Up in Smoke?: The Last in Time Rule and Empresa Cubana Del Tabaco v. Culbro Corp.

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INTRODUCTION

"Every kingdom divided against itself is brought to desolation; and every city or house divided against itself shall not stand."

Perched high above state law are the supreme laws of the United States. Divided into three bodies, these laws control and

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1 Matthew 12:25.

2 The Supremacy Clause mandates that the Constitution, federal law, and treaties of the United States are superior to the laws and constitutions of the individual states. See generally Ernest R. Larkins, U.S. Income Tax Treaties in Research and Planning: A Primer, 18 VA. TAX REV. 133, 133 (1998). "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be

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foster the destiny of the great "democratic experiment," born in 1776. Although these bodies are separate and distinct from each other, they are not islands unto themselves: they have often clashed in battles fought in the courts of our nation. Although the Constitution has reigned unchallenged as the undisputed champion of United States law, bouts between treaties and federal law have ended uncertainly.

International treaties and the laws of the United States are both supreme under Article VI, Clause II of the United States Constitution and consequently cannot be modified or repealed by state law. The Constitution’s silence on the hierarchy of supreme laws has led to conflicts among these bodies of law and the Supreme Court has been charged with determining the victor. In a series of momentous decisions in the late nineteenth century, the Court called it a draw. In fashioning the Last in Time rule 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." U.S. CONST. art. VI, cl. 2.


4 See e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (discussing separation of powers issue between executive and legislative branches when President Truman attempted to commandeer steel mills during wartime); Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (rejecting Presidential attempts to establish military commissions to try terrorists, holding that only Congress can independently setup military commissions because the president alone has no authority to do so).

5 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(3) (1987) (stating that rules of international law and provisions of international agreements will not be given effect if they are inconsistent with the United States Constitution); see generally Louis Henkin, May The President Violate Customary International Law?: The President and International Law, 80 A.J.I.L. 930 (1986) (discussing this conflict of laws issue).


7 See The Chinese Exclusion Case. Chae Chan Ping. v. United States, 130 U.S. 581, 600 (1889) (discussing how a court will decide which conflicting law to follow); Louis Henkin, Colloquy: Lexical Priority or "Political Question": A Response, 101 HARV. L. REV. 524, 531 ("[T]he framers of the Constitution did not address the lexical hierarchy of statutes and treaties . . . in the [Supremacy Clause] or elsewhere.").

8 See Henkin, supra note 7, at 524 ("[T]he Court may be saying only that when a statute is inconsistent with an earlier treaty, the treaty remains law in the United States and is 'lexically superior' to the statute, but that the courts cannot give effect to the treaty because a decision by the government to violate international law raises a political, and
for conflicts between international treaties and federal law, the Court reasoned that the two bodies of law are equal and the most recent expression of the sovereign will should govern. Under this rule, the treaty or federal law that is “last in time” will prevail over the other.

Rarely questioned by the courts themselves, the Last in Time rule has become outdated precedent in a global society increasingly reliant on multilateral treaties. It was questionably set forth in decisions that used flawed reasoning and assumptions. The implications of such a rule upon international law and policy are substantial. It violates international law and encourages the United States to ignore its commitments, harming its reputation and isolating it from the rest of the world. Moreover, the rule is arguably not in the spirit of the Framers' original intent and contradicts the writings of the Supreme Court's first Chief Justice,


9 See Chinese Exclusion, 130 U.S. at 600 (finding treaties and acts of Congress supreme and that “no paramount authority is given to one over the other.”).

10 See id. (announcing that “the last expression of the sovereign will must control”); see also Westen, supra note 8, at 513 (“[T]he Court in Chinese Exclusion chose to resolve conflicts between treaties and subsequent statutes by always giving effect to the latter”).

11 The RESTATEMENT OF FOREIGN RELATIONS LAW describes the Last in Time rule: An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled. RESTATEMENT (THIRD) OF FOREIGN REL. L. § 115(1)(a) (1987). The flipside of the Last in Time coin is described in § 115 (2): “A provision of a treaty of the United States that becomes effective as law of the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States.” RESTATEMENT (THIRD) OF FOREIGN REL. L. § 115(2) (1987).

12 See New Orleans v. United States, 35 U.S. 662, 736–37 (1836) (“The government of the United States . . . is one of limited powers . . . Congress cannot . . . enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power . . . the treaty cannot give this power to the federal government”); see also Willis L. M. Reese, Full Faith and Credit to Foreign Equity Decrees, 42 IOWA L. REV. 183, 193 (1957) (discussing the states'conflicts of laws with international laws).

John Jay, and our nation’s greatest economist, Alexander Hamilton.14

Recently in Empresa Cubana del Tabaco v. Culbro Corp.,15 the United States Second Circuit Court of Appeals relied on the Last in Time rule to justify its emphasis on the Cuban embargo in finding that Cubatabaco did not have a right to the Cohiba cigar trademark in the United States.16 Cubatabaco’s claim under the Paris Convention for the Protection of Industrial Property was found in conflict with subsequent embargo regulations and was dismissed.17

This comment uses the Second Circuit’s decision to criticize the Last in Time rule’s application by arguing that a unified approach, granting more deference to multilateral treaties, should be applied.18 Part I of this comment is a discussion of the relationship between international treaties and federal law, focusing primarily on the Last in Time rule and the decisions that delineated it. Part II is an overview of the facts leading to the Cohiba trademark controversy and the Second Circuit’s focus on the embargo and Last in Time rule in its decision. Part III argues that Last in Time should not apply to multilateral treaties because it

14 James Madison stated:

Does it follow, because this [treaty-making] power is given to Congress, that it is absolute and unlimited? I do not conceive that power is given to the President and Senate to dismember the empire, or to alienate any great, essential right. I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation.

Paust, supra note 13, at 394 n.1 (quoting DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 514 (J. Elliot ed. 1937)).

15 399 F.3d 462 (2d Cir. 2005).

16 Id. at 481 (discussing Last in Time rule application to Cubatabaco’s Paris Convention claim).

17 Id. (holding Embargo Regulations to bar Cubatabaco’s acquisition of property rights inside the United States “to the extent that the Paris Convention, standing alone, might pose an irreconcilable conflict to the Regulations, the latter will prevail.”).

18 This comment does not discuss the relationship between customary international law and domestic law. Legal scholars have argued that as multilateral treaties have increased in importance over the past half-century, the significance of international custom has diminished. See generally Theodor Meron, Editorial Comment, Revival of Customary Humanitarian Law, 99 A.J.I.L. 817, 817 (2005), which further discusses this viewpoint. It has also been argued that customary international law has transformed over time into something that “no longer deserves recognition as international law.” Samuel Estreicher, The New York University-University of Virginia Conference on Exploring the Limits of International Law: Rethinking the Binding Effect of Customary International Law, 44 VA. J. INT’L L. 5, 14-15 (2003). Since Cubatabaco’s claims in Empresa were brought under multilateral treaties, that is this comment’s focus.
is an unwise rule based upon questionable and incomplete reasoning, which both violates international law and is capable of unnecessarily harming the reputation of the United States.

I. THE LAST IN TIME RULE

A. Monism and Dualism

The terms monism and dualism refer to two different theories concerning the relationship that exists between international and domestic law.\(^1\) Although the terms have been criticized as simple,\(^2\) they are still frequently used in discussions of international law issues.

The modern monist theory was pioneered in the first half of the twentieth century by Hans Kelsen,\(^3\) and is one that combines international law and domestic law into a single body.\(^4\) Under a monist system, a state’s international laws and policies inevitably affect its domestic laws and policies.\(^5\) For example, in a monist nation, an international treaty need not be separately rati-

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\(^3\) See Jacob Dolinger, *Brazilian Supreme Court Solutions for Conflicts Between Domestic and International Law: An Exercise in Eclecticism*, 22 CAP. U. L. REV. 1041, 1044–45 (1993) ("The monist school started with Hans Kelsen"); see also Ludwikowski, *supra* note 19, at 262 (noting monism “was strongly supported by Hans Kelsen of the Vienna School of jurisprudence”).


fied in order for it to be binding domestically. Since there is only one system of law, any further endorsement of the treaty would be superfluous. In addition to being implemented without domestic legislation, international law is supreme in a monist nation and cannot be overruled by ordinary domestic law.

These basic principles of monist theory are reflected in the law and policy of monist nations. France is one of the most prominent monist nations. Article fifty-five of the French Constitution mandates that published treaties prevail over prior or subsequent acts of Parliament. The Netherlands is also a monist country. Article ninety-four of the Dutch Constitution holds that statutes in force within the Kingdom will not be applied if they conflict with treaty provisions. Across the Atlantic Ocean from Europe, Mexico’s system can fairly be characterized as mo-

24 See Henkin, Century of Chinese Exclusion and its Progeny, supra note 6, at 864 (stating “[d]omestic courts must give effect to international law” in a monist state); see also Elizabeth Manera Edelstein, The Loi Toubon: Liberte, Egalite, Fraternite, but Only on France’s Terms, 17 EMORY INT’L L. REV. 1127, 1164 (2003) (“France is a monist state: . . . the terms of international conventions are incorporated directly into national laws”).


27 Article fifty-five of the French Constitution exhibits France’s monist view of the relationship between international law and domestic law. Article fifty-five states that “[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.” See Pierre Michel Eisemann & Raphaele Rivier, National Treaty Law and Practice: France, NATIONAL TREATY LAW AND PRACTICE 268, 277 (Duncan B. Hollis et al. eds., Martinus Nijhoff Publishers 2005).


29 The superiority of treaty law has never been seriously questioned in the legal literature of the Netherlands. Article ninety-four of the Dutch Constitution states: “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.” See J.G. Brouwer, National Treaty Law and Practice: The Netherlands, NATIONAL TREATY LAW AND PRACTICE, supra note 27, at 498, 508.
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Mexico's hierarchy of law places the Constitution above federal laws and treaties. Although Mexican courts have been wary of declaring the superiority of international law over ordinary domestic legislation, they recently did so in a 1999 case involving a conflict between federal law and a treaty.

There are two legal systems within a dualist state: domestic law and international law. Unlike monism, dualism rejects integration of international law into the domestic legal system. A dualist nation has two bodies of law; actions involving one do not necessarily bind the other. The autonomy of nations in the inter-

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31 See Dr. Luis Miguel Diaz, *National Treaty Law and Practice: Mexico*, NATIONAL TREATY LAW AND PRACTICE, supra note 27, at 452 (noting Mexico's Constitution “shall prevail over treaties”); see also Patrick Del Duca, supra note 30, at 111 (citing “Mexican constitution supremacy”).

32 In 1992, Mexico’s Supreme Court ruled that federal laws and treaties are equal in rank. Three years later, it decided that it was not competent to decide between Mexican federal law and the Paris Convention on Patent Law. See Diaz, *National Treaty Law and Practice: Mexico*, NATIONAL TREATY LAW AND PRACTICE, supra note 27, at 452; see also Del Duca, supra note 30, at 122. The author noted that the 1999 Supreme Court decision held that international law is above domestic law.

33 The Mexican Supreme Court reevaluated its interpretation of Article 133 of Mexico’s Constitution and placed international treaties “above federal laws, second in rank to the Constitution.” See Diaz, *National Treaty Law and Practice: Mexico*, NATIONAL TREATY LAW AND PRACTICE, supra note 27, at 452-53. According to Article 133 of the Mexican Constitution:

> This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it that have been concluded and that are to be concluded by the President of the Republic with the approval of the Senate will be the Supreme Law of all the Union. The judges of every State will follow this Constitution and these laws and treaties in considering dispositions to the contrary that are contained in the constitutions or the laws of the States.

Constitución Política de los Estados Unidos Mexicanos [Const., as amended, Art. 133, Diario Oficial de la Federacion [D.O.]. 5 de Febrero de 1917 (Mex.).


36 See Roy E. Brownell II, Comment, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration’s Costly Failure to Seek Acknowledgement of “National Secu-
ernational community is furthered by a dualist system because international courts cannot be the sole judges of domestic legislation.\textsuperscript{37} The laws are interpreted by a nation's own system of courts, ensuring that its individual sense of morality and legality will not be left out of the law making process.\textsuperscript{38} Unlike in most monist states, international law is not generally viewed as superior in a dualist nation, and conflicts may be resolved in favor of domestic law.\textsuperscript{39}

As a dualist nation, the United States has separate international and domestic legal spheres.\textsuperscript{40} While it remains bound in international courts of law,\textsuperscript{41} it is not necessarily bound domesti-
cally by international law or treaties. For example, if the United States was a signatory to a multilateral treaty forbidding it from developing new types of nuclear weapons, Congress would not be precluded from passing legislation providing for such development. Although the United States would not be bound internally by the multilateral treaty in such a scenario, it could be sued for a breach of that treaty by other nations in an international court and would be liable for damages incurred as a result. Moreover, United States courts have found prior multilateral treaties inoperative in the face of subsequent irreconcilable Congressional legislation. The courts have reached such results by applying a rule of priority called the Last in Time rule.

B. Milestone Last in Time Decisions

Known by its Latin name, lex posterior derogat priori, the Last in Time rule has been applied to conflicts between treaties

Subsequent acts of Congress supersede prior international law or agreements if the act was clearly intended to supersede the prior international law or agreement. RESTATEMENT (THIRD) OF FOREIGN REL. L. § 115(1)(a) (1987). "[International law] may not have an immediate impact in cases before domestic courts." See Morrison, supra note 41, at 448.

See RESTATEMENT (THIRD) OF FOREIGN REL. L. § 115(1)(a) (1987), which exemplifies the application of Restatement (Third) of Foreign Relations Law §115(1)(a). See Morrison, supra note 41, at 450. The author discusses possible Congressional acts that could trump international law.

See, e.g., Taylor et al. v. Morton, 23 F. Cas. 784, 785 (1855) (stating the right of the foreign nation 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."); see also RESTATEMENT (THIRD) OF FOREIGN REL. L. §115 (1987) ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation").

See, e.g., Taylor, 23 F. Cas. at 785 (finding that there is "nothing in the mere fact that a treaty is a law, which would prevent congress from repealing it."); see also Edyce v. Robertson, 112 U.S. 580, 599 (1884) (opining that a treaty made by the United States with a foreign nation is subject to the acts of Congress).

See BLACK'S LAW DICTIONARY (8th ed. 2004) (defining the Last-in-Time rule as the "principle that a later statute negates the effect of a prior one if the later statute expressly repeals, or is obviously repugnant to, the earlier law"); see also Jesse Hallee, Note, The Sheinbein Legacy: Israel's Refusal to Grant Extradition as a Model of Complexity, 15 AM. U. INT'L L. REV. 667, 683 n.75 (2000) (stating the definition and the court's application of the Last-in-Time rule).

See BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "lex posterior derogat priori" as "a later law prevails over an earlier one"); see also Hallee, supra note 46 (referring to the Last-in-Time rule); Claire R. Kelly, Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes, 24 BERKELEY J. INT'L L. 79, 88 n.190 (2006) (citing the Last-in-Time rule).
and United States domestic law for over one hundred and fifty years. The Last in Time rule was developed by the Supreme Court in the context of conflicts between treaties and federal law in a series of cases from the late 19th century. One early use of the Last in Time rule was in Edye v. Robertson, the “Head Money Cases” decision. The controversy in that case was between a subsequent act of Congress, which imposed a customs duty on ships bringing immigrants into the United States, and a treaty with Russia. Although the Supreme Court held that the Congressional legislation involved did not violate “any of these treaties, on any just construction of them,” the Court went beyond what was necessary for its decision by fashioning what would become the Last in Time rule. The Court opined, “so far as the provisions in that act may be found to be in conflict with any treaty with a foreign nation, they must prevail.” Moreover, the Constitution gave treaties no superiority over acts of Congress. The Court then reasoned that since treaties and acts of Congress are equal under the Constitution, a treaty is “subject to such acts as Congress may pass for its enforcement, modification, or repeal.”

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48 See Taylor, 23 F. Cas. at 784-85, 788 (using the Last in Time rule for the first time in a US court against international treaties by upholding a federal statute imposing duties on the importation of hemp in contravention of a prior treaty between the United States and Russia); see also Julian G. Ku, supra note 13, at 335 (stating that the “first judicial articulation of the Last-in-Time rule occurred in Taylor v. Morton”).

49 112 U.S. at 599 (being of the opinion that a treaty with a foreign nation is subject to acts of Congress passed for enforcement, modification or repeal).

50 Id. at 589-90 (detailing the act of Congress at issue).

51 Id. at 597 (characterizing issue as “a supposed conflict between an act of Congress imposing a customs duty, and a treaty with Russia on that subject, in force when the act was passed”).

52 Id. (holding that the Congressional legislation at issue did not violate any international treaties).

53 Id. (finding that a treaty is subject to acts of Congress).

54 Edye, 112 U.S. at 597 (stating that if a conflict between act and treaty is found, then the act will prevail).

55 Id. at 598-599. The Court found treaties similar to acts of Congress in that neither are “irrepealable or unchangeable” under the Constitution. The Court also referred directly to the Supremacy Clause of the United States Constitution in finding that treaties and federal law are to be treated equally and whichever is more recent is to control the other. For the full text of Article VI of the United States Constitution, see supra note 2.

56 Id. at 599 (holding that treaties subject to judicial scrutiny in United States courts are also subject to enforcement, modification, or repeal by Congress).
The Supreme Court quickly followed up the *Head Money Cases* by deciding *Whitney v. Robertson*. The suit involved a claim by merchants importing sugar from the Dominican Republic. The merchants argued that they should not have to pay duties because their goods were similar to goods imported from the Hawaiian Islands, which were exempt from duties. Two treaties and an act of Congress were at issue. The first treaty was between the United States and the Dominican Republic, and provided that no higher duty would be imposed by the United States for the importation of goods from the Dominican Republic than for like goods from any other foreign nation. The second treaty was between the United States and the King of the Hawaiian Islands. That treaty provided for the duty-free importation of specific Hawaiian goods into the United States in exchange for the duty-free importation of similar American-made goods into Hawaii. The act of Congress authorized the collection of duties. The Court ruled against the plaintiffs, finding that the Dominican treaty was not designed to prevent the giving of special exemptions for sufficient consideration. The Court then ruled that since the act of Congress was passed after the treaty with the Dominican Republic, “if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control.” Finally, the Court put forth the maxim that the “duty of the courts is to construe and give effect to the latest expression of the sovereign will” and ended with a reiteration of its ruling in *Head Money Cases*.

Another historic Last in Time decision was *The Chinese Exclusion Case*. The Chinese Exclusion Act of 1888 prohibited the re-

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57 Whitney v. Robertson, 124 U.S. 190 (1887).
58 Id. at 190-191 (noting plaintiffs were New York merchants who had imported sugar from the island of San Domingo).
59 Id. at 191-92 (stating plaintiffs' reliance on the ninth article of the treaty between United States and Dominican Republic in making a claim).
60 Id. (describing the ninth article of the treaty).
61 Id. at 191 (noting treaty between United States and the King of Hawaii).
63 Id. at 193 (noting the authorization of duties by the Congressional act at issue).
64 Id. (finding that the treaty with the Dominican Republic “was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other”).
65 Id. at 193-94 (stating the Last in Time rule).
66 Id. at 195 (quoting *Head Money Cases* decision).
entry of Chinese laborers who had departed the United States prior to 1888.68 Chae Chan Ping was excluded from entry into the United States under the Act.69 He argued that treaties between the U.S. and China created in 1868 and supplemented in 1880 permitted his entry.70 The Chinese Exclusion decision relied heavily on Head Money Cases and Whitney v. Robertson.71 Emphasizing the right of the United States to regulate immigration,72 the Court held that “[t]he question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts.”73 The prior Last in Time decisions were further cemented into the American legal lexicon when the Court found that as between treaties and federal law, “no paramount authority is given to one over the other” and that the “last expression of the sovereign will must control.”74 The Court recognized the government's power to change policy in unforeseen circumstances that may “not only justify the government in disregarding their stipulations, but demand in the interests of the country that it should do so.”75 After adding that questioning the motives of Congress in contradicting a prior treaty is uncalled for,76 the Court ruled against Ping and upheld the application of the 1888 Act.77

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68 Id. at 589 (noting “the act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884, granting them permission to return”).

69 See id. at 582 (stating who Chae Chan Ping was); see also John L. Pollack, Note, Missing “Persons”: Expedited Removal, Fong Yue Ting, and the Fifth Amendment, 41 ARIZ. L. REV. 1109, 1118 (1999) (“Chae Chan Ping was a Chinese laborer who had lived in San Francisco since 1875.”).

70 The Chinese Exclusion Case, 130 U.S. at 592-598 (describing history of relations between United States and China concerning immigration of Chinese labor).

71 Id. at 600-01 (discussing Last-in-Time rule set out in Head Money Cases and Whitney v. Robertson).

72 Id. at 609 (stating government's right to exclude foreigners “cannot be granted away or restrained on behalf of anyone.”).

73 Id. at 602 (postulating that courts are incompetent to decide whether government is justified in disregarding international obligations).

74 Id. at 600 (explaining Last in Time rule and reasoning behind it).

75 Id. at 600-01 (justifying court's reliance on Last-in-Time rule).

76 Id. at 602 (observing that “if 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.”).

77 See id. at 611 (1889) (affirming Northern District of California's order).
C. United States Courts’ Use of the Last in Time Rule to Strike Down Prior International Treaties

United States courts continue to use the Last in Time rule as a way of resolving conflicts between international laws or agreements and federal legislation. The application of the rule is not as simple as it may appear on first reading of the historic Last in Time decisions described above.

The first important aspect of the Last in Time rule to note is that courts have traditionally been hesitant to use it. In cases involving treaties and acts of Congress, courts will do much to avoid a conflict between the two. If there appears to be a conflict, the court will only apply the Last in Time rule if the conflict is irreconcilable. Unless the court believes that the purpose of the treaty or Congressional act was clearly to supersede the earlier act or treaty, it will avoid use of the rule. Rather than apply the rule, the court will construe the text of the treaty or act in a way where both are congruent or do not intersect at all.

This hesitancy was famously set forth in Chief Justice John Marshall’s opinion in Murray v. Schooner Charming Betsy. In

78 Id. at 611 (indicating that the United States has been using the Last in Time rule for several years); see also Sonja Starr & Lea Brilmayer, Symposium, Family Separation as a Violation of International Law, 21 BERKELEY J. INT’L L. 213, 265 (2003) (noting that “where domestic and international law unavoidably conflict, the Last-In-Time rule normally applies.”).


80 See Beharry v. Reno, 183 F. Supp. 2d 584, 599 (E.D.N.Y. 2002) (ruling that in order to overrule international law, Congress must enact legislation which both postdates the international law, and clearly has the intent of repealing the international law); see also Starr, supra note 78, at 265.

81 See RESTATEMENT (THIRD) OF FOREIGN REL. L. § 115(1)(a) (1987) (stating that “the purpose of the act to supersede the earlier rule or provision” of the treaty must be clear, or the earlier rule or provision cannot be fairly reconciled with the act, for the Last in Time rule to apply); see also Michael Gerber, The Anti-Terrorism Act of 1987: Sabotaging the United Nations and Holding the Constitution Hostage, 65 N.Y.U. L. REV. 364, 375 (1990) (indicating that the court will look for congressional intent).

82 See RESTATEMENT (THIRD) OF FOREIGN REL. L. § 115 Comment (a) (indicating that courts will construe the act and treaty so that they are not in conflict); see also Gerber, supra note 81, at 376 (indicating that courts will try to interpret the treaty and law in a way that is congruently constitutional).

83 6 U.S. 64 (1804).
that case, the Court ruled that Congressional legislation must never be construed to violate international law unless the federal statute has no other possible construction. The precedent created by the Charming Betsy decision was followed in the Southern District of New York's decision in United States v. Palestine Liberation Organization. There, the conflict was between the Anti-Terrorism Act of 1988 and the Headquarters Agreement of the United Nations. Congress passed the Act in an effort to close P.L.O. offices located in the United States. The United States Attorney General deemed the P.L.O. Observer Mission in the United Nations to be unlawful under the Act. Suit was brought, and the court found that the Anti-Terrorism Act and the U.N. Headquarters Agreement were not in conflict. In a decision influenced by monist theory, the court reasoned that there was no clear Congressional intent for the statute to supersede the Headquarters Agreement. In light of the "long standing and well-established position of the Mission at the United Nations," the United States' "recognition of a duty to refrain from impeding the functions of observer missions to the United Nations," and lack of clear intent to supersede in the text of the Act itself, the court ruled that "the ATA and the Headquarters Agreement cannot be reconciled except by finding the ATA inapplicable to the PLO Observer Mission."

As seen in Head Money Cases, Whitney v. Robertson, and The Chinese Exclusion Case, if the act and treaty cannot fairly be reconciled, the Last in Time rule will apply. The most recent act or

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84 Chief Justice John Marshall's seminal opinion stated that:

It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

*Id.* at 118.


86 *Id.*

87 *Id.* at 1459-60.

88 *Id.* at 1460.

89 *Id.* at 1471.

90 *Id.* at 1469-70.


92 *Id.* at 1466.

93 *Id.* at 1465.
treaty will prevail over the other. It is irrelevant whether the treaty or the federal legislation is more recent. Courts have held a prior act of Congress invalid as against a subsequent treaty.

The rationale of the Last in Time rule rests upon an assumption made in the reading of the United States Constitution. Article VI, Clause II, also known as the Supremacy Clause, declares that the Constitution, federal law, and treaties are the supreme law of the land and binding upon the states. For this reason, the conflict must be between federal legislation and a treaty. Treaties are inherently superior to laws created by state legislatures and no application of the Last in Time rule is necessary to decide a conflict between a state law and a treaty. Since the language of the clause does not mention any order of priority between federal law and treaties, the Last in Time rule presumes that the Framers intended that they be equal. Since they are equal, the courts have reasoned that the most recent is controlling.

94 See The Chinese Exclusion Case, 130 U.S. at 600-01 (applying Last in Time rule); Whitney, 124 U.S. at 193-94 (stating Last in Time rule).

95 See Cook v. United States, 288 U.S. 102, 120 (1933) (finding that opposite of ordinary Last in Time conflict is at issue); see also Dolinger, supra note 21, at 1051 (discussing Cook ruling that "[t]reaty between the U.S. and Great Britain, which was later in date than Tariff Act of 1922, superseded the Act.").

96 See U.S. CONST. art. VI, cl. 2. For a brief discussion and the full text of Article VI of the United States Constitution, see supra note 2.

97 See Jennifer L. Brillante, Note, Continued Violations of International Law by the United States in Applying the Death Penalty to Minors and Possible Repercussions to the American Criminal Justice System, 29 BROOK. J. INT’L L. 1247, 1255 (stating “a treaty is superior to state law as well as any state constitution”); see also supra text accompanying note 5.


100 See Martin, supra note 99, at 73 (noting that a statute can override a treaty if enacted after); Van Alstine, supra note 99, at 701 n.52 (In the event of a conflict between the two, the later in time will prevail.").
In spite of the apparent reluctance to apply the Last in Time rule, there has not been a decline in its use over the years. In fact, courts have been invoking it with greater frequency of late.\(^1\) \textit{Breard v. Greene}\(^2\) and the \textit{Havana Club Rum case}\(^3\) are only two examples of decisions influenced by the Last in Time rule. Recently, the Second Circuit Court of Appeals decided the rightful owner of the world-famous Cohiba cigar trademark in \textit{Empresa Cubana Del Tabaco v. Culbro Corp.} ("Empresa").\(^4\) In this case, numerous claims were brought by a state-owned Cuban manufacturer of hand-made cigars against a United States corporation.\(^5\) A few of the claims involved multilateral treaties of which Cuba and the United States were signatories. In a decision predominantly focused on the embargo between Cuba and the United States, the Second Circuit supported its dismissal of Cuba's treaty claims by using the Last in Time rule.\(^6\)

II. \textsc{The Last in Time Rule in Empresa Cubana Del Tabaco v. Culbro Corp.}

A. \textit{Facts Surrounding the Cohiba Cigar Dispute Between Cuba and General Cigar}

Empresa Cubana does business as Cubatabaco,\(^7\) a state-owned Cuban company that manufactures cigars.\(^8\) One of the

\(^1\) See Sheryl Grant, \textit{Note, The International Criminal Court: The Nations of the World Must Not Give in to All of the United States Demands if the Court is to be a Strong, Independent, International Organ}, 23 SUFFOLK TRANSNAT'L L. REV. 327, 331 (1999) (In the last decade courts have increased the use of this last-in-time theory to invalidate portions of treaties, or even entire treaties”); Detlev F. Vagts, Editorial Comment, \textit{Taking Treaties Less Seriously}, 92 A.J.I.L. 458, 459 (1998) (listing decisions using Last in Time rule and arguing that such invocations “are multiplying”).


\(^3\) In the \textit{Havana Club} decision, the Second Circuit used the Last in Time rule to support its decision that the United States-Cuban embargo prohibited “a Cuban national or entity from transferring a United States trademark” in spite of claims brought under the Inter-American Convention. \textit{See Havana Club Holding, S.A. v. Galleon, S.A.}, 203 F.3d 116, 124 (2d Cir. 2000).

\(^4\) 399 F.3d 462, 465 (2d Cir. 2005).

\(^5\) \textit{See id.} at 464.\(^6\)

\(^6\) \textit{See id.} at 481.

\(^7\) \textit{See id.} at 464 (noting that Empresa Cubana Del Tabaco does business as Cubatabaco).
cigars it manufactures is Cohiba, which like all Cuban cigars, is made entirely of Cuban tobacco. Cohiba was created after the embargo and has never been legally sold in the United States. Culbro Corp. is the parent of General Cigar, a cigar manufacturer based in the United States.

Cohiba began in 1964 as a diplomatic gift of the Cuban government. Over the years, the mystique of this unusual cigar increased as word of mouth spread about its quality. Magazines took notice and published articles about this elusive luxury item. General Cigar also got wind of the prestige associated with Cuba's Cohiba. Although Cubatabaco

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109 See id. at *10-11 (finding that since 1970 “cigars branded with Cubatabaco's COHIBA trademark were being produced at the El Laguito factory in Havana”).

110 See TAD GAGE, THE COMPLETE IDIOT’S GUIDE TO CIGARS 74 (Alpha Books 1997) (explaining that Cuban Cigars contain only Cuban tobacco); see also Mark D. Nielsen, Comment, Cohiba: Not Just Another Name, Not Just Another Stogie: Does General Cigar Own a Valid Trademark for the Name “Cohiba” in the United States?, 21 LOY. L.A. INT'L & COMP. L. REV. 633, 636 (1999) (stating Cuban cigars are from the “'selection of the selection' of Cuba's tobacco.”) (internal citation omitted).

111 See Empresa, 399 F.3d at 465 (The Embargo Regulations prevent Cuban entities, such as Cubatabaco, from selling cigars in the United States.); see also Nielsen, supra note 110, at 633, 636 (discussing the effect of the 1962 embargo on U.S. trade with Cuba); MIN RON NEE, AN ILLUSTRATED ENCYCLOPEDIA OF POST-REVOLUTION HAVANA CIGARS 61-63 (Interpro Business Corporation 2003) (describing history of Cohiba cigar brand).

112 See General Cigar Co., Inc. v. Global Direct Mktg., 988 F. Supp. 647, 652 (S.D.N.Y. 1997) (explaining that Culbro assigned the Cohiba trademark to its subsidiary, General Cigar, in 1987); see also Nielsen, supra note 110, at 636 (acknowledging General Cigar as subsidiary of Culbro Corp.).


114 See Nee, supra note 111, at 61 (noting Cohiba's initial status as a diplomatic gift).

115 See Empresa, 399 F.3d at 465-66 (discussing buzz about Cuba's Cohiba cigar); see also Nielsen, supra note 110, at 633 (“Cuban Cohiba cigars are widely regarded as the world's finest cigars.”).


117 See Empresa, 399 F.3d at 465-66 (discussing General's acquiring knowledge of Cuba's Cohiba when one of its executives read an article discussing the cigars in the late 1970's).
had registered its Cohiba trademark in a number of nations,\textsuperscript{118} because of the embargo, it did not do so in the United States.\textsuperscript{119} General took advantage of Cuba’s hesitancy by registering the Cohiba trademark unopposed in 1978 and receiving the U.S. trademark in 1981.\textsuperscript{120} General initially manufactured its Cohiba in small quantities solely to preserve its mark.\textsuperscript{121} In 1982, Cubatabaco began selling the Cuban Cohiba to the general public outside of the United States.\textsuperscript{122}

During the “cigar boom” of the early 1990s\textsuperscript{123} the sales of premium tobacco products skyrocketed in the United States and the mainstream media took notice.\textsuperscript{124} The publication of magazines like Cigar Aficionado increased consumer awareness of the Cuban Cohiba and it garnered more favorable press than ever before.\textsuperscript{125} Once again, General spotted an opportunity and capitalized on Cohiba’s status as the world’s greatest cigar. Having re-

\textsuperscript{118} Id. at 465-66 (“By January 1978 Cubatabaco had applied to register the COHIBA mark in seventeen countries, including most Western European countries”; see also Nielsen, supra note 110, at 635-36 (noting that Cubatabaco had registered its Cohiba trademark in 115 countries).

\textsuperscript{119} See Empresa, 399 F.3d at 465-66 (stating Cubatabaco “did not apply to register the mark in the United States”); see also Nielsen, supra note 110, at 636 (explaining that “Cuba never registered the Cohiba name in the United States, although it could have”).

\textsuperscript{120} See Empresa, 399 F.3d at 466 (finding General Cigar filed an unopposed application to register the Cohiba mark in the United States on March 13, 1978 and obtained the registration on February 17, 1981); see also Nielsen, supra note 110, at 636 (describing that the United States Patent and Trademark Office approved Culbro’s Cohiba trademark application in 1981).


\textsuperscript{122} See Nee, supra note 111, at 62 (discussing public unveiling of Cuban Cohiba Cigars); see also Nielsen, supra note 110, at 635 (“By the early 1980s, Cohiba cigars were commercially available in many countries throughout the world.”).

\textsuperscript{123} See Nielsen, supra note 110, at 636-37 (identifying “cigar craze during the 1990s” as reason for General’s relaunch of its Cohiba cigar); see also W.G.F., supra note 116, at 136 (describing an upscale cigar club, “[w]alk into the wood-paneled Club Macanudo on the Upper East Side of New York and watch the masters of the universe massacre a fad.”).

\textsuperscript{124} See Empresa, 399 F.3d at 465-66 (discussing media’s focus on cigars during the cigar boom); see also Nielsen, supra note 110, at 649 (discussing the press coverage of Cohiba cigars).

\textsuperscript{125} See Empresa, 399 F.3d at 465-66 (noting Cigar Aficionado’s rating of Cuban Cohiba).

Shortly after the release of General's "new" Cohiba, Cubatabaco filed suit in the Southern District of New York. The Southern District found in favor of Cubatabaco on some of its claims, permanently enjoined General from using the Cohiba trademark, and ordered all materials associated with General's use of the mark "deliver[ed] up to Cubatabaco for destruction or

126 See id. at 466 (stating "General Cigar filed for a second COHIBA registration on December 30, 1992"); see also Nielsen, supra note 110, at 637 (discussing General's re-application for a Cohiba's trademark in 1992).
127 See Empresa, 399 F.3d at 466 (noting General Cigar's re-launch of its Cohiba Cigar "in the fall of 1997"); see also Nielsen, supra note 110, at 637 (discussing the United States Patent and Trademark Office approval of Culbro's Cohiba trademark re-application in 1995).
128 See Empresa, 399 F.3d at 466 (noting Cubatabaco's filing on November 12, 1997); see also Nielsen, supra note 110, at 637-38 (stating that in 1997 Cubatabaco filed a cancellation action against General in the Southern District of New York).
129 Cubatabaco's action alleged thirteen claims against General Cigar. Six claims alleged violations of various provisions under the Paris Convention for the Protection of Industrial Property and the Inter-American Convention, and asserted relief under Sections 44 (b) and 44 (h) of the Lanham Act. See Empresa, 399 F.3d at 466. Subtitled "Benefits of section to persons whose country of origin is party to convention or treaty," section 44 (b) of the Lanham Act states:

Any person whose country of origin is a party to any convention or treaty relating to trademarks, trade or commercial names, or the repression of unfair competition, to which the United States is also a party, or extends reciprocal rights to nationals of the United States by law, shall be entitled to the benefits of this section under the conditions expressed herein to the extent necessary to give effect to any provision of such convention, treaty or reciprocal law, in addition to the rights to which any owner of a mark is otherwise entitled by this Act.

15 U.S.C.S. § 1126(b) (2006). Section 44 (h) states:

Any person designated in subsection (b) of this section as entitled to the benefits and subject to the provisions of this Act shall be entitled to effective protection against unfair competition, and the remedies provided herein for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition.

15 U.S.C.S. § 1126(h) (2006). Cubatabaco also alleged various claims involving section 43(a) of the Lanham Act, including that Cubatabaco was entitled to relief under the famous marks doctrine and that General engaged in false representation by stating that their tobacco was grown from Cuban seed. Empresa, 399 F.3d at 467. Finally, Cubatabaco argued that General's actions would dilute its Cohiba mark in violation of New York General Business Law § 360. Id. The Southern District found that General had infringed on Cubatabaco's Cohiba mark, which was sufficiently famous for protection, and that there was a likelihood of confusion between the marks. Empresa, 2004 U.S. Dist. LEXIS 4835, at *152-53 (S.D.N.Y. Mar. 29, 2004). The Southern District dismissed the rest of Cubatabaco's claims. Id. at *153-69.
other disposition.”

Both parties subsequently appealed to the Second Circuit.

B. The Second Circuit's Focus on the Embargo

In deciding the issues before it, the Second Circuit placed great importance on the existence of the embargo between the United States and Cuba. Nearly every claim was decided in whole or in part by the federal laws codifying the economic blockade. In answering whether Cubatabaco had any right to relief under the famous mark doctrine of the Lanham Act, the court found that in the absence of a specific or general license, the embargo prohibited Cuba from acquiring any property rights within the United States.

130 Id. at *153.
131 Empresa, 399 F.3d at 464-65 (noting both Cubatabaco and General appealed the Southern District’s decision).
132 Id. at 465 (holding that the embargo bars Cubatabaco’s acquisition of the COHIBA mark and therefore all Cubatabaco’s claims must be dismissed).
133 Id. The court relied heavily on the Lanham Act.
134 Section 43(a) of the Lanham Act “allows [a] trademark holder to obtain trademark protection in foreign countries without registration, and more importantly, use in that country.” See Alisa Cahan, Note, China’s Protection of Famous and Well-Known Marks: The Impact of China’s Latest Trademark Law Reform on Infringement and Remedies, 12 CARDOZO J. INT’L & COMP. L. 219, 220 (2004). Section 43(a)(1) of the Lanham Act states:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person; or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

135 See Empresa, 399 F.3d at 473 (positing that general or specific licenses provide exceptions to prohibitions provided for in the Embargo Regulations); see also U.S. Department of State, Consular Information Sheet: Cuba, Jan. 8, 2007, available at http://travel.state.gov/travel/cis_pa_tw/cis/cis_1097.html (last visited January 11, 2008) (explaining that U.S. regulations require that persons subject to U.S. jurisdiction be licensed, either generally or specifically, to engage in any transactions related to travel to, from, and within Cuba).
136 Empresa, 399 F.3d at 473 (noting that absent a general or specific license “the Regulations prohibits a transfer of property rights, including trademark rights, to a Cuban entity by a person subject to the jurisdiction of the United States”).
The court quickly dismissed Cubatabaco's claim that General's use of the mark violated section 43(a) of the Lanham Act by causing consumer confusion. The court reasoned that because the embargo prohibited Cubatabaco from owning the U.S. Cohiba trademark, it could not win relief on the basis that another's lawful use of the mark would cause confusion.

C. The Second Circuit's Reliance on the Last In Time Rule in Resolving Cuba's Paris Convention Claims

The court also emphasized United States federal law in resolving one of Cubatabaco's international treaty claims against General. Cubatabaco asserted protected trademark interests under the Paris Convention for the Protection of Industrial Property, a multilateral treaty that both Cuba and the United States are bound by.

Cubatabaco argued that even if it was barred from receiving ownership of the Cohiba mark, it had a “right under Article 6 bis of the Paris Convention, in conjunction with Sections 44(b) and

137 Id. at 478-79 (discussing Cubatabaco's consumer confusion claim).
138 Id. (“Cubatabaco cannot obtain relief on a theory that General Cigar's use of the mark causes confusion, because, pursuant to our holding today, General Cigar's legal right to the COHIBA mark has been established as against Cubatabaco”).
139 Id. at 476 (stating that Cubatabaco's claims for injunctive relief based on the Paris Convention fail because they entail a transfer if property rights to Cubatabaco in violation of the embargo).
141 Article 6 bis provides:
142 Both the United States and Cuba are signatories. See Nielsen, supra note 110, at 644.

(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create con-
(h) of the Lanham Act, to obtain cancellation of General Cigar's mark and an injunction against its use. The court conceded that Cubatabaco was correct in arguing "that Sections 44(b) and (h) incorporate Article 6 bis and allow foreign entities to acquire U.S. trademark rights in the United States if their marks are sufficiently famous in the United States before they are used in this country" but found the argument irrelevant. The embargo prevented any Cuban entity from acquiring property rights under the famous marks doctrine of the Lanham Act whether it was read in conjunction with Article 6 bis of the Paris Convention or not.

The decision against Cubatabaco was supported by the Last in Time rule. The court used the rule to establish the embargo's binding power as subsequent federal law over prior multilateral treaties. After deciding that the embargo barred recovery under the Paris Convention, the court stated: "In any event, to the extent that the Paris Convention, standing alone, might pose an irreconcilable conflict to the [Embargo] Regulations, the latter will prevail." The Second Circuit found the most recent embargo codification, the Libertad Act of 1996, later in time than the most recent ratification of the Paris Convention in 1970. Since the federal law was later in time than the treaty and irreconcilable, the court ruled that the embargo would control.

The Paris Convention for the Protection of Industrial Property, supra note 140.

See supra note 129 and accompanying text.

See Empresa, 399 F.3d at 479 (discussing Cubatabaco’s argument).

Id. at 480 (acknowledging soundness of Cubatabaco’s assessment).

Id. at 481 (finding that “the embargo bars Cubatabaco from acquiring property rights in the U.S. COHIBA mark through the doctrine.”).

Id. (discussing the Cuban embargo).

Id. at 481 (applying Last in Time rule to Cubatabaco’s Paris Convention claims).

Id. (stating “legislative acts trump treaty-made international law when those acts are passed subsequent to ratification of the treaty and clearly contradict treaty obligations.”) (internal citation omitted).

Id. at 481.

Id. (finding that “the Regulations were reaffirmed and codified in 1996 with the passage of the LIBERTAD Act”).

Id. (noting that the 1970 ratification of the Paris Convention is earlier in time than Libertad Act of 1996).

See id. (ruling that the later statute shall prevail over prior treaty).
court ended its discussion of the issue by stating that “any claim grounded in the Paris Convention that presented an irreconcilable conflict with the Regulations would be rendered ‘null’ by the Regulations.”

III. THE LAST IN TIME RULE SHOULD NOT BE APPLIED TO MULTILATERAL TREATIES THAT CONFLICT WITH SUBSEQUENT DOMESTIC LAW

A. The Last In Time Rule’s Application in the International Law Context is Questionable Under Article VI, Clause II of the United States Constitution

It could be argued that the Constitution is purposely vague. Intending the celebrated document to be the blueprint of the nation for years to come, the Framers made its language broad in scope so that it would be adaptable to unforeseeable changes in the nation and world at large. This is evidenced by the language of Article VI, Clause II, also known as the Supremacy Clause, which mandates that the Constitution, federal law, and treaties of the United States are superior to the laws of the states. The Supremacy Clause does not state the order of superiority of the laws as between themselves. Consequently, it does not explicitly direct courts in deciding whether a treaty should prevail over federal law nor whether the Constitution overcomes treaties. This has led to numerous conflicts as detailed throughout this comment. In light of the controversy, it is important that federal courts recognize that the debate exists

154 Empresa, 399 F.3d at 481 (2005).
156 See Charles A. Rees, Preserved or Pickled?: The Right to Trial by Jury After the Merger of Law and Equity in Maryland, 26 U. BALT. L. REV. 301, 381 n.591 (noting “courts generally have been willing to read the broad language of the Constitution to account for changing social conditions”) (internal citation omitted); see also Kelly, supra note 155, at 103.
157 For a brief discussion and the full text of Article VI of the United States Constitution, see supra text accompanying note 2.
158 “This Constitution, and the law of the United States . . . and all treaties made . . . shall be the supreme law of the land.” U.S. CONST. art. VI, § 11.
and make exacting law ensuring that the intent of the Framers and long-term interests of the United States are not betrayed.

Although not explicitly stated in the Supremacy Clause, it has been generally agreed by courts and legal scholars that the Framers intended the Constitution to be the ultimate law, with authority over federal law and multilateral treaties.\textsuperscript{159} This assumption is a sound one because Congressional legislation must be Constitutional under Article I, Section Eight of the Constitution.\textsuperscript{160} Moreover, it is highly doubtful that the Framers intended to give international law or treaties the power to amend or revoke part or all of our Constitution.\textsuperscript{161} The assumption that the Supreme Court made in the initial Last in Time decisions is not quite as persuasive however.

In order to fashion the Last in Time rule, the Supreme Court relied on the fact that Article VI, Clause II describes both treaties and "Laws of the United States" as supreme without distinguishing between the two.\textsuperscript{162} This lack of distinction was one of the bases for the logical leap that treaties and federal law are equal and whichever is most recent should control.\textsuperscript{163} There are problems with that assumption however and it should be questioned in future decisions.

The first problem with the assumption is that it ignores the fact that the Supremacy Clause does not make any distinctions

\textsuperscript{159} See Missouri v. Holland, 252 U.S. 416 (1920) (ruling treaties must be Constitutional); see also \textsc{Restatement (Third) of Foreign Relations Law} § 115(3) (1987) (stating that treaties will not be given effect if they are inconsistent with the United States Constitution).

\textsuperscript{160} Article I, Section VIII of the Constitution grants Congress the authority to enact specific types of legislation. See \textsc{U.S. Const. art. I, § 8}.

\textsuperscript{161} See Dolinger, supra note 21, at 1052 (arguing that the "Supremacy Clause obviously did not intend to equate all federal law, for it lists the Constitution as well as laws and treaties as supreme law of the land, and surely laws and treaties are not equal as law to the Constitution"); see also Vincent Mulier, \textit{Recognizing the Full Scope of the Right to Take Fish Under the Stevens Treaties}, 31 Am. Indian L. Rev. 41, n. 132.

\textsuperscript{162} For a full discussion of the Supreme Court rulings in the seminal Last in Time cases, see supra Part I.B.

\textsuperscript{163} See \textsc{U.S. Const. art. VI, § 2} (failing to explain which of the "supreme law[s] of the land" will be most supreme); see also Curtis A. Bradley and Jack Goldsmith, \textit{Customary International Law as Federal Common Law: A Critique of the Modern Position}, 110 \textsc{Harv. L. Rev.} 815, 842 (1997) (stating, "The Supremacy Clause declares both treaties and 'Laws of the United States' to be 'the supreme Law of the Land.' In Whitney v. Robertson, the Supreme Court interpreted this clause to mean that 'no superior efficacy is given to either over the other.' One consequence of Whitney's logic is that a conflict between treaties and statutes is resolved by a last-in-time rule. Courts will give effect to a later act of Congress inconsistent with an earlier treaty, and vice-versa.")
between any of the forms of law that are listed as supreme. Textually, the Constitution, federal law and treaties are not given explicit priority in Article VI, Clause II. In the initial Last in Time rulings, the Court assumed that the Framers intended equality among two of the supreme laws based primarily on the fact that the clause was silent. That assumption is erroneous because that silence applies to all three types of law. If the rationale underlying the initial Last in Time rule decisions was applied to the Supremacy Clause in its entirety, all three bodies of law would be equal, creating a logical but undesired result. Since the Constitution is recognized as the supreme law of the United States, the Court should not have hastily presumed that treaties and federal law were equal when there is evidence that they should not be.

Mexican courts have come to an antithetical conclusion. Article 133 of the Mexican Constitution is textually similar to Article VI, Clause II of the United States Constitution. It lists the Mexican “Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it” as supreme. Although there is a stronger implication of Constitutional superiority in Mexico’s Constitution, neither Article 133 nor Article VI, Clause II imply or explicitly state the status of domestic laws and treaties. Mexican courts have interpreted this ambiguity in Article 133 to mandate that international trea-

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164 In the three cases discussed in Section I of this comment the Supreme Court stated that it would invalidate United States treaties as far as they conflicted with subsequent acts of Congress. See supra Part I.B.

165 See Missouri v. Holland, 252 U.S. 416 (1920) (stating that the “supreme law of the land” consists of three things); see also David Cinotti, The New Isolationism: Non-Self Execution Declarations and Treaties as the Supreme Law of the Land, 91 GEO. L.J. 1277, 1285 (2003) (arguing that the Framers intended that treaties be on equal footing with Congressional legislation).

166 Missouri, 252 U.S. at 416 (1920) (holding that although “a treaty stands upon equal footing with a law of the United States . . . there must be a limit, else that power would destroy many of the other provisions of the Constitution.”). But see Joseph Story, Commentaries on the Constitution of the United States 3, §1831 (1833) available at http://press-pubs.uchicago.edu/founders/documents/a6_2s42.html (last visited January 11, 2008) (posing that treaties should equally be the “supreme law of the land”).

167 For the full text of Article VI of the United States Constitution and Article 133 of the Mexican Constitution, see supra text accompanying notes 2 and 27.

168 Article 133 lists only treaties that are “in accord” with the Constitution as supreme. Art. VI, cl. 2 is not as explicit. See supra notes 2 and 27.
ties shall control domestic law whether prior or subsequent.\textsuperscript{169} The fact that a nation with a Supremacy Clause so similar to our own has come to a completely different reading of its constitution lends credence to the belief that the Last in Time decisions may have been wrongly decided. This belief is further strengthened when one examines the intent of the Framers.\textsuperscript{170}

Writing as Publius, founding father and first Supreme Court Chief Justice John Jay,\textsuperscript{171} spoke directly to the power of treaties in The Federalist No. 64.\textsuperscript{172} Characterizing treaties as bargains, Jay conceded that treaties could be amended and repealed.\textsuperscript{173} However, Jay argued vehemently that such amendments and repeals must be done with the approval of both parties to the agreement.\textsuperscript{174} Moreover, he noted that no other nation would sign a treaty if its provisions would only be binding on the United States "so long and so far as we may think proper to be bound by

\textsuperscript{169} Mexican courts have read Article 133 to place treaties above domestic legislation. See Dr. Luis Miguel Díaz, National Treaty Law and Practice: Mexico, in NATIONAL TREATY LAW AND PRACTICE, supra note 27, at 452–53; see also Alejandro Lopez-Velarde, Trademarks in Mexico: The Effects of the North American Free Trade Agreement, 17 HOUS. J. INT'L L. 49, 85 (1994); James F. Smith & Marilyn Whitney, The Dispute Settlement Mechanism of the NAFTA and Agriculture, 68 N.D. L. REV. 567, 602 n.195 (1992).

\textsuperscript{170} See THE FEDERALIST NO. 64 (John Jay).


\textsuperscript{172} The discussion of treaties in Federalist No. 64 noted above states:

Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.

THE FEDERALIST NO. 64 (John Jay).

\textsuperscript{173} Id. (arguing that treaties should be "repealable at pleasure").

\textsuperscript{174} See THE FEDERALIST NO. 64 (John Jay) (stating the consent of both parties to be a requirement that applies to treaty amendments and repeals as well as treaty formation).
it." Alexander Hamilton, Framer of the Constitution and fellow writer of the Federalist papers, stated in The Defence, No. 38 that it was the intent of the Constitutional Convention that treaties would "control and bind the legislative power of Congress." Such unequivocal language by prominent founding fathers has led some legal scholars to question the Last in Time decisions and their progeny. In spite of this evidence, the Court refused to probe into the intent of the Framers in the initial Last in Time decisions. Had the Court considered this powerful evidence it may have crafted a different rule granting more deference to multilateral treaties.

The second problem with the Court's reading of the Supremacy Clause is that the Last in Time rule was improperly decided at an inappropriate time. In the first cases in which it appeared, the Last in Time rule existed solely in dicta. The Court was capable of deciding the cases before it without deciding the status of federal law and treaties, and in the opinion of this author, it should have continued this practice. However, since the Court felt it necessary to overstep the bounds of the facts before it, it should have engaged in a thorough discussion that carefully examined factors relevant to determining the priority of federal laws with respect to treaties. Unfortunately, this issue was not given the care that it deserved. Had the Court looked deeper into the record of the Framers' intent, it may have found that treaties...
should be directly underneath the Constitution, whether earlier or later in time. At the very least, it would have found that the intent was inconclusive and that the Court would need to discuss and weigh factors related to three possible outcomes: treaties and federal laws being equal with the Last in Time rule resolving conflicts; treaties controlling federal law; or federal law being superior to treaties. Given the statements of Jay and Hamilton and the lack of explicit direction from the Constitution itself, the Court's untimely and underdeveloped finding was arguably incorrect and certainly debatable.

B. Global Changes in the Past Century Have Made the Last in Time Rule Outdated Precedent

The initial Last in Time cases were decided over a hundred years ago. The world in which the rule was created was markedly different from the world today. In 1884 (the year *Head Money Cases* was decided) the cornerstone of the Statue of Liberty was laid on Bedloe's Island in New York Harbor. When *Whitney v. Robertson* was decided four years later, slavery had

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179 See Lobel, *supra* note 178, at 1094 (reflecting Framers' understanding that international treaty law limited power of federal government during ratification debates following the Constitutional Convention); see also Kenneth C. Randall, *Foreign Affairs in the Next Century*, 91 COLUM. L. REV. 2097, 2104 (1991) (reviewing LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990)) (noting importance of consulting the Framers' original intent to interpret constitutional ambiguities about foreign affairs).

180 See Lobel, *supra* note 178, at 1100-01 (stating early leaders' uncertainty regarding the ambiguous relationship between treaties, customary law, and subsequent statutes); see also Vasquez, *supra* note 177, at 696 n.9 (arguing that Framers' intent is uncertain).

181 See Stewart Jay, *Essay, The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 828 (1989) (noting the prevalent notion in eighteenth-century jurisprudence that the federal government lacked the power to alter treaties); see also Lobel, *supra* note 179, at 1095-96 (pointing to Jay's argument that the Constitution affirmed treaties as beyond the legislature's reach as well as Hamilton's suggestion that the judiciary was bound by international law).

182 *The Chinese Exclusion Case* was decided 118 years ago. 130 U.S. 581 (1889). *Whitney v. Robertson* was decided 119 years ago. 124 U.S. 190 (1888). The *Head Money Cases* was decided 123 years ago in 1884. 112 U.S. 580 (1884).

just been abolished in Brazil and Jack the Ripper was on the loose in London. At the time of *The Chinese Exclusion Case*, Benjamin Harrison was President of the United States. This comment does not argue that these differences alone should provoke the questioning of legal precedent as accepted as the Last in Time rule. It argues that the way that the world has changed and the relevance of those changes to the continued application of the rule should provoke an inquiry into this issue by United States courts.

Over the past century, there has been an astonishing increase in the contact between nations. Naturally, an explosion of international trade coincided with the increase in relations. This phenomenon occurred for a number of reasons. The movement of goods has been facilitated by an exponential increase in technol-

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188 See Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT’L L. REV. 465, 466 (2005) (noting “dramatic increase in cross-border investments” that coincided with globalization); see also John D. Jackson, *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on “Legal Processes and National Culture,”* 5 CARDOZO J. INT’L & COMP. L. 51, 57 (1997) (pointing to “increased international communication and travel, increased international trade, the growth in number and reach of international organizations, the internationalization of business and technology, [and] increasing awareness of the international consequences of phenomena formerly regarded as national” as contributing to the homogenization of western cultures).
The commercial use of jet airplanes and the construction of enormous ships to transport truck containers have made it possible to move goods to distant nations. Moreover, the increased sophistication of communication devices allows entrepreneurs from around the globe to conduct business in an extremely efficient manner. Finally, the ability to do business with far off lands has led to multinational corporations and organizations designed to limit interference with the interests of global commerce. These are just a few reasons why many nations, the United States in particular, have been able to participate in

189 See Thomas Cottier, Symposium, The New Global Technology Regime: The Impact of New Technologies on Multilateral Trade Regulation and Governance, 72 CHI.-KENT. L. REV. 415, 416 (1996) ("Technology allows for the relatively inexpensive transportation of goods and services and accounts for an unprecedented growth of international trade since the end of World War II."); see also Rex Honey, Symposium, Interrogating the Globalization Project, 12 TRANSNAT'L L. & CONTEMP. PROBS. 1, 1 (2002) (observing that "[c]ommunication technology and the development of global markets allow people to buy and sell on all continents without so much as leaving their homes.").


191 See Edwin R. Render, How Would Today's Employees Fare in a Recession?, 4 U. PA. J. LAB. & EMP. L. 37, 37 (2001) (associating globalization with "new economy" industries such as trucking); see also Narayan Rangaraj & N. Viswanadham, An Example of a Supply Chain Involving Multi Modal Containerised Transport, available at www.me.iitb.ac.in/~narayan/transport/multi-modal-supply-chain.pdf (last visited January 11, 2008) (noting the increase in movement of goods by containerised mode in India and South Asia).

192 See Cottier, supra note 189, at 425-26 (stating that communication is essential for international trade because it reduces transaction costs, makes information and global interaction available, contributes to economic growth, and fosters cooperative exchange); see also Sharon K. Hom & Eric K. Yamamoto, Symposium, Collective Memory, History, and Social Justice, 47 UCLA L. REV. 1747, 1778 (2000) (noting that globalization is marked by new tools of technology including cellular phones, the internet, and media networks).


195 See Michel Rosenfeld, Symposium, Derrida's Ethical Turn and America: Looking Back From the Crossroads of Global Terrorism and the Enlightenment, 27 CARDOZO L.
and have benefited from increased commercial contact with the international community at large. Moreover, this growth in foreign trade has altered the means of international agreements.\textsuperscript{196} Prior to the second half of the twentieth century the law of nations was predominately made of bilateral treaties.\textsuperscript{197} The end of World War II and the increase in global relations fostered the development of multilateral treaties as the primary method of international governance.\textsuperscript{198}

The increase in contact between nations has amplified the significance of a nation’s reputation in the international community.\textsuperscript{199} This importance is magnified by the advancing communication technology and advent of multilateral treaties because news of a nation’s reputation is likely to travel quickly to a large number of potential trading partners. A country that is known to be disloyal or neglectful in performing its obligations is less likely


to be the leader of the global trade network.  Although the United States' power and wealth has helped mask the importance of reputation thus far, there is speculation among legal scholars that the mask is beginning to slip. When looked at in conjunction with the statements of John Jay and Alexander Hamilton, the Last in Time rule appears even less appropriate given changes over the lifetime of the United States. The statements of the Framers who felt that international law should take precedent over domestic law were made at a time when globalization had not yet reached its peak and agreements between nations were generally bilateral. Multitudes of nations are now entering binding multilateral agreements in rising numbers, increasing the harm done to our international standing. The abrogation of those treaties by the current use of the Last in Time rule for domestic purposes is problematic and arguably offensive to the intent of the creators of the United States.

C. The United States Harms Its Reputation by Disregarding International Obligations for Domestic Purposes

The harm done to the United States' increasingly important global reputation is another reason why the application of the Last in Time rule to multilateral treaties should be seriously questioned if not overruled. The rule is capable of damaging the outside world's perceptions in a number of ways. Not only may the rule be harmful but, as seen in Empresa, the upheld Congressional acts themselves may be injurious.

200 See Federalist No. 64 (John Jay) (discussing global credibility); Vagts, supra note 101, at 461-62 (criticizing United States use of Last in Time rule).

201 See Vagts, supra note 101, at 461-62 (highlighting United States' minimization of international obligations and arguing that "[a] reputation for playing fast and loose with treaty commitments can only do harm to our capacity to be a leader in the post-Cold War world"); Sean D. Murphy, Foreword—Lawyers and Wars: Asymposium Issue in Honor of Edward R. Cummings, 38 GEO. WASH. INT'L L. REV. 493, 498 (2006) (mentioning the idea that the United States' detention of combatants in the "war on terror" may be "impairing the United States' reputation, and in turn its ability to project 'soft power' abroad").

202 See John King Gamble, Human-Centric International Law: A Model and a Search for Empirical Indicators, 14 TUL. J. INT'L & COMP. L. 61, 72 (2005) (noting the increase in multilateral treaties and commenting that "the metaphor of a rising tide seems appropriate"); Jonathan D. Greenberg, Does Power Trump Law?, 55 STAN. L. REV. 1789, 1790 (2003) (stating that the number of multilateral treaties registered with the United Nations has increased 400% in "just over two decades").

203 Empresa, 399 F.3d at 472-73 (2005) (discussing the embargo statute); see 31 C.F.R. § 515.201(b) (2004) (prohibiting property transactions with designated countries).
The very existence of the Last in Time rule may damage American global interests. Depending on the scope of the federal law, the rule allows Congress to modify and even nullify multilateral treaties for reasons unlikely to be questioned by United States courts. This sends a message to the international community that the United States is capable of dishonoring its obligations under fairly negotiated treaties. Moreover, the courts’ frequent use of the Last in Time rule eats away at the good will that the United States enjoys around the world. The list of decisions utilizing this rule demonstrates to the rest of the world that not only is America able to ignore international treaties for domestic purposes, it has done so with notable frequency.

The federal laws given priority over prior multilateral treaties are often offensive to both allies and adversaries of the United States. The embargo that took center stage in Empresa is a great example of how the act of Congress itself further damages America’s reputation. Signed into law by President John F. Kennedy in 1962, the embargo was a response to the Cuban revolution of 1959 led by Fidel Castro and Ernesto “Che” Guevara. It was initially justified by Cuba’s alliance with the Soviet Union but little changed after communist Russia’s

204 In the three seminal cases discussed in Section I of this comment the Supreme Court stated that it would invalidate United States treaties as far as they conflicted with subsequent acts of Congress. See supra Part I.B.


206 Empresa provides a case in point, as its use of the Last-in-Time rule against a Cuban company has ramifications in connection with the Paris Convention. See Empresa, 399 F.3d at 481 (2005); see also Multilateral Treaty on the Protection of Industrial Property, 21 U.S.T. 1583 (1970).


208 See Dhooge, supra note 207, at 581 (noting “[r]elations between Cuba and the United States sharply deteriorated after Castro’s ascent to power”); Maniaci, supra note 207, at 898 (“Castro’s nationalization of all United States property could be considered an impetus which began a series of sanctions”).

209 See UNITED STATES ECONOMIC MEASURES AGAINST CUBA: PROCEEDINGS IN THE UNITED NATIONS AND INTERNATIONAL LAW ISSUES 135 (Michael Krinsky & David Golove
Acts of Congress passed after the end of the Cold War, such as the Libertad Act of 1996, have actually escalated tensions between Castro's government and the United States. Recent codifications of the embargo not only sanction Cuba but also punish third-party nations for trading with Cuba. In spite of this increased severity, the embargo regulations have continued to be incapable of effecting regime change and arguably doing nothing to push Castro out of power.

The ineffectiveness of the embargo, the suffering of the people under it, and the intrusiveness of Congressional legislation into the affairs of foreign nations have led to a backlash against the United States for its policies against Cuba. Many at home and abroad believe that the embargo is outdated law kept alive...
by a small but powerful group of Cuban exiles in Florida. As the only nation in the world who refuses to do business with Cuba, the United States is utterly alone in its view of its neighbor. Rather than dilute the embargo’s effectiveness by recognizing the importance of prior multilateral international commitments, the judicial branch of the United States has strengthened this alienation by applying the Last in Time rule. The enabling of unsound foreign policy, exemplified in Empresa, is slowly contributing to the isolation of the United States. Without a greater degree of care, the United States may transform from superpower to pariah.

D. The Last in Time Rule Sanctions Violations of International Law Norms

The Vienna Convention on the Law of Treaties [hereinafter Vienna Treaty] is commonly referred to as the “treaty on treaties” and was opened for signature in 1969 and entered into

216 See Jacqueline Bhabha, Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children, 7 U. Chi. L. Sch. Roundtable 269, 282-83 n.60 (noting “powerful Cuban Exile Community in Miami” and its ability to draw national attention to Elian Gonzalez incident); Oliver Houck, Thinking About Tomorrow: Cuba’s “Alternative Model” for Sustainable Development, 16 Tul. Envtl. L.J. 521, 531 n.53 (2003) (stating that for many Cuban exiles, the lifting of the embargo would “necessarily presuppose the death of Castro”).


218 See Jack Alan Levy, Note, As Between Prince and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators, 86 Geo. L.J. 2703, 2732-33 (1998) (pondering possibility of United States becoming a “pariah of the international legal community”); see also H.R. Rep. No. 103-702, at 12 (1994) (“We are unaware of any other country which grants its citizens the right to sue a foreign government for acts that the foreign government committed outside the citizen’s home country.”).

force in 1980.\textsuperscript{220} Created in response to the uncertainty surrounding treaties following World War II,\textsuperscript{221} the Vienna Treaty has been successful in getting nations of the world to sign and be bound by it.\textsuperscript{222} Although the United States has signed the treaty it has refused to ratify it.\textsuperscript{223} In spite of this, the Vienna Treaty is generally viewed as binding customary international law by American courts and legal scholars.\textsuperscript{224}

Article Twenty-Six of the Vienna Treaty requires that parties to treaties perform obligations under such treaties in good faith.\textsuperscript{225} The treaty does not define “good faith” specifically but Black’s Law Dictionary defines it as honesty, faithfulness to one’s duty, observance of reasonable commercial standards of fair dealing, or lack of intent to defraud or seek unconscionable disadvantage.\textsuperscript{226}

\textsuperscript{220} See Hylton, supra note 219, at 421 n.1 (noting the dates when the VCLT was signed and entered into force); see also Kearney, supra note 219, at 495 (stating the enactment dates of the VCLT).

\textsuperscript{221} See Hylton, supra note 219, at 419 (“The 1969 Vienna Convention on the Law of Treaties attempted to give some order to the confusion that was treaty law after World War II.”); see also Kearney, supra note 219, at 495 (“Convention on the Law of Treaties sets forth the code of rules that will govern the indispensable element in the conduct of foreign affairs.”).

\textsuperscript{222} See Hylton, supra note 219, at 421 n.3 (noting that “72 states had ratified and 46 states had signed” the treaty); see also Kearney, supra note 219, at 495 (“For the foreseeable future, the treaty will remain the cement that holds the world community together.”).


\textsuperscript{225} See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations art. 26, Mar. 21, 1986, 25 I.L.M. 543 [hereinafter Vienna Treaty] (containing Article Twenty-Six of the Vienna Treaty, subtitled “Pacta sunt servanda,” provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

\textsuperscript{226} Black’s Law defines “good faith” as: “A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.” BLACK’S LAW DICTIONARY (8th Ed. 2004).
By refusing to conform to a treaty simply because a later act of Congress conflicts with it, the United States arguably acts in bad faith by being unfaithful to its duties and obligations. As a signatory of the Paris Convention, the United States had a duty to enforce and perform the provisions of it.\(^{227}\) By dismissing the Paris Convention in favor of the embargo, the Second Circuit in *Empresa* sanctioned and encouraged the United States to dishonor its obligations by passing legislation contrary to prior agreements in violation of international law.\(^{228}\)

The Second Circuit’s decision in *Empresa* and other Last in Time decisions clearly violate Article Twenty-Seven of the Vienna Treaty. Article Twenty-Seven prohibits a nation from citing internal law as justification for its failure to perform a treaty.\(^{229}\) By rendering the Paris Convention inoperative because it conflicts with the subsequent embargo, the Second Circuit invoked United States federal law to justify its failure to perform obligations under a multilateral treaty. The *Empresa* decision unjustly ignored the Vienna Treaty and customary international law recognized by the United States. Although the Vienna Treaty did not exist at the time of the initial Last in Time decisions, that


\(^{228}\) See *Empresa*, 399 F.3d at 481 (noting that “[l]egislative acts trump treaty-made international law when those acts are passed subsequent to ratification of the treaty and clearly contradict treaty obligations.”); see also Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (stating that “[a]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”).

\(^{229}\) Article Twenty-Seven of the Vienna Treaty provides, “[a] party may not invoke provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.” Vienna Treaty, supra note 225, at art. XXVII. Article Forty-Six states:

1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Vienna Treaty, supra note 225, at art. XLVI.
does not justify the willful defiance of current international treaty norms.230

The United States recognizes the binding nature of the Treaty and its status as customary international law. Articles Twenty-Six and Twenty-Seven of the Vienna Treaty are important pieces of the international treaty law puzzle. A breach of these binding provisions is a violation of international law.231 Under the guise of the Supreme Court’s binding precedent, the Second Circuit’s use of the Last in Time rule in Empresa continued the normalization of United States international law disobedience.

E. United States Interests are Better Served by Policies Other Than the Judicial Application of the Last in Time Rule

Arguments can be made in favor of the Last in Time Rule. It may further United States interests by allowing Congress to respond to problems that were not foreseeable when the multilateral treaty was signed. It arguably preserves national sovereignty and allows the United States to continue to act in its own best interests without regard to prior engagements. Some would say that this comment exaggerates the harm done to the international reputation of the United States. In support of their argument, they likely would state that America would not lightly disregard its international obligations because it remains bound in international courts.232

230 See Vienna Treaty, supra note 225, at 1 (stating that the treaty was “[d]one at Vienna on 23 May 1969” and “enacted into force on 27 January 1980”).

231 See Lori Fisler Damrosch, Retaliation or Arbitration -- or Both? The 1978 United States-France Aviation Dispute, 74 A.J.I.L. 785, 789, 1980 (defining a material breach “as a repudiation not sanctioned by other provisions of the Vienna Convention, or a violation of a provision essential to the accomplishment of the object or purpose of the treaty.”); see also Vienna Treaty, supra note 225, at art. LI (stating that a “material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty”).

232 See Alfred P. Rubin, PERSPECTIVE: Milosevic and Hussein on Trial, 38 CORNELL INTL L.J. 1013, 1019 n.3 (2005) (“There are many bilateral and multilateral agreements to which the United States of America is a party, under which questions of interpretation are referred to the ICJ.”); see also John R. Crook, Contemporary Practice Of The United States Relating To International Law: State Diplomatic And Consular Relations: Seventh Circuit Allows Suit Seeking Damages For Lack Of Consular Notification, 100 A.J.I.L. 217, 219, (2006) (noting that the Supreme Court gives “respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [it]”).
In response, this comment puts forth the argument that in most situations the best interests of the United States are better served by the abolition of the Last in Time rule’s application against multilateral treaties. In other situations, United States interests would not be harmed by the discontinuation of Last in Time. Moreover, the number of recent Last in Time decisions indicates that the United States may not feel as committed to its international agreements as it should.

In creating treaties the United States need not rely on the Last in Time rule to ensure that its interests will continue to be protected. Although not binding on the United States as discussed above, the Vienna Treaty provides for reservations that the United States may use to its advantage. Reservations are unilateral statements made at the signing of a treaty that exclude or modify the effect of certain provisions in their application to the nation making the reservation. Although reservations are not permitted in every instance, they are a powerful tool that

See Alejandro Guanes-Mersan, A General Comparative Overview Of Trademark Regulations Between The United States And Paraguay, 16 ARIZ. J. INT’L & COMP. LAW 775, 780 (1999) (describing the Last-in-Time rule as a way to determine the prevailing law when there are two or more conflicting laws); see also Family Separation as a Violation of International Law, supra note 78, at 275 (stating “when an international law obligation conflicts with domestic federal law, United States judges are required to interpret the domestic law in a way that avoids the conflict if possible; if not, the two have equal status and the last-in-time rule applies.”).

See Francesco Parisi & Catherine Sevcenko, Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention, 21 BERKELEY J. INT’L L. 1, 1 (2003) (describing the use of reservations in multilateral treaties as a “seeming contradiction: 1) the law of reservations, enshrined in Articles 19-21 of the Vienna Convention on the Law of Treaties, favors the reserving state, but 2) the number of reservations attached to international treaties since the adoption of the Convention has been relatively low in spite of that natural advantage.”); see also John King Gamble, Jr., Reservations To Multilateral Treaties: A Macroscopic View of State Practice, 74 A.J.I.L. 372, 372 (1980) (“The International Law Commission, in its deliberations about the law of treaties, put the issue well: ‘[A] power to formulate reservations must in the nature of things tend to make it easier for some States to execute the act necessary to bind themselves finally to participating in the treaty and therefore tend to promote a greater measure of universality in the application of the treaty.”).

Article Two of the Vienna Treaty defines “reservations” as:

a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Vienna Treaty, supra note 225, art. II.

Article Nineteen of the Vienna Treaty explicitly states that reservations cannot be formulated in three situations. Vienna Treaty, supra note 225, art. XIX. Article Nineteen states:
would allow the United States to agree to a treaty and retain the ability to unilaterally tailor it to its own particular goals in both creation and enforcement. Further protecting the interests of individual nations, the Vienna Treaty does not require that reservations expressly authorized by the treaty be accepted by the other contracting states. In the instance of the treaty at issue in Empresa, the United States could have made a reservation modifying the enforcement of the treaty under certain specified conditions. By insisting that the treaty contain the reservation that the United States would not enforce the treaty in favor of nations that fell into a series of explicit categories, the United States could have continued to protect itself against unforeseen changes. These categories might have included nations that are openly hostile to the United States or its interests and nations that have a form of government that is opposed to the United States system. Post-revolutionary Cuba would have fallen into either category in this hypothetical reservation and the Last in Time rule would not have been necessary for the Second Circuit to resolve Cubatabaco's treaty claims in favor of General Cigar.

In addition to the power of reservations, the Vienna Treaty also provides other alternatives for the United States when its interests are no longer served by a treaty. As provided in Article Forty-Two, the provisions of the treaty itself may allow for the invalidity, termination or denunciation of a treaty. The Last in

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(a) the reservation is prohibited by the treaty;
(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Vienna Treaty, supra note 193, art. XIX.

See Vienna Treaty, supra note 225, art. XX ("A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.").

Article Forty-Two, subtitled "Validity and continuance in force of treaties," limits the circumstances in which a treaty may be terminated or a party may withdraw. Article Forty-Two states:
1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Vienna Treaty, supra note 193, art. XLII.
Time rule provides an incentive for the United States to enter international agreements that it should not. Knowing that the Last in Time rule allows it to ignore politically unpopular or unsound international obligations, the United States has less incentive to carefully negotiate agreements or exert sufficient pressure in the treaty-making process. Instead of making treaties first and asking questions later, using a more monist approach would force the United States to take its international obligations more seriously. The abolishment of the Last in Time rule would lead to the creation of treaties that were better tailored to serve United States interests and would lessen the loss of reputation that inevitably occurs when the United States disregards its commitments.

CONCLUSION

Faced with new challenges on our increasingly inter-connected planet, our nation is in a precarious position. The United States currently has the political and military clout to silence the protests of the rest of the world but this balance of power is not likely to last forever. By continuing to defer to Congress when deciding between subsequent federal law and prior multilateral treaties, the Judicial Branch of our government engenders resentment toward our law and policy. Although the Second Circuit was bound by Supreme Court precedent in Empresa, the Last in Time rule's century old story should not end without continued thoughtful scrutiny by the courts. For the reasons discussed in this comment, the Supreme Court should correct one hundred years of mistaken precedent and retire the Last in Time rule as it applies against multilateral treaties.