 U.S. 264, 271 (1898))).

236. Whitney v. Robertson, 124 U.S. 190, 195 (1888); *see also* Chae Chan Ping v. U.S. (*Chinese Exclusion*), 130 U.S. 581, 600 (1889) (explaining the function of the last-in-time rule as ensuring that "the last expression of the sovereign will . . . control[s]").

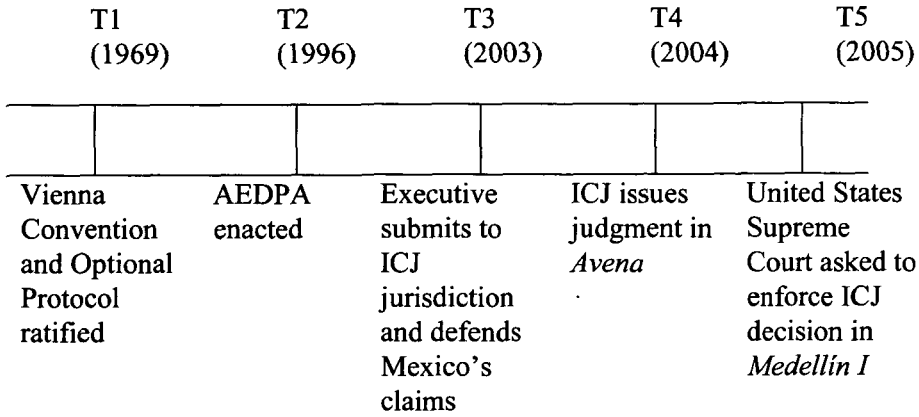
237. *See, e.g.*, *Botiller*, 130 U.S. at 247 ("This court . . . has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard."); *see also Chinese Exclusion*, 130 U.S. at 602-03 ("This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct.").

238. *See Chinese Exclusion*, 130 U.S at 603; *see also* United States v. Lee Yen Tai, 185 U.S. 213, 222 (1902) ("A statute enacted by Congress expresses the will of the people of the United States in the most solemn form. If not repugnant to the Constitution, it . . . should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to . . . be enforced.").

of several laws, adopted at different times," and give effect to "the latest expression of the will of the law-making power" (i.e., the political branches).[239]

IV. THE DYNAMIC LAST-IN-TIME RULE

Faced with a dispute over the domestic enforcement of the nation's obligations under a dynamic treaty regime, a court would be more faithful to established doctrine by applying the last-in-time rule in a similarly dynamic fashion, rather than reflexively adhering to the traditional, static version of the rule. Under this "dynamic last-in-time rule," if the United States has consented to the jurisdiction of an international tribunal pursuant to the terms of a duly ratified, dynamic treaty, and the nation's obligations as determined by the tribunal conflict irreconcilably with a statute, the court should generally refer to the date of the tribunal's judgment for purposes of the last-in time rule. This proposition is easier to evaluate when keeping in mind the dynamic conflict presented in *Medellín I*:



The question is what the court should do at T5. More specifically, the question is whether the Executive's decision at T3 is a legally cognizable act under the last-in-time rule. Under the dynamic last-in-time rule, the answer is "yes."

Applied in appropriate circumstances, the dynamic last-in-time rule best vindicates the purposes and policies underlying the last-in-time rule and its sister doctrines of self-execution and the *Charming Betsy* canon. It protects the nation's absolute sovereignty by giving effect to the political branches' decision

239. Bartram v. Robertson, 15 F. 212, 214 (C.C.S.D.N.Y. 1883); *see also* Johnson v. Browne, 205 U.S. 309, 318 (1907) (explaining that judicial observance of congressional treaty interpretations embodied in statutes has been justified "upon the . . . ground that [such] sections clearly manifest the will of the political department of the government."); *See also Chinese Exclusion*, 130 U.S. at 603 ("When once it is established that congress possesses the power to pass an act, our province ends with its construction and its application to cases as they are presented for determination.").

to use a modern foreign affairs device (i.e., a dynamic treaty regime) to govern the nation's international obligations. At the same time, it minimizes conflict between domestic law and the nation's international obligations, thereby reinforcing the good international reputation of the United States. It constrains courts from intruding upon the political branches' exercise of their constitutionally granted competence and authority in the realm of foreign affairs, thus vindicating principles central to the separation of powers. Finally, it enables courts to do their "duty . . . to construe and give effect to the latest expression of the sovereign will."[240]

The dynamic last-in-time rule is not a radical theory, as evidenced by the circumstances in which its application would *not* be appropriate. Indeed, T5 in the *Medellín I* example presents precisely such circumstances. The last-in-time rule—dynamic or otherwise—is simply one component of a complex regime governing the domestic interpretation and enforcement of treaty obligations.[241] Before a litigant like Medellín can establish a treaty-based defense to a domestic statute such as AEDPA, he must show that the international obligation they seek to enforce is self-executing and in irreconcilable conflict with the statute. Even then, he may be thwarted by a still more recent expression of the sovereign will when, for example, Congress passes a new abrogating statute.

A. Applying the Dynamic Last-in-Time Rule

The dynamic last-in-time rule applies only in cases involving an irreconcilable domestic conflict between a statute and a *dynamic* treaty obligation. A dynamic treaty has two components. One consists of substantive international obligations, while the other effectuates a domestic allocation of international sovereign power between the political branches.[242] This domestic allocation lends the treaty its dynamic character because it authorizes the Executive to submit treaty disputes to an international tribunal for binding resolution. A judgment resulting from the Executive's exercise of this authority is an international obligation of the United States.

This first condition for the dynamic last-in-time rule—that the treaty regime at issue is dynamic—is a matter of treaty interpretation. For example,

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240. *Whitney*, 124 U.S. at 195.

241. *See supra* Part II.C.

242. Most scholarly attention in this realm is focused on the international delegation effected by dynamic treaties, whereas this Article is more interested in the domestic allocation of authority that such an international delegation implicates. *Cf.* Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 535-39 (2004) (examining reasons why international delegations might be desirable, without considering the domestic separation of powers implications of such delegations); *cf.* Julian Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 88 (2000) (examining constitutional problems with international delegations, defined as "the transfer of constitutionally-assigned powers to an international organizations").

the Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the" ICJ.[243] The phrase "compulsory jurisdiction" is a bit misleading because the ICJ has jurisdiction only by consent of the member nations. The Optional Protocol, however, is one means by which a nation can consent to the ICJ's specific jurisdiction. Thus, in the event of a dispute under the Vienna Convention, the Optional Protocol allows "either party [to] bring the dispute before the Court by an application."[244] The parties may agree to settle their dispute another way, but if they cannot do so, the ICJ will hear the parties' arguments and issue a judgment.[245] This judgment "constitutes an international law obligation on the part of" the nations that participated in the proceedings.[246]

The Vienna Convention and its Optional Protocol constitute a dynamic treaty regime because they allocate to the Executive the authority to submit to ICJ proceedings that result in binding international obligations of the United States. The United States was party to the Optional Protocol at the time Mexico initiated proceedings before the ICJ in *Avena*, and the Executive submitted to the proceedings on behalf of the United States. The Constitution's allocation of sovereign power between the executive and the legislature designates the executive as the department with necessary competence to take diplomatic action such as that required to participate in ICJ proceedings.[247] The Executive exercised that authority, and the resulting ICJ judgment constituted an international law obligation of the United States.[248] The treaty regime is thus dynamic.

Even if the treaty regime is dynamic, however, the dynamic last-in-time rule will apply only if the international obligation sought to be enforced is self-executing. As always, self-execution is also a question of interpretation. But in the context of a dynamic treaty dispute, the inquiry is a bit more complex. The relevant substantive provision of the treaty must be self-executing, and so too must the international tribunal's judgment.

In the *Medellín I* example, the dynamic last-in-time rule would not apply because neither the treaty nor the *Avena* judgment is self-executing.[249] Although the Supreme Court has not ruled definitively on the issue, it appears to view the claim that Article 36 of the Vienna Convention is self-executing with skepticism.[250] And even if this substantive provision of the treaty were

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243. Optional Protocol, *supra* note 3.

244. *Id.*

245. *Id.* at art. II, III.

246. Medellín v. Texas (*Medellín II*), 552 U.S. 491, 504 (2008).

247. *See, e.g.*, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) (explaining that the Executive has "the lead role . . . in foreign policy").

248. *Medellín II*, 552 U.S. at 504.

249. More accurately, because the obligations are non-self-executing, one never reaches the last-in-time rule question. *See supra* at Part II.

250. *See, e.g.*, Sanchez-Llamas v. Oregon, 548 U.S. 331, 343 (2006) ("[A]ssum[ing],

self-executing, the ICJ's decision in *Avena* is not, for two reasons.

First, Article 94 of the U.N. Charter, as interpreted by the Supreme Court in *Medellín II*, renders all ICJ judgments non-self-executing.[251] The first section of Article 94 provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party," while the second section establishes recourse to the U.N. Security Council as the exclusive remedy for a member nation's breach of its obligation to comply with an ICJ judgment.[252] The Supreme Court, agreeing with the Executive's position in *Medellín II*, has interpreted these provisions as reserving for the political branches discretion to determine how the United States shall comply with ICJ judgments. Because Article 94 provides that all ICJ judgments are non-self-executing,[253] an ICJ judgment cannot displace a federal statute.

Second, the *Avena* judgment is non-self-executing on its own terms. In *Avena* the ICJ found the United States violated the Vienna Convention and further found "the appropriate reparation in this case consists in the obligation of the United States of America to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences of the Mexican nationals" who were the named subjects of the proceedings.[254] This language belies self-execution because it explicitly gives the United States discretion as to the means of providing review and reconsideration of the foreign nationals' convictions. The Constitution vests the authority to exercise such discretion in the political branches, not the courts.

If not for Article 94, and if the colloquial understanding of *Avena*—that it directed United States courts to provide review and reconsideration of the named nationals' convictions—had been correct, the judgment may have been self-executing. In that event, it would have conflicted irreconcilably with AEDPA, which strictly limits federal court review of state criminal convictions. Then the dynamic last-in-time rule would have been outcome determinative. It would have required the courts to give effect to the latest expression of the sovereign will by enforcing *Avena* notwithstanding the contrary requirements of the previously enacted statute, AEDPA.

As long as dynamic treaty regimes persist, there are sure to be litigants seeking to enforce international tribunal judgments in U.S. courts. For these litigants, the dynamic last-in-time rule may be outcome determinative. And in appropriate cases, courts would better vindicate established constitutional principles by resorting to the dynamic last-in-time rule instead of its traditional, static counterpart.

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without deciding, that Article 36 does grant" individually enforceable rights, and holding that, under the terms of the treaty, the remedy for violation of Article 36 "is a matter of domestic law.").

251. *See Medellín II*, 552 U.S. at 508-11.

252. *See* U. N. Charter art. 94.

253. *Medellín II*, 552 U.S. at 508-09.

254. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena)*, Judgment, 2004 I.C.J. 12, 72, ¶ 153(9) (Mar. 31) (emphasis added).

B. Objections to the Dynamic Last-in-Time Rule

Some might object to the dynamic last-in-time rule because it gives too much weight to the Executive's decision to submit a dispute to the international tribunal.[255] This misses the mark for two reasons. First, a dynamic treaty has two components—it defines the nation's substantive obligations, and it effectuates a domestic allocation of sovereign authority.[256] But in the usual case, the intervening statute conflicts only with the first component, the substantive treaty obligations. Giving legal effect to the Executive's decision to submit a dispute to an international tribunal under the dynamic terms of the treaty does not exclusively give effect to the Executive's action: it simultaneously gives effect to the domestic allocation of authority accomplished by the dynamic terms of the treaty. When the intervening statute expressly limited or undermined those dynamic terms, the dynamic last-in-time rule might not apply. So, if AEDPA had limited federal review and reconsideration of state convictions notwithstanding ICJ judgments under the Vienna Convention, the result would be to neutralize the domestic allocation effected by the dynamic provisions of the treaty, at least with respect to the subjects addressed by AEDPA. Second, and related, to the extent that the dynamic last-in-time rule prioritizes the Executive's decision over the legislature's judgment as expressed in the intervening statute, it does so only as required by the dynamic terms of the treaty. In other words, the objection is not really an objection to the dynamic last-in-time rule; it is an objection to dynamic treaties.[257]

A related objection is that the dynamic last-in-time rule does not reflect the sovereign will of the political branches—that is, there is no reason to believe the political branches intend a dynamic treaty to result in international judgments that oust intervening statutes. In some cases, such as *Medellín II*, this may be true.[258] There the Court interpreted the U.N. Charter as establishing a general rule that ICJ judgments are non-self-executing. But this is a matter of interpreting the specific treaty at issue. If the political branches ratify a dynamic treaty that does *not* so limit the domestic enforceability of the international tribunal's judgment, a court is duty bound to give it legal effect. Moreover, the

255. *See, e.g.*, Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 Stan. L. Rev. 1557, 1559 (2003) (arguing that international delegations "may increase the relative power of the executive branch, both because they often delegate the powers of other branches, and because the United States is represented in these institutions by executive branch agents").

256. *See supra* Part II.D.

257. The dynamic last-in-time rule may exacerbate conflicts between international delegations and other constitutional principles, such as federalism's anticommandeering limitations. *See id.* at 1566-67. If so, the extent of any such problems would appear to depend upon—and stem from—the particular international delegation. Such issues would not be the result of the dynamic last-in-time rule per se.

258. *See Medellín II*, 552 U.S. at 511 (interpreting the U.N. Charter as establishing that ICJ decisions are always non-self-executing).

requirement that the underlying substantive treaty obligation be self-executing provides some assurance that applying the dynamic last-in-time rule is consistent with the political branches' expectations regarding the domestic enforceability of the treaty.

Finally, some may be compelled to object to the last-in-time rule by their strong views regarding the wisdom of international delegations. There are those who object to international delegations as an affront to our nation's sovereignty; there are those appalled at the continued observance of long-established doctrines limiting the domestic enforceability of international obligations. The former may object to the dynamic last-in-time rule because it increases the likelihood that an international tribunal's judgment will be domestically enforceable. The latter may object to the dynamic last-in-time rule because it does not guarantee such domestic enforcement. Neither suggestion undermines the validity of the dynamic last-in-time rule which ensures scrupulous adherence to established constitutional principles in the context of the modern reality of dynamic treaty conflicts.

C. Defense of the Nation's Absolute Sovereignty

The dynamic last-in-time rule protects our nation's absolute sovereignty to use the full range of tools—including dynamic treaty regimes—to govern both its foreign and domestic affairs. A litigant's request that a court enforce an international judgment issued under the terms of a dynamic treaty regime implicates two separate, but related, expressions of sovereign will. First, by ratifying a dynamic treaty, the Senate implicitly delegates to the Executive discretion to submit disputes to the international tribunal for binding resolution on behalf of the United States. Second, by exercising that delegated discretion, the Executive expresses the sovereign will to abide by the tribunal's judgment.[259] This second sovereign decision (submission) is not merely unilateral because it is authorized by the first sovereign decision (ratification). Taken together, they produce an international obligation that should be sufficient to supersede conflicting, intervening legislation.[260] Rigidly adhering to a static last-in-time analysis, as suggested in *Breard*, is wrong because it ignores the legal significance of the Executive's authorized expression of the sovereign will.

Disregarding the legal significance of the Executive's decision is particularly troubling when the intervening statute neither conflicts with nor undermines the dynamic provisions of the treaty. Under *Medellín I*, for example, the alleged conflict between AEDPA and the Vienna Convention

259. *See infra.* Part IV.D.

260. *C.f.* Henkin, *International Law as Law*, *supra* note 97 at 1563 (noting that "law made by courts not on their own constitutional authority but pursuant to authorization by Congress would presumably draw on congressional authority and like a later act of Congress could supersede earlier legislation").

related exclusively to the substantive provisions of the treaty: the argument was that AEDPA barred the review and reconsideration that *Avena* said was required under the Vienna Convention. But nothing in AEDPA called into question the treaty's delegation of authority to the Executive to submit disputes to the ICJ for binding resolution. Applying the traditional, static last-in-time rule in such circumstances unnecessarily impinges upon absolute sovereignty along two dimensions: (1) it nullifies the domestic allocation of sovereign authority achieved by ratifying the dynamic treaty; and (2) it disregards the international consequences of the Executive's authorized decision to submit the United States to the international tribunal's judgment. The dynamic last-in-time rule, in contrast, gives effect to both expressions of the nation's absolute sovereign will.

D. Allegiance to the Separation of Powers

The dynamic last-in-time rule ensures proper respect for the political branches' constitutional authority to exercise U.S. sovereign power in international affairs. Giving effect to the nation's absolute sovereignty and respecting the Constitution's separation of powers are intimately related tasks in the context of a dynamic treaty dispute. To give effect to the former is to respect the latter.

The dynamic last-in-time rule also properly defers to the Executive's decision to submit a treaty dispute to an international tribunal. As a general rule, an agreement to submit a dispute to a tribunal for resolution "implies an agreement to abide [by] the result."[261] The Supreme Court has recognized that this rule applies with equal force when a nation submits to the compulsory jurisdiction of an international tribunal.[262] Indeed, "an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith."[263] The Office of the Legal Advisor ("OLA") of the Department of State, which ultimately is controlled by the Executive, represents the United States before the ICJ, among other international tribunals. When the Executive decided, by and through the OLA, that the United States would participate in the ICJ's *LaGrand* and *Avena* proceedings, he committed the nation to executing in good faith the resulting

261. Smith v. Morse, 76 U.S. 76, 82 (1869); *see also* Citigroup Global Mkts. Inc. v. Bacon, 562 F.3d 349, 351 (5th Cir. 2009) (affirming the continued validity of the principle expressed in *Smith*).

262. La Abra Silver Mining Co. v. United States, 175 U.S. 423, 463 (1899); *see also* Michael J. Larson, Comment, *Calling All Consuls: U.S. Supreme Court Divergence From the International Court of Justice and the Shortcomings of Sanchez-Llamas v. Oregon*, 22 EMORY INT'L L. REV. 317, 342 (2008) (arguing that the ICJ's judgments in *LaGrand* and *Avena* should be enforced domestically because "under U.S. law, once a party submits to a tribunal's jurisdiction, it shall adhere to its decision" (citing *Smith*, 76 U.S. at 82)).

263. *La Abra Silver Mining*, 175 U.S. at 463.

judgments.

This approach also protects the separation of powers by preventing the judiciary from imputing bad faith to the political branches. In *Medellín I,* if the Court had applied a static version of the last-in-time rule, that might have implied that the Executive submitted the dispute to the ICJ knowing that the United States would either prevail or escape enforcement of an adverse ruling by applying AEDPA. Such an implication would be "wanting in proper respect for the intelligence and patriotism of a coordinate department of the government,"[264] and would thus offend separation of powers. By applying the dynamic last-in time rule, the courts would give appropriate respect to the nation's international obligations, while ensuring that any decision to abrogate those obligations emanates from the departments of our government endowed with the constitutional authority and practical competence to express the sovereign will.

E. Fidelity to Judicial Duty

Finally, the dynamic last-in time rule ensures fidelity to the judiciary's role in foreign affairs cases. This role includes interpreting treaties, enforcing self-executing provisions, and giving effect to changes in U.S. international obligations. The court's duty to interpret treaties requires it to determine whether a treaty is dynamic. It also requires the court to interpret the treaty and the international tribunal's judgment to determine whether the international obligation sought to be enforced is self-executing. If the court answers these questions in the affirmative, it must do its duty to enforce the self-executing international obligation. In so doing, the court fulfills its obligation to give effect to changes in the nation's international obligations that come about as a result of the political branches' exercise of the nation's absolute sovereignty.

The dynamic last-in-time rule also ensures fidelity to the judicial role in foreign affairs cases because it contemplates that another more recent expression of the sovereign will may intervene to prevent enforcement of the international tribunal's judgment. For example, the Executive may submit a dispute for adjudication but then withdraw from the proceedings before a judgment is issued. Or Congress may respond to the international tribunal's judgment by enacting a statute that prevents its domestic enforceability. Such a statute could, for example, create an alternative mechanism for compliance with the international obligations at stake. This would be a valid exercise of the nation's absolute sovereignty to regulate its domestic affairs, and the courts would be required to give it effect.

Not every apparent expression of the sovereign will would be sufficient to prevent enforcement of the judgment under the dynamic last-in-time rule. *Medellín II* provides an example: the Executive could not unilaterally direct

264. Chew Heong v. United States, 112 U.S. 536, 540 (1884).

state courts to enforce *Avena*.[265] Such action is not authorized by background principles of domestic constitutional law. This distinction is consistent with a fundamental premise of the dynamic last-in-time rule: where law authorizes a coordinate department to exercise the nation's sovereignty, courts should give due legal effect to the resulting international law obligation.

CONCLUSION

Dynamic treaties are a common component of modern international relations, but their domestic enforceability is determined by applying long-standing judicial doctrines grounded in fundamental constitutional principle. Resolving domestic conflicts between dynamic treaty obligations and statutes requires no modification of these doctrines. But it does require careful thought and precise explication of constitutional principle. In the course of the Vienna Convention disputes, the resolution of which has never depended upon the last-in-time rule, the Supreme Court uncritically suggested that adhering to a traditional, static version of the last-in-time rule is categorically appropriate in dynamic treaty disputes. More deliberate consideration suggests that it is not. Indeed, when faced with a conflict between a dynamic treaty obligation and statute, if it reaches the last-in-time rule, a court may better serve fundamental constitutional principles by applying that rule in a correspondingly dynamic fashion.

265. *See* Medellín v. Texas (*Medellín II*), 552 U.S. 491, 525 (2008) ("The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them.").