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THE DIFFERENCE BETWEEN TREATY INTERPRETATION AND TREATY APPLICATION AND THE POSSIBILITY TO ACCOUNT FOR NON-WTO TREATIES DURING WTO TREATY INTERPRETATION

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I. INTRODUCTION

In principle, different treaty systems[1] do not systemically affect each other. However, under certain conditions, different treaty systems can affect each other by relying on or accounting for treaty application or treaty interpretation.[2]

There are a number of methods to account for a treaty in the operation of another independent treaty. These different methods have limits regarding the extent of their application and thus are worth exploring.

The World Trade Organization (WTO) treaty system is, to some extent, self-contained. WTO treaty interpreters are not always permitted to account for non-WTO treaties. Whether or not and to what extent non-WTO treaties can be taken into account so that the WTO treaty system can be enriched by and can avoid conflict with these non-WTO treaties is of great importance from a theoretical and practical perspective. Theoretically, WTO treaty interpreters accounting for non-WTO treaties could clarify the relationship between different treaty systems. Practically, WTO treaty interpreters accounting for

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1. A "treaty system" used here refers to a group of treaties established under an international regime. For instance, the various agreements under the World Trade Organization are within a treaty system.

2. For purposes of this Article, the terms "relying on" and "taking into account" refer to introducing other treaties or norms of international law through treaty interpretation or direct application. Moreover, "taking into account" other treaties includes all situations where treaty interpreters consider the language of other treaties, including relying on other treaties.

non-WTO treaties may help to harmonize the different treaty systems and reduce potential conflicts between WTO treaties and other treaties (such as environmental treaties).

This Article explores possible ways of accounting for non-WTO treaties by focusing on the method of treaty interpretation. Although commentators have debated the prudence of applying non-WTO treaties[3] in the WTO system,[4] this Article explores the various methods of accounting for non-WTO treaties and clarifies the difference between the application and interpretation of WTO treaties. This Article's focus on treaty interpretation will create a framework for WTO treaty interpreters to apply and account for non-WTO treaties.

II. VARIOUS METHODS OF TAKING NON-WTO TREATIES INTO ACCOUNT

A. Through Incorporation

It is common for a treaty to incorporate some provisions of another treaty or some external norms. There are a number of examples of such incorporation in the WTO treaty system. For instance, Article 3(2) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) provides that "[t]he Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[5] Thus, the DSU incorporates the norm of customary rules of interpretation of public international law to assist with the interpretation of WTO agreements. As discussed below, the *Vienna Convention on the Law of Treaties* (VCLT) provides the customary rules for interpretation of public international law, and they are consistently applied in all WTO dispute settlement cases.[6] This is an example of incorporating external norms into the WTO treaty system through a WTO provision.

There are examples of more explicit and direct incorporation of other

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3. *See generally* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001); *see also* Joel Trachtman, *Jurisdiction in WTO dispute settlement*, *in* KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 132, 137 (Rufus Yerxa & Bruce Wilson eds., 2005).

4. *See* Andrew D. Mitchell & David Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 MICH. J. INT'L L. 559, 577 (2010).

5. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf [hereinafter DSU].

6. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *available at* untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [hereinafter VCLT].

international treaties into the WTO system. For instance, Article 2(1) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement) provides that "[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)."[7] Similarly, Article 2(2) provides that "[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits."[8]

Furthermore, Article 9(1) of the TRIPS Agreement provides that "[m]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom."[9] Under these articles, the Paris Convention, the Berne Convention, the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits, or some provisions of them, have become an integral part of the TRIPS Agreement and can be directly applied to one another accordingly.

Another example of incorporation is found in Article 2.4 of the *Agreement on Technical Barriers to Trade* (TBT Agreement), which requires Members to follow international standards.[10] Article 2.4 provides:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.[11]

These international standards are set forth by other international organizations.

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7. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 2(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS Agreement].

8. *Id.* art. 2(4).

9. *Id.* art. 9(1).

10. Agreement on Technical Barriers to Trade art. 2.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf [hereinafter TBT Agreement].

11. *Id.*

They are non-WTO norms. Thus, the reliance on international standards is also a type of incorporation by a WTO agreement of non-WTO norms. The *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) has a similar provision concerning the application of international standards. Article 3(3) provides in part, "Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations . . . ."[12]

When incorporating a non-WTO treaty or an external norm, a WTO agreement can set forth qualifications. For instance, Article 1.1 of the TBT Agreement defines TBT measures by referring to those adopted within the United Nations system and international standardizing bodies.[13] However, Article 1.1 still requires the context, object, and purpose of the TBT Agreement to be taken into account.[14] Article 1.1 provides, "General terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement."[15]

When a WTO agreement explicitly incorporates a non-WTO treaty into its text, the interpreters of the WTO agreement are bound by the application of the incorporated non-WTO treaty. The WTO treaty interpreters may also need to interpret the treaty through different methods provided in Articles 31 and 32 of the VCLT. Thus, when interpreting the incorporated treaty, WTO treaty interpreters might not only need to consider the context, object, purpose, and subsequent practice of the WTO agreement, but also the incorporated non-WTO treaty.

Concerning the form of incorporation, a relevant issue is whether including a general statement in the preamble of a treaty can be considered as an incorporation of another treaty. For example, the sustainable development statement in the first paragraph of the preamble of the *Agreement Establishing the World Trade Organization* (Establishing Agreement) could be considered to indirectly incorporate other environmental agreements so that WTO treaty interpreters are enabled to apply them. The pertinent portion of the preamble provides:

> *Recognizing* that their relations in the field of trade and economic endeavour should be conducted . . . allowing for the optimal use of the world's resources in accordance with the

12. Agreement on the Application of Sanitary and Phytosanitary Measures art. 3(3), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, *available at* http://www.wto.org/english/docs_e/legal_e/15-sps.pdf.

13. TBT Agreement, *supra* note 10, art. 1.1.

14. *Id.*

15. *Id.*

> objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development[.][16]

There are a couple of reasons not to consider the statement in the preamble to be an incorporation clause. First, the preamble is not the main text of the treaty. The preamble helps treaty interpretation by providing context. As provided in Article 31(2) of the VCLT, "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . ."[17] Since the VCLT has characterized the preamble as context for the purpose of treaty interpretation, it should not be considered an incorporation clause. Also, the statement in the Establishing Agreement does not specify which environmental agreements are incorporated. Therefore, it would be difficult for treaty interpreters to rely on such a general statement to directly apply any specific environmental agreements. Nevertheless, this statement does provide a contextual basis for accounting for environmental agreements through treaty interpretation.

Another issue concerning the status of an incorporated treaty is whether an incorporated non-WTO treaty should be viewed as the "context" of the incorporating WTO agreement, or whether the incorporated treaty becomes "text" of the incorporating WTO treaty. If the incorporating treaty becomes text, treaty interpreters need not rely on the concept of "context" to interpret it. The Panel in *Canada – Pharmaceutical Patents* took the position that an incorporated non-WTO treaty should be considered as "context" to be taken into account by the treaty interpreter:

> The Panel noted that, in the framework of the TRIPS Agreement, which incorporates certain provisions of the major pre-existing international instruments on intellectual property, the context to which the Panel may have recourse for purposes of interpretation of specific TRIPS provisions, in this case Articles 27 and 28, is not restricted to the text, Preamble and Annexes of the TRIPS Agreement itself, but also includes the provisions of the international instruments on intellectual property incorporated into the TRIPS Agreement, as well as any agreement between the parties relating to these agreements within the meaning of Article 31(2) of the Vienna Convention on the Law of Treaties. Thus, as the Panel will have occasion

16. Marrakesh Agreement Establishing the World Trade Organization pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154, *available at* http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

17. VCLT, *supra* note 6, art. 31(2).

> to elaborate further below, Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (1971) . . . is an important contextual element for the interpretation of Article 30 of the TRIPS Agreement.[18]

This Article disagrees with the Panel's view. A treaty interpreter is required to look at the "context" to interpret a term in the "text" of a treaty. The "context" is not the interpreted term itself; instead, the "context" is used to interpret the term. However, a treaty incorporated into a WTO agreement becomes part of the "text" of the WTO agreement. The application of the text from the incorporated non-WTO treaty is by its nature an application of the incorporating WTO agreement. It is incorrect to say that the incorporated treaty is a "contextual element." Since the incorporated treaty has become the text of the incorporating WTO agreement, the terms in the incorporated treaty may require interpretation through determining their ordinary meaning and examining the context of such terms.

B. Through Inherent or Implied Power

In addition to the direct incorporation of a non-WTO treaty by a WTO agreement enabling WTO treaty interpreters to directly apply non-WTO treaties, another complication arises regarding whether the treaty interpreters can take into account non-WTO treaties in other situations. One way to account for non-WTO treaties is to consider the application of other international norms and inherent power of treaty interpreters.[19] Some commentators argue that the WTO panels and the Appellate Body

> do have inherent jurisdiction but that recognition of this jurisdiction does not give them carte-blanche to use any international law principles to resolve WTO disputes. Inherent jurisdiction permits WTO Tribunals to apply only international law rules that satisfy three conditions. First, the application of the international law rule must be necessary for the WTO Tribunal to properly exercise its adjudicatory function. Second, the rule in question must have no substantive content of its own. Third, its application must not be inconsistent with the Covered Agreements. This third condition is particularly important: it requires careful scrutiny of the Covered Agreements in general terms and with regard to the effect of the proposed application of a principle in a

18. Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 7.14, WT/DS114/R (Mar. 17, 2000).

19. Mitchell & Heaton, *supra* note 4, at 561.

given case.[20]

The Appellate Body in *Mexico – Taxes on Soft Drinks* attributed a limited scope of inherent power to the treaty interpreters. Their report provides:

> WTO panels have certain powers that are inherent in their adjudicative function. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it." Further, the Appellate Body has also explained that panels have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated."[21]

Another way is to consider the application of other international norms to be within the scope of the implied power of a tribunal. Some argue that the power to apply other international laws might

> be thought of as implied from the provisions of the Covered Agreements establishing WTO Tribunals, taken as a whole and read in the light of their objects and purposes (one of which is the establishment of judicial dispute settlement). This is effectively stating that the WTO Agreements impliedly authorize panels to do all that is necessary to fulfill their (judicial) function, which is an application of the principle of utility.[22]

Reliance on the methods of inherent or implied power for the purpose of accounting for other international norms is constrained by the nature of the norms. If the applied international rule is a general rule of international law, such as one that is necessary to fulfill the judicial function of treaty interpreters, the application of non-WTO rules through reliance on these methods is less difficult. However, if it is not a general rule of international law, these methods are not very useful to the application of non-WTO rules. For instance, it is

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20. *Id.*

21. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 45, WT/DS308/AB/R (Mar. 6, 2006).

22. Mitchell & Heaton, *supra* note 4, at 569 (citations omitted).

implausible for a treaty interpreter to ascertain that accounting for an environmental treaty in interpreting a WTO agreement is an implied or inherent power. Such a general statement allows treaty interpreters to add to or to diminish the rights and obligations of the WTO Members. This result breaches Article 3(2) of the DSU, which requires that recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements."[23]

C. Through Treaty Interpretation

The last method of accounting for other treaties is through treaty interpretation. Since all treaties are part of international law, the interpretation of any treaty must be in accordance with the treaty interpretation principles under public international law. WTO agreements are not exempt from this general principle. The dispute settlement procedures under Article 3(2) of the DSU requires treaty interpreters "to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law."[24] The principles provided in Article 31 of the VCLT are customary rules and have been uniformly applied in WTO dispute settlement cases.[25] Thus, the Appellate Body and the dispute settlement panels have consistently relied on the VCLT provisions to interpret WTO provisions.

III. DIFFERENCE BETWEEN TREATY INTERPRETATION AND TREATY APPLICATION

The inherent and implied powers and the incorporation of non-WTO treaties in a WTO agreement can serve as the bases for the WTO panels and Appellate Body to "apply" non-WTO treaties. Methods of treaty application are concerned with the scope of laws, that is, the applicable laws or the sources of law to be applied. Methods of treaty interpretation account for various factors including other treaties in order to correctly and properly apply the interpreted treaty.

Some argue that little difference exists between a treaty interpretation and a treaty application. For instance, they contend:

> The distinction between application and interpretation is not concrete and it may in some cases be difficult to determine whether a WTO Tribunal is applying international law or

23. DSU, *supra* note 5, art. 3(2).

24. *Id.*

25. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *Gasoline* Appellate Body Report]; Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 46, WT/DS50/AB/R (Dec. 19, 1997).

> simply using international law to interpret a WTO provision. The answer to this question may not make a large difference from a practical perspective.[26]

While this argument has some strength, it is not complete. From the perspective that external rules should be applied, treaty interpretation and treaty application are the same when accounting for non-WTO treaties.

In the process of a dispute settlement, treaty interpretation and treaty application can both be involved. For instance, when interpreting the WTO rules, a panel or the Appellate Body must apply the VCLT to interpret various WTO agreements in order to account for non-WTO treaties. There are three conceptual steps in this process: (1) applying the VCLT, (2) taking into account non-WTO treaties, and (3) interpreting a WTO agreement. Thus, treaty application (the application of non-WTO rules such as the VCLT) and treaty interpretation (the interpretation of WTO agreements) are interrelated.

However, treaty interpretation and treaty application are different in nature and have independent functions. "All interpretation pursues meaning within a penumbra of discursive formations."[27] Treaty interpretation is a process of discovering the proper meaning of treaty terms through various interpreting methods; however, treaty application is a process of identifying the source of law and applying it.[28] Thus, it is important to separately analyze treaty interpretation to decide whether non-WTO treaties can be taken into account.

IV. THE RELATIVELY SELF-CONTAINED WTO TREATY SYSTEM

Whether a treaty is self-contained depends on whether the treaty interpreter can apply other treaties to decide the rights and obligations of the parties involved. If a treaty is not self-contained, it would be easier to apply other treaties without relying on treaty interpretation; whereas, if a treaty is self-contained, the application of other treaties would be more difficult.

Some argue that the WTO system is not self-contained.[29] However, this Article takes the view that most treaties are closed systems given that interpreters are not authorized to rely on other treaties to decide the rights and obligations between the parties under the interpreted treaties. The exception is that customary international law is always applied to all treaties for the purpose

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26. Mitchell & Heaton, *supra* note 4, at 570.

27. Diane A. Desierto, *Necessity and "Supplementary Means of Interpretation" for Non-Precluded Measures in Bilateral Investment Treaties*, 31 U. PA. J. INT'L L. 827, 828 (2010).

28. For discussions of sources of law under the WTO dispute settlement procedure, see DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 49-84 (2d ed. 2004).

29. Joost Pauwelyn, *The Application of Non-WTO Rules of International Law in WTO Dispute Settlement*, *in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS VOLUME I 1405, 1406 (Patrick F. J. Macrory et al. eds., 2005).

of interpretation.

In other words, the WTO system is basically self-contained from the perspective of treaty application, but the WTO system is not self-contained from the perspective of treaty interpretation. In the context of treaty interpretation, the WTO system is not self-contained because treaty interpretation is a process of determining the proper meaning of treaty terms. In order to determine the proper meaning of treaty terms, the interpreters must rely on customary rules of international law to interpret WTO agreements. The VCLT contains the customary rules of interpretation of public international law and is a source of law for the panels and the Appellate Body to interpret WTO agreements.

Substantively, the WTO system is self-contained to a large extent because the sources of law in the form of treaty provisions are the "covered agreements" under the DSU only.[30] Treaty interpreters of the WTO do not apply non-WTO treaties as a source of law. Thus, Article 1(1) indicates that the DSU applies to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding . . . ."[31] Strictly speaking, Article 1(1) is not used purely for defining the source of law. Article 1(1) of the DSU provides that WTO panels and the Appellate Body are directed to only decide complaints under a WTO agreement.

The Appellate Body in *EC – Poultry* also indicated that an agreement not included as a "covered agreement" cannot serve as the basis to decide a dispute.

> Schedule LXXX is annexed to the *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994* (the "*Marrakesh Protocol*"), and is an integral part of the GATT 1994. As such, it forms part of the multilateral obligations under the *WTO Agreement*. The Oilseeds Agreement, in contrast, is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC – Oilseeds*. As such, the Oilseeds Agreement is not a "covered agreement" within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the *WTO Agreement*, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the *WTO Agreement*. Although the provisions of certain legal instruments that entered into force under the GATT 1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into

30. DSU, *supra* note 5, art. 1(1).

31. *Id.*

> the *WTO Agreement*, the Oilseeds Agreement is not one of those legal instruments.[32]

V. VARIOUS METHODS OF TREATY INTERPRETATION

Non-WTO treaties cannot be introduced into the operation of the WTO by direct application but can be introduced through treaty interpretation. Regarding Article 3(2) of the DSU, the Appellate Body in *U.S. – Gasoline* noted that "direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law."[33] If it refers to other non-WTO treaties, the requirement of not reading a WTO agreement in clinical isolation from other treaty systems must be based on treaty interpretation. Article 31 of the VCLT requires a treaty to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[34] Article 32 also requires that the circumstance of the conclusion of a treaty be considered to confirm or determine the meaning.[35]

According to the Appellate Body, consideration of the textual contents is the starting point for treaty interpretation and should be read in their context. When the text is equivocal, the object and purpose of the treaty is considered. The Appellate Body report in *US – Shrimp* provides:

> A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[36]

In the sections to follow, this Article will discuss the ordinary meaning of the textual contents, the context, the object and purpose, together with other supplementary methods, to determine whether and to what extent treaty

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32. Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, ¶ 79, WT/DS69/AB/R (July 13, 1998) (citations omitted) [hereinafter *Poultry* Appellate Body Report].

33. *Gasoline* Appellate Body Report, *supra* note 25, at 17.

34. VCLT, *supra* note 6, art. 31(1).

35. *Id.* art. 32.

36. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp* Appellate Body Report].

interpretation can account for a non-WTO treaty.

A. Ordinary Meaning

Article 31(1) of the VCLT provides in part that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty . . . ."[37] Treaty interpreters tend to rely on dictionaries to interpret treaty terms of WTO agreements.[38] However, a dictionary is not the only method available to interpret the ordinary meaning of a treaty term. A relevant question is whether a treaty interpreter can look at other treaties for the purpose of giving ordinary meaning to the term. The Appellate Body has suggested that they can. In its *US – Shrimp* report, the Appellate Body relied on other international instruments to decide the ordinary meaning of the term "exhaustible natural resources" in Article XX(g) of the General Agreement on Tariffs and Trade 1994 (GATT 1994). The report provided:

> From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary". It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.[39]

Examining non-WTO treaties to determine a term's ordinary meaning is helpful in clarifying the meaning of the WTO treaty terms and avoiding possible conflict with non-WTO treaties. The phrase "ordinary meaning" suggests that the interpreted term must be used widely and frequently. The Appellate Body's criterion of the "frequent references" made by "modern international conventions and declarations" indicates that the interpreted term when ordinarily used has a certain extent of breadth and frequency. However, the requirement that a term be "informative" is confusing because it does not address the essence of ordinary meaning.

Similarly, in the *EC – Approval and Marketing of Biotech Products* Panel Report, with regard to relying on other treaties to decide the ordinary meaning of a treaty term, the panel provided:

> The ordinary meaning of treaty terms is often determined on the basis of dictionaries. We think that, in addition to

37. VCLT, *supra* note 6, art. 31(1).

38. *See* Chang-fa Lo, *Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding*, 1 J. INT'L DISP. SETTLEMENT 431, 431 (2010).

39. *Shrimp* Appellate Body Report, *supra* note 36, ¶ 130 (citations omitted).

> dictionaries, other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. . . . In the light of the foregoing, we consider that a panel may consider other relevant rules of international law when interpreting the terms of WTO agreements if it deems such rules to be informative. But a panel need not necessarily rely on other rules of international law, particularly if it considers that the ordinary meaning of the terms of WTO agreements may be ascertained by reference to other elements.[40]

The *EC – Approval and Marketing of Biotech Products* panel and Appellate Body reports confirm that non-WTO rules can be introduced into the WTO system through treaty interpretation when searching for the "ordinary meaning" of a WTO term. The Appellate Body and the panel reasoned that the "frequent references" made by "modern international conventions and declarations" and other relevant rules of international law are "informative" for the purpose of interpreting WTO agreements by relying on non-WTO rules.[41]

B. Context

1. The Contextual Documents Include Agreements and Other Instruments

Article 31 of the VCLT includes the following provisions concerning the reliance on context for treaty interpretation.[42] Article 31(1) provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context."[43] Article 31(2) provides:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any *agreement* relating to the treaty which

40. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.92-.93, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) (citations omitted).

41. *Shrimp* Appellate Body Report, *supra* note 36, ¶ 130.

42. VCLT, *supra* note 6, art. 31.

43. *Id.* art. 31(1).

> was made between all the parties in connection with the conclusion of the treaty; (b) any *instrument* which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[44]

In terms of the non-WTO rules being considered as the "context" of the WTO agreement, it should be noted that in addition to an agreement, other "instruments," including unilateral ones, can also be considered as the context of a treaty to be interpreted. The International Law Commission provides:

> The principle on which [Article 31(2)] is based is that a unilateral document cannot be regarded as forming part of the "context" . . . *unless not only was it made in connexion with the conclusion of the treaty but its relation to the treaty was accepted in the same manner by the other parties*. . . . What is proposed in [Article 31(2)] is that, for purposes of interpreting the treaty, these categories of documents should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty.[45]

2. The Contextual Document Must be Relevant

Article 31(2) of the VCLT provides in part:

> The context for the purpose of the interpretation of a treaty shall comprise . . . (a) any agreement *relating to* the treaty which was made between all the parties *in connection with* the conclusion of the treaty; (b) any *instrument* which was made by one or more parties *in connection with* the conclusion of the treaty and accepted by the other parties as an instrument *related to* the treaty."[46]

Thus, the main criteria for interpreting WTO agreements, is the "relationship" between the WTO agreements and non-WTO agreements or instruments. In

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44. *Id.* art. 31(2) (emphasis added).

45. *Report of the Commission to the General Assembly*, U.N. Doc., at 221, A/6309/Rev.l, (1966), *reprinted in* [1967] 2 Y.B. Int'l L. Comm'n 172, U.N. Doc. A/CN.4/SER.A/1966/Add.1., *available at* http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v2_e.pdf (emphasis added).

46. VCLT, *supra* note 6, art. 31(2) (emphasis added).

other words, the two must be "relating to," "in connection with," or "related to" each other.[47]

Neither the Appellate Body nor any dispute settlement panels have provided a direct interpretation of the terms "relating to," "in connection with," or "related to" as used in the VCLT. However, the term "relating to" is also used in GATT Article XX(g) and the Appellate Body has previously interpreted this term.[48] In *US – Gasoline*, the Appellate Body indicated that although the parties of the dispute agree that the term "relating to" used in Article XX(g) of the GATT 1994 is an equivalent of "primarily aimed at," the "phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)."[49]

The term "relating to" does not mean that the relationship should be as close if one is the primary aim of the other. One commentator suggested that, in order to be related to the treaty and thus a part of the "context," an instrument "must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application. It must equally be drawn up on the occasion of the conclusion of the treaty."[50] Phrased differently, as long as there is a substantive relationship between the two, it meets the requirement of "relating to," "in connection with," and "related to."

3. Broad Consensus Is a Useful Indication of Relevance

The Appellate Body in *EC – Chicken Cuts* confirmed that the Harmonized System (HS) constituted relevant "context" to interpret a Member's schedule of concessions, and that the "broad consensus" among WTO Members to rely on such non-WTO rules helped confirm the needed relations.

> The Harmonized System is not, formally, part of the *WTO Agreement*, as it has not been incorporated, in whole or in part, into that Agreement. Nevertheless, the concept of "context", under Article 31, is not limited to the treaty text—namely, the *WTO Agreement*—but may also extend to "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty", within the meaning of Article 31(2)(a) of the *Vienna Convention*, and to "any instrument which was made by one or more parties in connection with the conclusion of the treaty

47. *Id.*

48. General Agreement on Tariffs and Trade art. XX(g), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

49. *Gasoline* Appellate Body Report, *supra* note 25, at 18-19.

50. IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 129 (2d ed. 1984) (citation omitted).

> and accepted by the other parties as an instrument related to the treaty", within the meaning of Article 31(2)(b) of the *Vienna Convention*. Moreover, should the criteria in Article 31(3)(c) be fulfilled, the Harmonized System may qualify as a "relevant rule[] of international law applicable in the relations between the parties".[51]

The Appellate Body's report further provides:

> [P]rior to, during, as well as after the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to *use* the Harmonized System as the basis for their WTO Schedules, notably with respect to agricultural products. In our view, this consensus constitutes an "agreement" between WTO Members "relating to" the *WTO Agreement* that was "made in connection with the conclusion of" that Agreement, within the meaning of Article 31(2)(a) of the *Vienna Convention*. As such, this agreement is "context" under Article 31(2)(a) for the purpose of interpreting the WTO agreements, of which the EC Schedule is an integral part. In this light, we consider that the Harmonized System is relevant for purposes of interpreting tariff commitments in the WTO Members' Schedules.[52]

The Panel Report on *EC – Tariff Treatment of Certain Information Technology Products* also confirms that the HS can be used as context for interpreting WTO agreements because of its "close link" with the WTO agreements. This "close link" is shown by the relevant WTO agreements referring to the HS for the purpose of defining product coverage:

> In establishing that the HS provided relevant "context" for the interpretation of a Member's schedule, the Appellate Body took into consideration a number of factors. While noting that

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51. Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 195, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005) [hereinafter *Chicken Cuts* Appellate Body Report].

52. *Id.* ¶ 199; *see also* Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, ¶ 89, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5, 1998) ("We are puzzled by the fact that the Panel, in its effort to interpret the terms of [the EC Schedule], did not consider the *Harmonized System* and its *Explanatory Notes*. We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the Harmonized System. Furthermore, it appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the *Harmonized System's* nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature.").

> the HS was not formally part of the WTO Agreement and was not incorporated, in whole or in part, into that Agreement, the Appellate Body observed that the vast majority of WTO Members are also contracting parties to the HS and identified what it considered was a "close link" between the HS and the WTO Agreement. Specifically, the Appellate Body observed that a number of WTO agreements resulting from the Uruguay Round, including the Agreement on Rules of Origin (in Article 9), the Agreement on Subsidies and Countervailing Measures (in Article 27), and the Agreement on Textiles and Clothing (in Article 2 and the Annex thereto), refer to the HS for purposes of defining product coverage within the agreement or the products subject to particular provisions.[53]

The Panel Report on the same case further indicates that the Information Technology Agreement (ITA) is an instrument that may be used to provide context for WTO treaty interpretation because the ITA was proposed, drafted, and agreed to by a subset of WTO Members and other states or separate custom territories in the process of acceding to the WTO.[54] In this regard, the Panel Report lowers the "broad consensus" threshold. As long as there is a subset of WTO Members engaged in the process of negotiating and concluding the ITA and such Members modified their tariff schedules accordingly, the relationship threshold is met. The relevant paragraphs provide:

> Setting aside for the moment whether the ITA is a treaty or not, Article 31(2) recognizes that both "agreements" and "instruments" may qualify as context as long as they meet certain conditions. The Vienna Convention refers to the concepts of "agreement" and "instrument" within the definition of "treaty" above. The statement by the International Law Commission above implies that a qualifying "instrument" may even be a unilateral "document" so long as it complies with the additional requirements in Article 31(2)(b) that it was "made in connection with the conclusion of the treaty", and "its relation to the treaty was accepted in the same manner by the other parties". In light of this, it is useful to consider whether the ITA is concerned with the substance of the treaty, clarifies concepts in the *WTO Agreement*, or otherwise limits its field of application, and the extent to which it was drawn

53. Panel Report, *European Communities—Tariff Treatment of Certain Information Technology Products*, ¶ 7.440, WT/DS375/R, WT/DS376/R, WT/DS377/R (Aug. 16, 2010) (citation omitted).

54. *Id.* ¶ 7.445.

> up on the occasion of the conclusion of the treaty. . . . At a minimum, the ITA qualifies as an "instrument" for the purposes of Article 31(2)(b). The ITA was proposed, drafted and agreed to by a subset of WTO Members and states or separate customs territories in the process of acceding to the WTO. ITA participants in turn modified their WTO Schedules, which themselves form part of the WTO Agreement, following the conclusion and signing of the ITA. In this sense, the parties recognized the ITA as an "instrument" as we understand that term.[55]

The Panel concluded that the ITA may serve as context within the meaning of Article 31(2)(b) of the VCLT.[56]

4. Sufficient Linkage

The criteria given by the Appellate Body and the *EC – Technology* panel for meeting the relationship requirement, as quoted above, include showing: a broad consensus among the parties to use a non-WTO agreement as the basis for a WTO agreement; the vast majority of the parties are also parties to the non-WTO agreement; a number of WTO agreements refer to the non-WTO agreement for purposes of defining the agreements' coverage; and a subset of WTO Members engaged in the process of negotiating and concluding the agreement and they amended their tariff schedules accordingly.[57] The terms "relating to," "in connection with," and "related to" as used in Article 31(2) are not very strict criteria to meet. These terms only require some connection or relationship between the non-WTO agreement or instrument and the interpreted WTO agreement.

The *EC – Technology* panel and Appellate Body reports confirm that the HS is "context" as a result of the broad consensus among the parties to use the HS as the basis for their WTO Schedules. The HS is "context" because the vast majority of WTO Members are also contracting parties to the HS, and the Members identified a "close link" between the HS and the WTO Agreement. The ITA is "context" because it was made by a subset of WTO Members in connection with the conclusion of the treaty and accepted by WTO Members as an instrument related to the treaty. The WTO Members have proved a certain amount of connection or relationship between the HS and the WTO tariff schedules (the connection being the broad consensus to use the HS), between the HS and the WTO Agreement (the connection being the close link) and between the ITA and the WTO Agreement concerning the tariff schedule (the

55. *Id.* ¶¶ 7.376-77 (citations omitted).
56. *Id.* ¶ 7.383.
57. *Id.* ¶¶ 7.376-81.

connection being that the ITA was proposed, drafted and agreed to by some WTO Members and the participants of the ITA in turn modified their WTO Schedules). In addition to these specific situations establishing needed connections or relations, the needed connection or relation may also be established as long as certain linkage exists for the purpose of accounting for a non-WTO treaty to interpret a WTO agreement.

C. Subsequent Agreement or Practice and Relevant Rules

Article 31(3) of the VCLT provides:

> There shall be taken into account, together with the context: (a) any *subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any *relevant rules of international law applicable in the relations between the parties*.[58]

Thus, the three named situations are subsequent agreement, subsequent practice, and relevant rules of international law.

Subsequent agreement must concern "the interpretation of the treaty or the application of its provisions."[59] It is rare for a non-WTO treaty concluded between WTO Members to provide an interpretation of a WTO agreement or the application of its provisions. Thus, the first situation is not very relevant to the discussion in this Article.

Relevant rules of international law must be "relevant" and "applicable" to the relationship between the parties. However, these requirements are not very strict, and they should not be over utilized. For instance, if all environmental agreements are considered relevant to the WTO mentioning anything about the environment or sustainable development, it would be too broad and would result in adding to or diminishing the rights and obligations of WTO Members. Thus, when the word "relevant" is interpreted, the interpreter should account for the degree of relevancy between the non-WTO treaty and the relevant WTO agreement. If the relevancy is remote, a WTO treaty interpreter should not take the environmental agreement into account.

Additional cases confirm reliance on subsequent practice to assist treaty interpretation. Commentators and WTO interpreters have elaborated on some of the criteria. Subsequent practice must not be a

58. VCLT, *supra* note 6, art. 31(3) (emphasis added).
59. *Id.*

single or sporadic practice. It must become a pattern of practice adopted by WTO Members.

Ian Sinclair notes:

> It should of course be stressed that paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice – that is to say, concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the Convention.[60]

The Appellate Body Report, *Japan – Alcoholic Beverages II,* explains that "subsequent practice" within the meaning of Article 31(3)(b) entails a "'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation."[61]

The Appellate Body's Report in *US – Gambling* explains that there are two elements for the purpose of establishing "subsequent practice": "(i) there must be a common, consistent, discernible pattern of acts or pronouncements; *and* (ii) those acts or pronouncements must imply *agreement* on the interpretation of the relevant provision."[62]

In reference to the criteria for subsequent practice, the Appellate Body in its Report on *EC – Chicken* provided:

> We share the Panel's view that not each and every party must have engaged in a particular practice for it to qualify as a "common" and "concordant" practice. Nevertheless, practice by some, but *not all* parties is obviously not of the same order as practice by only one, or very few parties. To our mind, it would be difficult to establish a "concordant, common and discernible pattern" on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the *WTO Agreement.*[63]

Thus, the subsequent practice must be a "concordant, common and consistent sequence of acts or pronouncements sufficient to establish a

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60. SINCLAIR, *supra* note 50, at 138.

61. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

62. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 192, WT/DS285/AB/R (Apr. 7, 2005).

63. *Chicken Cuts* Appellate Body Report, *supra* note 51, ¶ 259.

discernible pattern" and the acts or pronouncements must imply the agreement of the parties on the interpretation of the treaty term. However, it does not require each and every party to engage in the practice.[64]

Under these criteria, a non-WTO agreement can theoretically be a subsequent practice for the purpose of interpreting a WTO agreement. However, it is a rare situation where there is an agreement concluded outside the WTO system where WTO members participate and practice concordantly subsequent to the agreement to indicate the meaning or intention of the WTO agreement.

D. Object and Purpose

Article 31(1) of the VCLT requires treaty interpreters to assign ordinary meaning to the terms of the treaty in their context and in the light of their "object and purpose."[65] Normally, treaty interpreters must account for the object and purpose of the whole agreement. For instance, the Appellate Body in *Argentina – Textiles and Apparel* provided:

> In accordance with the general rules of treaty interpretation set out in Article 31 of the *Vienna Convention*, Article II:1(b), first sentence, must be read in its context and in light of the object and purpose of the GATT 1994. Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members "treatment no less favourable than that provided for" in its Schedule. It is evident to us that the application of customs duties *in excess of* those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes "less favourable" treatment under the provisions of Article II:1(a).[66]

Article 31 requires that ordinary meaning be given to the terms of the treaty when considering the treaty's object and purpose.[67] Therefore, a treaty interpreter must determine the object and purpose of the interpreted treaty. WTO interpreters have little room to account for non-WTO treaties when identifying the "object and purpose" of a WTO agreement.

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64. *Id.* ¶ 26.

65. VCLT, *supra* note 6, art. 31(1).

66. Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶ 47, WT/DS56/AB/R (Mar. 27, 1998).

67. VCLT, *supra* note 6, art. 31(1).

E. Circumstances of Conclusion

Article 32 of the VCLT provides supplementary means of interpretation.[68] It provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and *the circumstances of its conclusion*, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.[69]

WTO jurisprudence confirms that non-WTO documents, including a WTO Member's legislation and its court judgments, can be considered the circumstances of conclusion of a WTO agreement. Thus non-WTO documents may be taken into account by treaty interpreters when interpreting a WTO agreement.

The Panel Report on *EC – Chicken* clearly indicates that EC regulations can be "circumstances of conclusion" for the purpose of treaty interpretation of WTO agreements. The Report provides that "the mere fact that an act, such as EC Regulation No. 535/94, is unilateral, does not mean that that act is automatically disqualified from consideration under Article 32 of the *Vienna Convention*."[70] The Panel reasoned that:

> [S]ince EC Regulation No. 535/94 was published prior to the conclusion of the EC Schedule, the WTO Membership may be considered to have had constructive knowledge of that Regulation at the time the EC Schedule was concluded for the purposes of Article 32 of the *Vienna Convention*. In this regard, we disagree with the European Communities that Members should have specifically raised EC Regulation No. 535/94 during the verification period in order for it to form part of the "circumstances of conclusion".[71]

The Panel concluded "that EC Regulation No. 535/94 is relevant to the conclusion of the EC Schedule and, therefore, qualifies as 'circumstances of conclusion' of the EC Schedule within the meaning of Article 32 of the *Vienna*

68. *Id.* art. 32.

69. *Id.* (emphasis added).

70. Panel Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts: Complaint by Brazil*, ¶ 7.360, WT/DS269/R (May 30, 2005).

71. *Id.* ¶ 7.361 (citation omitted).

Convention."[72] The same Panel Report also confirms that EC judgments can be "circumstance of conclusion" for a WTO agreement, providing:

> Regarding the question of whether or not court judgements can be considered as "circumstances of conclusion" under Article 32 of the *Vienna Convention*, the Panel recalls that, in *EC – Computer Equipment*, the Appellate Body explicitly stated that the importing Member's classification practice during the Uruguay Round and that Member's "legislation" that was applicable at that time should have been taken into consideration under Article 32. As has been noted by the parties in this case, the issue arises as to whether the Appellate Body's list is exhaustive or, rather, is merely linked to the particular facts of that case, implying that other unlisted items may also qualify. The Appellate Body's report tends to indicate that the latter interpretation is the valid one – that is, the Appellate Body was merely making a pronouncement on the basis of the facts that were available to it in that case rather than seeking to provide an exhaustive list of items qualifying as "circumstances of conclusion" in all cases. This would suggest that a valid distinction cannot be drawn between, on the one hand, EC legislation and, on the other hand, ECJ judgements for the purposes of Article 32 of the *Vienna Convention*. Accordingly, the Panel considers that court judgements, such as the *Dinter* and *Gausepohl* judgements, may be considered under Article 32 of the *Vienna Convention*.[73]

The *EC – Chicken* Appellate Body Report confirms that those documents, which are neither bilateral nor multilateral, can still be "circumstances of conclusion" for the purpose of treaty interpretation:

> Although we do not disagree with the general proposition by Yasseen, we do not agree with the European Communities that a "direct link" to the treaty text and "direct influence" on the common intentions must be shown for an event, act, or instrument to qualify as a "circumstance of the conclusion" of a treaty under Article 32 of the *Vienna Convention*. An "event, act or instrument" may be relevant as supplementary means of interpretation not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause

72. *Id.* ¶ 7.364.
73. *Id.* ¶ 7.391 (citation omitted).

> and effect; it may also qualify as a "circumstance of the conclusion" when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision. . . . Thus, not only "multilateral" sources, but also "unilateral" acts, instruments, or statements of individual negotiating parties may be useful in ascertaining "the reality of the situation which the parties wished to regulate by means of the treaty" and, ultimately, for discerning the common intentions of the parties. . . . We agree with the Panel that "relevance", as opposed to "direct influence" or "[genuine] "link", is the "more appropriate criterion" to judge the extent to which a particular event, act, or other instrument should be relied upon or taken into account when interpreting a treaty provision in the light of the "circumstances of its conclusion".[74]

When a unilateral legislation or a judgment of a court qualifies as the "circumstance of conclusion" within the meaning of Article 32 of the VCLT, it is not difficult to ascertain that a bilateral or multilateral non-WTO treaty can also qualify as the "circumstance of conclusion." Thus, in *EC – Poultry*, the Appellate Body found that a bilateral agreement between two WTO Members could serve as "supplementary means" of interpretation for a provision of a covered agreement.

> [T]he Oilseeds Agreement may serve as a *supplementary means* of interpretation of Schedule LXXX pursuant to Article 32 of the *Vienna Convention*, as it is part of the historical background of the concessions of the European Communities for frozen poultry meat.[75]

A non-WTO treaty can be accounted for as part of the "circumstances of conclusion" of a WTO agreement. The criteria for accounting for a non-WTO treaty include whether the non-WTO treaty helps to discern the common intentions of the WTO Members at the time of the conclusion, or whether "relevance," as opposed to "direct influence" or "genuine link," can be found between the non-WTO treaty and a WTO agreement.

The criteria are not very strict. However, in practice the application of such a treaty interpretation method is still limited. Under this interpretation method, treaty interpreters are expected to look at the circumstances surrounding the conclusion of a WTO agreement. The non-WTO treaties eligible for consideration would be limited to those existing at the time of the

74. *Chicken Cuts* Appellate Body Report, *supra* note 51, ¶¶ 289-90.

75. *Poultry* Appellate Body Report, *supra* note 32, ¶ 83.

conclusion of the interpreted WTO agreement. If a non-WTO treaty develops after the conclusion of a WTO agreement, it is not relevant to the conclusion of the WTO agreement in question and thus would not be able to meet the requirement of "circumstance of conclusion" of the WTO agreement. Therefore, it is a rare situation where a non-WTO treaty exists prior to the relevant WTO agreement and still helps to discern the common intentions of the WTO Members.

VI. CONCLUSION

This Article argues for the importance of distinguishing treaty interpretation from treaty application, for the basic reason that they have their respective functions and are subject to different rules. Different methods are available for treaty interpreters. Some of the treaty interpretation methods do not enable interpreters to look at non-WTO treaties. For instance, there is little room for WTO treaty interpreters to account for non-WTO treaties when identifying the "object and purpose" of a WTO agreement. Also, it is a rare situation where a non-WTO agreement can be practiced concordantly subsequent to the WTO agreement indicating the meaning or intention of the WTO agreement. Additionally, the non-WTO treaties eligible for consideration as part of the circumstances of conclusion are very limited.

However, there are other methods that can serve as a basis for treaty interpreters to account for non-WTO treaties. For instance, "frequent references" made by "modern international conventions and declarations" help decide the ordinary meaning of a WTO term. The extent of connections or relationships between the non-WTO agreement or instrument and the interpreted WTO agreement helps to decide the context of the WTO agreement.

THE DYNAMIC LAST-IN-TIME RULE

Emily S. Bremer*

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

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

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Optional Protocol, *supra* note 3.

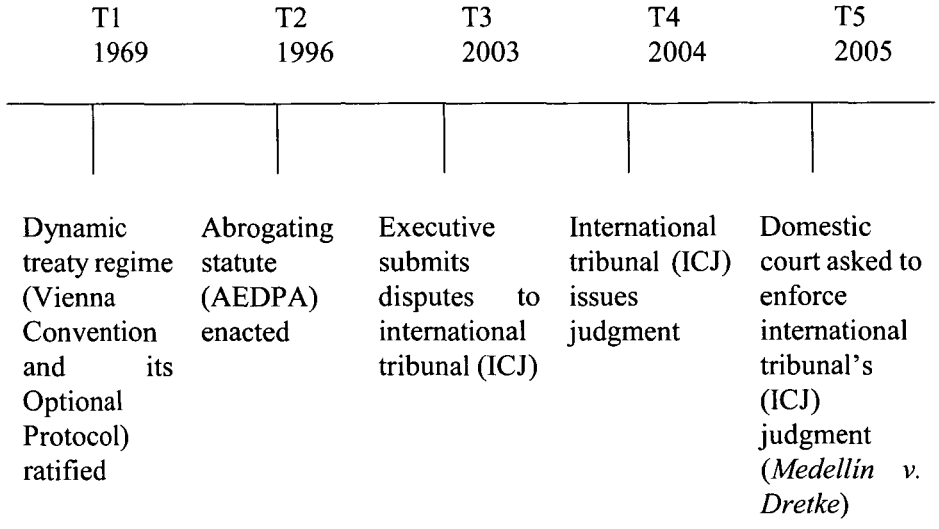
10. *See, e.g., id.*

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

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

13. *Id.*

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



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

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

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

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

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

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

I. A DYNAMIC EXAMPLE: THE CONSULAR RELATIONS DISPUTES

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

A. The Vienna Convention and its Optional Protocol

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

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

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

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

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

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

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

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

20. *Id.*

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

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

23. *See id.*

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

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

26. U.N. Charter art. 92.

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

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

B. Medellín v. Dretke

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

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

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

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

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

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

32. *Medellín II*, 552 U.S. at 500.

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

34. *Medellín II*, 552 U.S. at 501.

35. *Id.*

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

37. *Medellín II*, 552 U.S. at 501.

38. *Id.*

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

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

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

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

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

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

41. *Id.*

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

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

44. *Medellín I*, 544 U.S. at 663.

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

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

47. *Medellín I*, 544 U.S. at 663.

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

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

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

C. Breard v. Greene

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

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

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

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

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

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

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

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

55. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

72. *Id.* at 661-62.

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

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

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

76. *Id.* at 664.

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

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

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

II. THE DOMESTIC JUDICIAL ENFORCEMENT OF TREATIES

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

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

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

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

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

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

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

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

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

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

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

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

A. The Doctrine of Self-Execution

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

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

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

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

answered by applying the doctrine of self-execution.

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

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

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

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

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

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

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

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

constitutional system,[95] providing:

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

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

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

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

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

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

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

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

100. *Id.* at 314.

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

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

B. The Charming Betsy *Canon*

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

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

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

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

104. *Id.*

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

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

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

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

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

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

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

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

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

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

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

114. *Id.*

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

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

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

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

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

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

C. The Last-in-Time Rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The Dynamic Last-in-Time Rule

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

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

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

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

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

A. Incorporating International Law's Concept of Absolute Sovereignty

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

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

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

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

132. U.S. CONST. art. VI, § 2.

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

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

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

136. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

157. *Id.*

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

159. *Id.*

160. *Id.*

161. *Id.* at 209-10.

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

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

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

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

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162. *Id.* at 211-12.

163. HENKIN, *supra* note 89, at 26. The converse is examined in the next section, *see infra* at Part III.C., is that the judiciary does not share in this sovereign political power, but may be called upon to give effect to the political decisions of the coordinate branches. *See, e.g.*, Botiller v. Dominguez, 130 U.S. 238, 247 (1889) (explaining that the Court "has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard").

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

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

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

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

nations.'"[168]

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

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

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

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

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

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

172. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

181. *Id.*

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

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

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

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

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

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

186. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

194. *Id.* at 603.

195. *Id.*

196. *Id.*

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

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

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

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

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

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

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

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

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

203. *Id.*

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

205. *Id.* at 549.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

218. *Id.*

219. *Id.* at 346-47.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

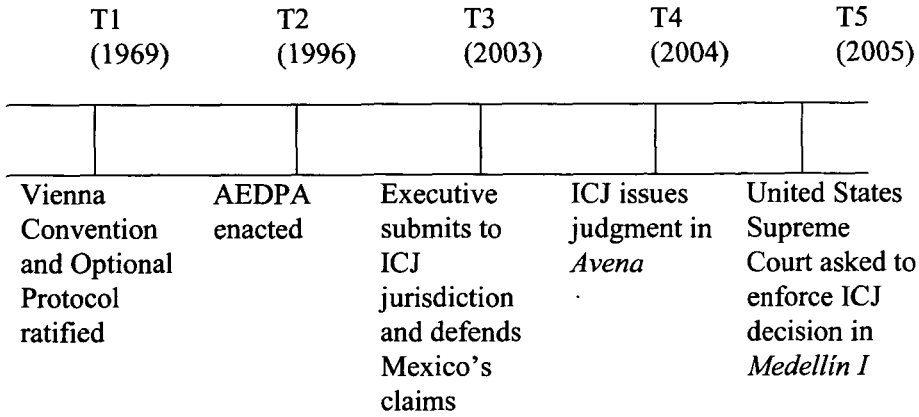
237. *See, e.g.*, *Botiller*, 130 U.S. at 247 ("This court . . . has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard."); *see also Chinese Exclusion*,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

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

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

IV. THE DYNAMIC LAST-IN-TIME RULE

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



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

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

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

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

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

A. Applying the Dynamic Last-in-Time Rule

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

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

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

241. *See supra* Part II.C.

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

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

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

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

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

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243. Optional Protocol, *supra* note 3.

244. *Id.*

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

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

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

248. *Medellín II*, 552 U.S. at 504.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

256. *See supra* Part II.D.

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

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

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

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

C. Defense of the Nation's Absolute Sovereignty

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

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

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

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

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

D. Allegiance to the Separation of Powers

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

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

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

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

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

judgments.

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

E. Fidelity to Judicial Duty

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

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

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

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

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

CONCLUSION

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

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

KILLING ME SOFTLY: A COMPARATIVE REVIEW OF CHINESE INHERITANCE LAW TO ADDRESS THE PROBLEM OF ELDER ABUSE AND NEGLECT IN THE UNITED STATES

Adam G. Province*

"Treat your elders as elders, and extend it to the elders of others; treat your young ones as young ones, and extend it to the young ones of others; then you can turn the whole world in the palm of your hand."

—Mencius (391–308 B.C.E.)

I. INTRODUCTION

Estimates indicate that every year 2.1 million elderly Americans are victims of abuse or neglect.[1] For every case of elder abuse reported, authorities believe another five cases go unreported.[2] While this injustice continues, those same elders provide for their families through inheritance.[3] Every state recognizes the ability of testators to pass property to a descendant[4] when the descendant is named in a testamentary instrument;[5] however, a problem arises when the descendant commits elder abuse or neglect but is still permitted to inherit under the will. Currently, a beneficiary's bad conduct does not alter the

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1. *Elder Abuse and Neglect: In Search of Solutions*, AM. PSYCHOLOGICAL ASS'N, http://www.apa.org/pi/aging/resources/guides/elder-abuse.aspx (last visited Oct. 28, 2011) [hereinafter APA Elder Abuse] (discussing the overall problem of elder abuse and neglect).

2. *Id.*

3. *See generally* Sara Max, *What to Expect from Mom and Dad*, CNN MONEY (Dec. 2, 2003, 10:05 AM), http://money.cnn.com/2003/11/25/retirement/inheritance/.

4. *E.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "descendant" as "[o]ne who follows in the bloodline of an ancestor, either lineally or collaterally").

5. The Federal Constitution does not prohibit states from drafting rules of inheritance; thus, each individual state is permitted to promulgate its own rules for passing property upon death. Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) ("Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.").

testamentary distribution scheme after a testator's death.[6]

On August 13, 2007, philanthropist and socialite Brooke Astor passed away at age 105.[7] She was survived by her only son, Anthony D. Marshall,[8] and his son, Philip C. Marshall.[9] A year before Brooke Astor's death, Philip filed a civil lawsuit against his father, the legal guardian of Brooke Astor. The lawsuit alleged that Anthony neglected to care for Mrs. Astor while profiting from the wealthy estate.[10] Philip claimed that his father paid himself $2.3 million a year for taking care of Mrs. Astor and that he should be removed as guardian.[11]

Prior to this event, a number of changes in Mrs. Astor's estate plan were made. First, the original will from 1997 was revoked when another will was drafted in 2002.[12] Later, in 2003, $3.4 million in securities and Mrs. Astor's home in Maine, valued at $5.5 million, were all transferred to Anthony.[13] Anthony also began taking a commission for selling his mother's works of art. Anthony transferred hundreds of thousands of dollars from Mrs. Astor to his theater company and funded his charities with assets from his mother's estate.[14]

A number of accusations that Anthony tampered with Mrs. Astor's 2002 will were made.[15] Anthony allegedly prepared checks to himself totaling $900,000.[16] Ultimately, the probate estate[17] of Mrs. Astor took years to complete, required weeks of litigation during the criminal trial of Anthony

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6. *Cf.* Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. 401 (1995) (reviewing statistical analysis of the occurrence of family violence and recommending probate reform in instances of parental abuse).

7. Brooke Astor was the heiress of the wealthy Astor Foundation. Charities to which contributions were made include, *inter alia*, the New York Public Library and the Metropolitan Museum of Art. *See generally* MERYL GORDON, MRS. ASTOR REGRETS (2008).

8. James Barron, *New York Loses Consummate A-List Philanthropist*, N.Y. TIMES, Aug. 14, 2007, at B2 (stating Mr. Anthony Marshall is "a Broadway producer and former C.I.A. employee").

9. *Id.*

10. James Barron & Anemona Hartocollis, *As Mrs. Astor Slips, the Grandson Blames the Son*, N.Y. TIMES, July 27, 2006, at A1.

11. Mike McIntire, *The Fortune She Inherited and the Fortune She Gave to Philanthropy*, N.Y. TIMES, July 28, 2006, at B4.

12. Serge F. Kovaleski, *Astor's Mental State Questioned Before She Signed Final Will*, N.Y. TIMES, Sept. 10, 2007, at B1 (stating Anthony Marshall was a principal beneficiary of the 1997 will but stood to receive a greater amount of the Astor estate under the 2002 will).

13. Serge F. Kovaleski, *Son of Astor Is Said to Face Criminal Case*, N.Y. TIMES, Nov. 27, 2007, at A1.

14. *Id.*

15. Serge F. Kovaleski, *Astor's Mental State Questioned Before She Signed Final Will*, N.Y. TIMES, Sept. 10, 2007, at B1.

16. Serge F. Kovaleski & Mike McIntire, *A Former Astor Aide Tells How Spending Habits Changed*, N.Y. TIMES, Aug. 1, 2006, at B1.

17. The estate was estimated to be worth $132 million, in addition to a trust valued at $60 million. Barbara Whitaker, *Brooke Astor's Guardians and Son Battle Over Estate*, N.Y. TIMES, Aug. 23, 2007, at B4.

Marshall, and claimed thousands of dollars in attorney's fees.[18] While the Astor probate estate concluded with a jury finding Anthony Marshall guilty of defrauding the estate, the concern remains that absent high-profile victims, cases of elder abuse or neglect will go unpunished.[19]

This Article raises the issue of whether testamentary beneficiaries should be allowed to inherit from a decedent if elder abuse or neglect occurs. Reviewing the Chinese inheritance system provides a different perspective for handling the problem of abusive beneficiaries. Probate reform is needed in the American inheritance system in order to provide a solution to the problem of caring for the elderly.

II. COMPARATIVE REVIEW: TWO INHERITANCE SYSTEMS THAT ARE WORLDS APART

While the United States and China have advanced along very different historical paths, they both now face the problem of how best to care for elderly individuals. Their inheritance systems developed under two different concepts of property rights. The many cultural distinctions between the two systems are most apparent when reviewing the People's Republic of China's (P.R.C.) civil code for disinheriting heirs based on their conduct toward a testator.

A. The Chinese System and the Cultural Divide

The most important distinction between the Chinese and American inheritance systems is that the Chinese system places significant emphasis on the family unit rather than on individuals. This feature has evolved throughout centuries and is highlighted by characteristics of traditional Confucian practices. Western influence in the twentieth century brought significant changes to Chinese society. By 1949, the P.R.C. began drafting statutory provisions recognizing an individual's right to inherit. Today, the P.R.C.'s civil code recognizes not only an individual's right to inherit, but also the individual's ability to limit or revoke that inheritance if it is determined that the beneficiary has failed to care for the elder family member.

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18. *In re* Probate Proceeding for Letters of Admin., 863 N.Y.S.2d 568, 575-76 (N.Y. Sur. 2008) *aff'd sub nom., In re* Astor, 879 N.Y.S.2d 560 (N.Y. App. Div. 2009) (ordering Anthony Marshall to produce discovery documents *in camera*).

19. *See, e.g.*, Donna Smith, *Mickey Rooney Tells Congress of Abuse*, REUTERS, Mar. 3, 2011, *available at* http://www.reuters.com/article/2011/03/03/us-mickeyrooney-idUSTRE7217BX20110303 (reporting actor Mickey Rooney testified before the Senate Special Committee on Aging regarding years of physical abuse and financial exploitation at the hand of his stepson, Rooney stated, "I couldn't muster the courage to seek the help I knew I needed.").

1. History and Development of the Chinese Inheritance System

In China, caring for members of the family unit is a moral obligation. This concept dates back to the Eastern Zhou Dynasty (1045 to 256 B.C.) when Confucius wrote about the strong ties of family to the state.[20] Confucius wrote that in order to ensure peace, individuals must elevate their concept of both the family and the state.[21] The moral concept of *li*—the belief that social order is created through education—governed conduct in order to maintain social order.[22] A hierarchical order was required so that every individual knew his or her societal responsibility.[23] Various factors, such as gender and age, determined societal obligations.[24] Because *li* placed an obligation on the family unit, individuals were expected to follow this rigid hierarchical structure to maintain social order.[25]

Importance of the family unit governed inheritance upon the death of a family member. Generations of family members lived together on communal property called *jia*.[26] A head member, typically the father or grandfather, governed each *jia*.[27] This patriarchy allowed only the head of the *jia* the right to dispose of the *jia* property.[28] Upon the death of the head of the *jia*, distribution of property was made in shares depending on gender, marital status, and family status.[29] In all circumstances, the family was required to stay together on the common property for three years after the death of the head of the *jia*.[30] Living together on communal land was a natural extension of the family-unit emphasis of ancient Chinese culture.

For centuries, Confucian principles heavily influenced Chinese feudal society. Membership in local family clans helped handle general disputes that arose between families.[31] For example, clans resolved criminal disputes

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20. *See, e.g.*, JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 12 (2008) (discussing the five cardinal relations of men: "the relationship of ruler and minister; of father and son; of husband and wife; of elder brother and younger brother; and of friend and friend.").

21. *Id.*

22. *Id.* at 11.

23. *Id.*

24. *See, e.g.*, *id.* at 12 n.39 ("The father should be kind, the son filial, the elder brother affectionate, the younger brother respectful, the husband good-natured, the wife gentle, the mother-in-law kind, the daughter-in-law obedient – all in conformity to *li*.").

25. *Id.* at 13 ("[T]he final goal of good government was the correct operation of hierarchical human relationships").

26. *See* M. J. MEIJER, MARRIAGE LAW AND POLICY IN THE CHINESE PEOPLE'S REPUBLIC 9 (1971) (stating that it was common for several generations to live together on communal property).

27. *Id.* (stating the head of the *jia* was called the *jiazhang*).

28. *Id.* at 10.

29. *See, e.g.*, *id.* at 12 (stating that children born out of wedlock would receive only half a share).

30. *Id.*

31. *Id.* at 20.

internally rather than through an outside public court system.[32] The power of local clans was so strong that families were able to defend their own property from aggressors or even determine the punishment for clan members who broke clan rules.[33] Clans considered disobeying one's parents a disorderly act because "it disturbed the natural harmony in society."[34] Likewise, filial obligations were not to be ignored by clan members.[35] Confucian principles played a vital role until the age of modern China.

During the twentieth century, China went through significant social and political reform. Western economic influence helped spark a nationalist movement that called for one central government instead of rule by feudal lords.[36] By 1926, the Kuomintang (K.M.T.) unified China under a national government for the purpose of instituting democracy and economic development.[37] Interestingly, the K.M.T. wanted to abolish the Confucian principle of *li* because it undermined the concept of a nationalized government.[38] A modern, Western-style legal system replaced the traditional rule of *li*.[39] Those in the countryside, however, continued to follow traditional practices while ignoring the new Western system.[40]

Throughout the reign of the K.M.T., Communists gained popularity among the rural areas of China.[41] The Communists organized a revolution against the K.M.T,[42] and in 1949 won a bitter civil war against the K.M.T. under the leadership of Mao Zedong.[43] A new rule of law abolished capitalistic ideals and replaced them with communist principles.[44] Additionally, under the

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32. *Id.*

33. *Id.*

34. *Id.* at 7.

35. *See* William Theodore De Bary, *The "Constitutional Tradition" in China*, 9 J. CHINESE L. 7, 12 (1995) (discussing that filial obligations were eventually codified into law during the Han dynasty); *see also* Eric Kolodner, *Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation*, 12 UCLA PAC. BASIN L.J. 407, 416 (1994) (stating that Confucian principles heavily stressed, *inter alia*, filial obligations).

36. *See* MEIJER, *supra* note 26, at 21 (stating western economic penetration into China helped lead to the erosion of traditional concepts of Chinese society).

37. *Id.* at 24.

38. *Id.* at 25.

39. *See id.* (discussing the notion that the new K.M.T. law would "promote nationalism, democracy, and economic development with equitable distribution of wealth").

40. *See id.* at 26 (providing that the rural Chinese "continued to live according to their traditional ways").

41. *See generally* KEVIN J. O'BRIEN & LIANJIANG LI, RIGHTFUL RESISTANCE IN RURAL CHINA 9 (2006) (stating that rural resistance has occurred for thousands of years. "[N]o decade since the fall of the Qing Dynasty has been entirely free of rural unrest.").

42. MEIJER, *supra* note 26, at 30.

43. *Id.*

44. *See id.* at 30–31 (discussing the notion that the new communist law would focus on "protecting, strengthening and developing relationships and procedures suitable and beneficial to the workers").

new P.R.C. regime, the traditional concept of *li* was abandoned.[45]

2. The Chinese Inheritance System under the P.R.C.

The P.R.C. explicitly recognizes the ability of individuals to inherit property from their family members. Specifically, Article 13 of the 2004 Chinese Constitution provides that "[t]he state protects by law the right of citizens to inherit private property," and that "[t]he state protects the right of citizens to own [private] property."[46]

In 1985, the National People's Congress codified the Law of Succession of the P.R.C.[47] The Law of Succession provides for two forms of inheritance for Chinese citizens: intestacy[48] or will instrument.[49] However, wills are permitted only so long as they do not conflict with public policy.[50] The Law of Succession provides that the scope of inheritable property includes, *inter alia*, a testator's income, house, personal effects, livestock, property rights in a citizen's copyrights and patents, and other lawful property.[51] If a citizen elects to draft a will instrument, he or she may dispose of the property to anyone he or she chooses.[52] If the citizen elects not to draft a will, the order of statutory inheritance will apply.[53]

One feature that distinguishes the Chinese system from the American system is the ability of judges to include a citizen's caretakers in the distribution of the property.[54] Article 14 of the Law of Succession provides that

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45. *But see* Frances Hoar Foster, *Codification in Post-Mao China*, 30 AM. J. COMP. L. 395, 396 (1982) (stating that in the post-Mao period the preferred method of government is for strong morals, *li*, rather that reliance on law, *fa*, because such reliance will lead a "morally bankrupt leadership").

46. XIANFA [Constitution of the People's Republic of China] art. 13 (Dec. 4, 1982, revised Mar. 14, 2004).

47. Zhonghua Renmin Gongheguo Jicheng Fa (中华人民共和国继承法) [Law of Succession] (promulgated by Order No. 24 of the President of the People's Republic of China, Apr. 10, 1985, effective Oct. 1, 1985) *available at* http://www.lawinfochina.com/display.aspx?lib=law&id=56 [hereinafter Law of Succession].

48. *E.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "intestacy" as "[t]he state or condition of a person's having died without a valid will").

49. Law of Succession, *supra* note 47, ch. 1, art. 5.

50. *See generally* Louis B. Schwartz, *The Inheritance Law of the People's Republic of China*, 28 HARV. INT'L L.J. 433 (1987).

51. Law of Succession, *supra* note 47, ch. 1, art. 3(1)–(7); *see also* Louis B. Schwartz, *The Inheritance Law of the People's Republic of China*, 28 HARV. INT'L L.J. 433, 440 (1987).

52. Law of Succession, *supra* note 47, ch. 3, art. 16.

53. *Id.* at ch. 2, art. 10 (providing that the property will be distributed to the first class—spouse, children, and parents—and then to the second class—brothers, sisters, paternal grandparents, and then maternal grandparents).

54. *See generally* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 182–89 (2008) (discussing the role of caregivers in the United States and noting the financial difficulties they endure in order to provide for their elder family member).

"[a]n appropriate share of the estate may be given to a person, other than a successor, who depended on the support of the decedent and who neither can work nor has a source of income, or to a person . . . who was largely responsible for supporting the decedent."[55] Interestingly, this feature creates an incentive for caretakers who are not already beneficiaries to provide additional support for the testator.[56]

Other Chinese codes also expressly recognize the ability to inherit.[57] One of the earliest civil provisions enacted by the P.R.C. was the Marriage Law of 1950.[58] Most recently codified in 2001,[59] the law serves a dual function: it first acts as an instrument for the transformation of a new communist society; second, it regulates marriage by providing a framework for resolving disputes that arise between spouses.[60] Article 1 of the law recognizes the principle of family relations; Article 24 allows a husband and wife to inherit from each other.[61]

The Marriage Law of 2001 imposes certain moral obligations on Chinese citizens depending on their status in a family unit.[62] These obligations and duties are placed on children, parents, and grandparents in order to maintain social welfare.[63] Article 21 is an important provision for purposes of this discussion because it provides that "children *shall* . . . be under the obligation of supporting their parents. Where any child fails to perform his or her

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55. Law of Succession, *supra* note 47, ch. 2, art. 14.

56. *See, e.g.*, Frances H. Foster, *Towards A Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 100 n.133 (1998) (citing a case where the decedent's youngest son, who became the caregiver, was awarded 2,500 yuan, while his brothers received only 500 yuan).

57. *See, e.g.*, Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [General Principles of the Civil Law of the People's Republic of China] (promulgated by Order No. 37 of the president of the People's Republic of China, Apr. 12, 1986, effective Jan. 1, 1987) ch. V, § 1, art. 76, *available at* http://www.lawinfochina.com/display.aspx?lib=law&id=1165 [hereinafter General Principles Civil Law] ("Citizens shall have the right of inheritance under the law").

58. *See generally* MEIJER, *supra* note 26, at 69–82 (discussing the background and significance of enacting the Marriage Law as one of "the instruments of change in rural China during the first few years of the new republic.").

59. Zhonghua Renmin Gongheguo Hunyin Fa (中华人民共和国婚姻法) [Marriage Law of the People's Republic of China] (promulgated by Order No. 9 of the Chairman of the Standing Committee of the National People's Congress on Sept. 10, 1980, amended in accordance with the Decision on Amending the Marriage Law of the People's Republic of China, adopted by the Standing Committee of the Ninth National People's Congress, Apr. 28, 2001) *available at* http://www.lawinfochina.com/display.aspx?lib=law&id=1793 [hereinafter Marriage Law].

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at ch. 3, art. 28 & 29 ("Grandparents . . . *shall* be under the obligation of upbringing the grandchildren . . . whose parents have deceased . . . Elder brothers or elder sisters *shall* be under the obligation of supporting their younger brothers and sisters . . . whose parents are incapable of supporting them.") (emphasis added).

obligations, the parents thereof who are unable to work or who are living a difficult life shall be entitled to ask their child to pay aliments."[64] The P.R.C. holds children liable if they fail to provide for elder parents who require care.[65]

While the P.R.C. recognizes the ability to inherit property, it also limits that ability by giving discretion to the local judge to consider whether the successors fulfilled their family obligations to the testator.[66] Article 13 of the Law of Succession provides that "successors who had the ability and were in a position to maintain the decedent but failed to fulfil their duties shall be given no share or a smaller share of the estate."[67] The provision acts as a deterrent to ensure that will beneficiaries meet their filial obligations to the testator so that society is not burdened by providing care. Moreover, the provision reflects the traditional practice of *li.*

Similarly, another provision that reflects the practice of *li* is Article 44 of the Marriage Law of 2001. It limits an individual's right to inherit by stating:

> Any member deserted by his or her family *shall* be entitled to make petitions, and the relevant urban residents' committee, villagers' committee or the entity where the victim is a staff member shall make dissuasions or mediations. Where any person deserted by his or her family makes a petition, the people's court *shall* make a judgment concerning the payment of expenses for upbringing, supporting and maintenance.[68]

The P.R.C. places emphasis on the family members functioning as a productive unit so that society is not burdened. Article 44 permits Chinese judges to disregard an heir's inheritance when that individual failed to care for the decedent.[69]

The overarching theme of the Chinese inheritance system places importance on the family unit rather than individual class members.[70] In Chinese courts, many factors are considered when determining the right of

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64. *Id.* at ch. 3, art. 21.

65. *See, e.g.*, Foster, *supra* note 56, at 96 n.97 (citing an inheritance case where the testator's two stepsons failed to provide care, and, as a result, the testator starved and froze to death. The Chinese court awarded no inheritance to the two stepsons).

66. *Id.* at 99-100 (citing an inheritance case where four children were supposed to inherit equally under the laws of intestacy, but because one of the sons moved away from the family village, and, thus, was unable to provide daily support, that son received a smaller inheritance share).

67. Law of Succession, *supra* note 47, ch. 2, art. 13.

68. Marriage Law, *supra* note 59, ch. 5, art. 44.

69. *See, e.g.*, Foster, *supra* note 56, at 96 n.99 (citing a case where the Chinese court found acts of abandonment by the testator's grandson, and as a result limited his inheritance).

70. *See* M. H. Van Der Valk, *China, in* THE LAW OF INHERITANCE IN EASTERN EUROPE AND IN THE PEOPLE'S REPUBLIC OF CHINA 297, 317 (1961) (stating that the principles of determining inheritance in the Chinese system are to guarantee "harmony within the family").

succession.[71] Even though an heir may be in line to inherit, a court may consider other factors in order to determine the distribution of property.[72] These factors include the descendant's family and marital status, actual state of the property, influences made on the decedent, and conduct in caring for the decedent.[73] Chinese courts place greater importance on the family unit rather than an individual's statutory right to inherit, which is the position of American probate courts.

B. American System of Inheritance

The American inheritance system is distinguishable from the Chinese model because it provides separate jurisdictions the ability to grant property rights to individuals in the probate process. The system is founded upon centuries of jurisprudence that protect the testator's intent.[74] The theory is that the right to pass property at death is neither a natural right nor a constitutionally protected right.[75] The effect of the American probate process is to provide for the testator's heirs according to the scheme drafted by the will instrument.[76] This also includes the ability to disinherit family members if the testator wishes.[77] It is important to note that each individual state governs the probate process, thus allowing some jurisdictions to be more progressive than others in

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71. *See, e.g.*, Law of Succession, *supra* note 47, ch. 4 (providing that the probate judge is permitted to consider the rights of creditors, payment of taxes, rights under divorce support agreements, and rights of unborn children).

72. *See, e.g.*, MEIJER, *supra* note 26, at 257 n.32 ("When adjudicating actual cases of inheritance, we must start from the spirit of strengthening the mutual aid within the group, which is advantageous for socialist construction and socialist transformation. As far as problems are concerned which have already been solved or abandoned, we must exert persuasion on the parties to the fullest extent so as to discourage them from fighting again. The courts should not handle such problems again, in order to avoid an increase of quarrels on inheritance in society.").

73. *See, e.g.*, Law of Succession, *supra* note 47, ch. 5, art. 35 (providing that local nationalities may provide additional factors to the Law of Succession so long as they do not conflict with the requirements of the code provision).

74. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.").

75. *See generally* 2 WILLIAM BLACKSTONE, COMMENTARIES *10–13 ("[R]ights of inheritance . . . are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid; neither does anything vary more than the right of inheritance under different national establishments.").

76. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.1(b), (1999) (providing that the "estate passes to the decedent's heirs or devisees by intestate or testate succession").

77. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. f, (1999) (recognizing the ability of the testator to disinherit a line of descendants).

their inheritance schemes.[78]

1. The American Testamentary Scheme

The American inheritance system was originally imported from the English system; testamentary freedom emerged from the original shadow of primogeniture.[79] The system allowed testators to pass property of the estate freely to any child through an instrument that was drafted *inter vivos*.[80] An elder was allowed to provide for not just the eldest son, but for the family as a whole. This testamentary scheme fits a republican society better than primogeniture, which parallels the scheme of authority in a monarchy.[81]

The testator's ability to name beneficiaries also provides the ability to disinherit.[82] Traditionally, the American legal system respects the wishes of an individual when passing along his or her property at the time of death.[83] These benefits allow the testator to have control over his or her actions taken at death.[84] While rigid, the use of testamentary intent respects the wishes of the testator's distribution scheme in the probate process.[85]

Each jurisdiction requires certain formalities when a will instrument is executed. So long as the will is executed properly and does not violate public policy, the testator's intent takes precedent. However, there are some limitations to the testator's wishes.

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78. *See* Hall v. Vallandingham, 540 A.2d 1162, 1164 (Md. Ct. Spec. App. 1988) ("The right to receive property by devise or descent is not a natural right but a *privilege granted by the State*.") (emphasis added).

79. The original English system automatically permitted the eldest son to take the entire ancestor's estate, no matter the presence of a will. *E.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "primogeniture" as "[t]he common-law right of the firstborn son to inherit his ancestor's estate, usu. to the exclusion of younger siblings").

80. *Id.* (defining "inter vivos" as "relating to property conveyed not by will or in contemplation of an imminent death, but during the conveyor's lifetime").

81. *See* Tate, *supra* note 54, at 154 (discussing the history of the English system of primogeniture).

82. The right to exclude is a consistent theme among other areas of American jurisprudence. *Cf.* Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1404 (2009) (discussing alienability and the ability to exclude under property law).

83. *See* Tate, *supra* note 54, at 159 (discussing the idea of American individualism and how this concept plays into the ability to freely disinherit any person).

84. This control is often referred to as the "dead hand" because it allows the testator to influence with wealth the conduct of friends and family after death, and is often seen by many scholars as a system that needs more flexibility. *See* Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 615-16 (2009) (discussing the problem of the dead hand control).

85. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. g, (1999) ("To be a will, the document must be executed by the decedent with testamentary intent, *i.e.*, the decedent must intend the document to be a will or to become operative at the decedent's death").

2. Limits on Disinheriting Children

When a testator wishes to disinherit a child, he or she may do so at any time.[86] Many limits are placed on the testator in order to protect the financial interests of the children.[87] In this sense, the policy behind the American model does consider the interest of family support in limited situations over that of the testator's desires.[88] Courts will ensure that, if a parent testator has a familial obligation to provide for a child, the child is provided for despite the testator's failure to provide for the child in the will instrument.[89] The most common example occurs when the testator has a physically or mentally disabled child.[90] Once the will instrument is admitted to the probate court, courts will not consider whether an elder testator was provided for during their elderly years by beneficiaries.

Another example of limiting the testator's distribution scheme occurs when the descendant murders the testator.[91] The slayer rule bars a will beneficiary from collecting under the will instrument.[92] The theory behind the slayer rule is to prohibit a will beneficiary from becoming unjustly enriched through committing a criminal act.[93] Therefore, probate courts will prohibit an individual from inheriting under a testator's will instrument in limited circumstances because of certain bad acts performed against the testator.

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86. *See, e.g.*, UNIF. PROBATE CODE § 2-507(a)(1)–(2) (amended 1993) (providing that a will may be revoked either by executing a subsequent will that revokes a previous will, or by "performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will").

87. *See, e.g.*, UNIF. PROBATE CODE § 2-302(a) (amended 1993) ("If a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate").

88. *See* Pamela R. Champine, *Dealing With Mental Disability At Non-Institutional Mental Disability Law Through The Sanism Filter*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 177, 187–88 (2003) (discussing the importance of providing for family protection in limited circumstances of mental disease).

89. *See, e.g.*, 42 U.S.C. § 667(a) (2011) ("Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State.").

90. *See, e.g.*, CAL. FAM. CODE § 3910(a) (West 2011) ("The father and mother have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means.").

91. *See generally* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 844–52 (1993) (reviewing the overall scheme of the American rule prohibiting will beneficiaries from collecting if they murdered the decedent).

92. *See* UNIF. PROBATE CODE § 2-803(b) (amended 1997) ("An individual who feloniously and intentionally kills the decedent forfeits all benefits under this Article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share . . . .").

93. *See, e.g.*, *In re* Estate of Mahoney, 126 Vt. 31, 33 (1966) ("[N]o one should be permitted to profit by his own fraud, or take advantage and profit as a result of his own wrong or crime.").

Similar to the slayer rule, California limits the ability of a beneficiary to inherit under the will instrument when acts of elder abuse are committed. In California, a descendant is prohibited from collecting if it is proven that elder abuse occurred at the hands of a descendant.[94] A probate judge in California will limit the inheritance due to a beneficiary who is found to have committed elder abuse against the decedent.[95] Disinheritance will occur only if a separate investigation and criminal case is conducted to find that the will or trust beneficiary did in fact commit elder abuse.[96] While California is making progress in curbing the occurrence of elder abuse and neglect by limiting the inheritance of family members, it is the only jurisdiction in the United States fighting these problems through limiting a beneficiary's inheritance.

Most jurisdictions will not alter a will in the event that the child beneficiary's actions constituted neglect of the decedent.[97] There is a strong interest in keeping the testator's intent as part of the will distribution scheme.[98] Once the testator is deceased, it is difficult to raise the issue of whether the decedent would want to amend the will instrument. Courts could always admit evidence extrinsic to the will in an attempt to show that the beneficiary neglected the elderly testator.[99] Courts permit evidence to be presented outside the four corners of a will instrument only in limited situations, such as to provide clarity to ambiguous provisions or to prove fraud, undue influence, or lack of mental capacity.[100]

Finally, it is important to note that American courts do not consider actions taken by the testator's non-family caregivers upon distribution of the probate estate.[101] This includes those who provide both financial support and care leading up to the testator's death. If a caregiver is not expressly provided

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94. *See* CAL. PROB. CODE § 259(a)(1)–(4) (West 2011) (providing that any person is deemed to have predeceased a decedent where it is proven that the person is liable for physical abuse of the elder adult).

95. *See, e.g., In re* Estate of Lowrie, 118 Cal. App. 4th 220, 222-25 (Cal. Ct. App. 2004) (holding that the trust beneficiary was precluded from inheriting after the beneficiary was found guilty of committing elder abuse against the decedent).

96. *See* CAL. PROB. CODE § 259(b) (West 2011).

97. *See* Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351, 1387 (2008) (noting that most courts do not have the flexibility to adjust inheritance rights to reflect neglect).

98. *See id.* at 1388–89 (discussing the testamentary intent approach).

99. This assertion would be an expansion of the extrinsic evidence rule. The current rule would not allow this type of evidence because it is typically limited to situations of fraud, lack of mental capacity, and mistake. *See, e.g.*, UNIF. PROBATE CODE § 2-302(c) (amended 1993) (stating that extrinsic evidence to provide for a child can be admitted when the testator mistakenly believes the child to be dead).

100. *See* JESSE DUKEMINIER ET AL, WILLS, TRUSTS, AND ESTATES 372 (7th ed. 2005) (outlining the instances when extrinsic evidence is used to cure defective wills).

101. *See, e.g.*, CAL. PROB. CODE § 21350(a)(6) (West 2004) (stating that care custodians are disqualified from being beneficiaries of testamentary transfers from dependent adults for whom they provide care).

for in the will, legislatures in the United States are hesitant to wedge the caregiver into the distribution scheme.[102] This is in stark contrast to a number of other Western countries, which award a caregiver some portion of the estate because of his or her service to the testator.[103]

3. Support Trusts Provide Extra Financial Support for the Elderly

Trusts have different benefits over will instruments when attempting to provide for family.[104] Specifically, a trust allows more flexibility because a trustee is appointed to manage trust property—usually in the form of financial investments—while owing a fiduciary duty to the settlor[105] and to the trust beneficiaries.[106] The trustee holds legal title to the trust property, while the trust beneficiary holds equitable title.[107] Trusts take different forms depending on the wishes of the person setting up the trust.[108] Because a settler cannot always foresee problems that may arise, discretionary support trusts offer flexibility to provide financially for any healthcare or general maintenance needs.[109] Although a trust may not be as effective as having a child beneficiary provide care on a daily basis, it does supplement financial needs that an elder parent may need while the child beneficiary is away.[110]

III. ANALYSIS: INSTANCES OF ELDER ABUSE OR NEGLECT BY BENEFICIARY SHOULD LIMIT INHERITANCE

This section highlights two problems with the inheritance systems of both

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102. *See, e.g.*, Kirsten M. Kwasneski, *The Danger of a Label: How the Legal Interpretation of "Care Custodian" Can Frustrate a Testator's Wish to Make a Gift to a Personal Friend*, 36 GOLDEN GATE U. L. REV. 269, 287-90 (2006) (discussing the gift limit that testators can make to caregivers because of the concern of undue influence).

103. *See generally* Joseph Laufer, *Flexible Restraints on Testamentary Freedom: A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 282 (1955) (discussing the law in Austria, Mexico, and New Zealand as providing a family maintenance system, which bends testamentary intent to allow the probate judge flexibility in distributing property).

104. *See generally* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995) (discussing the overall development and use of trusts in American society).

105. *E.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "settlor" as "[a] person who makes a settlement of property; esp., one who sets up a trust").

106. *See* RESTATEMENT (THIRD) OF TRUSTS § 32 cmt. b (2003) (imposing the role of the trustee to act as a fiduciary).

107. *See id.* § 40 cmt. b (stating that the trust beneficiaries hold equitable title while the trustee holds legal title to the trust property).

108. *See id.* § 1 (discussing three different types of trusts that may be used for the beneficiaries' use).

109. *See* Evelyn Ginsberg Abravanel, *Discretionary Support Trusts*, 68 IOWA L. REV. 273, 301 (1983) (describing the overall benefits of a trust for providing support to family members).

110. *See id.*

the United States and China. The current system in the United States is inadequate to meet the needs of a family unit because it fails to consider the possibility of elder abuse or neglect.[111] A different problem in China arises as the rapid pace of a modernizing economy continues to change traditional cultural norms.[112] As Chinese citizens migrate from the countryside into metropolitan cities, they may leave behind family obligations without ensuring necessary care and support for elderly family members.[113] The Chinese government will need a way to provide for its elderly citizens as its economy continues to modernize.

A. Problems in the American Inheritance System

It is estimated that in 2003 between one and two million Americans over the age of sixty-five were injured or mistreated by someone they depended on for care and protection.[114] Experts believe that for every case of elder abuse and neglect that is reported, another five go unreported.[115] Some data suggests that only one in fourteen incidents comes to the attention of authorities.[116] In addition, some experts believe that five million cases of financial exploitation of the elderly occur each year.[117] There is no doubt that elder abuse and neglect occur in the shadows of American society.

Currently in the United States, the large and quickly aging baby boom generation presents young Americans with the challenge of providing adequate care for their parents.[118] In addition, individuals are living longer than ever before thanks to advances in medical technology.[119] Therefore, more elderly

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111. *See* Jane Gross, *Forensic Skills Seek to Uncover Hidden Patterns of Elder Abuse*, N.Y. TIMES, Sept. 27, 2006, at A1 (reporting that in California alone during 2003, 100,000 reports were filed claiming incidents of elder abuse).

112. *See generally* MAURICE MEISNER, MAO'S CHINA AND AFTER: A HISTORY OF THE PEOPLE'S REPUBLIC 415 (3d ed. 1999) (stating that industrial production by 1977 in China was the most ever achieved by a country during any period in history).

113. *See* Foster, *supra* note 56, at 123–24 (discussing the problem of the inheritance system as more economic growth continues to modernize China).

114. NAT'L CTR. ON ELDER ABUSE, ELDER ABUSE PREVALENCE AND INCIDENCE 1 (2005), *available at* http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/FinalStatistics050331.pdf.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See* DEP'T OF HEALTH & HUMAN SERV., PROJECTED FUTURE GROWTH OF THE OLDER POPULATION, http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/future_growth.aspx (last modified June 23, 2010) (stating that by 2030 there will be more than 70,000,000 Americans age sixty-five or older, which is double the total number of Americans over the age of sixty-five in 2000).

119. *See, e.g.*, Elizabeth Arias, *United States Life Tables, 2001*, 52 NAT'L VITAL STAT. REP., No. 14 at 33 (2004), *available at* http://cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_14.pdf (stating

individuals will need additional medical care and attention for a longer period of time. When family members fail to provide basic care for elders, the burden is passed on to American society through the increased medical care costs paid by Medicaid.

1. Cases of Elder Neglect[120]

Elder neglect can lead to health concerns such as malnutrition and dehydration.[121] The elderly require extra attention because of typical problems associated with aging such as dysphagia,[122] movement disorders, and gastroesophageal disorders.[123] Moreover, financial constraints increase as more medical demands are placed on the elderly individual.[124] Daily attention is needed in order to assist the family elder in achieving a basic quality of life.[125] Inadequate care may even hasten death.[126]

While a child may be aware of his or her own obligations to an elderly family member, career and societal demands may compete with the attention that the elderly individual requires. Many changes in modern American society over the past century have permitted individuals to become more mobile.[127] As a nomadic society, individuals are now, more than ever before, able to pick up their roots and start a new life in an unfamiliar part of the country or world.[128] The evolution of the modern American transportation system—specifically automobile and commercial air travel—allows people to leave behind their

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that the average life expectancy at birth increased from 68.2 years in 1950 to 77.2 years in 2001).

120. *E.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "neglect" as "[t]he omission of proper attention to a person or thing, whether inadvertent, negligent, or willful; the act or condition of disregarding" and "[t]he failure to give proper attention, supervision, or necessities . . . to such an extent that harm results or is likely to result").

121. *See* FRANK GLENDENNING & PAUL KINGSTON, ELDER ABUSE AND NEGLECT IN RESIDENTIAL SETTINGS 106 (1999) (discussing a direct correlation between under-nutrition, starvation, and dehydration as causes of death to the neglected elderly).

122. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2008) (defining "dysphagia" as a condition that results in the elder individual having a difficult time swallowing food or water).

123. GLENDENNING & KINGSTON, *supra* note 121, at 93–97.

124. *Id.* at 100.

125. *Id.* at 106.

126. *Id.* at 110.

127. *See* Keith Bartholomew, *Cities and Accessibility: The Potential for Carbon Reductions and the Need for National Leadership*, 36 FORDHAM URB. L.J. 159, 169 (2009) (discussing the increased mobility that allows more Americans to explore different segments of society).

128. *See* Edgardo Rotman, *The Globalization of Criminal Violence*, 10 CORNELL J.L. & PUB. POL'Y 1 n.215 (2000) (quoting Elliot Currie stating employers praise "flexibility, from the point of view of the employer translates into *rootlessness* for individuals and families and atomization for communities.") (emphasis added).

families in search of economic opportunity.[129] When this occurs, they may also leave behind family obligations.

The concern arises when those individuals are willed into the testator's estate, but then fail to care for family members left behind.[130] This result forces a family unit to supplement care for the testator while the child beneficiary is still able to collect from the estate upon death.[131]

Elder neglect may also occur when a child descendant has every intention of providing care for the elderly testator, but for whatever reason, fails to perform.[132] Here, the child beneficiary is acting negligently. As in the first instance, the result will force the family unit to supplement care for the elder family member despite the testator financially providing for the child beneficiary.

2. *Cases of Elder Abuse*[133]

Even more disturbing than elder neglect are cases of elder abuse, especially when they occur at the hand of family members. It is estimated that millions of elderly Americans fall victim to abuse every year.[134] When the abuser is a family member, the elder victim is often unlikely to report the abuse.[135] Any collected data that attempts to quantify the cases of elder abuse

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129. *See* Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 LOY. U. CHI. L.J. 557, 563 (2009) (discussing the increase in opportunities as American society becomes more mobile).

130. *See* Jacobs v. Newton, 768 N.Y.S.2d 94, 100 (N.Y. Civ. Ct. 2003) (stating a child who assumes responsibility for the care of a parent who is limited by age or illness, or both, owes a duty to the parent to use reasonable care, and will be liable for harm caused by the failure to use reasonable care by affirmative act or omission).

131. *See* Robert H. Binstock, *Public Policies on Aging in the Twenty-First Century*, 9 STAN. L. & POL'Y REV. 311, 319 (1998) (discussing that eighty percent of long-term care is provided for by the elderly person's family).

132. *See* Laura Watts & Leah Sandhu, *The 51st State – The "State of Denial": A Comparative Exploration of Penal Statutory Responses to "Criminal" Elder Abuse in Canada and the United States*, 14 ELDER L.J. 207, 221 (2006) (stating that historically children are the wrongdoers of neglect cases).

133. *E.g.*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "abuse of the elderly" as "abuse of a senior citizen . . . by a caregiver," which may occur when an elderly person is "deprive[d] of food or medication, beatings, oral assaults, and isolation"). *See also* Margaret F. Hudson, *Elder Mistreatment: Taxonomy with Definitions by Delphi*, 3 J. OF ELDER ABUSE & NEGLECT 1, 2 (1991) (defining "elder abuse" as "the intentional or unintentional abuse (commission) . . . of an older adult by a person in a personal, social, professional or business relationship that results in physical, psychological, social, or financial consequences").

134. APA Elder Abuse, *supra* note 1.

135. ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 325 (1994) (discussing that elder abuse most often occurs in the form of emotional, physical, and even sexual maltreatment at the hands of an abusive family member, and that the victim usually feels reluctant to report the abuse because the abuser is usually a family member).

for statistical analysis is likely inaccurate as a result. Therefore, cases of elder abuse could be two or three times more frequent than the current data suggests.[136]

Elder abuse is just one area of elder law that is often ignored and overlooked by American society. Of even more concern is whether the current legal system is prepared to handle the inevitable increase in elder abuse as the baby boom generation continues to age. If the legal system does not provide adequate deterrence in preventing elder abuse, the burden will be placed on government programs such as Medicaid.

B. Different Problems for the Chinese Model

Modernization is rapidly changing China.[137] Similar to the United States in the years following the Industrial Revolution, China is quickly becoming more mobile.[138] Currently, demand for automobiles and commercial airlines is at an all-time high in China.[139] In addition, massive construction projects are underway to build roads and basic infrastructure.[140] The question is not if, but when, Chinese society will become more nomadic like its American counterpart.[141] The main concern for China is how best to adapt ancient principles and ideas of family to a modern industrialized nation of 1.3 billion

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136. APA Elder Abuse, *supra* note 1 (estimating that for every one case of elder abuse there are five cases that go unreported).

137. China's "economic growth has averaged 9½ per cent over the last two decades." ORG. FOR ECON. CO-OPERATION & DEV., ECONOMIC SURVEY OF CHINA, 2005 1 (Sept. 2005), *available at* http://www.oecd.org/dataoecd/10/25/35294862.pdf. While this economic prosperity has no doubt pulled some citizens out of poverty and increased the average lifespan, problems continue to exist providing healthcare to China's aging population in rural areas. *See* Randall Peerenboom, *Human Rights in China*, *in* HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 413, 433-34 (Randall Peerenboom et al. eds., 2006) (discussing the problem of providing adequate healthcare to those in the countryside).

138. *See, e.g.*, Andrew P. Morriss, *The Next Generation of Mobile Source Regulation*, 17 N.Y.U. ENVTL. L.J. 325, 328 (2008) (stating that China had the same number of cars per 1,000 population in 1994 as the United States did in 1911, and by 2005, China had the equivalent number of cars per 1,000 population as the United States did in 1915).

139. *See* Nicola Clark, *Heavy Orders for Airbus and Boeing Raise Backlog Questions*, N.Y. TIMES, Jan. 15, 2008, at C4 (reporting that air traffic in China has nearly doubled the pace of anticipated economic growth).

140. *See* Keith Bradsher, *China's Route Forward*, N.Y. TIMES, Jan. 23, 2009, at B1 (stating China plans to spend "hundreds of billions of dollars on new highways, railroads and other infrastructure projects").

141. *Cf.* Israel Doron & Tal Golan, *Aging, Globalization, and the Legal Construction of "Residence": The Case of Old-Age Pensions in Israel*, 15 ELDER L.J. 1, 9-11 (2007) (discussing the effect that globalization has on migration and its impact on the elderly).

people.[142] As traditional concepts of the family unit evolve with modernization, the Chinese inheritance system must also adapt to these changes in its culture.

As China continues to grow economically, more citizens are likely to move from rural areas to cities.[143] Cars will replace bicycles,[144] leading Chinese citizens to explore all parts of a vast country that boasts an impressive 9,596,961 square kilometers.[145] This result will cause a depression effect in these small rural communities as younger Chinese citizens leave for cities such as Beijing or Shanghai.[146] The family unit will likely be forced to make up for the care and support needed from its younger members.[147] The question then becomes, to what extent will Chinese citizens be punished for leaving behind a rural upbringing in search of work?

The Chinese government needs to consider how best to provide for its overwhelming elder population.[148] Recent reports indicate that by 2010 China will have more than 174 million senior citizens.[149] Other estimates have placed China's elder population at 439 million by 2050.[150] If no family support exists, these retirees will be forced to receive welfare benefits from the national government.[151] The Chinese government already appears to have taken note of the problem by implementing the "one-child policy" in order to curb its ballooning population.[152] Unfortunately, this policy will have no direct impact on improving the quality of life for senior citizens who require extra care or

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142. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html (last updated Jan. 4, 2012) [hereinafter WORLD FACTBOOK].

143. Peerenboom, *supra* note 137, at 433 (discussing how modernization will change the landscape of rural China).

144. *See* Keith Bradsher, *Digging a Hole Through China*, N.Y. TIMES, Mar. 27, 2009, at B1 (stating that automobile sales have "soared ninefold since 2000" in China).

145. WORLD FACTBOOK, *supra* note 142.

146. *See* Li Jing, *China's New Labor Contract Law and Protection of Workers*, 32 FORDHAM INT'L L.J. 1083, 1088 (2009) ("[R]ural workers in cities increased from less than two million in the early 1980s to eighty million in 1995.").

147. *See* Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 S. CAL. REV. L. & SOC. JUST. 371, 371 (2007) (discussing the American principle of providing care for the elderly and disabled).

148. *Cf.* I. K. Gujral, *Global Aging, Depopulation and Virtual Work*, 18 NEW PERSP. Q., no. 2, Spring 2001, *available at* http://www.digitalnpq.org/archive/2001_spring/global.html (describing the massive increase of senior citizens in industrialized countries as a global crises that is unprecedented).

149. *Nation's one-child policy 'will not change'*, CHINA DAILY, Sept. 30, 2006, http://www.chinadaily.com.cn/china/2006-09/30/content_700203.htm.

150. Amy Hampton, *Population Control in China: Sacrificing Human Rights for the Greater Good?*, 11 TULSA J. COMP. & INT'L L. 321, 349 (2003).

151. *See* Peerenboom, *supra* note 137, at 433 (stating that 29.33 million retirees were covered by welfare in 2003, which was a forty-one percent increase from 2002).

152. *Cf.* Ying Chen, *China's One-Child Policy and its Violations of Women's and Children's Rights*, 22 N.Y. INT'L L. REV. 1, 145 (2009) (recommending that China should be focusing more on improving human rights and less on population control efforts).

financial assistance because it attempts only to decrease the size of future generations rather than solve the current problem of an aging elder class.[153]

IV. RECOMMENDATIONS: BENEFITING FROM A COMPARATIVE REVIEW IN ORDER TO FIND SOLUTIONS TO PROBLEMS IN THE INHERITANCE SYSTEMS

A. Recommendations for the Chinese Inheritance System

While citizens should maintain their caregiving obligations to the elderly if possible, young Chinese should not be kept from their inheritance because they are in search of a better life. Chinese inheritance law needs to keep up with the rapidly changing characteristics of both families and its economy. Social welfare policies need to be enacted for the benefit of those elderly living outside major cities.

1. Social Welfare Program for China's Elderly

The Chinese government should consider adopting a national retirement pension plan for its elderly citizens.[154] As younger Chinese citizens flock to economic zones in search of prosperity, there must be a safety net to catch those individuals who may fail to receive care from the family unit. While the Chinese Constitution does establish a social security system, it does not provide benefits to all elderly retirees.[155] Social Security in the United States, while not perfect, does maintain a basic standard of living for elder retirees.[156] A similar system in China, while costly, will help provide elders the basic financial assistance they require.

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153. *See* Hampton, *supra* note 150, at 350-51 (discussing the bleak state of elder care in China, and stating an increase of elderly citizens is now on the horizon). The one-child policy has also created a shortage of children to serve as caretakers for the elderly.

154. *See id.* at 352–53 (recommending that China implement a national social security system for retirees).

155. *See* XIANFA art. 14 (Dec. 4, 1982, revised Mar. 14, 2004) (China) (providing that the government "establishes and improves the social security system fitting in with the level of economic development").

156. *Cf.* Sarah Richelson, Note, *Trafficking and Trade: How Regional Trade Agreements Can Combat the Trafficking of Persons in Brazil*, 25 ARIZ. J. INT'L & COMP. L. 857, 888-89 (2008) (stating that citizens in Brazil who are not on social security fail to improve their standard of living).

2. Increased Use of Support Trusts will Help Provide Extra Financial Support for the Elderly

The P.R.C. codified its trust law on April 28, 2001.[157] The concept is very new and will require education and training for attorneys and the general public in China.[158] Because of the flexibility that a discretionary trust provides, the model is favored in China as a way to provide for elder citizens who require financial support. It does not appear, however, that Chinese citizens are using trusts.[159] A number of uniform measures to the Chinese banking industry are necessary if trusts are to take off as they have in the United States.[160] More frequent use of trusts could be one way that families provide financial support to elderly family members.

B. Adopting Provisions of the Chinese Model as Guidance for American Courts

Probate reform is needed in order to reduce elder abuse and neglect.[161] The problem is foreseeable: the aging baby boom generation will place strains on the healthcare industry to levels previously unseen by Americans. Up to this point, the solution has been to allow nursing homes to supplement the day-to-day needs of the elderly.[162] While this is a solution for some, not all families are

157. Zhonghua Renmin Gongheguo Xintuo Fa (中华人民共和国信托法) [Trust Law of the People's Republic of China] (promulgated by the Ninth National People's Congress, Apr. 28, 2001, effective Oct. 1, 2001) *available at* http://www.lawinfochina.com/display.aspx?lib=law&id=1800.

158. *See generally* Charles Zhen Qu, *The Doctrinal Basis of the Trust Principles in China's Trust Law*, 38 REAL PROP. PROB. & TR. J. 345, 346–48 (2003) (discussing the background and concepts of which the trust law was enacted).

159. *See* Karla W. Simon, *Regulation of Civil Society in China: Necessary Changes After the Olympic Games and the Sichuan Earthquake*, 32 FORDHAM INT'L L.J. 943, 960 (2009) (stating that Chinese law professors do not believe trusts are being used).

160. *But see* Zongguo Yinjianhui Guanyu Yinfa "Xingtuo Gongsi Siren Guquan Touzi Xintuo Yewu Caozuo Zhiyin" de Tongzhi (中国银监会关于印发《信托公司私人股权投资信托业务操作指引》的通知) [Notice of China Banking Regulatory Commission on Issuing the Guidelines for Trust Companies to Operate the Trust Private Equity Investment Business] (June 25, 2008), http://www.lawinfochina.com/display.aspx?lib=law&id=7069 (providing recent reforms to the banking industry's use of trusts).

161. *Cf.* Watts & Sandhu, *supra* note 132, at 228 (recommending reform in Canada to prevent cases of elder abuse).

162. *See* CTR. FOR DISEASE CONTROL AND PREVENTION, NURSING HOME CURRENT RESIDENTS, tbl. 8 (revised Nov. 5, 2010), http://www.cdc.gov/nchs/data/nnhsd/Estimates/nnhs/Estimates_PaymentSource_Tables.pdf (estimating 1.5 million Americans were placed in nursing homes in 2004).

able to afford the monthly payment for these institutions.[163] The recommendations made here are addressed specifically to those families who provide day-to-day care for their elder family members in addition to managing a career and other family obligations.

1. Reduce Inheritance of Beneficiaries Responsible for Elder Abuse and Neglect

The Chinese system preserves and strengthens the family unit by holding members accountable for their actions. U.S. probate courts should consider the recommendations made by Francis H. Foster,[164] and reduce the inheritance of will beneficiaries if it is determined that elder abuse or neglect occurred. Limiting a beneficiary's testamentary distribution could act as a deterrent in preventing future elder abuse. Americans must be held accountable for the needs of their elder family members. If they are not, society will pay for the ignored family obligation. Probate courts and state legislatures alike should take notice of this growing problem in order to find creative solutions for the elder abuse and neglect problems.

2. Reward Caregivers who Provide Support to Neglected Elderly Testators

American jurisdictions should reward caregivers who provide both out-of-pocket financial and medical support to an elder.[165] This would require amending the elder's intentions for property distribution, but would encourage beneficiaries to provide adequate care.[166] Similar to the Chinese system, if the beneficiary fails to provide adequate support, then those who supplement care will be both reimbursed and rewarded for their assistance.[167] Moreover, rewarding caregivers could reduce the burden on society by reducing costs associated with Medicaid.

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163. *See* SHEEL PANDYA, AARP PUB. POL'Y INST., NURSING HOMES (Feb. 2001), *available at* http://www.aarp.org/home-garden/livable-communities/info-2001/aresearch-import-669-FS10R.html (estimating the average annual cost of a nursing home in 1998 was $56,000).

164. *See* Foster, *supra* note 56, at 94-95 (recommending that U.S. probate courts have flexibility in deciding whether unworthy heirs should inherit).

165. *Id.* at 103 (discussing how Chinese courts will reward good conduct by increasing inheritance for a caretaker during the probate process).

166. *See, e.g., id.* at n.149 (citing a Chinese inheritance case where the testator's daughter was awarded additional inheritance because she was the sole financial provider).

167. *See, e.g., id.* at n.171 (citing an inheritance case where the testator's stepsons provided full support and were awarded the majority of the testator's estate for providing financial, physical, and emotional needs).

3. Problems with Adopting the Chinese Method of Inheritance

It should be noted that the Chinese method of considering actions by the beneficiary before inheritance is not a perfect system and could go against local jurisprudence in many American states. First, implementation of the above recommendations from the Chinese system vastly expands the discretion held by probate judges. While there are already limited situations for allowing judicial discretion,[168] the recommendations here would go against the broad authority of considering the testator's intent. Second, if the recommendations were accepted, the effect would expand the type of evidence admitted extrinsically to the testator's will. Specifically, admitting evidence to determine cases of elder neglect and abuse may conflict with a jurisdiction's rule on when to admit extrinsic evidence. Finally, allowing a court to amend the testator's will distribution scheme could possibly encourage a fellow sibling or family member to make false allegations in order to gain a larger inheritance.

V. CONCLUSION

The current probate system in the United States, while placing heavy emphasis on the testator's intent, should be reformed in order to deter cases of elder abuse and neglect. One cannot help but wonder if the son of Brooke Astor would have made different decisions knowing that his inheritance would be significantly limited when looking out for his own interests rather than his mother's. Cases like these are likely to increase as the number of elders continues to rise exponentially with the aging of the baby boom generation. Reviewing the Chinese system of inheritance, which restricts or even prohibits beneficiaries from receiving property if they failed to fulfill their filial obligations, provides a possible solution to these problems. Similar to the United States, China is undergoing rapid economic and cultural change, which is likely to impact support for Chinese elders. Recommendations are made for both nations to consider adopting reform to increase the quality of elder care while at the same time decreasing cases of elder abuse and neglect. The law in both countries must adapt to cultural changes in order to protect American and Chinese elders alike.

168. *See, e.g.*, ALA. CODE § 43-8-91(a) (LexisNexis 2011) (allowing a probate judge to provide for a child who is unintentionally left out of a testator's will so that the child will receive an intestate share of the estate).

UNVEILING THE TRUTH BEHIND THE FRENCH BURQA BAN: THE UNWARRANTED RESTRICTION OF THE RIGHT TO FREEDOM OF RELIGION AND THE EUROPEAN COURT OF HUMAN RIGHTS

Jennifer Heider*

I. INTRODUCTION: THE BURQA DEBATE

The traditional Muslim religious garment, the burqa, is the subject of controversy around the world. Some detractors of the burqa view it as a form of discrimination against women and argue that the garment should be banned in order to achieve gender equality and to ensure women's dignity.[1] Others view the burqa as a public interest concern, arguing that its prohibition, in some instances, is necessary to ensure public safety, security, health, order, and morals.[2] The primary counter-view in the burqa debate is that a public burqa ban violates human rights by eliminating the rights to individual liberty and freedom of religion.[3] In addition, some burqa supporters view a ban itself as a form of discrimination,[4] as such bans tend to be tailored specifically to Muslims and reflective of anti-Islamic sentiments.[5]

Action has been taken against the burqa in some areas of the world.[6] This Note focuses on France, which recently implemented a law banning full-face Islamic veils in public.[7] This law's potential impact on other countries is a cause for concern. Because the Muslim population has become more prominent throughout Europe,[8] laws such as France's may be implemented discriminatorily, resulting in a large-scale restriction on the right to freedom of

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1. *Bans on Full Face Veils Would Violate International Human Rights Law*, AMNESTY INT'L (Apr. 21, 2010), http://www.amnesty.org/en/library/asset/POL30/005/2010/en/e0ad88e1-4e5a-4120-a624-b2a6c70ed174/pol300052010eng.html [hereinafter *Bans on Full Face Veils*].

2. *Id.*

3. *Id.*

4. *Id.*

5. Editorial, *Government-Enforced Bigotry in France*, N.Y. TIMES, Apr. 12, 2011, at A24.

6. *See infra* Parts II, VI.C.4.

7. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 prohibiting the concealment of the face in public spaces], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 11, 2010, p. 18344 [hereinafter Law 2010-1192]; *French 'Burqa' Ban Passes Last Legal Hurdle*, FR. 24 (Oct. 7, 2010), http://www.france24.com/en/20101007-french-burqa-ban-passes-last-legal-hurdle-constitutional-council-veil [hereinafter *French Burqa Ban*].

8. *See infra* Parts III.B, VI.C.1.b.

religion.[9]

Part II of this Note provides an overview of the 2004 French Religious Symbols Law and the recent French law that bans the burqa.[10] Part III examines the principle of secularism in France and its effect on France's minority populations;[11] it also discusses the current environment specifically facing French-Muslims.[12] Part IV of this Note considers the French burqa ban as it relates to human rights.[13] First, this Note looks at France's human rights obligations, focusing on the European Convention on Human Rights (European Convention) and the body responsible for enforcing this treaty, the European Court of Human Rights (ECHR).[14] Second, this Note discusses Article 9 of the European Convention, which guarantees the right to freedom of religion.[15] Part V examines ECHR case law pertaining to Article 9, including cases that have specifically dealt with bans of Islamic garments.[16]

Part VI of this Note offers reasons why the French burqa ban, if brought before the ECHR, should be found to violate Article 9 of the European Convention.[17] This Note first explains how the new French law is distinguishable from prior Article 9 cases.[18] It then argues that the law is disproportionate to any legitimate French concerns, which requires that the ECHR strike it down.[19] Finally, this Note emphasizes the ECHR's duty to uphold human rights[20] and argues that, in light of the present day conditions in France as well as Europe in general, the only way for the ECHR to uphold the right to freedom of religion for Muslim women is to declare the French burqa ban an unlawful interference with Article 9.[21] This Note opines that the French burqa ban presents the perfect opportunity for the ECHR to set a strong precedent in favor of the freedom of religion under the European Convention.[22]

II. RELIGION LAWS IN FRANCE

The burqa ban is not the first French law to place limitations on public displays of religious expression. On March 15, 2004, France passed Law No.

9. *See Bans on Full Face Veils, supra* note 1.
10. *See infra* Part II.
11. *See infra* Part III.A.
12. *See infra* Part III.B.
13. *See infra* Part IV.
14. *See infra* Part IV.A.
15. *See infra* Part IV.B.
16. *See infra* Part V.
17. *See infra* Part VI.
18. *See infra* Part VI.A.
19. *See infra* Part VI.B.
20. *See infra* Part VI.C.
21. *See infra* Parts VI.C.1.a, VI.C.1.b.
22. *See infra* Parts VI.C.2, VI.C.3, VI.C.4.

2004-228,[23] which provides that "in public elementary schools, junior high schools and high schools, students are prohibited from wearing signs or clothing through which they exhibit conspicuously a religious affiliation."[24] On its face, this law affects all religions equally.[25] In practice, however, this law has most severely impacted Muslim students because it prohibits Muslim schoolgirls from wearing headscarves to school.[26]

On October 8, 2004, the *Conseil d'État* (French Supreme Court on Administrative Matters) upheld the constitutionality of Law No. 2004-228,[27] finding that, although it infringed on the "freedom of thought, conscience, and religion," the restriction "was proportionate to the general interest pursued[—]respect for the principle of secularism in public schools."[28] Prior to this decision, an investigative commission[29] examined the necessity of the law and determined that France needed to take action against religious symbols in public schools for three reasons: (1) "wearing an ostensibly religious symbol... suffices to disrupt the tranquility of the life of the school";[30] (2) headscarves threaten public order as it is too difficult for teachers and local officials to distinguish "illicit ostentatious symbols" from "licit non-ostentatious ones";[31] and (3) headscarves threaten public order due to their association with communitarianism.[32]

Five years later, French President Nicolas Sarkozy began campaigning for

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23. Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law No. 2004-228 of March 15, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools], art. 1, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190 [hereinafter Law No. 2004-228]; Nicole Atwill, *France – Implementation of Law Prohibiting Religious Clothing in Public Schools*, 12 WORLD L. BULL. 2004, at 15, 15, *available at* http://www.fas.org/sgp/othergov/wlb/200412.pdf.

24. Atwill, *supra* note 23, at 15 (translating Law No. 2004-228 of March 15, 2004, art. 1 (Fr.)).

25. *Id.*

26. *Id.*

27. *Conseil d'État* [CE Sect.] [highest administrative court], Oct. 8, 2004, Rec. Lebon 2004, 367 (Fr.).

28. Atwill, *supra* note 23, at 16 (discussing CE Sect., Rec. Lebon 2004, 367 (Fr.)).

29. In 2003 French President Chirac created a committee that issued a report, based on interviews with political and religious leaders, school principals, and social and civil rights groups, that led to the adoption of Law No. 2004-228. Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629, 2645 (2009); *See* Commission de reflexion sur l'application du principe de laïcite dans la Republique, Rapport au President de la Republique (Dec. 11, 2003) (Fr.) [hereinafter Commission Report], *available at* http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics//034000725/0000.pdf.

30. Mancini, *supra* note 29, at 2646 (quoting Commission Report, *supra* note 29, at 41).

31. *Id.* (citing Commission Report, *supra* note 29, at 31).

32. *Id.* (citing Commission Report, *supra* note 29, at 45-46).

a stricter law on religious expression.[33] He argued that such a law is necessary to uphold France's values and secular ways, viewing the burqa as a sign of subservience rather than an expression of religious beliefs.[34] Advocating for the new law, President Sarkozy bluntly stated: "[The burqa] will not be welcome on the territory of the French republic."[35] Similarly, French Immigration Minister Eric Besson stated that he wanted "the wearing of the full veil to be systematically considered as proof of insufficient integration into French society, creating an obstacle to gaining (French) nationality."[36] These desires were realized in 2010, when the prohibition created by Law No. 2004-228[37] was broadened by a law that banned the burqa and other full-face veils in all public places.[38] Both the French Assembly and the French Senate overwhelmingly passed the ban,[39] which was ultimately approved by the Constitutional Council, France's top legal authority, on October 7, 2010.[40] The law went into effect on April 11, 2011.[41]

Unlike Law No. 2004-228, which restricts religious garments only in public schools,[42] the new French law bans full-face veils in nearly all public places, including streets, markets, private businesses, entertainment venues, government buildings, and public transportation, but excluding public places of worship.[43] Any woman caught wearing a face-covering veil is subject to a 150

33. *Nicholas Sarkozy: Burqa Not Welcome in France*, TELEGRAPH (June 22, 2009), http://www.telegraph.co.uk/news/worldnews/europe/france/5603070/Nicolas-Sarkozy-burqa-not-welcome-in-France.html [hereinafter *Burqa Not Welcome*].

34. Angelique Chrisafis, *Nicholas Sarkozy Says Islamic Veils Are Not Welcome in France*, GUARDIAN (June 22, 2009), http://www.guardian.co.uk/world/2009/jun/22/islamic-veils-sarkozy-speech-france; *French Senate Passes Ban on Full Muslim Veils*, USA TODAY (Sept. 15, 2010), http://www.usatoday.com/news/religion/2010-09-16-veil15_ST_N.htm [hereinafter *French Senate Passes Ban*].

35. *Burqa Not Welcome*, *supra* note 33.

36. Elaine Ganley, *Minister Says Burqa-Style Veils Impede Citizenship*, SEATTLE TIMES (Dec. 16, 2009), http://seattletimes.nwsource.com/html/nationworld/2010522907_apeufrancemuslimveil.html.

37. *France's Ban on the Burqa: The War of French Dressing*, ECONOMIST (Jan. 14, 2010), http://www.economist.com/node/15270861.

38. Law 2010-1192, *supra* note 7.

39. The French Assembly voted 336 to 1 in favor of the law. Liz Leslie, *French National Assembly Approves Burqa Ban*, MUSLIM VOICES (July 13, 2010), http://muslimvoices.org/french-national-assembly-approves-burqa-ban/. Similarly, the French Senate passed the law by a vote of 246 to 1. *French Senate Approves Burqa Ban*, CNN (Sept. 15, 2010), http://www.cnn.com/2010/WORLD/europe/09/14/france.burqa.ban/index.html [hereinafter *French Senate Approves Burqa Ban*].

40. *French Burqa Ban*, *supra* note 7.

41. Steven Erlanger, *France Enforces Ban on Full-Face Veils in Public*, N.Y. TIMES (Apr. 11, 2011), http://www.nytimes.com/2011/04/12/world/europe/12france.html?_r=3&hp.

42. *See supra* note 24 and accompanying text.

43. *French Burqa Ban*, *supra* note 7.

euro fine or a mandatory French citizenship course.[44] Additionally, anyone who forces a woman to wear a religious garment is punishable by a 30,000 euro fine and a year in prison; 60,000 euro and two years in prison if the forced individual is a minor.[45]

Although the new law does not single out Islam on its face, in practice, the burqa ban is tailored to affect the Muslim population. The law constitutes a "restriction of a practice adopted only by women associated with a particular religion with the effect of impairing their enjoyment of fundamental rights."[46] It is estimated that only 2,000 women in France actually wear the burqa[47]—an insignificant number given France has an estimated Muslim population of five to six million.[48] Thus, the law is more symbolic than practical;[49] it "exploits a non-problem . . . and panders to anti-Muslim sentiment . . . ."[50]

The French government has justified the law's effect on the free exercise of religion by stating: "Given the damage [the full-face veil] produces on those rules which allow the life in community, ensure the dignity of the person and equality between sexes, this practice, even if it is voluntary, cannot be tolerated in any public place."[51] But it appears that France's discriminatory tendencies underlie the new burqa ban. The law suggests that "one cannot be [both] a pious Muslim and a good French citizen, or even that Muslims are not welcome in France."[52]

Already France has encountered difficulties enforcing its burqa ban. On the day the law went into effect, at least three burqa-clad women were arrested while attending a demonstration against the new law outside the Notre Dame Cathedral in Paris.[53] Surprisingly, police arrested these women for staging an

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44. *French Senate Passes Ban*, *supra* note 34; *France's Burqa Ban in Effect Next Month*, CNN (Mar. 4, 2011), http://edition.cnn.com/2011/WORLD/europe/03/04/france.burqa.ban/ [hereinafter *Ban in Effect*].

45. *French Senate Passes Ban*, *supra* note 34; *Ban in Effect*, *supra* note 44.

46. *Human Rights Watch Submission to the National Assembly Information Committee on the Full Muslim Veil on National Territory*, HUM. RTS. WATCH (Nov. 20, 2009), http://www.hrw.org/en/news/2009/11/20/human-rights-watch-submission-national-assembly-information-committee-full-muslim-ve [hereinafter *Human Rights Watch*].

47. *Id.*

48. Houssain Kettani, *2010 World Muslim Population*, PROC. 8TH HAW. INT'L CONF. ON ARTS & HUMAN., § 4.2.2 (2010), *available at* http://www.pupr.edu/hkettani/papers/HICAH2010.pdf.

49. *Defiance on First Day of Burqa Ban*, TIMES LIVE (Apr. 16, 2011), http://www.timeslive.co.za/africa/article1024131.ece/Defiance-on-first-day-of-burka-ban [hereinafter *Defiance*].

50. *French Burqa Ban*, *supra* note 7.

51. *French Senate Approves Burqa Ban*, *supra* note 39.

52. *Human Rights Watch*, *supra* note 46.

53. *Defiance*, *supra* note 49; *see generally* Colin Randall, *Is France Dithering over Burqa Ban?*, GUARDIAN (May 5, 2011), http://www.guardian.co.uk/commentisfree/2011/may/05/france-burqa-ban-rachid-nekkaz. French-Algerian businessman Rachid Nekkaz has created a lobby group, "Hands off my Constitution," and a one million euro fund to pay any fines and

unauthorized demonstration rather than for wearing the burqa.[54] Regarding this incident, the Deputy General-Secretary of the Union of Senior Police Officers admitted, "The law is going to be immensely difficult to apply and will be applied in a small way."[55] In a separate incident, a French woman due in court for violating the burqa ban was denied entry into her hearing because she refused to remove her burqa.[56] Because police are prohibited from removing the veils themselves,[57] the woman was told to leave the court, and her court appearance was abandoned.[58] Another woman due in court for the same reason simply stayed home, having been told she would be unable to gain entry into the court.[59] The burqa ban's implementation challenges continue as on December 13, 2011, a woman was again denied entry into court for her hearing because she was wearing a burqa; however, the court sentenced her to fifteen days of "citizen service" and ruled that failure to comply will result in up to a two year prison sentence and a 30,000 euro fine.[60]

III. BACKGROUND

A. Secularism in France

The French concept of secularism (*laicité*)[61] has been the law in France since 1905 and requires the separation of church and state.[62] It arose during the French Revolution and is based on the belief that France should promote a

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court fees incurred by women wearing the burqa. *Id.* Nekkaz challenges the French government's assertion that the burqa ban is being implemented and that burqa-clad women are being fined. *Id.*

54. *Defiance, supra* note 49.

55. *Id.*

56. Peter Allen, *French Burka Ban Descends into Farce*, TELEGRAPH (June 17, 2011), http://www.telegraph.co.uk/news/worldnews/europe/france/8581980/French-burka-ban-descends-into-farce.html. The woman stated, "The law forbids me from expressing myself, and indeed from defending myself. It forces me to dress a certain way, when all I want to do is live according to my religion." *Id.*

57. *Id.*; Angelique Chrisafis, *Muslim Women Protest on First Day of France's Face Veil Ban*, GAURDIAN (Apr. 11, 2011), http://www.guardian.co.uk/world/2011/apr/11/france-bans-burqa-and-niqab.

58. Allen, *supra* note 56.

59. *Id.*

60. *Woman Risks Jail for Wearing Full Veil in France*, THE LOCAL (Dec. 13, 2011), http://www.thelocal.fr/2008/20111213/.

61. Pew Res. Ctr., *100th Anniversary of Secularism in France*, PEW F. ON RELIG. & PUB. LIFE (Dec. 9, 2005), http://pewforum.org/Government/100th-Anniversary-of-Secularism-in-France.aspx.

62. Embassy of France in Washington, *Freedom of Religions and Sects*, FR. U.S. (Mar. 13, 2008), http://ambafrance-us.org/spip.php?article642.

unified national identity and ignore religious and ethnic differences.[63] France does not recognize or promote any specific religion;[64] the government requires only that French citizens show loyalty to France.[65] Therefore, the people of France may freely practice their religion of choice, subject only to security concerns, public laws, and a showing of respect for fellow citizens.[66]

France legally requires separation of church and state,[67] and "it does so more militantly than any other [country]."[68] France expects those living within its borders, including immigrants, to embrace French identity.[69] This was emphasized by President Sarkozy when he spoke out against multiculturalism during a live, on-air interview in March 2011:

> I do not want a society where communities coexist side by side . . . France will not welcome people who do not agree to melt into a single community. We have been too busy with the identity of those who arrived and not enough with the identity of the country that accepted them.[70]

This complete assimilation into French society can be problematic for many French-Muslim immigrants and citizens because Islam "permeates every aspect of Muslim life."[71] Consequently, the French often perceive the burqa and other Islamic head coverings as signs of opposition to the "French model for integration and cultural homogeneity" and thus, as a refusal to become "French."[72]

The burqa ban is just one example of France's extensive commitment to assimilation. In 2008 France denied citizenship to a woman, Moroccon-born Faiza Mabchour, reasoning that she had failed to integrate into French society.[73]

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63. Sarah Bienkowski, Note, *Has France Taken Assimilation Too Far? Muslim Beliefs, French National Values, and the June 27, 2008 Conseil d'État Decision on Mme M.*, 11 RUTGERS J.L. & RELIGION 437, 439-40 (2010).

64. *Id.*

65. Henri Astier, *The Deep Roots of French Secularism*, BBC NEWS (Sept. 1, 2004), http://news.bbc.co.uk/2/hi/europe/3325285.stm.

66. Embassy of France in Washington, *supra* note 62.

67. Cynthia DeBula Baines, Note, *L'affaire des Foulards – Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT'L L. 303, 311 (1996). Along with France, India, Japan, Mexico, and Turkey also legally require separation of church and state. *Id.* n.50.

68. Astier, *supra* note 65.

69. Baines, *supra* note 67, at 311-12.

70. Soeren Kern, *Debate Heats up over Muslims in France*, HUDSON N.Y. (Mar. 17, 2011), http://www.hudson-ny.org/1969/muslims-in-france.

71. Baines, *supra* note 67, at 311.

72. *Id.* at 312.

73. Conseil d'État [CE Sect.] [highest administrative court], June 27, 2008, No. 286798, *available at* http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=

Ms. Mabchour had lived in France with her husband and three children since 2000.[74] Although she regularly wore the Muslim headscarf, Ms. Mabchour indicated that she began the practice at her husband's insistence and continued it due to habit rather than overlying conviction.[75] But the French authorities viewed this religious practice as her insistence not to assimilate.[76] The *Conseil d'État* upheld the decision to deny Ms. Machbour citizenship, finding the ruling necessary because she had "adopted a radical practice of her religion, incompatible with the essential values of the French community, and particularly with the principle of sexual equality."[77] Ms. Machbour's case shows not only the French view on Islamic garments but also France's willingness, in the name of *laicité*, to require assimilation to the point of refusing citizenship because of religious expression.[78]

B. The French Muslim Population

Muslim immigration to France began to increase during the period following World War II.[79] Faced with a labor shortage, France looked to its former colonies of Algeria, Morocco, and Tunisia for a supply of workers.[80] Although France's secular laws prevent the government from keeping statistics on the religious affiliation of the French population,[81] the current Muslim population in France is estimated at five to six million.[82] Notably, France is home to Europe's largest Muslim population, and following Catholicism, Islam is the country's second largest religion.[83]

Despite France's relatively large Muslim population, a majority of which are French citizens, French Muslims face extreme discrimination in the areas of housing, employment, education, and political participation.[84] The French-

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CETATEXT000019081221; Yael Barbibay, Note, *Citizenship Privilege or the Right to Religious Freedom: The Blackmailing of France's Islamic Women*, 18 CARDOZO J. INT'L & COMP. L. 159, 165 (2010).

74. Barbibay, *supra* note 73, at 165.

75. *Id.*

76. *Id.* at 166.

77. *France and Islam: A Burqa Barrier*, ECONOMIST (July 17, 2008), http://www.economist.com/node/11751650.

78. Barbibay, *supra* note 73, at 166.

79. *Id.* at 167

80. *Id.*

81. *French Burqa Ban Clears Last Legal Obstacle,* CNN (Oct. 7, 2010), http://www.cnn.com/2010/WORLD/europe/10/07/france.burqa.ban/index.html.

82. Kettani, *supra* note 48, § 4.2.2.

83. *See* Embassy of France in Washington, *supra* note 62; Bureau of Eur. & Eurasian Affairs, *Background Note: France*, U.S. DEP'T STATE, http://www.state.gov/r/pa/ei/bgn/3842.htm (last updated May 27, 2011).

84. U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Rep. of the Independent Expert on Minority Issues*, add., p. 2, Sept. 19-28, 2007, U.N. Doc. A/HRC/7/23/Add.2 (Mar. 4, 2008) (prepared by Gay McDougall).

Muslim community has been characterized as "vulnerable" and a "target group."[85] Upon their arrival in France, poor immigrants of certain ethnic or religious backgrounds are segregated from the general French population by consistently being "allocated the poorest housing in specific neighbourhoods."[86] These neighborhoods are located outside of major cities and mainly consist of run-down, economically depressed high-rise apartment blocks.[87] It is estimated that one-third of France's Muslim population lives in such suppressed housing.[88]

Employment discrimination is another obstacle facing French-Muslims. A survey measuring employment discrimination found that "four out of five employers preferred ancestral French workers" over those with minority backgrounds and that only 11% of French employers satisfied equal treatment standards during the employee recruitment process.[89] Another study, specifically investigating Muslim employment discrimination, sent fictitious résumés to a French employment agency and found that résumés with white French names received a 25% to 30% positive response rate while that of the same résumés sent using Arab-sounding names was only 5%.[90]

Employment discrimination fuels high unemployment rates for Muslims and other minority groups,[91] making it hard for these groups to leave the poor neighborhoods.[92] Further, the inability to leave such housing tends to unite Muslims, primarily through religion, instead of facilitating their assimilation into French culture.[93] This cycle may also account in part for the fact that Muslims made up 50% to 80% of the French prison population in 2004.[94]

The disparate impact on ethic minorities in France has created tension between France and its Muslim population.[95] Discontent boiled over in 2005, when two young African immigrants died while fleeing police;[96] the public

85. Eur. Comm'n Against Racism & Intolerance, *ECRI Report on France*, at 29, CRI (2010) 16 (June 15, 2010),*available at* http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/France/FRA-CbC-IV-2010-016-ENG.pdf.

86. U.N. Human Rights Council, *supra* note 84, para. 45.

87. *Id.*

88. Barbibay, *supra* note 73, at 169.

89. U.N. Human Rights Council, *supra* note 84, para. 54.

90. *Id.* para. 58.

91. Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 L. & SOC'Y REV. 699, 702 (2007). In 2003 French North African immigrants were unemployed at a rate of four to five times the national average. *Id.*

92. *Ghettos Shackle French Muslims*, BBC NEWS (Oct. 31, 2005), http://news.bbc.co.uk/2/hi/4375910.stm.

93. Oriana Mazza, Note, *The Right to Wear Headscarves and Other Religious Symbols in French, Turkish, and American Schools: How the Government Draws a Veil on Free Expression of Faith*, 48 J. CATH. LEGAL STUD. 303, 314 (2009).

94. Wiles, *supra* note 91, at 702.

95. *Ghettos Shackle French Muslims*, *supra* note 92.

96. Barbibay, *supra* note 73, at 169.

blamed the state for the teens' deaths, and major civil unrest followed.[97] Violent riots raged for three weeks in areas largely populated by Muslim immigrants.[98] In response, then-Interior Minister Nicolas Sarkozy vowed to "clean the [cities]" and "get rid of the rabble," causing even more outrage throughout the Muslim community.[99] France thereafter issued a national state of emergency.[100] It is estimated that, as a result of the riots, 10,000 cars were burned, 300 buildings were damaged, 220 police officers were injured, and over 6,000 people were arrested.[101] Commenting on the riots, then-French President Jacques Chirac emphasized that "discrimination must be fought, but order must be restored, as well."[102]

Although the deaths of the two teens triggered the riots, "nobody doubts that the real roots of the trouble [lay] in the social and economic alienation of the largely Muslim population . . . ."[103] In 2007 riots further plagued French neighborhoods after two teens were killed in a motorcycle accident involving a police car.[104] Again, racial and cultural tensions were instigating factors, showing that the French government's promises[105] to decrease discrimination after the 2005 riots had fallen short.[106]

Compounding Muslim discrimination in France, the terrorist attacks on September 11, 2001,[107] and the 2007 London bombings,[108] along with other recent terrorist activity,[109] have fueled a fear of extreme Islam in France.[110] The

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97. *Id.* at 169-70.

98. *Id.* at 170.

99. *Id.*

100. *Id.*

101. Jeffrey Stinson, *Fear of Replay of '05 Riots Has French on Edge*, USA TODAY (Oct. 27, 2006), http://www.usatoday.com/news/world/2006-10-26-france-riot-anniversary_x.htm.

102. *France Riots: Understanding the Violence*, CBC NEWS, http://www.cbc.ca/news/background/paris_riots/timeline.html (last updated Nov. 28, 2007) [hereinafter *France Riots*].

103. *France's Failure: The Biggest Lesson of the French Riots Is that More Jobs Are Needed*, ECONOMIST (Nov. 10, 2005), http://www.economist.com/node/5136305.

104. *France Riots*, *supra* note 102.

105. *Id.*

106. Emilie Boyer King, *Sarkozy Promises Inquiry into Teenage Deaths that Sparked Riots*, GUARDIAN (Nov. 28, 2007), http://www.guardian.co.uk/world/2007/nov/29/france.international.

107. Eur. Monitoring Ctr. on Racism & Xenophobia [EUMC], *Summary Report on Islamophobia in the EU after 11 September 2001*, at 18 (May 2002), *available at* http://fra.europa.eu/fraWebsite/attachments/Synthesis-report_en.pdf; EUMC, *Anti-Islamic Reactions in the EU after the Terrorist Attacks against the USA: France*, (May 23, 2002), *available at* http://fra.europa.eu/fraWebsite/attachments/France.pdf.

108. *See* EUMC, *The Impact of 7 July 2005 London Bomb Attacks on Muslim Communities in the EU*, at 33-35, 37-38 (Nov. 2005), *available at* http://fra.europa.eu/fraWebsite/attachments/London-Bomb-attacks-EN.pdf (discussing incident reports made by several EU countries and the French government's reaction to the attacks).

109. Perwez Abdullah, *France Integrating Muslims into Society to Promote Harmony*, INT'L NEWS (Mar. 10, 2011), http://www.thenews.com.pk/

prevalence of Islamophobia undoubtedly impacts how Muslims are treated,[111] which begs the question as to whether France's burqa ban is motivated by an unease regarding Islam rather than an effort to uphold secularism.

It is also worth noting France's recent treatment of another unpopular minority population, the Roma, commonly referred to as "gypsies."[112] In the summer of 2010, France expelled over 1,000 Roma from the camps where they lived.[113] France denies any discriminatory motivations for these deportations;[114] however, the European Union (EU) called the expulsions a "disgrace," and EU Justice Commissioner Viviane Reding stated that the expulsions "gave that impression that the people are being removed . . . just because they belong to an ethnic minority."[115] She added, "[This] is a situation that I had thought that Europe would not have to witness again after the Second World War."[116] The recent Roma expulsions further exemplify the difficult environment facing French minorities.

IV. FRANCE'S HUMAN RIGHTS OBLIGATIONS

Human rights are equally inherent to all individuals regardless of "nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status."[117] They are also "interrelated, interdependent and indivisible."[118] Nations are bound to uphold human rights obligations by various sources of international law, including treaties, customary international

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TodaysPrintDetail.aspx?ID=35301&Cat=4&dt=3/10/2011. "France has received threats from Al Qaeda, and it is not a theoretical threat. French citizens have been killed in some Muslim countries in the Maghreb (West)." *Id.*

110. The French Ambassador to Pakistan conceded, "It is quite true that France has Islamophobia." *Id.*

111. EUMC, *Muslims in the European Union: Discrimination and Islamophobia*, at 73-75 (Dec. 2006), *available at* http://www.fra.europa.eu/fraWebsite/attachments/Manifestations_EN.pdf.

112. *EU Threatens Action over France's Roma Expulsions*, NPR (Sept. 14, 2010), http://www.npr.org/templates/story/story.php?storyId=129852033 [hereinafter *Roma Expulsions*].

113. *Id.*; *see generally EU Nations and Roma Repatriation*, BBC NEWS (Sept. 17, 2010), http://www.bbc.co.uk/news/world-europe-11344313 (discussing how EU Member States are responding to the French Roma expulsions); *see generally France Gets EU Reprieve on Roma*, BBC NEWS (Oct. 19, 2010), http://www.bbc.co.uk/news/world-europe-11572646 (explaining that France vowed to implement an EU directive on the freedom of movement, and that the European Commission will not, for the time being, seek legal action against France regarding the Roma expulsions).

114. *Roma Expulsions*, *supra* note 112.

115. *Id.*

116. *Id.*

117. Office of the High Comm'r for Human Rights, *What Are Human Rights?*, U.N. HUM. RTS., http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx (last visited Nov. 12, 2011).

118. *Id.*

law, and general principles.[119] The main relevant sources of France's human rights obligations include the Universal Declaration of Human Rights (Universal Declaration), the European Convention, the International Covenant on Civil and Political Rights, and the Convention for Elimination of All Forms of Discrimination Against Women.[120]

The Universal Declaration[121] was established by the United Nations (UN) in 1948.[122] This declaration lists fundamental human rights and freedoms and divides them into six categories: (1) security rights, (2) due process rights, (3) liberty rights, (4) political rights, (5) quality rights, and (6) social rights.[123] The French burqa ban affects liberty rights, specifically the right to freedom of religion.[124] Article 18 of the Universal Declaration provides that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[125] However, the exercise of this and other Universal Declaration rights are limited by Article 29: "[E]veryone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[126] Although the Universal Declaration is a General Assembly resolution and, consequently, does not impose binding legal obligations,[127] it is viewed as the "principal basis for global human rights standards"[128] and has greatly influenced the European Convention.[129] And because the ECHR is responsible for ensuring that member states uphold the European Convention,[130] this Note proceeds with a focus on

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119. *Id.*

120. *Id.*; *Multilateral Treaties Deposited with the Secretary-General: Chapter IV – Human Rights*, United Nations, http://treaties.un.org/Pages/ParticipationStatus.aspx (last visited Nov. 12, 2011).

121. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration].

122. *Id.*

123. James Nickel, *Human Rights*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/rights-human/ (last updated Aug. 24, 2010).

124. *See id.*; Henry Samuel, *So Whose Liberty, Equality, Fraternity Is Really at Stake?*, TELEGRAPH (Apr. 15, 2011), http://www.telegraph.co.uk/journalists/henry-samuel/8454833/So-whose-liberty-equality-fraternity-is-really-at-stake.html.

125. Universal Declaration, *supra* note 121, art. 18.

126. *Id.* art. 29.

127. Kendal Davis, Note, *The Veil that Covered France's Eye: The Right to Freedom of Religion and Equal Treatment in Immigration and Naturalization Proceedings*, 10 NEV. L.J. 732, 753 (2010).

128. *Id.*

129. Convention for the Protection of Human Rights and Fundamental Freedoms pmbl., Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

130. *Id.* art. 19.

France's obligation to uphold the right of freedom of religion in the context of the European Convention and the ECHR.

A. The European Convention and the European Court of Human Rights

The European Convention was enacted,[131] in part, to unite European countries through the realization and enforcement of certain fundamental freedoms and human rights.[132] France is one of forty-six Member States of the European Convention,[133] and all Member States are held to the Convention's principles.[134] The ECHR was established by the European Convention[135] in 1959 for the purpose of interpreting and enforcing human rights.[136] Therefore, the ECHR will ultimately decide a validity challenge to the French burqa ban.[137]

The ECHR is not bound by the principle of *stare decisis* and therefore is not required to follow its own precedent.[138] Yet, the Court gives weight to its prior decisions and normally follows them in order to ensure "legal certainty and the orderly development of the Convention case-law."[139] The ECHR, however, will stray from precedent if it has a "cogent reason" for doing so, such as to "ensure that the interpretation of the Convention reflects societal changes and remains in line with present day conditions."[140] In this sense, the ECHR views the European Convention as a "living instrument" which must constantly be re-interpreted.[141]

When deciding a case, the ECHR also looks for standards common throughout Europe based on domestic law, domestic practice, and other international or European instruments.[142] Because the ECHR functions to uphold the human rights enumerated in the European Convention, the Court

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131. *Id.* pmbl.

132. *Id.*

133. Christopher D. Belelieu, Note, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Şahin Judgment*, 12 COLUM. J. EUR. L. 573, 588 (2006).

134. *Id.*

135. European Convention, *supra* note 129, art. 19.

136. Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474, 474 (1982).

137. Angelique Chrisafis, *France's Burqa Ban: Women Are 'Effectively Under House Arrest'*, GUARDIAN (Sept. 19, 2011), http://www.guardian.co.uk/world/2011/sep/19/battle-for-the-burqa.

138. Cossey v. United Kingdom, App. No. 10843/84, 13 Eur. H.R. Rep. 622, para. 35 (1990).

139. *Id.*

140. *Id.*

141. Tyrer v. United Kingdom, App. No. 5856/72, 2 Eur. H.R. Rep. 1, para. 31 (1978).

142. Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 126 (2003).

must "narrowly interpret" any interference with these rights.[143] Such interpretation is necessary for the existence of religious pluralism, which is a characteristic inherent to a democratic society.[144] Understanding the ECHR's method of deciding cases is important because, although it has upheld bans on Islamic headscarves in the past, the cultural landscape in Europe has since changed.[145] For this reason, the ECHR should interpret the European Convention differently with regard to new cases dealing with religious freedom and Islamic headscarves.

B. Freedom of Religion under Article 9 of the European Convention

An ECHR determination on the validity of the French burqa ban will likely be based on the Court's application and interpretation of Article 9 of the European Convention[146] Article 9 provides:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. [147]
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[148]

Thus, citizens of Member States have the right to freedom of religion under Article 9, but the right to manifest religious beliefs may be restricted under certain circumstances.[149]

Because the status and treatment of the European Convention within a state's legal system may differ from state to state, the ECHR established the "margin of appreciation" doctrine as a tool to help determine whether an infringement on the rights guaranteed under Article 9 is warranted.[150] The

143. Sunday Times v. United Kingdom, App. No. 6538/74, 2 Eur. H.R. Rep. 245, para. 65 (1979).

144. Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) para. 31 (1993).

145. *See infra* Parts III.B, VI.C.1.b.

146. *See* Joshua Rozenberg, *Would the Burqa Ban Stand up at the European Court?*, GUARDIAN (Apr. 13, 2011), http://www.guardian.co.uk/law/2011/apr/13/law-burqa-ban-european-court.

147. European Convention, *supra* note 129, art. 9.

148. *Id.*

149. *See id.*

150. *See The Margin of Appreciation*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp (last visited Nov. 12, 2011).

margin of appreciation doctrine refers to the latitude the ECHR is "willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights . . . ."[151] Accordingly, the Court considers the cultural background of the country at issue and gives a degree of deference to that state's decision as to whether a state law or practice is in compliance with the European Convention.[152] The ECHR determines whether to closely scrutinize a state's decision or to create a strong presumption in favor of the state decision on a case-by-case basis;[153] thus, the determination for one state may not be appropriate for another.[154] The Court, however, tends to narrow its deference if there is a consensus among the states regarding the right or law at issue.[155] Also, the Court often applies a narrow margin of appreciation if a right is deemed "fundamental."[156] To justify infringement upon a fundamental right, a state must "'convincingly establish' the necessity of the restriction."[157]

Some commentators criticize the margin of appreciation doctrine as a way for the ECHR to avoid its responsibility to enforce the European Convention.[158] Others argue that the extent to which the Court relies on the doctrine is no longer necessary, as Member States today are much more uniform with regard to democracy and civil liberties than they were when the margin of appreciation doctrine was created.[159] Regardless, the ECHR will apply some margin of appreciation to France if the Court rules on the French burqa ban. This Note argues that, because the burqa ban implicates the fundamental human right to freedom of religion, France's margin of appreciation should be narrow.[160]

As set forth above, the right to manifest religious expression is not absolute and may be restricted under Article 9(2) if that restriction is (1) "prescribed by law," (2) corresponds to a legitimate state aim, and (3) is "necessary in a democratic society."[161] This Note concedes that the first two elements pose no obstacle to the French burqa ban. A restriction is "prescribed by law" if the state law in question is simply "accessible to the individual and expressed with sufficient detail to enable the petitioner to adjust his conduct

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151. *Id.*

152. *Human Rights Act: How It Works*, BBC NEWS (Sept. 29, 2000), http://news.bbc.co.uk/2/hi/uk_news/946390.stm.

153. O'Donnell, *supra* note 136, at 475.

154. *Id.*

155. *Id.* at 495.

156. *Id.*

157. Belelieu, *supra* note 133, at 592.

158. *Id.* at 590. "The problem with the margin of appreciation is that it is an ill-defined judicial principle . . . . [And] the very notion of a margin of appreciation implies some type of infringement of an individual right which raises the question whether such a jurisprudential concept is compatible with a serious commitment to protecting human rights." *Id.*

159. Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587, 601-02 (2005).

160. *See* O'Donnell, *supra* note 136, at 495.

161. European Convention, *supra* note 129, art. 9.

accordingly."[162] Additionally, countries generally show a legitimate state aim by "re-contextualizing the interference within their idiosyncratic historical, political, and demographic contexts."[163] France will likely justify the burqa ban's human rights interference by re-contextualizing it within the legitimate state aim of upholding secularism.

The third element under Article 9(2) presents a greater challenge. In order for a limitation of an individual right to be "necessary in a democratic society," the limitation must relate to a "pressing social need" and be "proportionate to the legitimate aim pursued."[164] In this regard, the ECHR balances "the severity of the restriction placed upon the individual against the public interest in question . . . ."[165] However, problems arise in the application of this balancing test because it is vague[166] and because the Court has not determined an ideal standard for deciding whether the interests at issue in a given case are equitably balanced.[167] At times, the Court has required that the limitation on the right be the least restrictive means by which the countervailing public interest can be accomplished.[168] At other times, the Court has required that the limitation only meet a rational basis test, meaning that the limitation need only have a reasonable relationship to the legitimate public interest objectives.[169] Nonetheless, the Court's goal in balancing these interests is to protect individual rights and prevent disproportionate state action against these rights in the name of public policy.[170] Therefore, this balancing test may be seen as a mechanism to prevent abuse of the margin of appreciation doctrine.[171]

V. ECHR CASE LAW

A. ECHR Cases that Have Found Article 9 Interference

The ECHR did not hear its first Article 9 case, *Kokkinakis v. Greece*, until 1993.[172] In *Kokkinakis*, a Jehovah's Witness couple called on the home of a neighbor to have a religious discussion[173] and was prosecuted for and found guilty of violating a Greek law that prohibited proselytism, the act of soliciting

162. Davis, *supra* note 127, at 749.
163. Barbibay, *supra* note 73, at 188-89.
164. Silver v. United Kingdom, App. No. 5947/72, 5 Eur. H.R. Rep. 347, para. 97(c) (1983).
165. Belelieu, *supra* note 133, at 592.
166. *Id.* at 590, 594.
167. *Id.* at 592, 594.
168. *Id.* at 593.
169. *Id.* at 593-94.
170. *Human Rights Act: How It* Works, *supra* note 152.
171. *Id.*
172. Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) (1993).
173. *Id.* paras. 6-7.

religious conversion.[174] The Greek courts reasoned that the couple had attempted to change the neighbor's religious beliefs "by taking advantage of her inexperience, her low intellect and her naïvety."[175]

On application to the ECHR, the Court held that the Greek law violated Article 9 of the European Convention, finding it to be not proportionate to the legitimate aim of protecting the rights and freedoms of others and not "necessary in a democratic society."[176] In so holding, the Court expressed for the first time that the right of freedom to manifest one's religion can be exercised "in public," with those sharing the same faith, as well as in private.[177] The Court also recognized, however, that it may be necessary to limit this right in order to "reconcile the interests of . . . various groups and ensure that everyone's beliefs are respected" in contexts where the population maintains a variety of religious beliefs.[178]

The ECHR similarly found an Article 9 violation in the 2010 case of *Ahmet Arslan v. Turkey*.[179] There, members of a religious group, the Aczimendi tarikatÿ, had gathered at a mosque for worship, and in accordance with the group's religious beliefs, walked in public wearing turbans and other distinctive religious garments.[180] The members were arrested and convicted for breaching Turkey's headgear law as well as Turkey's law that prohibited the wearing of religious garments in public.[181] The ECHR recognized there was a legitimate aim for interfering with the right of freedom to manifest one's religion, especially given that Turkey is a secular nation.[182] However, the Court found that the interest of secularism was not furthered by interfering with this group's religious dress and practices because the members were merely wearing their religious clothing in public.[183] The Court reasoned that the manifestation of religious beliefs in public rather than in state institutions does not garner the concern that the religious manifestation will influence others and violate state neutrality.[184]

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174. *Id.* paras. 8-9.

175. *Id.* para. 10.

176. *Id.* paras. 49-50.

177. *Id.* para. 31.

178. *Id.* para. 33.

179. Ahmet Arslan v. Turkey, App. No. 41135/98, Eur. Ct. H.R. (Feb. 23, 2010).

180. *Id.* paras. 6-7.

181. *Id.* para. 3; *Ahmet Arslan and Others v. Turkey*, Summary, NETH. INST. HUM. RTS. (Feb. 23, 2010), http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/233813e697620022c1256864005232b7/7ac3c865131b054cc12576d3004f2955?OpenDocument [hereinafter Summary].

182. *Ahmet Arslan*, App. No. 41135/98, para. 47; Summary, *supra* note 181.

183. *Ahmet Arslan*, App. No. 41135/98, paras. 51-52; Summary, *supra* note 181.

184. *Ahmet Arslan*, App. No. 41135/98, para. 49; Summary, *supra* note 181.

B. ECHR Cases that Have Dealt with the Islamic Garment Issue under Article 9

1. Dahlab v. Switzerland

The ECHR case of *Dahlab v. Switzerland* dealt specifically with the use of the Islamic headscarf under Article 9 of the European Convention.[185] This case concerned a Swiss primary school teacher, Lucia Dahlab, who wore the Islamic headscarf while teaching.[186] Ms. Dahlab was forced to stop wearing the garment while at work because the practice was incompatible with Switzerland's Public Education Act requiring that "the political and religious beliefs of pupils and parents are respected."[187] The Court found no Article 9 violation, reasoning that the interference with Ms. Dahlab's Article 9 right was "necessary in a democratic society" and proportionate to the legitimate aim of "protecting the rights and freedoms of others, public order and public safety."[188] Specifically, the Court concluded that Ms. Dahlab's right to manifest her religion was outweighed by the need to protect students.[189] The ECHR emphasized that Ms. Dahlab was in a position of influence over her students, which presented a particular concern for the impact "a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children."[190] The Court also expressed concern over the Islamic headscarf's impact on the principle of gender equality.[191] Noting that the garment is often imposed on women, the Court reasoned it was "difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."[192]

2. Şahin v. Turkey

Şahin v. Turkey[193] may be the most well-known Article 9 case,[194] and it is

185. Dahlab v. Switzerland, App. No. 42393/98, 2001-V Eur. Ct. H.R. (2001).
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*; *see also* Dogru v. France, App. No. 27058/05, 49 Eur. H.R. Rep. 179 (2008). In *Dogru* an eleven-year-old French-Muslim student refused to remove her Islamic headscarf during gym class and was expelled from school. *Id.* The ECHR held that the religious restriction was justified under Article 9(2) as it was necessary in a democratic society and directed towards a legitimate aim—furthering secularism in state schools. *Id.*
193. Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5 (2005).

extremely relevant to understanding why the ECHR would be justified in striking down the French burqa ban. *Şahin* involved a Turkish ban on the Islamic headscarf in institutions of higher education.[195] Leyla Şahin, a Muslim student at one such educational institution, wore the Islamic headscarf because she considered it her religious duty.[196] Şahin was banned from taking an exam and from attending lectures pursuant to the Turkish headscarf ban,[197] and she brought suit alleging that the ban violated her right to "manifest her religion" under Article 9 of the European Convention.[198] After taking into consideration Turkey's margin of appreciation in the matter,[199] the ECHR held that, although the ban interfered with Şahin's Article 9 rights, the interference was "justified in principle and proportionate to the aim pursued."[200] Specifically, the ECHR found that the Turkish ban pursued the legitimate aim of "protecting the rights and freedoms of others and of protecting public order."[201]

The *Şahin* Court focused most of its analysis on the issue of whether the ban was "necessary in a democratic society."[202] In making its determination, the ECHR considered that the Article 9 values represented of freedom of thought, conscience, and religion help make up the foundation of a "democratic society."[203] In addition, the Court acknowledged that the right of freedom to manifest one's religion can be exercised individually, in public, and in community with others, but that the right is not absolute under Article 9(2).[204] The ECHR concluded that limitations of this right are especially relevant when a country has a diverse political demographic because such restrictions help to ensure that all religious interests are considered and respected.[205] But the Court added that "democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position."[206]

Regarding the headscarf issue in *Şahin*, the ECHR reasoned that because the Islamic headscarf is treated differently across Europe, the Court must give a relatively wide margin of appreciation to a state when such issues are being reviewed.[207] Context will determine the meaning or impact of an expression of

194. Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 CARDOZO L. REV. 2669, 2677-78 (2009).

195. *Şahin*, App. No. 44774/98, para. 19.

196. *Id.* para. 14.

197. *Id.* para. 17.

198. *Id.* para. 18.

199. *Id.* paras. 112-26.

200. *Id.* para. 122.

201. *Id.* para. 99.

202. *Id.* paras. 100-22.

203. *Id.* para. 104.

204. *Id.* para. 105.

205. *Id.* para. 106.

206. *Id.* para. 108.

207. *Id.* para. 109.

religious belief, whether it be the wearing of an Islamic garment or some other form of religious expression.[208] Therefore, rules regarding Article 9 will differ from state to state according to the respective state customs and way of life.[209] The rules will also depend on the requirements necessary for a state to protect its citizens' rights and freedoms and to maintain public order.[210]

The ECHR justified the Islamic headscarf ban in *Şahin* on grounds of secularism and equality,[211] emphasizing that Turkey is a secular and predominantly Muslim state.[212] Because of Turkey's demographic, the Islamic headscarf is a highly influential symbol that the Court feared could be "presented or perceived as a compulsory religious duty," thereby pressuring those not wearing a headscarf into doing so.[213] In addition, the Court emphasized that the headscarf is a symbol that has gained political significance in Turkey over the years, which does not coincide with the principle of secularism.[214] The Court recognized Turkey's concern about extreme political movements looking to "impose on society as a whole their religious symbols and conception of a society founded on religious precepts."[215] Thus, the Court acknowledged that Turkey views the Islamic headscarf as a symbol of political Islam, not just that of individual liberty.[216] Also, given the law's educational context, the Court found that the Islamic headscarf did not coincide with the values of "pluralism, respect for the rights of others and, in particular, equality before the law of men and women."[217]

A dissenting opinion was issued in *Şahin* by Judge Tulkens, who viewed the Islamic headscarf not only as a "local" issue but also as an issue facing Europe as a whole.[218] Consequently, the ECHR cannot rely on the margin of appreciation doctrine to ensure that the states are upholding the European Convention.[219] Instead of weighing the principles of secularism, equality, and liberty against one another, the majority opinion should have harmonized those principles.[220] The Court should have concentrated on the fact that Şahin did not wear her headscarf in an "ostentatious or aggressive" manner or use it to "provoke a reaction, to proselytise or to spread propaganda and undermine . . . the convictions of others."[221] Therefore, the dissent concluded, there was no

208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* para. 116.
212. *Id.* paras. 39, 114.
213. *Id.* para.115.
214. *Id.*
215. *Id.*
216. *Id.* para. 55.
217. *Id.* para. 116.
218. *Id.* para. 3 (Tulkens, J., dissenting).
219. *Id.*
220. *Id.* 4.
221. *Id.* para. 8.

"pressing social need" for the Court to restrict Şahin's right to manifest her religion through wearing a headscarf.[222] The Court had never before allowed a limitation of Article 9 rights because the religious sentiments at issue belonged to a minority or may be viewed as offensive to some.[223]

The dissent also addressed the concern of Islamophobia and how such discrimination can adversely affect the human rights of Muslims.[224] The Muslim headscarf is not an indicator of radical Islam, and one who wears a Muslim garment is not automatically one who seeks to impose such a religious symbol on the public in general.[225] Further, there was no reason to categorize Şahin as an extremist.[226] The practice of wearing an Islamic garment is one that is utilized for various reasons—it does not carry with it a single meaning.[227]

Further, the dissent did not view the headscarf as an automatic representation of a woman's submission to a man. Instead, the dissent emphasized that, because Muslim women, often wear an Islamic garment as a freely chosen expression of their religious beliefs,[228] the headscarf at times can "be a means of emancipating women."[229] Thus, the majority's gender equality justification for the law was ironic because the implementation of the ban meant that Şahin was prevented from participating in a practice she freely adopted.[230] Moreover, it is beyond the role of the Court to make a "unilateral and negative" depiction of a religion or religious practice, to "determine in a general and abstract way" the significance of the Muslim headscarf, or to impose its viewpoint on Şahin.[231] Summarily, in arguing that the Turkish ban was not "necessary in a democratic society," the dissent considered the opinions of Muslim women and showed that there is another side to the burqa debate, a side that the *Şahin* majority ignored.[232]

VI. THE ECHR SHOULD STRIKE DOWN THE FRENCH BURQA BAN

Law 2010-1192 infringes on a Muslim woman's Article 9 right by preventing her from wearing the burqa in manifestation of her religious beliefs.[233] In a validity challenge based on this infringement, the ECHR will determine whether the limitation is warranted under Article 9(2).[234] This Note

222. *Id.* para. 9.
223. *Id.*
224. *Id.* para. 10.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* para. 12.
229. *Id.* para. 11.
230. *Id.*
231. *Id.* para 12.
232. *Id.* para. 11.
233. *See supra* Parts II, V.
234. *Id.*

concedes that the burqa ban is "prescribed by law" and pursues France's "legitimate aim" of upholding its secular identity;[235] however, the ECHR should strike down the burqa ban on the ground that it is not "necessary in a democratic society."[236] While the Court, rightly or wrongly, has upheld restrictions on the wearing of Muslim headscarves because the laws were found "necessary,"[237] there are several reasons that will require the ECHR to treat the French burqa ban differently.

A. The French Burqa Ban is Distinguishable from Prior ECHR Case-Law

The French burqa ban is distinguishable from cases where the ECHR has held that an Article 9 limitation was "necessary in a democratic society." Therefore, much of the Court's reasoning in prior Article 9 cases is inapplicable to the current situation in France. First, and rather importantly, the French burqa ban and the Turkish headscarf ban in *Şahin* take place in notably different political and social contexts.[238] Islam is the predominant religion in Turkey; 99.8% of the Turkish population is Muslim.[239] Also, Islamic extremism is a legitimate concern in Turkey, where the government fears that such movements have the potential to interfere with the country's recent democratic progression.[240] In contrast, only a minority of France's population is Muslim, and according to the French ambassador to Pakistan, "there is no home-grown terrorism in France."[241] Unlike Turkey, France is not concerned with "striving to maintain a democratic system and guarding against the constant menace of insurrectionary Islamic political parties."[242] Moreover, the French political sphere lacks Muslim representation; therefore, "Islamic attire lacks the political [symbolism] that it has in the Turkish context."[243] The ECHR, therefore, should distinguish the current environment in France from that of Turkey, where a burqa ban may be necessary.[244]

The ECHR should also treat the French burqa ban differently from prior Article 9 cases because the ban's social context renders its practical effect highly discriminatory. The burqa ban is blatantly designed to affect Muslims, a minority population in France.[245] In France, women wearing headscarves are

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235. *See supra* Parts III.A, V.

236. *See Şahin*, App. No. 44774/98 (Tulkens, J., dissenting).

237. *See supra* Part V.B.

238. *Religious Expression*, EUR. CT. HUM. RTS., http://ecohr.wordpress.com/2010/04/16/religious-expression/ (last visited Nov. 12, 2011).

239. *The World Factbook: Turkey*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html (last updated Sept. 27, 2011).

240. *Religious Expression*, *supra* note 238.

241. Abdullah, *supra* note 109.

242. Barbibay, *supra* note 73, at 192.

243. *Id.*

244. *Id.*

245. *Id.* at 192, 204.

often viewed as outsiders.[246] And because an insignificant number of French Muslims actually wear the burqa, there is no concern that those who wear it will unduly influence Muslim women who do not.[247] Although the Turkish ban on headscarves in *Şahin* was also tailored to affect Muslims, that ban did not discriminate against minorities. "In Turkey, Muslim women wearing headscarves are not 'others.' They are perhaps the wives, mothers, and daughters of the legislators . . . ."[248] Because most of Turkey's population is Muslim, there was a legitimate concern that allowing the headscarf in schools may pressure women who do not wear the garment into doing so.[249]

The ECHR has stated that, under its case law, "the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."[250] However, considering that French Muslims have historically faced discrimination, especially in the areas of housing and employment,[251] it appears that France is using the burqa ban to do just that. France is exploiting its discretion against a minority population in order to dictate that Islam is neither a legitimate nor a welcome religion in France.[252] According to the ECHR, the French government may not abuse its dominant position; rather, it must guarantee the "fair and proper treatment of people from minorities."[253] Instead of treating the Muslim population of France fairly and properly, the French burqa adversely affects this population by imposing on them the state's beliefs. The ECHR has not allowed a restriction of human rights merely because some may find a religion and its practices offensive.[254] While the Muslim headscarf ban in *Şahin* does not discriminate against a minority, the burqa ban in France does, and this minority population relies on the ECHR to protect its human rights.

Additionally, the French burqa ban is distinguishable from prior ECHR case law because the scope of the law is, for the first time, all encompassing.[255] In *Şahin* and *Dahlab* the headscarf was banned only in certain education institutions.[256] In contrast, the new French law prevents women from exercising their right to wear the garment in nearly all public spaces; it restricts teachers and students as well as women who wish merely to take a walk outside.[257]

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246. Mazza, *supra* note 93, at 318.

247. *Religious Expression*, *supra* note 238.

248. Mazza, *supra* note 93, at 318.

249. *Id.*

250. Moscow Branch of the Salvation Army v. Russia, App. No. 72881/01, 44 Eur. H.R. Rep. 912, para. 92 (2006).

251. *See supra* Part III.B.

252. *See supra* Part III.A.

253. Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5, para. 108 (2005).

254. *See supra* note 223 and accompanying text.

255. *See supra* notes 42-45 and accompanying text.

256. *See supra* Part V.B.

257. *See supra* notes 42-45 and accompanying text.

Thus, the burqa ban is a more serious infringement on the right to religious freedom under Article 9 than the ECHR has previously considered.

Further, in *Dahlab* and *Şahin*, the potential impact of the burqa on students was a cause for concern and a factor that led the ECHR to uphold the Article 9 infringements.[258] This factor was of particular importance in *Dahlab*, where the headscarf was worn by a teacher who held a position of influence over her young students and was responsible for instilling democratic values in the children.[259] The French burqa ban does not invoke comparably specific concerns.

The ECHR's holding in *Ahmet Arslan*, that the religious group members' Article 9 rights were violated because the group did not interfere with Turkey's secular interests by merely wearing their religious clothing in public,[260] hints that the ECHR may generally oppose broad public bans on religious clothing.[261] Indeed, since its decision in *Kokkinakis*, the ECHR has stated that Article 9 rights are exercisable "in public."[262] The French law's all encompassing ban of the burqa "constitutes an even more far reaching interference with religious freedom . . . since it amounts to a state-imposed dress code applicable at all times."[263] Overall, the French law is sufficiently different from all prior Islamic garment laws ruled on by the ECHR, rendering the Court's rational for finding Article 9 limitations "necessary in a democratic society" in those cases unpersuasive and the French burqa ban unnecessary.

B. The French Burqa Ban is Disproportionate to Legitimate French Concerns

In addition to not being "necessary in a democratic society," the French burqa ban is not "proportionate" to France's legitimate state concerns.[264] Consequently, the law does not satisfy the "requirements for permissible interference with qualified rights" as established by the ECHR.[265] There are "less restrictive and potentially far more effective alternatives" to achieving France's goal behind the burqa ban,[266] whether that goal is to "promote gender equality, defend secular neutrality of the state (*laicité*) or ensure security, or any combination of the three."[267]

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258. *See supra* Part V.B.

259. *See supra* notes 185-92 and accompanying text.

260. *See supra* notes 179-84 and accompanying text.

261. Malcolm D. Evans, *From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights*, 26 J.L. & RELIGION 345, 367 (2010).

262. Kokkinakis v. Greece, App. No. 14307/88, Eur. Ct. H.R. (ser. A) para. 31 (1993).

263. *Human Rights Watch*, *supra* note 46.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

France's goal of promoting gender equality by protecting those women who are forced to wear the burqa does not legitimize the law's restriction on the right freedom of religion.[268] While many Muslim women are forced to wear a headscarf or burqa unwillingly "because of social pressure by family or even harassment by their peer group . . . others choose to wear it either on religious grounds, as an assertion of Muslim identity or as a culturally defined display of modesty."[269] By completely banning the burqa in public, France wrongly assumes that all women are forced to wear the garment.[270] Therefore the law is overbroad and will "inevitably conflict with the rights of those who make a conscious choice to veil themselves."[271]

Moreover, the French burqa ban will likely have an adverse effect on gender equality because it puts women who wear the burqa in a no-win situation: either go out in public and risk state punishment or be restricted to their homes.[272] Such confinement denies these women access to many "services essential to the enjoyment of social and economic rights."[273] This is especially true for women who are forced to wear the burqa; confinement reduces their ability to seek advice on and refuge from their controlled situation. Thus, the burqa ban, promoted as a "measure designed to protect women against harassment and oppression[,] may well result in even greater confinement."[274] To deny women the right to wear a burqa under the guise of promoting gender equality when women themselves often choose to do so is ironic and ineffective.[275] "Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them."[276]

Unlike gender equality, French secularism and the protection of public morals are legitimate French concerns. But they are driven by public dissent to the burqa, which alone does not legitimize a full ban.[277] The ECHR has repeatedly found that "the right to freedom of expression includes forms of expression 'that offend, shock or disturb the state or any section of the population.'"[278] Further, human rights law has clearly established that "the disquiet of one person cannot be used to justify a restriction on the freedom of

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268. *Bans on Full Face Veils*, *supra* note 1.

269. EUMC *supra* note 107, at 10.

270. *See supra* notes 228-32 and accompanying text.

271. *Human Rights Watch*, *supra* note 46.

272. *French Politicians Urged to Reject Ban on Full Face Veils*, AMNESTY INT'L (May 19, 2010), http://www.amnesty.org/en/news-and-updates/french-politicians-urged-reject-ban-full-face-veils-2010-05-19 [hereinafter *French Politicians*].

273. *Bans on Full Face Veils*, *supra* note 1.

274. *Id.*

275. Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5, para. 12 (2005) (Tulkens, J., dissenting).

276. *Id.*

277. *See supra* note 221 and accompanying text.

278. *Bans on Full Face Veils*, *supra* note 1.

expression of another."[279] France may believe the burqa ban is necessary to defend its values, but "such important values as liberty, equality and fraternity can[not] be advanced by such a discriminatory restriction."[280]

Security is another legitimate French concern, especially in situations where individuals must be identified, such as in airports, schools, and government buildings and proceedings.[281] But instead of completely banning the burqa to rectify these security concerns, the government could simply require that a woman be taken aside in order to show her face to a female employee.[282] This protocol is one way to "satisfy both the individual's right to manifest her religious beliefs and the duty to identify oneself."[283]

Preventing radical behavior and terrorism is another legitimate security concern because the burqa is often associated with radical Islam in a world where radical Islam often invokes a fear of terrorism. However, "[e]quating conservative religious beliefs with violent radicalism is a mistake."[284] Women often wear the burqa for reasons not associated with radical Islam.[285]

While France does have legitimate state concerns regarding the burqa, the burqa ban disproportionately addresses these concerns by completely curtailing Muslim women's right to freedom of religion, specifically the freedom to manifest one's religion. Because this freedom is a fundamental right, the burqa ban's interference must be "narrowly interpreted[.]"[286] The ECHR should find that the severity of the burqa ban's restriction outweighs its public interest justifications. While legitimate and important to some extent, France can combat its concerns in a manner that is less burdensome than a public ban on the garment. Thus, the ECHR should rule that the French burqa ban is disproportionate to the legitimate state concerns and constitutes a violation of Article 9.

C. The ECHR is Obligated to Uphold Human Rights

The burqa ban constitutes France's failure to uphold its human rights obligations under Article 9 of the European Convention.[287] While the Universal

279. *French Politicians, supra* note 272.
280. *Id.*
281. *Human Rights Watch, supra* note 46.
282. *Id.*
283. *Id.*
284. *Id.*
285. *See* Martin Asser, *Why Muslim Women Wear the Veil,* BBC NEWS (Oct. 5, 2006), http://news.bbc.co.uk/2/hi/middle_east/5411320.stm. The Koran, the holy book of Islam, asks both women and men to dress modestly; therefore, many women wear the burqa out of respect for their religion, as a way to display modesty and as a means to express their religion. *Id.*
286. Sunday Times v. United Kingdom, App. No. 6538/74, 2 Eur. H.R. Rep. 245, para. 65 (1979).
287. *See supra* Part IV.

Declaration is a very influential human rights treaty,[288] it does not bind a Member State to its human rights provisions.[289] This lack of enforcement power is precisely why the ECHR is among the most powerful treaty-based courts,[290] having the duty and ability to enforce the human rights obligations of the European Convention upon Member States.[291] This is also why the ECHR must fulfill its human rights obligations; States must in some way be held responsible for the human rights obligations they undertake.

1. The ECHR Must Interpret the European Convention as a Living Document

The ECHR has a duty to treat the European Convention as a "living instrument."[292] Therefore, in determining whether the French burqa ban interferes with human rights, the ECHR must interpret the European Convention in light of the present day conditions in France as well as across Europe.[293]

a. Present Day Conditions in France

Current conditions in France require that the ECHR strike down the French burqa ban. The recent *Mabchour* citizenship case,[294] burqa ban, and Roma expulsions[295] are unfortunate examples of France's commitment to assimilation at the expense of human rights. Considering that the burqa ban interferes with the fundamental right to freedom of religion,[296] and in light of the ban's social and cultural context,[297] the ECHR should apply a narrow margin of appreciation to France's ruling that the burqa ban does not infringe upon Article 9 rights.[298] Because French-Muslims are a discrete minority population,[299] and because the French burqa ban subjects this group to further discrimination,[300] current conditions in France provide the ECHR with a

288. *See supra* notes 121-29 and accompanying text.

289. *Id.*

290. Andreas Follesdal, *The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights*, 40 J. SOC. PHIL. 595, 595 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652238.

291. *See supra* Part IV.A.

292. Tyrer v. United Kingdom, App. No. 5856/72, 2 Eur. H.R. Rep. 1, para. 31 (1978); *see* supra notes 138-41.

293. *Tyrer*, 2 Eur. H.R. Rep. 1, para. 31; *see* supra notes 138-41.

294. *See supra* notes 73-78 and accompanying text.

295. *See supra* notes 112-16 and accompanying text.

296. *See supra* Parts II, V.

297. *See supra* Part III.

298. *See supra* Part IV.B.

299. *See supra* Part III.

300. *See supra* Part II.

"cogent reason" to stray from its previous decisions "to ensure that the interpretation of the Convention reflects societal changes."[301]

b. Present Day Conditions in Europe

Current conditions in Europe in general also require that the ECHR strike down the French burqa ban. Because many EU countries do not collect population data regarding religion, data regarding the Muslim population in Europe is often speculative.[302] It is clear, however, that the Muslim population in Europe is rapidly increasing, having more than doubled over the past thirty years.[303] Islam is the second largest religion in Europe,[304] with estimates that there are at least fifteen million and up to as many as twenty-three million Muslims in the EU.[305] Indicative of this trend, "Mohammed," a common Muslim name, was the most popular name for males born in the United Kingdom in 2009.[306] It is further estimated that 20% of the EU's population will be of the Muslim faith by the year 2050, and this population percentage already exists in many European cities.[307] One study forecasts that "Muslims could outnumber non-Muslims in France and perhaps in all of Western Europe by mid century."[308] A common theme among these different studies is that Europe's landscape is clearly changing, which is sure to bring about social changes and requires greater discussion of minority integration in Europe.

Despite their growing population throughout Europe, the tide is turning against European Muslims.[309] Key findings from the European Monitoring Centre on Racism and Xenophobia declare that:

> Muslims are often disproportionately represented in areas with poor housing conditions, while their educational achievement

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301. Cossey, App. No. 10843/84, 13 Eur. H.R. Rep. 622, para. 35 (1990).

302. *French Senate Approves Burqa Ban*, *supra* note 39.

303. Adrian Michaels, *Muslim Europe: The Demographic Time Bomb Transforming Our Continent*, TELEGRAPH (Aug. 8, 2009), http://www.telegraph.co.uk/news/worldnews/europe/5994047/Muslim-Europe-the-demographic-time-bomb-transforming-our-continent.html.

304. *See supra* note 83 and accompany text.

305. Michaels, *supra* note 303.

306. Richard Allen Greene, *Mohammed Tops List of English Baby Names*, CNN (Oct. 28, 2010), http://articles.cnn.com/2010-10-28/world/uk.mohammed_1_mohammed-islam-imam-abdullah?_s=PM:WORLD.

307. Michaels, *supra* note 303.

308. *Id.*

309. Peter Wilkinson, *Tide Turning Against Europe's Immigrants*, CNN (Nov. 20, 2010), http://www.cnn.com/2010/WORLD/europe/11/17/migrants.victims/index.html?iref=allsearch. Wilkinson argues that migrants are often used as scapegoats in difficult economic and political times such as the situation currently in Europe. *Id.* Because the media often portrays immigrants poorly, when in fact most are "economic, are working and paying taxes," it is argued that it is easy for migration easily can to become an "excuse for xenophobia and racism" and easy for the public to "confuse migrants with settled ethnic minorities." *Id.*

> falls below average and their unemployment rates are higher than average;
>
> Muslims are often employed in jobs that require lower qualifications and as a group they are over-represented in low-paying sectors of the economy . . . [which] is a particular cause for concern given that unemployment is a key factor affecting integration; and
>
> Muslims are often victims of negative stereotyping, at times reinforced through negative or selective reporting in the media.[310]

It is clear that Islamophobia is increasingly affecting the Muslim population throughout Europe and the rest of the world, especially in light of recent acts of terrorism.[311]

Undoubtedly, the burqa debate is extremely controversial, and all too often, those who do not understand the debate associate the burqa with radical Islam.[312] This misunderstanding is a byproduct of the actions of Islamic extremists, whose militant responses to the burqa ban fuel stereotypes and discrimination toward the entire Muslim of a population. In 2009 several Islamic websites published messages stating that "a radical North-African Islamic group affiliated with al Qaeda, threatened to retaliate against France if the country banned the burqa."[313] In September 2010 officials stated that a bomb threat at the Eiffel Tower was taken seriously because the threat came soon after the anniversary of the September 11 attacks and minutes after the French Senate approved the burqa ban bill.[314] Further, in October 2010 the Al-Jazeera television station released an audiotape in which an individual believed to be al-Qaeda leader, Osama Bin Laden, referenced the French burqa ban and

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310. EUMC, *supra* note 107, at 8. This report argues that the main issues facing Europe's Muslim population is "how to avoid stereotypical generalisations, how to reduce fear, and how to strengthen cohesion in . . . diverse European societies while countering marginalisation and discrimination on the basis of race, ethnicity, religion or belief." *Id.* at 3. The study also includes findings from interviews with Muslims from ten EU Member States. *Id.* These participants believed that through that assimilation, whereby Muslims would lose their religious identity, is the key for Muslims to feel accepted in current society, especially in light of the September 11 attacks which have made Muslims feel like they are "under a general suspicion of terrorism." *Id.*

311. *Id.*

312. *Human Rights Watch*, *supra* note 46.

313. David Gauthier-Villars & Charles Forelle, *French Parliament Passes Law Banning Burqas*, WSJ (Sept. 15, 2010), http://online.wsj.com/article/SB10001424052748703376504575492011925494780.html.

314. *Id.*

threatened to kill French citizens.[315] The message stated: "If you want to tyrannize and think that it is your right to ban the free women from wearing the burqa, isn't it our right to expel your occupying forces, your men from our lands by striking them by the neck?"[316]

Fear of extreme behavior and backlash from the burqa ban prompted France to raise its national terror alert to its second highest level after the French Senate passed the public burqa ban.[317] Similarly, terror threat information led the U.S. State Department to issue a travel alert to Americans in Europe in the fall of 2010, warning U.S. citizens "to be aware of their surroundings and protect themselves when traveling."[318] A security source stated that "[a] possible backlash from the French burqa ban [was] considered a factor in the . . . warning."[319] The various responses to the burqa ban show how controversial the law is and how the perception of the Muslim population can be negatively skewed by the actions of a small number of extremists. Overall, "views on the scarf ban [are] closely tied to overall attitudes toward Muslims, with those with negative views of Muslims far more inclined to embrace the ban than those with more positive views."[320]

Europe's Muslim population is rapidly increasing,[321] and with it, Islam is becoming a more prevalent religion throughout Europe.[322] If the ECHR allows France to continue its burqa ban, it will be setting a dangerous precedent during this critical time in Europe. This could potentially lead to other European countries adopting similar bans, which in turn, would result in widespread human rights violations across Europe. The burqa ban's discriminatory and potentially precedential impact provide the ECHR with a "cogent reason" for straying away from its previous decisions.[323]

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315. *French Politics Will Not Be Swayed by Bin Laden Tape, Sarkozy Says*, CNN (Oct. 29, 2010), http://articles.cnn.com/2010-10-29/world/france.bin.laden_1_french-legislation-french-president-nicolas-sarkozy-french-politics?_s=PM:WORLD.

316. *Id.*

317. David Knowles, *New Eiffel Tower Bomb Threat but One of Many in Paris Lately*, AOL NEWS (Sept. 28, 2010), http://www.aolnews.com/surge-desk/article/new-eiffel-tower-bomb-threat-but-one-of-many-in-paris-lately/19652139.

318. *U.S. Issues Alert for Americans in Europe*, CNN (Oct. 3, 2010), http://www.cnn.com/2010/US/10/03/europe.terror.advisory/index.html.

319. *Id.*

320. Richard Morin & Juliana Menasce Horowitz, *Europeans Debate the Scarf and the Veil*, PEW RES. CENTER (Nov. 20, 2006), http://pewresearch.org/pubs/95/europeans-debate-the-scarf-and-the-veil.

321. Kettani, *supra* note 48, § 4.

322. *Id.*

323. Cossey v. United Kingdom, App. No. 10843/84, 13 Eur. H.R. Rep. 622, para. 35 (1990).

2. The ECHR's Treatment of Islam is Suspect

The ECHR has often been criticized for its treatment of religious minorities—notably Muslims—and their Article 9 right to freedom of religion.[324] Although the ECHR was established in 1959, the Court did not accept an Article 9 case dealing with "new," "minority," or "nontraditional" religions until the 1993 *Kokkinakis* case.[325] And while the Court found an interference with religious freedom under Article 9 in that case, it failed to elaborate or define the scope of its decision or its obligations under Article 9.[326] From this inaction it has been inferred that the ECHR does not view the right to freedom of religion as one of utmost importance.[327]

Further, the Court suggested in *Kokkinakis* that a witness lobbying for a Christian religion would be treated more favorably than a witness lobbying for a minority religion.[328] Because of this distinction, it has been argued that the ECHR favors mainstream over non-mainstream religions.[329] Additionally, it appears that the ECHR tends to downplay the influential impact of mainstream religious symbols (e.g., the crucifix) by interpreting them as representations of national culture and identity.[330] In contrast, the ECHR has consistently viewed minority religious symbols, in particular the Islamic headscarf and burqa, as symbols that are inconsistent with fundamental democratic values.[331] Even in *Şahin*, where Islam was the majority religion, the Court applied the "margin of appreciation" doctrine to protect the non-Muslim minority.[332] Considering that the Court does not often rule for the protection of the minority religion, which is often Islam, this application of the doctrine is interesting.[333]

Critics also argue that *Şahin* exemplifies the ECHR's failure to objectively analyze the Islamic headscarf issue; rather, the Court "portray[s] all uses of the headscarf as symbolic of a larger Islamic fundamentalist movement

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324. *See generally* Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L L. 663 (2011) (exploring why the ECHR has held that it is not discriminatory for a state to recognize and protect Article 9 rights for Christianity but not for Islam).

325. Keturah A. Dunne, Comment, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms in Germany*, 30 CAL. W. INT'L L.J. 117, 138 (1999).

326. *Id.* at 138-39.

327. *Id.*

328. *Id.* at 138.

329. *Id.* Dunne argues that such a distinction reflects the Court's favoritism towards "state-established religions and general unwillingness to analyze laws that benefit religions favored by the State." *Id.* Dunne further notes the European Commission's statement that "a State Church system cannot in itself be considered to violate Article 9 of the Convention [because] such a system . . . existed there . . . already when the Convention was drafted." *Id.*

330. Mancini, *supra* note 29, at 2631.

331. *Id.*

332. *Id.* at 2659.

333. *See* Belelieu, *supra* note 133, at 621.

intent on disrupting the democratic values of . . . all of Europe."[334] Such considerations beg the question as to whether the ECHR decisions regarding religious freedom reflect the anti-Islam bias that is present throughout Europe.[335]

The ongoing question of whether Turkey will join the EU provides further insight into Europe's view of Islam. If Turkey is to be admitted as a Member State, it must show that it fits the mold of the West,[336] having the "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities."[337] Significantly, the West views the Islamic headscarf and burqa as a sign of radical Islam.[338] And as noted earlier, the ECHR's decision to uphold the headscarf ban in *Şahin* was justified in part on the ground that Turkey needed to prevent an uprising of radical Islam.[339] Turkey's mission against the Islamic headscarf may be viewed as an effort to reduce "Europe's distrust of Turkey's ability to 'control' its Muslim roots" and to create the perception of satisfying EU membership criteria.[340] But these efforts simultaneously restrict the human right to freedom of religion in an ironic violation of the EU membership requirement to uphold human rights.[341] Islamic garments have been viewed as a "symbolic enemy" of the EU, which was founded "on a common Christian heritage."[342] Further, while the EU has a motto of "unity in diversity," the EU's view on Islam, exemplified by the treatment of Islamic garments and Turkey's willingness to go to lengths to downplay its Muslim roots, can be said to show that the EU may be selective in what kind of diversity it chooses to accept.[343] This current political and religious background in Europe must be kept in mind as it may have some underlying impact on the ECHR's decisions regarding the right to freedom of religion.

In determining the validity of the French burqa ban, the ECHR should

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334. *Id.* at 622.

335. Danchin, *supra* note 324.

336. Belelieu, *supra* note 133, at 586-87.

337. *Accession Criteria*, EUR. COMMISSION http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm (last updated Oct. 30, 2010). An EU candidate country must also satisfy the following membership requirements: "the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union" and "the ability to take on the obligations of membership including adherence to the aims of political, economic & monetary union." *Id.*

338. Belelieu, *supra* note 133, at 586.

339. Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5, para. 10 (2005).

340. Belelieu, *supra* note 133, at 618.

341. *Id.* at 617-18.

342. *Id.* at 621.

343. *Id.* For more on this topic, see BARRY RUBIN ET AL., TURKEY AND THE EUROPEAN UNION: DOMESTIC POLITICS, ECONOMIC INTEGRATION, AND INTERNATIONAL DYNAMICS (Barry Rubin & Ali Carkoglu eds., 2003).

strongly consider the reasoning of the *Şahin* dissent.[344] That approach considers the burqa ban in light of present-day conditions and better serves the Court's obligation to uphold human rights.[345] Unlike the *Şahin* majority, the dissent recognized that Islamic garments are an issue throughout Europe and not merely local to Switzerland.[346] The dissent also acknowledged that European Islamophobia feeds a stereotypical view of Islamic garments and negatively impacts the treatment of Muslims.[347] Further, the dissent emphasized that Islamic garments do not carry a single meaning, and because some women voluntarily wear a headscarf or burqa, bans on such garments may in some ways diminish gender equality.[348] Additionally, the dissent reiterated the importance of protecting the Article 9 rights of minorities, even though their beliefs may be offensive to some.[349]

The ECHR is obligated to overcome the anti-Islam bias that is present in Europe and to take action in order to protect the human rights of all European Convention member citizens—whether they be of a mainstream or minority religion. "Above all, the message that needs to be repeated over and over again is that the best means of preventing and combating fanaticism and extremism is to uphold human rights."[350]

3. Europe's View on the Burqa

Europe's stance on the burqa coincides with its general stance on Islam. In 2010 the Pew Research Center surveyed France, Germany, Great Britain, Spain, and the United States regarding a ban on the full Islamic veil.[351] The results show that the French public has the most widespread support for the ban, with 82% of those polled in approval.[352] A majority of the people polled in the other Western European countries also supported the idea of a ban in their own countries, with 71% approval in Germany, 62% in Britain, and 59% in

344. *See supra* notes 218-32.

345. *Id.*

346. *Id.*

347. *Id.*; *see generally* COMM'N ON BRITISH MUSLIMS & ISLAMOPHOBIA, ISLAMOPHOBIA: ISSUES, CHALLENGES AND ACTION (Robin Richardson ed., 2004), *available at* http://www.insted.co.uk/islambook.pdf (addressing attitudes, the international context, and employment issues arising from Islamophobia, as well as the need to educate, deal with the media, and change race relations in order to overcome discrimination).

348. *See supra* notes 218-32.

349. *Id.*

350. Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5, para. 20 (2005) (Tulkens, J., dissenting).

351. *Widespread Support for Banning Full Islamic Veil in Western Europe*, PEW RES. CENTER (July 8, 2010), http://www.pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe/ [hereinafter PEW RES. CENTER].

352. *Id.*

Spain.[353] In contrast, only 28% of those polled in the U.S. approved of a burqa ban.[354]

A similar Pew Institute study, conducted in 2005, regarding bans on Muslim headscarves reflected lower approval ratings.[355] Seventy-eight percent of those polled in France approved, with 54% in Germany, only 29% in Britain, and 43% in Spain.[356] This study also found that a majority of the Muslim women polled in Britain and Spain, and just under half of those in Germany, wear a headscarf or other garment that covers their heads every day or almost every day.[357] In contrast, 73% of Muslim women polled in France reported that they do not wear a Muslim head covering.[358] As noted above, it is estimated that only around two thousand women in France wear the burqa.[359]

The burqa ban approval ratings listed above dangerously correlate with the dramatically increasing Muslim population throughout Europe. And because Muslim head coverings appear to be more prevalent in European countries other than France, it stands to reason that burqa bans in other European countries would result in the widespread denial of Muslim women's

353. *Id.*

354. *Id.*; *see* Bobby Ghosh, *Islamophobia: Does America Have a Muslim Problem?*, TIME (Aug. 30, 2010), http://www.time.com/time/nation/article/0,8599,2011798,00.html. Currently there is a controversy in the U.S. surrounding the proposed plans to build an Islamic mosque on the site of Ground Zero. *Id.* New York City Mayor Michael Bloomberg put into perspective the U.S. First Amendment constitutional right to freedom of religion, stating: "Everything the United States stands for and New York stands for is tolerance and openness, and I think it's a great message for the world that unlike in other places where they might actually ban people from wearing a burqa or they might actually keep people from building a building, that's not what America was founded on, nor is it what America should become." Michael Howard Saul, *Bloomberg, Palin Agree to Disagree on Ground Zero Mosque Plans*, WSJ (July 21, 2010), http://blogs.wsj.com/metropolis/2010/07/21/bloomberg-palin-agree-to-disagree-on-ground-zero-mosque-plans/; *see* Ron Elving, *'Ground Zero Mosque': Latest in a Litany of Killer Phrases,* NPR (Aug. 20, 2010), http://www.npr.org/blogs/watchingwashington/2010/08/20/129319446/. It appears that the U.S. would treat a headscarf or burqa ban differently under the First Amendment than the ECHR has done in the past under Article 9. *See generally* Christina A. Baker, Note, *French Headscarves and the U.S. Constitution: Parents, Children, and Free Exercise of Religion*, 13 CARDOZO J.L. & GENDER 341 (2007) (discussing the freedom to religion under U.S. law, and how a headscarf ban in the U.S. would potentially be treated under the U.S. Constitution).

355. *Islamic Extremism: Common Concern for Muslim and Western Publics*, PEW RES. CENTER (July 14, 2005), http://www.pewglobal.org/2005/07/14/islamic-extremism-common-concern-for-muslim-and-western-publics/. The increase in approval of Muslim veil bans since the 2005 study may be explained in part by Muslim acts of violence in 2005 and 2006, including an unsuccessful terrorist plot by British Muslims to blow up U.S.-bound airplanes and the French riots. *See* Morin & Horowitz, *supra* note 320.

356. Morin & Horowitz, *supra* note 320.

357. *Id.*

358. *Id.*

359. *Human Rights Watch*, *supra* note 46.

right to freedom of religion.[360]

4. European Countries Considering Burqa Bans

Several European countries are debating whether to follow in France's footsteps and ban the burqa in public. A public ban similar to France's was enacted in Belgium on July 23, 2011, shortly after the French burqa ban went into effect.[361] In fact, Belgium was the first European country to propose a law banning full-face veils, with Belgium's lower house of parliament passing the bill in April 2010.[362] The Belgium law, which imposes a 30 euro fine and a penalty of up to seven days in jail, is justified by security concerns.[363] But like the French law, the Belgian ban is more symbolic than practical because very few Belgian women actually wear the burqa.[364]

In August 2011 an Italian parliamentary commission approved a draft law banning the public burqa, similar to that in France and Belgium.[365] The proposed law would fine women wearing the burqa in public as well as those who force women to wear the garment.[366] Proponents argue that the law is necessary to combat security concerns and to help Muslim women assimilate into Italian society, but only a relatively small number of women in Italy actually wear the garment.[367]

In Spain, a proposal was made for a full ban on the Islamic veil, but it was rejected by the Spanish parliament.[368] Barcelona, however, has implemented a ban on such garments in certain public places, such as "municipal offices, public markets and libraries."[369] The conservative Popular Party has since called to extend the ban to all public places.[370]

Half of the states in Germany have passed laws that restrict "the wearing of religious clothing and symbols, including the burqa and hijab (headscarf), in

360. Morin & Horowitz, *supra* note 320; PEW RES. CENTER, *supra* note 351.

361. *Belgian Ban on Full Veils Comes into Force*, BBC NEWS (July 23, 2011), http://www.bbc.co.uk/news/world-europe-14261921.

362. Kayvan Farzaneh, *Europe's Burqa Wars*, FOREIGN POL'Y (May 11, 2010), http://www.foreignpolicy.com/articles/2010/05/11/europe_s_burqa_wars.

363. *Id.*

364. *Id.*

365. *Italy Approves Draft Law to Ban Burqa*, GUARDIAN (Aug. 3, 2011), http://www.guardian.co.uk/world/2011/aug/03/italy-draft-law-burqa.

366. *Id.*

367. *Italy: Burqa Ban Provision Approved by Parliamentary Committee*, LIBR. CONGRESS (Aug. 11, 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205402773_text; *see generally* Stephan Faris, *In the Burqa Ban, Italy's Left and Right Find Something to Agree on*, TIME (Aug. 4, 2011), http://www.time.com/time/world/article/0,8599,2086879,00.html.

368. *The Islamic Veil Across Europe*, BBC NEWS (June 15, 2010), http://news.bbc.co.uk/2/hi/5414098.stm.

369. *Id.*

370. *Id.*

schools."[371] And recently, a German representative in the European Parliament called for a "Europe-wide ban on face-covering veils," citing gender equality as a justification.[372]

The Netherlands considered implementing an all-encompassing burqa ban simliar to the French law, but the Dutch Cabinet prevented the law from going into effect due to "concerns over freedom of religion and offending the country's growing Muslim community."[373] The government, however, has suggested it will seek a ban on "face-covering veils in schools and state departments."[374]

Britain does not have a law that restricts Islamic dress, but schools do have the power to implement their own dress codes.[375] The UK Independence Party is the first British party to support a complete burqa ban, and discussion as to whether such a ban should be implemented has recently increased.[376]

The fact that several European countries have either taken measures limiting the burqa or are considering a burqa ban similar to the French law "shows the depth of concern over the rise of Muslim culture in Europe."[377] If the ECHR allows the French burqa ban to stand, other European countries may be more inclined to take legal action against the burqa, posing a significant and widespread threat to religious freedom.

VII. CONCLUSION

At times it appears France is willing to justify any treatment of its minority populations in the name of secularism and assimilation. That is indeed the case with the French burqa ban. However, with an understanding of the history of French-Muslims and the current environment facing them as France's largest minority population, it appears that discrimination underlies the French burqa ban. The ban specifically prevents women of the Islamic faith from wearing the burqa, despite the fact that the practice is a manifestation of religious beliefs. This prohibition contravenes France's obligation under the European Convention to uphold the human rights guaranteed by Article 9.

The ECHR should condemn France for its failure under the European Convention. With its expansive scope, the French burqa ban is the first law of its kind, and the Court should treat it as such. The ECHR should consider the French burqa ban in light of the changing demographic both in France and in Europe as a whole. If the Court were to consider such factors, it would recognize that upholding the French burqa ban may encourage other European

371. Farzaneh, *supra* note 362.
372. *Id.*
373. *Id.*
374. *The Islamic Veil Across Europe, supra* note 368.
375. *Id.*
376. *Id.*
377. Gauthier-Villars & Forelle, *supra* note 313.

countries to follow suit. Such a result could potentially affect the human rights of a large portion of the European population.

The European Court of Human Rights should find that the French burqa ban is an unwarranted restriction of the right to religious freedom under Article 9 of the European Convention. In doing so, the ECHR would emphasize the importance of the right to freedom of religion and set a strong precedent against religious discrimination.

WARNING! CHILDREN'S BRAINS IN DANGER: LEGISLATIVE APPROACHES TO CREATING UNIFORM RETURN-TO-PLAY STANDARDS FOR CONCUSSIONS IN YOUTH ATHLETICS

Ryan McLaughlin*

I. INTRODUCTION

Zack Lystedt was a rising football star in Maple Valley, Washington, when, in October 2006, he suffered a concussion while making a tackle during a game, changing his life forever.[1] Despite seeing the young athlete grab his head in pain, Zack's coaches put the thirteen-year-old back in the game just several plays later.[2] The game ended with Zack collapsing into his father's arms and being quickly airlifted to a hospital for emergency, life-saving surgery on both sides of his brain.[3] As a result of his injuries, Zack spent three months in a coma and twenty months on a feeding tube, had to relearn how to talk, and likely still struggles to stand up out of his wheel chair.[4] Zack's young life was completely turned around because the proper precautions were not taken when he showed symptoms of a possible concussion.[5]

Thankfully, Zack Lystedt's tragic story has a silver lining. In 2009 Zack's struggle led to the enactment of the Zackery Lystedt Law in Washington State.[6]

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1. Matt Markovich, *Teen, Family Reach Settlement for Brain Injury*, KOMONEWS.COM (Sept. 16, 2009), http://www.komonews.com/news/59563802.html?; Tim Booth, *5 Years After Injury, Zack Lystedt to Graduate*, WASH. TIMES (June 8, 2011), http://p.washingtontimes.com/news/2011/jun/8/5-years-after-injury-zack-lystedt-to-graduate/.

2. *Id.*

3. Ctr. for Disease Control & Prev. [CDC], *The Lystedt Law: A Concussion Survivor's Journey*, CDC, http://www.cdc.gov/media/subtopic/matte/pdf/031210-Zack-story.pdf (last visited Dec. 19, 2011); Richard H. Adler, Esq. & Stanley A. Herring, MD, *Changing the Culture of Concussion: Education Meets Legislation*, 3 PM&R S468, S468 (2011).

4. CDC, *supra* note 3; *see also* Booth, *supra* note 1.

5. *See* CDC, *supra* note 3.

6. *Id.*; WASH. REV. CODE § 28A.600.190 (2009). Zack Lystedt's injury also inspired one of the first sports concussion centers in the United States, the Seattle Sports Concussion Program at Harborview Medical Center. *See* Luke Duecy, *Boy's Story Inspires New Concussion Program*, KOMONEWS.COM (July 14, 2009), http://www.komonews.com/news/50813637.html. As a partnership between the University of Washington School of Medicine, Seattle Children's Hospital, and Harborview Medical Center, the Program is composed of health care professionals in neuropsychology, rehabilitation medicine, and sports medicine, and it aims to provide education and awareness on sports-related concussion prevention as well as proper treatment and rehabilitation for concussion injuries. *See* Press Release, Gov. Commc'n Office, Gov.

As one of the most stringent return-to-play laws of its kind,[7] the legislation aims to protect young athletes by requiring that any individual who has or is suspected of having a concussion be removed from the game or practice until he or she is officially cleared by a licensed healthcare professional trained in evaluating concussions.[8] The law also provides funding for educational programs to help young athletes, parents, and coaches better recognize the signs and symptoms of concussions.[9] Other states have followed suit and enacted similar laws,[10] and the U.S. Congress has considered two bills[11] that would create an enforceable national standard similar to Washington's Lystedt Law.[12]

Zack Lystedt's story and others have generated a growing wave of concern surrounding concussions and traumatic brain injuries in sports at all levels in the United States.[13] After decades of operating with an unspoken "shake it off" and "play through the pain" mentality, the National Football League (NFL) has begun to properly address traumatic brain injury precautions with its players and is leading the charge in injury policy reform.[14] But the dangers remain for youth athletes, who not only are exposed to greater risks because of their developing brains but also are unable to accurately and consistently recognize the signs and symptoms of concussions.[15] As a result, many of the concussions suffered by young athletes go unreported and, therefore, untreated.[16] The enacted state and proposed federal return-to-play and concussion management legislation in the United States represents promising

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Gregoire Attends Opening of Concussion Program at Harborview, (July 14, 2009), *available at* http://www.governor.wa.gov/news/news-view.asp?pressRelease=1288&newsType=1.

7. Matt Rybaltowski, *Young Player Helps Turn Trauma into Action on Concussions*, CBS SPORTS (Feb. 14, 2010), http://www.cbssports.com/nfl/story/12928497/young-player-helps-turn-trauma-into-action-on-concussions.

8. CDC, *supra* note 3; WASH. REV. CODE § 28A.600.190(3)-(4) (2009).

9. CDC, *supra* note 3; WASH. REV. CODE § 28A.600.190(2) (2009).

10. *Goodell Sends Letter to 44 Governors*, ESPN (May 24, 2010), http://sports.espn.go.com/nfl/news/story?id=5212326 [hereinafter *Goodell Sends Letter*] (listing Oregon, Connecticut, Virginia, New Mexico, and Oklahoma).

11. Protecting Student Athletes from Concussions Act of 2011, H.R. 469, 112th Cong. (2011); Concussion Treatment and Care Tools Act of 2010, H.R. 1347, 111th Cong. (2010).

12. *Zackery Lystedt Law: FAQs*, NFL HEALTH & SAFETY, http://nflhealthandsafety.com/zackery-lystedt-law/faqs/ (last visited Dec. 31, 2011); Marie-France Wilson, *Young Athletes at Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and the Related Legal Issues*, 21 MARQ. SPORTS L. REV. 241, 287 (2010).

13. COMM. ON EDU. & LABOR, *Protecting Student Athletes from Concussions Act*, IMPACT (Sept. 22, 2010) http://impacttest.com/news/detail/422 (listing supporters of the congressional bill).

14. Howard Fendrich, *NFL Changes Return-to-Play Rules*, ESPN (Dec. 3, 2009), http://sports.espn.go.com/nfl/news/story?id=4707604; *accord Goodell Issues Memo Enforcing Player Safety Rules*, NFL (Oct. 20, 2010), http://www.nfl.com/news/story/09000d5d81b7b9ef/article/goodell-issues-memo-enforcing-player-safety-rules (NFL Commissioner Goodell stating, "One of our most important priorities is protecting our players from needless injury. In recent years, we have emphasized minimizing contact to the head and neck.").

15. *See infra* Part II.D.

16. *See infra* Part IV.

efforts to curb prolonged brain injuries,[17] but internationally, youth athletes continue to face heightened risks—a problem that requires worldwide attention.[18]

Part II of this Note provides a medical overview of concussions, addressing their definition, diagnosis, and prevention.[19] This Part also discusses second-impact syndrome, long-term effects of concussions, and the added dangers of concussions in children.[20] Part III examines the frequency of concussions in competitive, contact sports in the United States, as compared to those in Canada, Australia, and New Zealand.[21] Part IV then discusses factors that limit the number of reported concussions in youth sports.[22] These include the "gladiator" mentality and a lack of knowledge among youth athletes regarding concussion signs and symptoms.[23]

Part V of this Note highlights how various sports organizations in the United States have attempted to address the concussion problem.[24] Because policies instituted at the professional level often "trickle-down" to the youth level,[25] this Part analyzes the efforts made in professional, amateur, and youth sports.[26] Part VI explores U.S. legislative solutions to the concussion problem in youth sports. This Part reviews state and federal concussion law that existed prior to the enactment of Washington's Lystedt Law[27] and then discusses state laws that have been subsequently enacted, using the Lystedt Law as a model.[28] This Part also discusses the Protecting Student Athletes from Concussion Act and the Concussion Treatment and Care Tools Act currently under congressional consideration, and it addresses some of the criticism surrounding these legislative solutions.[29]

Part VII examines several international concussion standards[30] as well as those employed nationally by sport organizations in Canada, Australia, and New Zealand.[31] This Part further discusses legislative efforts made by these countries and their inadequacy at addressing the problem of concussions in

17. *See infra* Part VII.
18. *See infra* Part III.
19. *See infra* Part II.A.
20. *See infra* Part II.B-D.
21. *See infra* Part III.
22. *See infra* Part IV.
23. *See infra* Part IV.A-B.
24. *See infra* Part V.
25. Alan Schwarz, *N.F.L.'s Influence on Safety at Youth Levels Is Cited*, N.Y. TIMES (Oct. 29, 2009), http://www.nytimes.com/2009/10/30/sports/football/30concussion.html.
26. *See infra* Part V.A-C.
27. *See infra* Part VI.
28. *See infra* Part VI.A.
29. *See infra* Part VI.B.
30. *See infra* Part VII.
31. *See infra* Part VII.A-C

sports.[32] To date, only British Columbia in Canada has proposed legislation that would create such standards.[33] In Part VIII, this Note recommends that these countries and others follow the United States' lead and enact binding legislation that establishes minimum return-to-play standards and concussion education programs.[34] Proper concussion management is a global issue, and all countries need to be proactive in protecting their youth athletes, who are not always able to protect themselves.

II. BACKGROUND INFORMATION ON SPORTS-RELATED CONCUSSIONS

There is no universally accepted definition for "concussion" or "mild traumatic brain injury" (MTBI), but several have been offered.[35] In 2008 a group of physicians, therapists, certified trainers, health professionals, coaches, and others involved in the care of injured athletes at all levels of sport met in Zurich, Switzerland, to discuss sports-related concussions at the Third International Conference on Concussion in Sport.[36] There, the group of qualified sports concussion experts unanimously defined "concussion" as "a complex pathophysiological process affecting the brain, induced by traumatic biomechanical forces."[37] According to this definition, a concussion can result from a direct blow to the head, face, or neck, or from an "impulsive" force transmitted to the head from elsewhere on the body.[38] The group recognized that "the acute clinical symptoms [of a concussion] largely reflect a functional disturbance rather than a structural injury."[39] Many sports leagues have accepted this definition,[40] and this Note will proceed from it.

A. Concussion Prevention and Diagnosis

There are two steps to addressing the dangers concussions pose to athletes of all ages: initial prevention and proper management.[41] The most cited

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32. *See id.*

33. *Youth Concussion Law Proposed in B.C.*, THE CANADIAN PRESS (Nov. 17, 2011), http://www.cbc.ca/news/canada/british-columbia/story/2011/11/17/bc-youth-sports-concussion-legislation.html?cmp=rss [hereinafter *Youth Concussion Law, B.C.*].

34. *See infra* Part VIII.

35. Paul Satz et al., *Mild Head Injury in Children and Adolescents: A Review of Studies (1970-1995)*, 122 PSYCHOLOGICAL BULL. 107, 125-29 (1997).

36. *See* P. McCrory et al., *Consensus Statement on Concussion in Sport: The 3rd International Conference on Concussion in Sport, Held in Zurich, November 2008*, 43 BRIT. J. SPORTS MED. (supp I) i76-84 (2009). The Second International Conference was held in Prague, Czech Republic, in November 2004, and the First was held in Vienna, Austria, in November 2001. *Id.*

37. *Id.* at i76.

38. *Id.*

39. *Id.*

40. *Id.*

41. Wilson, *supra* note 12, at 248, 256.

approaches to concussion prevention focus on improved equipment, rule changes, and changes in player attitude and behavior.[42] While all of these methods help to reduce the occurrence of concussions in competitive sports, the complete elimination of all sports-related concussions is unrealistic.[43] Because all concussions cannot be prevented, the solution must, and perhaps more importantly should, be focused on the assessment and management of concussions once they occur.[44]

The ability to recognize the signs and symptoms of concussion is the first step in diagnosing an athlete suspected of suffering the injury.[45] According to the *Consensus Statement on Concussion in Sport*,[46] a concussion should be suspected when an athlete presents with one or more of the following symptoms: headaches, fogginess, emotional symptoms, loss of consciousness, amnesia, behavioral changes (e.g., irritability), cognitive impairment (e.g., slowed reaction times), and sleep disturbance (e.g., drowsiness).[47] Headaches are the most common and easily recognizable MTBI symptom,[48] but despite all known symptoms, concussions remain difficult to properly diagnosis.[49]

In recent years concussion diagnosis has improved through the increasing use of a computer-based test called "ImPACT" (Immediate Postconcussion Assessment and Cognitive Testing).[50] The ImPACT test evaluates and monitors multiple aspects of an athlete's brain function and compares the results with a baseline level determined at the start of the season, before the athlete entered competition.[51] As of 2009, over 1,800 high schools, 700 colleges, and 500 sports medicine centers, as well as professional sports teams throughout the world used the ImPACT software to diagnosis and manage the head injuries suffered by their athletes.[52]

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42. *Id.* at 249-56.

43. *Id.* at 256-57.

44. *Id.* at 256.

45. McCrory et al., *supra* note 36.

46. The Third International Conference on Concussion in Sport culminated with the drafting of a consensus statement, which sought to revise and update the recommendations that had been developed during the First and Second International Symposia on Concussion in Sport. *Id.*

47. *Id.* at i77.

48. *See* David Kushner, M.D., *Mild Traumatic Brain Injury: Toward Understanding Manifestations and Treatment*, 158 ARCHIVES INTERNAL MED. 1617, 1617-18 (1998).

49. J.S. Delaney et al., *Recognition and Characteristics of Concussions in the Emergency Department Population*, 29 J. EMERGENCY MED. 189, 189-97 (2005).

50. IMPACT APPLICATIONS, INC., EXECUTIVE SUMMARY 3 (2009), *available at* http://www.impacttest.com/pdf/Executive_Summary.pdf.

51. Erika A. Diehl, Note, *What's All the Headache?: Reform Needed to Cope with the Effects of Concussions in Football*, 23 J.L. & HEALTH 83, 95 (2010); *see* IMPACT APPLICATIONS, INC., *supra* note 50.

52. IMPACT APPLICATIONS, INC., *supra* note 50, at 5.

B. Second-Impact Syndrome

Failure to properly diagnose a concussion can have devastating consequences for an athlete that returns to play too soon. "Second-impact syndrome" is a condition that occurs when individuals, predominately children and teenagers, who have not fully recovered from an initial concussion suffer another impact. [53] This can cause the brain to swell dangerously, resulting in loss of blood flow and often death.[54] Because no specific treatment for concussions exists, most concussed individuals are prescribed rest in order for the brain to heal itself;[55] this approach, however, has "limited effectiveness."[56] Second-impact syndrome is, therefore, a significant threat to youth athletes.

Frighteningly, a simple tap on the head can cause the onset of second-impact syndrome, lead to collapse, and result in death within minutes.[57] The mortality rate for second-impact syndrome is estimated to be around 50% and the rate of disability associated with the syndrome is almost 100%.[58] As a testament to the threat of these tragic consequences, the Colorado legislature enacted a bill in 2011 specifically aimed at protecting youth athletes from the dangers of second-impact syndrome.[59]

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53. Robert C. Cantu, *Second-Impact Syndrome*, 17 CLINICS SPORTS MED. 37, 38 (1998).

54. Anne P. Bowen, *Second Impact Syndrome: A Rare, Catastrophic, Preventable Complication of Concussion in Young Athletes*, 29 J. EMERGENCY NURSING 287, 288 (2003); *see generally* Tom Wyrwich, *Special Report: The Dangers of Adolescents Playing Football with Concussions*, SEATTLE TIMES (Nov. 4, 2008), http://seattletimes.nwsource.com/html/highschoolsports/2008347382_concussions04.html (discussing the death of ninth-grader David Bosse, who lost his life to second impact syndrome while playing football in 1995).

55. Barry Willer, PhD & John J. Leddy, MD, *Management of Concussion and Post-Concussion Syndrome*, 8 CURRENT TREATMENT OPTIONS NEUROLOGY 415, Opinion Statement, at 415 (2006).

56. *Id.*

57. David Cifu et al., *Repetitive Head Injury Syndrome*, MEDSCAPE REFERENCE (Nov. 16, 2010), http://emedicine.medscape.com/article/92189-overview.

58. John Whisler, *Fighting for safety; Boxing officials learning about deadly syndrome; Sport struggles to educate participants about dangers*, SAN ANTONIO EXPRESS-NEWS, Feb. 27, 2004, at C1.

59. COLO. REV. STAT. § 25-43-101 (2011). The law is named the *Jake Snakenberg Youth Concussion Act* after a high school football player who died on the playing field after suffering a sudden case of second-impact syndrome. Jeffrey Wolf & Bazi Kanani, *Legislators Proposing Law to Protect Young Athletes from Concussions*, 9NEWS.COM (Feb. 10, 2011), http://www.9news.com/news/story.aspx?storyid=180724&catid=222. The sponsors of the bill stated that its explicit goal is to "protect athletes ages 11 to 19 from Second Impact Syndrome." *Id.* A top NFL official and former Broncos wide receiver Ed McCaffrey spoke in support of the bill to the Colorado House of Representative. Stuart Zaas, *Broncos Support Jake Snakenberg Youth Concussion Act*, DENV. BRONCOS (Feb. 11, 2011), http://www.denverbroncos.com/news-and-blogs/article-1/Broncos-Support-Jake-Snakenberg-Youth-Concussion-Act/9df70285-2163-4d73-b536-aa9b8d826ee9.

C. *Long Term Effects of Concussions*

According to the Center for Disease Control and Prevention (CDC), those who suffer from a traumatic brain injury (TBI) can experience "a wide range of functional short- or long-term changes affecting thinking, sensation, language, or emotions."[60] These changes can include a variety of effects, such as a reduction in memory and reasoning; loss of touch, taste, and smell; difficulty communicating; and experiences with depression, anxiety, personality changes, aggression, acting out, and social inappropriateness.[61] TBI is also associated with epilepsy and an increased risk of "Alzheimer's disease, Parkinson's disease, and other brain disorders that become more prevalent with age."[62] An NFL-commissioned study reports that Alzheimer's and similar memory-related diseases appear to have been diagnosed in the league's former players in numbers dramatically higher than in the national population.[63]

In 2005 veteran sports agent Leigh Steinberg and Hall of Fame quarterback Warren Moon held a concussion summit in Marina Del Ray, California.[64] Their mission was to educate players and others about the severity of concussions and their potential lasting effects on former players.[65] Steinberg represented concussion-laden athletes throughout his career, including two future Hall of Fame quarterbacks, Steve Young and Troy Aikman, who were forced to retire because of concussions.[66] At the summit, Steinberg asked, "What are the stakes? It's one thing to go out and play football and understand that when you turn [forty], you can bend over to pick up your child and have aches and pains. It's another thing to bend down and not be able to identify that child."[67]

D. *Added Dangers of Concussions in Children*

It is well recognized that head injuries must be managed differently

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60. CDC, *What Are the Potential Long-Term Outcomes of TBI?*, CDC (Mar. 8, 2010), http://www.cdc.gov/traumaticbraininjury/outcomes.html.

61. *Id.*

62. *Id.*

63. Alan Schwarz, *Dementia Risk Seen in Players in N.F.L. Study,* N.Y. Times (Sept. 29, 2009), http://www.nytimes.com/2009/09/30/sports/football/30dementia.html?adxnnl=1&adxnnlx=1257577339-z1TRJhMcxbzX7lvIp3cSYw&pagewanted=all. The rate for these former players is nineteen times the normal rate for men ages thirty through forty-nine. *Id.*; *see* Peter N. Nemetz et al., *Traumatic Brain Injury and Time to Onset of Alzheimer's Disease: A Population-Based Study*, 149 AM. J. EPIDEMIOLOGY 32 (1999).

64. Dave Scheiber, *Concussions on their Minds*, TAMPA BAY TIMES (Aug. 5, 2007), http://www.sptimes.com/2007/08/05/Sports/Concussions_on_their_.shtml.

65. *Id.*

66. *Id.*

67. *Id.*

depending on the age of the athlete.[68] In general, the symptoms of concussions "are intensified and recovery is prolonged" for youth athletes in comparison to their older counterparts.[69] The fact that a youth's brain is still cognitively maturing creates two major implications for concussion management in youth athletes.[70] "Firstly, the child's brain [may] be more vulnerable to the impact of head injury than the more mature adult brain due to the disturbances of neuronal maturation caused by brain trauma."[71] Second, "unlike adults[, whose] cognitive function is relatively stable over time," a child's cognition is in continual development.[72] Therefore, whether assessing cognitive function as a baseline tool or for a post-injury evaluation, the normal maturation of a child's cognition must be taken into account.[73] But because the developing brain can alter the outcome of the assessment and lead to inaccurate diagnosis, evaluating concussions in youth athletes based on a baseline number is difficult.[74]

III. CURRENT STATISTICS ON PREVALENCE OF SPORTS-RELATED HEAD INJURIES BY COUNTRY

When evaluating the severity of sports-related concussions as a social concern, current statistics regarding their prevalence on a global scale are essential. It is necessary to examine and compare countries that have similar rates of participation in organized, competitive sports at the professional, amateur, and youth levels. These countries should also have similar rates of participation in the same or comparable sports and operate under comparable legislative systems. Based on these criteria, the problem of concussions has been frequently analyzed according to data from the United States, Canada, Australia, and New Zealand.

A. United States

A recent study estimates that approximately 1.6 to 3.8 million cases of sports and recreation related traumatic brain injury occur in the United States each year.[75] The majority of these "are observed in American football

68. Paul McCrory, *Can We Manage Sport Related Concussion in Children the Same as in Adults?*, 38 BRIT. J. SPORTS MED. 516, 517 (2004).

69. Press Release, Congressman George Miller, Lawmakers Reintroduce Legislation to Protect Student Athletes from Concussions (Jan. 26, 2011), *available at* http://georgemiller.house.gov/2011/01/lawmakers-reintroduce-legislation-to-protect-student-athletes-from-concussions.shtml [hereinafter *Lawmakers Reintroduce Legislation*].

70. McCrory, *supra* note 68.

71. *Id*

72. *Id.*

73. *Id.*

74. *Id.*

75. Jean A. Langlois, ScD, MPH et al., *The Epidemiology and Impact of Traumatic Brain Injury: A Brief Overview*, 21 J. HEAD TRAUMA REHABILITATION 375, 376 (2006); Michael

(incidence: 0.7 – 9.4 concussions per 1,000 player hours), ice hockey (incidence: 1.5 – 6.0 per 1,000 player hours), and soccer (incidence: 0.4 – 0.7 per 1,000 player hours)."[76] Concussions suffered by professional athletes may be well known, but "[f]or every concussion . . . at the professional sports level, there are tens of thousands of injuries at the high school level and below."[77] It is estimated that high school athletes suffered 400,000 concussions between the 2005 and 2008 school years alone,[78] and a comparison of catastrophic head injuries reported in high school and college football between 1989 and 2002 shows a dramatic imbalance towards high school football.[79] Sports-related concussions in the United States, however, are not limited to contact sports such as football and ice hockey; they also occur with relative frequency in wrestling, lacrosse, and basketball.[80]

B. Canada

Ice Hockey is Canada's most popular sport,[81] and with this national pastime, a startling number of concussions occur among its players of all ages. A survey of youth hockey players ages eleven to twelve in the Canadian province of Alberta estimated that 700 of the 9,000 players participating each year suffer a concussion during the season.[82] This equates to 7.8% of all participants suffering a concussive head injury in one season.

The Canadian Football League (CFL) also experiences a substantial number of concussions among its players. During the 1997 CFL season,

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Makdissi, *Sports Related Concussion: Management in General Practice*, 39 AUSTL. FAM. PHYSICIAN 12, 12 (2010).

76. Makdissi, *supra* note 75, at 12.

77. Press Release, U. of Pitt. Med. Ctr., UPMC Conference to Discuss Newest Scientific Knowledge Forcing Doctors to Re-Think How to Safely Manage Concussions in Athletes of All Levels (July 23, 2008), *available at* http://www.medicalnewstoday.com/releases/115817.php.

78. Betsy Miller Kittredge, *Protecting Student Athletes from Concussions Act*, COMMITTEE ON EDUCATION & LABOR JOURNAL, Sept. 22, 2010; *see* Gerald Tramontano, Op-Ed, *Head Games*, N.Y. TIMES, Sept. 13, 2008, at A19 (citing a study by the Center for Disease Control which estimates that a minimum of 96,000 children between the ages of 5 and 18 suffer a sports-related concussion each year in the United States. The varying number of estimated concussions only supports the fact that many concussions are either misdiagnosed or not reported at all).

79. BP Boden et al., *Catastrophic Head Injuries in High School and College Football Players*, 35 AM. J. SPORTS MED. 1075, 1077 (2007) (showing an average of 7.08 catastrophic head injuries per year reported in high school football, compared with an average of .15 for college football during the same period).

80. DAVID KLOSSNER, 2009-10 NCAA SPORTS MEDICINE HANDBOOK 52 (20th ed. 2009), *available at* http://www.ncaapublications.com/productdownloads/MD10.pdf; William P. Meehan III & Richard G. Bachur, *Sports-Related Concussion*, 123 PEDIATRICS 114, 118 (2009) (discussing high rates of concussion in soccer).

81. CITZENSHIP & IMMIGR. CAN., DISCOVER CANADA: THE RIGHTS AND RESPONSIBILITIES OF CITIZENSHIP 39, CIC (2011), *available at* http://www.cic.gc.ca/english/pdf/pub/discover.pdf.

82. Jeff Z. Klein, *With Focus on Youth Safety, a Sport Considers Changes*, N.Y. TIMES, Oct. 18, 2010, at D6.

"44.8% of players experienced at least one concussion."[83] The number of concussions suffered by Canadian athletes at the college and university level is equally as frightening. A 1999 McGill University study of over 500 university football and soccer players found that 62.7% of the soccer players and 70.4% of the football players reported signs or symptoms of having suffered at least one concussion.[84]

C. Australia

Australia has some of the highest sports-related concussion rates of any country in the world, and the country's most participated sports—Australian Football League, rugby league, and rugby union—have among the highest rates of head injury of all the world's team sports.[85] The combined number of concussion in these sports is 5.9 to 9.8 concussive injuries per 1,000 player hours.[86] This equates to an average of approximately five injuries per team, per season.[87] This number is staggeringly high compared to U.S. football and hockey.[88]

D. New Zealand

A recent study estimated the number of concussion-related visits to New Zealand hospitals to be 437 per 100,000 per year for individuals ages 15 and over and 252 per 100,000 per year for individuals under 15.[89] Additionally, the New Zealand Guidelines Group has estimated a yearly incident rate of 24,000 concussions and noted that the New Zealand Accident Compensation

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83. J. Scott Delaney, MDCM et al., *Concussions During the 1997 Canadian Football League Season*, 10 CLINICAL J. SPORT MED. 9, 11 (2000).

84. J. Scott Delaney, MDCM et al., *Concussions Among University Football and Soccer Players*, 12 CLINICAL J. SPORT MED. 331, 333 (2002) (the signs and symptoms examined included: "brief loss of consciousness, light-headedness, vertigo, cognitive and memory dysfunction, tinnitus, blurred vision, difficulty concentrating, amnesia, headache, nausea, vomiting, photophobia, [and] balance disorder").

85. Makdissi, *supra* note 75, at 12.

86. *Id.* (citing AD Hinton-Bayre et al., *Presentation and Mechanisms of Concussions in Professional Rugby League Football*, 7 J. SCI. MED. SPORT 400 (2004)); *see* Michael Makdissi et al., *A Prospective Study of Postconcussive Outcomes After Return to Play in Australian Football*, 37 AM. J. SPORTS MED. 877, 880 (2009) (reporting 5.6 concussions per 1,000 player hours); *see also* Simon P.T. Kemp et al., *The Epidemiology of Head Injuries in English Professional Rugby Union*, 18 CLINICAL J. SPORT MED. 227, 229 (2008) (reporting 6.6 head injuries per 1,000 player hours).

87. Makdissi, *supra* note 75, at 12.

88. *See supra* Part III.A.

89. Fathimath Rifshana, Outcome Evaluation of the Massey University Concussion Clinic: A Pilot Study 6 (2009) (unpublished M.S. thesis, Massey University) (on file with the Massey University Library system).

Corporation (ACC) recorded 17,514 new cases of concussions in 2003.[90] The ACC's report found the 15 to 24 age group had the highest frequency of concussions, "mostly due to road accidents and sports."[91]

IV. INHERENT PROBLEMS IN SPORT THAT LIMIT THE NUMBER OF REPORTED CONCUSSIONS

Despite the prevalence of head injuries in competitive sports and the tragic consequences associated with them, athletes seldom self-report their concussions.[92] A 2005 survey found that more than 88% of all concussions go unrecognized,[93] making diagnosis a daunting task, particularly in young athletes.[94] Similar studies show that many sports-related concussions may be recognized but are simply never reported.[95]

A. The "Gladiator" Mentality in Sport

One aspect of contact sports that limits the number of reported concussions reported by athletes is the "gladiator" mentality.[96] Studies show that many athletes suffering from head injuries often refuse to take themselves out of games for fear of appearing weak to their teammates.[97] Pressure on young athletes to prematurely return to play can be great and often comes from the most unlikely sources.[98] Moreover, the culture of many contact sports applauds players for their tenacity and toughness.[99] Former All-Pro defensive back and past president of the NFL Players' Association (NFLPA) Troy Vincent recalled many instances when he was virtually "out of it" during games: "I'm in the huddle but don't know where I'm at, don't know the call and I have a teammate just holding me up," but "[b]ecause of that gladiator

90. *Id.*

91. *Id.*

92. Meehan & Bachur, *supra* note 80; *see* Schwarz, *supra* note 63. Diagnosis of concussions is also made difficult by athletes who hide symptoms because of the "gladiator mentality." *See infra* Part IV.A.

93. Delaney, *supra* note 49.

94. Meehan & Bachur, *supra* note 80, at 116; Schwarz, *supra* note 63.

95. Meechan & Bachur, *supra* note 80, at 115.

96. Scheiber, *supra* note 64.

97. Alan Schwarz, *Silence on Concussions Raises Risks of Injury*, N.Y. TIMES, Sept. 15, 2007, at A1.

98. *See* Schwarz, *supra* note 25. Merril Hoge, the famed Pittsburgh Steelers running back turned youth football coach, described being approached by a young player's twenty-five-year-old brother when Hoge removed the concussed young boy from a game. The older brother "could very easily be a head coach in a youth program and he was willing to put his own brother back on the football field . . . [p]urely out of ignorance," Hoge said. "That's why I think standards and education would help." *Id.*

99. *See id.* "The gladiator mentality prevails in sports. Given a choice, athletes - if they can stay on their feet - will usually insist on staying in a game." Scheiber, *supra* note 64.

mentality, we just keep going, get some smelling salts and go back in."[100] Vincent suffered "six or seven" diagnosed concussions during his fifteen-year NFL career.[101] He also recognized that he had been "'dinged' to some degree" fifty or sixty times while playing football throughout his life.[102]

The gladiator mentality is found not only in American football but also in contact sports across the globe. Canadian hockey has seen a frightening rise in the number of concussions suffered by players and a corresponding desire in many of them to prematurely return to competition.[103] Adding to this concern, a recent study found that four out of every five concussions suffered in the CFL go unreported by players.[104] "It's almost a badge of courage [for Canadian hockey players] to come back before they've healed . . . they equate playing injured as a sign of toughness."[105] It is apparent that players alone cannot be relied upon to report and manage their concussions. In fact, the gladiator mentality is a driving force behind the movement to implement baseline testing "as a tool for assessing concussions because players can't be trusted to assess themselves."[106]

B. Lack of Knowledge Regarding Concussion Signs, Symptoms, and Risks

Ignorance is another factor that leads to the underreporting of concussions, especially by youth athletes. Studies show that many youth athletes are unable to identify common concussion symptoms[107] and, surprisingly, that they are unaware of "the potential seriousness of continued participation in contact or collision sports after an initial concussion."[108] As a result, the number of concussions suffered by young athletes is dramatically

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100. Scheiber, *supra* note 64.

101. *Id.*

102. *Id.*

103. *See Hockey Canada Holds Concussion Summit*, CTV NEWS (Nov. 13, 2010), http://toronto.ctv.ca/servlet/an/local/CTVNews/20101113/hockey-canada-montreal-concussion-seminar-101113/20101113/?hub=TorontoNewHome [hereinafter *Summit*].

104. Delaney, *supra* note 83, at 12.

105. *Summit*, *supra* note 103. (quoting Canadian sport psychologist Paul Dennis, referring to Canadian hockey players' tendency to underreport their concussions).

106. Scheiber, *supra* note 64.

107. Press Release, St. Michaels Hosp., Minor League Hockey Players Unable to Identify Concussion Symptoms, Study Says (May 27, 2009), *available at* http://www.eurekalert.org/pub_releases/2009-05/smh-mlh052709.php.

108. Michael McCrea, PhD et al., *Unreported Concussion in High School Football Players: Implications for Prevention*, 14 CLINICAL J. SPORT MED. 13, 13, 16 (2004) (explaining that "the most common reasons for concussion not being reported included a player not thinking the injury was serious enough to warrant medical attention (66.4% of unreported injuries), motivation not to be withheld from competition (41.0%), and lack of awareness of probable concussion (36.1%)").

underreported.[109] Even more surprising, a recent survey of parents with children ages twelve to seventeen engaged in youth sports found a startling lack of knowledge among parents regarding the risks of sports-related concussions.[110] Only 8% of parents surveyed had heard a substantial amount of information regarding the risks of repeated concussions, and 36% had not heard anything about these risks.[111]

V. CURRENT CONCUSSION STANDARDS IN PROFESSIONAL AND AMATEUR SPORTS LEAGUES

Awareness regarding the prevalence and danger of concussions is growing among professional and amateur sports leagues. Various upper-level sports organizations now have rules and policies addressing proper concussion management and return-to-play standards in their respective sport, and these practices often "trickle-down" to the youth level.[112] Because of this relationship, professional and amateur sports leagues can play a major role in shaping the future of concussion prevention and management in youth sports.[113]

A. Professional Sports

The NFL has taken several steps in recent years to curb the problems associated with traumatic brain injuries and has conducted studies to determine the severity and long-term effects associated with concussions.[114] In December 2009 NFL Commissioner Rodger Goodell announced a new return-to-play standard, which states that "a player who gets a concussion should not return to action on the same day if he shows certain signs or symptoms."[115] The old rule, in effect since 1997, only prohibited a player from returning to the same game if there was a loss of consciousness.[116] The new standard also states that "[o]nce removed for the duration of a practice or game, the player should not be

109. I. J. S. Williamson & D. Goodman, *Converging Evidence for the Under-Reporting of Concussions in Youth Ice Hockey*, 40 BRIT. J. SPORTS MED. 128, 131 (2006) (discussing underreporting in youth ice hockey).

110. Lindsay Barton, *Parents' Concussion Knowledge Limited but Support for Mandatory School Policies Strong*, MOMSTEAM (Dec. 2, 2010), http://www.momsteam.com/health-safety/parents-concussion-knowledge-limited-but-support-for-mandatory-school-policies-strong.

111. *Id.*

112. Schwarz, *supra* note 25 (quoting Representative Hank Johnson). "Walking off the pain in an N.F.L. game turns into walking it off in a Little League game—the trickle-down effects on high school and college players are very real and can be fatal . . . ." *Id.*

113. *Id.*

114. *See* Elliot J. Pellman, M.D. & David C. Viano, Dr. Med., PhD, *Concussion in Professional Football: Summary of the Research Conducted by the National Football League's Committee on Mild Traumatic Brain Injury*, 21 NEUROSURGICAL FOCUS E12 (2006).

115. Fendrich, *supra* note 14.

116. *Id.*

considered for return-to-football activities until he is fully asymptomatic . . . ."[117] Commissioner Goodell's announcement came shortly after a November 2009 congressional hearing on head injuries in the NFL, which was conducted in response to building momentum and growing public sentiment for changes in NFL player safety policy.[118] Since then, the NFLPA has voiced the players' approval of the new return-to-play standard and the steps taken by the NFL to increase player protection.[119]

The National Hockey League (NHL) has seen a large number of reported concussions in recent years,[120] most notably a recent high profile concussion injury to the Pittsburgh Penguins' captain Sidney Crosby.[121] In the 2010-2011 NHL season alone, there was "a threefold increase in games lost due to concussions suffered through accidental collisions," a startling trend that has garnered the attention of NHL Commissioner Gary Bettman.[122] Late in the 2009-2010 season, the league addressed the problem of injurious hits on players by adding "Rule 48," which bans lateral blindside hits to the head.[123] Reports further suggest that the league is considering additional guidelines to address growing concerns regarding concussions.[124]

Professional basketball has also seen a startling number of concussions in recent years.[125] According to league data, the NBA experienced a 30% rise in the number of reported concussions in the 2010-2011 season over that in 2008.[126] League officials claim that the rise in the number of reported concussions can be attributed to teams and players taking head injuries more

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117. *Id.*

118. *Id.*

119. *Id.*

120. *See* Jeff Z. Klein, *Hockey Urged to Ban All Blows to Head by Concussions Panel*, N.Y. TIMES, Oct. 21, 2010, at B19.

121. *See* Rich Chere, *Around the NHL: Sidney Crosby Could Face Tough Decisions on His Career*, NJ.COM (Dec. 18, 2011), http://www.nj.com/devils/index.ssf/2011/12/around_the_nhl_sidney_crosby_c.html; Scott Burnside, *Crosby's Setback a Stark Reality for NHL*, ESPN.COM (Dec. 29, 2011), http://espn.go.com/nhl/story/_/id/7398140/pittsburgh-penguins-captain-sidney-crosby-return-shifts-anticipation-resignation.

122. A.J. Perez, *Accidental Collisions Cause Major Rise in NHL Concussions*, AOL NEWS. (Jan. 29, 2011), http://www.aolnews.com/2011/01/29/accidental-collisions-cause-major-rise-in-nhl-concussions/.

123. *Id.*; Dan Rosen, *Teams, Players Receive Rule Changes Video Explanation*, NHL (Sept. 19, 2011), http://www.nhl.com/ice/news.htm?id=588987.

124. Perez, *supra* note 122.

125. Colin Fly, *NBA Player Wants League to Establish Concussion Policy*, TSN (Feb. 8, 2011), http://www.tsn.ca/nba/story/?id=352935 [hereinafter *Concussion Policy*]; *see also* Scott Howard-Cooper, *NBA Sees Sudden, Scary Increase in Concussions*, SACRAMENTO BEE (Feb. 25, 2009), *available at* http://neurosurgery.ucla.edu/workfiles/In%20the%20news/Hovda%5B1%5D.Sac.Bee.pdf. (listing several incidents of concussions in the NBA over a two week span in January 2009. The article also tells the story of Charlotte Bobcat's Gerald Wallace who wears a special mouthguard on doctor's orders after suffering 4 concussions over a five year span).

126. *Concussion Policy*, *supra* note 125.

seriously.[127] Yet, players continue to petition officials to establish a league-wide standard, indicating that there remains opportunity for the league to improve its concussion management.[128]

B. Amateur Sports

The National Collegiate Athletic Association (NCAA) has recognized the need for greater concussion awareness and concussion management procedures. In April 2010 the NCAA Executive Committee adopted its current concussion management policy for collegiate athletes in the United States.[129] The new policy, which became effective at the start of the 2010-2011 academic year, requires all institutions across the NCAA's three athletic divisions to create and maintain a current "concussion management plan."[130] This plan must mandate the removal of a student-athlete from practice or competition if she or he "exhibits signs, symptoms or behaviors consistent with a concussion."[131] Once removed from the playing field, the student-athlete "must be evaluated by an athletics healthcare provider with experience in the evaluation and management of concussion."[132] If the athlete is diagnosed with a concussion, she or he is prohibited from activity for the remainder of that day.[133] The NCAA policy also requires student-athletes to sign a statement acknowledging their responsibility to report injuries and provides for the promotion of educational materials on concussions, especially their signs and symptoms.[134]

C. Youth Sports

High school athletic programs also have begun to designate procedures for addressing concussion injuries. The National Federation of High School Associations (NFHS)[135] established its first concussion management procedures in 2006 and now includes them in all NFHS rules books.[136] When a young

127. *Id.*

128. *Id.*

129. Gary Brown, *Executive Committee OKs Concussion Management Policy*, NCCA NEWS (Apr. 29, 2010), *http://fs.ncaa.org/Docs/NCAANewsArchive/2010/aWide/executive_committee_oks_concussion_management_policy.html.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. The NFHS is the governing body that establishes policies and procedures for high school sports in the United States. Nat'l Fed'n of State High Sch. Ass'ns, *About Us*, NFHS, http://www.nfhs.org/activity3.aspx?id=3260&linkidentifier=_id&itemid=3260 (last visited Dec. 18, 2011).

136. News Release, Nat'l Fed'n of State High Sch. Ass'ns, Changes Made in Spearing Rule, Uniforms in High School Football (Jan. 31, 2006), *available at* http://www.sgma.com/press/view.php?id=44.

athlete is suspected of having a concussion, the procedure is as follows:

> (1) remove athlete from play;
> (2) ensure that the athlete is evaluated by an appropriate health-care professional and don't try to judge the seriousness of the injury yourself;
> (3) inform the athlete's parents or guardians about the known or possible concussion and give them the fact sheet on concussion; and
> (4) allow the athlete to return to play only with permission from an appropriate health-care professional.[137]

Participating state athletic associations are required to follow these NFHS mandates, but they are authorized to strengthen them if desired.[138]

While the NCAA and NFHS concussion management efforts are steps in the right direction, they do not offer a comprehensive solution for minimizing the dangers of concussions. Their guidelines only apply to college and high school student-athletes, leaving a gap for youth athletes playing in school sanctioned sports at the junior high level and younger. They also do not cover recreational leagues organized outside of the educational setting. Further, beyond prohibiting a same-day return, the NCAA guidelines provide no return-to-play standards for athletes that have been diagnosed with concussions.[139]

VI. CONCUSSION LEGISLATION IN THE UNITED STATES

Prior to the enactment of Washington's Lystedt Law, there existed no legislation in the United States that directly addressed the issue of concussion management or established strict return-to-play standards for youth athletes.[140] The most recently enacted federal law, the Children's Health Act of 2000, [141] sought only a "better understand[ing of] the full impact and the long-term consequences of MTBI."[142] The Act required the CDC to determine the proportion of the U.S. population experiencing the effects of MTBI and to report its findings to Congress, but this report said nothing about how to

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137. *Id.*

138. Nat'l Fed'n of State High Sch. Ass'ns, *NFHS Rules Writing Activity*, NFHS, http://www.nfhs.org/content.aspx?id=3298 (last visited Jan. 4, 2011).

139. Brown, *supra* note 129.

140. *See* NAT'L CTR. FOR INJURY PREV. & CONTROL ET AL., TRAUMATIC BRAIN INJURY IN THE UNITED STATES: A REPORT TO CONGRESS (1999) (discussing the Traumatic Brain Injury Act of 1996), *available at* http://www.cdc.gov/ncipc/pub-res/tbi_congress/01_executive_summary.htm.

141. Children's Health Act of 2000, Pub. L. No. 106-310, § 1, 114 STAT. 1101.

142. NAT'L CTR. FOR INJURY PREV. & CONTROL, REPORT TO CONGRESS ON MILD TRAUMATIC BRAIN INJURY IN THE UNITED STATES (2003), *available at* http://www.cdc.gov/ncipc/pub-res/mtbi/mtbireport.pdf.

properly diagnose or manage concussions in youth athletes.[143] Moreover, it did not establish any guidelines regarding sports-related concussions.[144]

The only state law in place prior to the Lystedt Law was a Texas statute known as "Will's Bill."[145] This law was named after Will Benson, who died as a result of a second concussion he suffered after prematurely returning to play in a Texas high school football game.[146] It requires the state education commissioner to develop and implement an extracurricular activity safety program, under which coaches, trainers, or sponsors for an extracurricular activity must undergo and complete a certified safety training program.[147] This program must include current training in "recognizing symptoms of potentially catastrophic injuries, including head and neck injuries, concussions, injuries related to second impact syndrome," and others.[148] Although Will's Bill features an educational component, it does not create substantive criteria for managing students suspected of having a concussion nor establish a minimum return-to-play standard.[149]

A. The Zack Lystedt Law and Other State Laws

On May 19, 2009, Washington Governor Chris Gregoire signed the Zack Lystedt Bill into law.[150] At the time of its enactment, the law was considered to be the "strongest return-to-play statute" in the country, requiring athletes under the age of eighteen who show concussion symptoms to be taken off the playing field and kept off until a licensed health care provider submits written approval of their return.[151] As of July 30, 2011, nearly thirty states had adopted youth concussion laws similar to the Lystedt Law.[152] Each state law is unique, but most share a common theme: a three-part approach, incorporating both educational programs and strict return-to-play standards.[153] As framed by the

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143. *Id.*

144. *Id.*

145. Schwarz, *supra* note 25.

146. *Id.*; Alan Schwarz, *Silence on Concussions Raises Risks of Injury*, N.Y. TIMES (Sept. 15, 2007), http://www.nytimes.com/2007/09/15/sports/football/15concussions.html?pagewanted=all.

147. TEX. EDUC. CODE ANN. § 33.202(a)-(b) (West 2007).

148. *Id.* § 33.202(c)(2)(D).

149. *See id.*

150. WASH. REV. CODE § 28A.600.190 (2009); *States Consider Youth Concussion Laws*, ESPN (Jan. 28, 2010), http://sports.espn.go.com/espn/news/story?id=4865622.

151. *States Consider Youth Concussion Laws*, *supra* note 150.

152. *Concussion Legislation by State*, NFL HEALTH & SAFETY, http://nflhealthandsafety.com/zackery-lystedt-law/states/ (last updated Oct. 17, 2011). These states include Alabama, Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, and Wyoming. *See id.*

153. *See id.*

Washington statute, this approach looks to: (1) establish a set of concussion management guidelines in order to educate coaches, parents, and young athletes about the risks associated with concussions; (2) remove young athletes from competition if they exhibit any sign or symptom of a concussion; and (3) require a youth athlete to be cleared by a licensed health care professional before returning play.[154] However, not all state concussion laws follow this approach. Idaho's statute, for example, simply sets up concussion guidelines for informing coaches, parents, and youth athletes of the risks and symptoms of concussion; it does not establish any mandatory removal or return-to-play standards.[155]

B. Proposed Federal Legislation

Consistent with the state legislative movement lead by Washington's Zack Lystedt Law, Congress is considering two bills that provide for baseline testing, funding of educational programs, and nationwide minimum standards for youth athletes who have suffered a concussion.[156] One, the Concussion Treatment and Care Tools Act (ConTACT Act),[157] was passed by the U.S. House of Representatives on September 30, 2010, [158]and would apply to children between the ages of five and eighteen.[159] The Act would require baseline testing for every student-athlete at the start of each playing season.[160] "[This] testing would serve as a guide in determining when an athlete who has suffered a concussion could safely return to play."[161] The other bill, the Protecting Student Athletes from Concussions Act,[162] would adopt the three-part approach used by many state concussion laws[163] and would require school districts to implement a concussion management plan that reflects the Lystedt Law's "when in doubt, sit out" principle.[164]

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154. *Id.*

155. IDAHO CODE ANN. § 33-1625 (2011).

156. Madison Park, *Players, Grieving Mom Back Youth Head Injury Protection Bill*, CNN (Sept. 23, 2010), http://www.cnn.com/2010/HEALTH/09/23/football.concussions.brain/index.html; Kittredge, *supra* note 78.

157. Concussion Treatment and Care Tools Act of 2010, H.R. 1347, 111th Cong. (2010).

158. Zak Koeske, *Laws Aim to Protect Student Athletes with Concussions, but Money Is Lagging*, POLITICS DAILY (Nov. 9, 2010), http://www.politicsdaily.com/2010/11/08/laws-aim-to-protect-school-athletes-with-concussions-but-money/. The bill then moved to consideration by the Senate. *Id.*

159. Office of Bill Pascrell, Jr., *About the ConTACT Act of 2009-HR 1347*, KIDS CONCUSSION (Jan. 13, 2010), http://www.kidsconcussion.com/about.htm.

160. Koeske, *supra* note 158.

161. *Id.*

162. Protecting Student Athletes from Concussions Act, H.R. 469, 112th Cong. (2011).

163. Park, *supra* note 156; *see H.R. 6172, Protecting Student Athletes from Concussions Act: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 2-3 (2010) [hereinafter *Hearing*].

164. *Hearing*, *supra* note 163, at 4.

In September 2010 Congress held a hearing to discuss issues surrounding the proposed Protecting Student Athletes from Concussions Act.[165] Several concussion victims and doctors spoke at the hearing to stress the severity of the problem.[166] In addition, U.S. Representative George Miller expressed his hope that by providing "the tools to properly manage concussions and implement safety precautions, parents, coaches and students can change the culture of school sports for the better and keep . . . students safe on the field and thriving in the classroom."[167] Addressing the dangerous "gladiator" mentality in sports, the congressman added that the legislation aims to "ensure that pressure to play won't supersede students' health."[168]

The NFL and other professional sports organizations have shown support for the proposed federal legislation and its currently enacted state law counterparts, encouraging other states to follow Washington's lead. In March 2010 NFL Commissioner Roger Goodell sent a letter to the governor of every state that had not yet adopted a return-to-play law, specifically urging state officials to take measures to protect youth athletes.[169] More recently Commissioner Goodell spoke with high regard for the proposed federal legislation and pledged the NFL's support, saying, "The Protecting Student Athletes from Concussion Act represents a strong step forward in our shared goal of protecting young male and female athletes in all sports from the risks of concussion and other brain injuries."[170] The American College of Sports Medicine also endorsed the bill, stating that the proposed legislation will hopefully provide "for best practices such as educating students, parents and school personnel about concussion; removal from play or practice of any youngster suspected of having suffered a concussion, and return to play only after medical clearance."[171]

Not all the reaction to the federal legislation, however, has been supportive. Skeptics have concerns regarding its funding in inner city and rural areas.[172] Some fear that without federal money for implementation, a new

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165. *Id.*

166. *Id.* One of the concussion victims was a member of her high school soccer team when she suffered a concussion that continues to give her problems, including headaches, fatigue, and decreased attentiveness in completing school work. *Id.* at 6, 12-14.

167. *Lawmakers Reintroduce Legislation*, *supra* note 69.

168. *Id.*

169. *Goodell Sends Letter*, *supra* note 10. "Given our experience at the professional level, we believe a similar approach is appropriate when dealing with concussions in all youth sports. That is why the NFL and its clubs urge you [state governor] to support legislation that would better protect your state's young athletes by mandating a more formal and aggressive approach to treatment of concussions." *Id.* "We would urge that similar legislation be adopted in your state"; "We believe that sports and political leaders can help raise awareness of these dangerous injuries and better ensure that they are treated in the proper and most effective way." *Id.*

170. *Lawmakers Reintroduce Legislation*, *supra* note 69.

171. *Id.*

172. Koeske, *supra* note 158.

nationwide mandate would leave indigent schools unprotected and unable to comply.[173] This would create an inequity in concussion safety between school districts with better funding and those that struggle to survive financially.[174] In contrast, some supporters of the bill believe that the potential for monetary challenges should not deter lawmakers from enacting legislation. They stress the importance of raising concussion awareness and education first, arguing that the funding will need to come later.[175]

Other proponents of the federal legislation hold that its implementation may not be as expensive as many people think and that any expenses that exist can be offset in a myriad of ways.[176] One suggestion is that coaches or teachers be certified to evaluate concussions and allowed to act as athletic trainers.[177] This would cut the costs of having a licensed health care provider staff every game.[178] Another method is for parents to pay the small cost to have the baseline pre-season testing done.[179] Moreover, because caring for a youth athlete suffering from a concussion can be incredibly costly, if "one traumatic brain injury can be prevented," a "cost-benefit exists."[180] Still, detractors are not convinced that the income gap will be so easily addressed.[181]

VII. INTERNATIONAL CONCUSSION STANDARDS AND LEGISLATION

The prevalence of head injuries in rugby seems to have garnered serious attention on an international level.[182] In 2009 the International Rugby Board (IRB), the sport's governing body, established that "[t]he *Zurich Consensus Statement in Concussion in Sport* should underpin all decisions relating to Regulation 10[, the Board's concussion management regulation,] and provide

173. *Id.*

174. *Id.* At the congressional hearing, Democratic Representative Donald Payne stated: "I doubt seriously if the inner city schools can afford it . . . . I don't know what the answer is, but we have to come up with some thought or some discussion because I am concerned that a number of these kids will not be diagnosed properly." *Id.*

175. *Id.* In support of the Lystedt Law, Dr. Staley Herring, the current team physician for the NFL's Seattle Seahawks, stated: "If you want to see this penetrate the rural communities there has to be education and legislation, and then there has to be capacity to put resources in place." *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* "[T]here are several school districts that do baseline testing pre-season. It costs $2 an athlete. I can't imagine, except in cases of the most hardship, that parents wouldn't be willing to come up with that $2." *Id.*

180. *Id.*

181. *Id.*

182. B.C. Injury Research & Prev. Unit, *Rugby Injuries*, BCIRPU, http://www.injuryresearch.bc.ca/Publications/Fact%20Sheets/rugby%20fact%20sheet.pdf (last visited Dec. 18, 2011). "Between 5-25% of rugby injuries are head injuries, including concussions." *Id.*

the basis of any recommendations for [its] alteration."[183] In adopting this standard, the IRB recommended that a player diagnosed with a concussion "not be allowed to return to the field of play that day."[184] For junior players, the international rules require concussed athletes to take a three-week break.[185] These are responsible approaches and illustrate the IRB's acceptance that concussion management reduces the number of concussion claims.[186]

As the IRB did with rugby, the International Federation of Association Football (FIFA) has begun to seriously examine concussion safety and management.[187] In 2008 FIFA, along with the International Ice Hockey Federation (IIHF), International Olympic Committee (IOC), and the IRB, hosted the Third International Concussion in Sport Conference in Zurich.[188] In order to evaluate concussions among is players FIFA, as well as the IRB, IIHF, and IOC, has also adopted the Sports Concussion Assessment Tool 2 (SCAT2) as its diagnostic tool.[189] Similar to the ImPACT system,[190] SCAT2 is a widely used method for evaluating athletes post-head injury.[191] Compared to the computer-based software of ImPACT, however, SCAT2 is much more primitive; it simply uses a detailed, standardized questionnaire administered to an athlete after suffering a suspected concussion.[192] Importantly, these international efforts have been matched by many of the sport's organizations in

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183. *IRB Medical Conference Puts Players First*, INT'L RUGBY BD. (Nov. 13, 2009), http://www.irb.com/newsmedia/mediazone/pressrelease/newsid=2034326.html (emphasis added). Regulation 10 mandates a "graduated return to play protocol." *Regulation 10: Medical*, INT'L RUGBY BD., http://www.irb.com/mm/document/lawsregs/regulations/04/23/26/100518gfirbhandbook2010freg10english.pdf (last visited Jan. 5, 2012).

184. *IRB Medical Conference Puts Players First*, *supra* note 183.

185. *How the Codes Deal with Concussion*, THEAGE.COM.AU, (Oct. 23, 2009), http://www.theage.com.au/news/sport/how-the-codes-deal-with-concussion/2009/10/22/1256147843091.html.

186. *See generally* Simon Gianotti & Patria A. Hume, *Concussion Sideline Management Intervention for Rugby Union Leads to Reduced Concussion Claims*, 22 NEUROREHABILITION 181 (2007).

187. *FIFA Hosts Concussion Conference*, FIFA.COM (Oct. 27, 2008), http://www.fifa.com/aboutfifa/footballdevelopment/medical/news/newsid=926923/index.html; *see supra* Part II.

188. *Id.* By hosting such a huge event in sports concussion management, FIFA has responded to events such as the severe head injury suffered by Chelsea goalkeeper Peter Cech in 2006. Maureen Cavanaugh & Hank Cook, *Should Soccer Players Wear Head Protection?*, KPBS (Feb. 24, 2010), http://www.kpbs.org/news/2010/feb/24/should-soccer-players-wear-head-protection/. Events like Cech's life-threatening injury have brought concussion awareness into the minds of soccer players, coaches, and fans across the globe. *Id.*; *see also Concussion in Sport*, FIFA.COM (Nov. 6, 2008), http://www.fifa.com/aboutfifa/footballdevelopment/medical/news/newsid=938876/index.html.

189. McCrory et al., *supra* note 36.

190. *See* Part II.A.

191. Tom Billups, C.S.C.S., *Concussion Management*, RUGBYRUGBY.COM (Mar. 14, 2011), http://www.rugbyrugby.com/news/features/tom_billups/6993484/concussion_management.

192. *Id.*

Canada, Australia, and New Zealand.

A. Canada

The number of concussions suffered by youth hockey players in Canada has led to recent potential reforms in the way the game is played.[193] Hockey Canada has developed a new initiative that emphasizes "injury prevention and safety through risk management and education."[194] The Hockey Canada Safety program is now a mandatory program, which Hockey Canada hopes will improve game safety "by providing an organized, easy-to-access education program for hockey safety and injury-prevention volunteers."[195] The program also includes educational materials directed solely at concussion awareness,[196] however, it does not have enforceable return-to-play standards that would require a symptomatic athlete to be removed from play and cleared by a licensed health provider before returning to play.

The CFL has also improved its concussion education efforts in an effort to curb the number of concussions suffered by players.[197] The concussion educational campaign is spreading the word about the dangers of these injuries by distributing simple "concussion flyers" and posters to hundreds of thousands of athletes and coaches across Canada.[198] Football Canada, the national governing body of Canadian amateur football, supports the CFL's educational movement and even instituted a rule in January 2011 which requires officials to report players exhibiting concussion symptoms to coaches or medical staff during play.[199] While these are all steps in the right direction, none of these initiatives create an enforceable, strict return-to-play standard to ensure that symptomatic players do not return to activity too soon.

In 2008 the Province of Ontario, Canada, recognized the *Ontario Physical Education Safety Guidelines* (*Ontario Guidelines*),[200] which address

193. Klein, *supra* note 82.

194. Hockey Canada Safety Program, HOCKEY CANADA, http://www.hockeycanada.ca/index.php/ci_id/7697/la_id/1.htm (last visited Jan. 11, 2011).

195. *Id.*

196. *Id.*

197. *Working to Promote Concussion Awareness*, CFL.CA (May 3, 2011), http://www.cfl.ca/article/working-to-promote-concussion-awareness (last visited Jan. 11, 2011).

198. *Id.*

199. Football Canada, *Promoting Concussion Awareness: A Media Backgrounder*, CFL.CA, http://www.cfl.ca/uploads/assets/CFL/PDF_Docs/Concussion_Awareness_%20Media_Backgrounder.pdf.

200. "The Safety Guidelines were developed by Ophea in partnership with the Ontario School Board's Insurance Exchange (OSBIE), the Canadian Intramural Recreation Association – Ontario (CIRA-ON), the Ontario Federation of School Athletic Associations (OFSAA), and the Ontario Association for Supervisors of Physical and Health Education (OASPHE)." OPHEA, THE ONTARIO PHYSICAL EDUCATION SAFETY GUIDELINES (SAFETY GUIDELINES), *available at* OPHEA, http://www.ophea.net/programs-services/safety-guidelines (last visited Jan. 5, 2011).

concussion assessment and management in the province's elementary and secondary schools.[201] "Most School Boards in Ontario have subscribed to the . . . *Guidelines* and their related services."[202] They include initial response procedures, recovery timelines, and information on second-impact syndrome, and one of their key components is a post-concussion program that participating schools must follow before any student-athlete suffering from a head injury is allowed to return to play.[203] Like the enacted state and proposed federal legislation in the United States, this program requires evaluation and physician approval in order to prevent premature return to play.[204]

Appendix C of the *Ontario Guidelines* specifically addresses concussions.[205] It stresses the importance of recognizing the symptoms and signs of concussions with or without a loss of consciousness[206] and provides website addresses where parents, athletes, and coaches can obtain more information regarding concussion symptoms, diagnosis, and treatment.[207] Although the *Ontario Guidelines* are a step in the right direction, they are not enforceable law.

British Columbia, however, has followed the United State's lead with its proposed Concussions in Youth Sport Safety Act, which would create enforceable law.[208] British Columbia Liberal Member of the Legislative Assembly Moira Stilwell has proposed the bill, which she hopes will help prevent the number of concussions in Canadian youth athletes.[209] The bill would require the removal of a symptomatic youth athlete from play and would also prohibit the athlete's return to play until a physician signs off on their recovery.[210] According to Stilwell, "the majority of sport-related head injuries occur in athletes younger than the age of 20 and that the frequency of these injuries is increasing."[211] Stilwell hopes that British Columbia will be the national leader in Canada with such a bill.[212]

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201. OPHEA, ONTARIO SAFETY GUIDELINES FOR PHYSICAL EDUCATION: ELEMENTARY CURRICULAR GUIDELINES (2009) [hereinafter ELEMENTARY CURRICULAR GUIDELINES]; *see also* OPHEA, ONTARIO SAFETY GUIDELINES FOR PHYSICAL EDUCATION: SECONDARY CURRICULAR GUIDELINES (2009) [hereinafter SECONDARY CURRICULAR GUIDELINES].

202. *Safety Guidelines*, *supra* note 200.

203. SECONDARY CURRICULAR GUIDELINES, *supra* note 201.

204. *Id.*

205. *Id.* at Appendix C.

206. *Id.*

207. *Id.*

208. *Youth Concussion Law, B.C.*, *supra* note 33.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

B. Australia

To date, there are no federally mandated return-to-play standards for sports related concussion or government sponsored concussion management programs in Australia. The country has relied on independent sporting bodies, such as Australian Rugby, to address these issues. For example, Australian Rugby, the governing body for the rugby union in Australia,[213] has helped address concussion management through its SmartRugby program.[214] SmartRugby is a mandatory safety program which requires every rugby coach and referee in Australia to receive a safety qualification each year.[215] The safety qualification can be received by obtaining various safety training courses in which the participant learns about proper playing technique and injury prevention.[216] Australian Rugby puts on these courses for free and holds courses throughout the country.[217] The program provides some injury prevention education for coaches and reference, but it does not focus on concussion management and provides no return-to-play requirements.[218] The lack of enforceable return-to-play standards in Australia could be addressed through concussion-related legislation that would apply to all sports in Australia, not just rugby.

C. New Zealand

In 2001, the New Zealand legislature passed the Accident Compensation Act in 2001, which provides for "comprehensive, no-fault personal injury cover for all New Zealand residents and visitors to New Zealand."[219] The Act provides compensation no matter how the injury occurred or who caused the injury.[220] Compensation ranges from payments for medical treatment and rehabilitation costs at home to income assistance for time away from work.[221] Injuries that happen during sport or recreation are covered.[222] Because the Act provides for a wide-range of services for injuries on a no-fault basis, personal injury lawsuits are not actionable in New Zealand, with an exception for

213. Int'l Rugby Board, *Australia*, IRB.COM, http://www.irb.com/unions/union=11000007/index.html (last visited Jan. 16, 2011).

214. Australian Rugby, SmartRugby, www.rugby.com.au, http://www.rugby.com.au/tryrugby/Coaching/Courses/SmartRugby.aspx (last visited Jan. 16, 2011).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. Accident Compensation Corp., *Introduction to ACC*, ACC.CO.NZ, http://www.acc.co.nz/about-acc/overview-of-acc/introduction-to-acc/index.htm (last visited Jan. 16, 2011).

220. *Id.*

221. *Id.*

222. *Id.*

exemplary, or punitive, damages.[223] The Act is funded by placing levies on New Zealander's earnings, businesses' payrolls, fuel purchases and vehicle licensing fees as well as through general government funding.[224]

The Act also created the Accident Compensation Corporation (ACC) which administers the Act by preventing injury, making sure injured individuals receive treatment and helping these individuals return to their everyday life.[225] To address the number and severity of sports-related injuries, the ACC created the SportSmart program.[226] The ACC's SportSmart program was created to minimize the risk of injury for all participants in organized sport in New Zealand.[227] The main thrust of the program is its *10-Point Action Plan for Sports Injury Prevention*, which outlines key areas for sports injury prevention.[228] SportSmart also recommends return-to-play guidance for injuries in general, but neither focuses on concussion nor creates an enforceable standard.[229]

In 2003, the ACC launched its Sports Concussion Programme, which focuses on concussion prevention and management. The main initiative of the program is the use of "a credit-card-sized Sideline Concussion Checklist for coaches and players" to better evaluate concussion symptoms for players.[230] While the ACC considers the program a success,[231] the Programme does not mandate any return-to-play standards, and simply provides education for players and coaches to better recognize concussions.[232] The ACC could better address concussion management issues by creating strict return-to-play standards, coupled with their program's educational component. This would place New Zealand at the forefront of concussion management because the well-funded ACC would help the country cope with some of the funding issues that will no doubt face the United State's proposed Protecting Student Athletes from Concussions Act and British Columbia's proposed Concussions in Youth Sport Safety Act. The ACC has already set up and funded several concussion clinics throughout New Zealand to assess and treat individuals who suffer mild traumatic brain injuries.[233]

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223. *Id.*

224. *Id.*

225. Accident Compensation Act 2001 (N.Z.).

226. ACC SportSmart, *ACC SportSmart: Educational Resource*, ACC.CO.NZ, http://www.acc.co.nz/PRD_EXT_CSMP/groups/external_ip/documents/publications_promotion/wcmz002230.pdf (last visited Jan. 16, 2011).

227. *Id.*

228. *Id.*

229. *Id.*

230. ACCIDENT COMPENSATION CORP., ANNUAL REPORT 2005 34 (2005).

231. *Id.*

232. *Id.*

233. Rifshana, *supra* note 89, at 23.

VIII. RECOMMENDATIONS

Notwithstanding the proposed legislation in British Columbia, there appears to be no legislation specifically addressing concussion management and return-to-play standards for youth athletes in any of the countries analyzed in this Note. Canada, Australia, and New Zealand seem to rely on the governing bodies of their independent sports organizations to ensure the safety of their youth athletes. But even organizations that have sufficient return-to-play standards in place may find it difficult to adequately enforce them across their country's large geographical area. As it has in the United States, this will likely create a lack of uniformity among sports and age groups, and it calls for legislative responses.

Given the lack of binding concussion legislation in Canada, Australia, and New Zealand, this Note suggests two primary methods of protecting international youth athletes from serious, long-term brain injuries. First, state or provincial governments in these countries should adopt legislation similar to the Lystedt Law and its state and federal counterparts. Such legislation would make concussion management and return-to-play standards binding for all types and at all levels of sports. Second, countries should enact such legislation on a national level, if possible, so that the standards and funding are uniform across the entire country and across all sports, not just the more obvious contact sports.[234] Much of the early concussion-related legislation in the United States was enacted as a direct response to a tragic event where a youth athlete suffered a catastrophic injury.[235] Other countries should be proactive and not wait until a tragic incident involving the death or serious injury of a young athlete spurs a legislative response.

The three-part-approach used by concussion legislation in the United States addresses many of the inherent problems with sports-related concussions and offers a comprehensive model for other countries to follow when developing their own concussion standards. The educational component addresses the lack of knowledge among youth athletes, parents, and coaches regarding concussion symptoms and long-term effects. The removal and strict return-to-play guidelines take the decision-making out of the hands of young athletes, who do not always properly report their concussions because of the "gladiator" mentality. Basing return-to-play decisions on physician approval also provides several advantages.[236] First, physicians are obviously more knowledgeable about the symptoms and short- and long-term effects of

234. Meir Rinde, *Experts Say Cheerleaders Suffering More Concussions*, NJ.COM (Jan. 10, 2010), http://www.nj.com/news/times/regional/index.ssf?/base/news-18/126310593543530.xml&coll=5. "The sport that has had the greatest increase in catastrophic injury is cheerleading." *Id.*

235. *See* Schwarz, *supra* note 25.

236. Wilson, *supra* note 12, at 267-68.

concussions than coaches, parents, or children.[237] Second, physicians act as an "objective and dispassionate participant in the process," with "no 'stake' in the timing of the return to play of young athletes, other than their safety and health."[238]

Another key component of the legislative approaches in the United States is the allocation of funding so that public schools can staff physicians at athletic events and provide educational materials. Other countries looking to protect youth athletes should similarly incorporate funding into their local and/or federal laws. Although other countries will certainly face the funding issues currently under debate in the United States, the problem of concussion is substantial enough for a solution to be found, and there are many options available to address the funding issue. New Zealand, in particular, could utilize its ACC to fund an enforceable, country-wide return-to-play standard.

IX. CONCLUSION

There is no question that concussion safety and management in youth sports is a problem that is prevalent worldwide. More importantly, the dangers associated with premature return-to-play are present in any contact sport and are particularly frightening when it pertains to youth athletes. Fortunately, it is evident that sports organizations at all levels of sport worldwide are beginning to take the dangers of concussions seriously and the efforts taken by these organizations are commendable and a step in the right direction. The need for uniformity in return-to-play standards, however, still exists. State, provincial, and, ideally, national return-to-play standards provide this uniformity and leave little in doubt with regard to how an athlete participating in any sport and at any age should be handled when suspected of suffering a concussion. Further, the pairing of these standards with educational programs for parents, coaches, and youth athletes regarding concussion management will help ensure that youth athletes are not the only ones making the call on their personal safety.

Currently, the United States is on the forefront in creating plausible, legislative solutions to the concussion problem. The Zackery Lystedt Law, other enacted state laws like it, and the proposed Protecting Student Athletes from Concussions Act and Concussion Treatment and Care Tools Act should serve as models to other countries that are currently not protecting their youth athletes as they should. Much of the early concussion-related legislation in the United States was enacted as a direct response to tragic events where a youth athlete either died or became paralyzed after suffering a catastrophic head injury. The concussion risks facing youth athletes in today's sporting climate are too great for other countries to be similarly reactive.

237. *Id.* at 268.
238. *Id.*

THE ADOPTION AND FUNCTION OF INTERNATIONAL INSTRUMENTS: THOUGHTS ON TAIWAN'S ENACTMENT OF THE ACT TO IMPLEMENT THE ICCPR AND THE ICESCR

Mark L. Shope*

I. INTRODUCTION

The Charter of the United Nations (Charter) aims "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[1] The Charter goes on to state that the United Nations (UN) serves the purpose of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[2] These pronouncements were further expressed by the UN General Assembly in 1948 through the promulgation of the Universal Declaration of Human Rights.[3] "In accordance with the principles proclaimed in the Charter" and the Universal Declaration of Human Rights, the UN adopted the International Covenant on Civil and Political Rights (ICCPR)[4] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[5] on December 16, 1966.

Taiwan implemented into its domestic law the ICCPR and ICESCR (Covenants) on March 31, 2009, through the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (Taiwan Act).[6] Although Taiwan is not a

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1. U.N. Charter pmbl.

2. *Id.* art. 1.

3. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The ICCPR was adopted by consensus through the United Nations General Assembly Resolution 2200A (XXI); it entered into force on March 23, 1976.

5. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. Adopted through the United Nations General Assembly resolution 2200A (XXI). The ICESCR entered into force on January 3, 1976.

6. Gongmin yu Zhengzhi Quanli Guoji Gongyue ji Jingji Shehui Wenhua Quanli Guoji Gongyue Shixing Fa (公民與政治權利國際公約及經濟社會文化權利國際公約施行法) [Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights], art. 1 (promulgated Apr. 22, 2009), *Laws & Regulations Database of the Republic of China*, MINISTRY OF JUSTICE, http://mojlaw.moj.gov.tw/EngLawContent.aspx?id=3 (Taiwan) [hereinafter Taiwan Act]. Other

member of the UN and, therefore, cannot formally be a member of the Covenants, Taiwan implemented the Covenant provisions with the ultimate goal of strengthening its human rights protection system.[7] Taiwan highly respects the human rights of its citizens, and demand for this respect is growing.[8] But real human rights problems, such as corruption, discrimination against women, human trafficking, and abuse of foreign migrant workers, still exist in Taiwan and need to be addressed.[9] The implementation of the ICCPR and ICESCR into Taiwan's domestic law has afforded Taiwan a brilliant opportunity and an additional mechanism for holding itself accountable for its human rights issues.[10] Taiwan's human rights situation will likely be strengthened by the fruitful and constructive dialogue among the government, non-governmental organizations (NGOs), and other stakeholders that is encouraged by the Covenants.[11] This dialogue can be facilitated in part by the formation of ad hoc committees that provide recommendations for the future development of human rights guarantees.[12] Additionally, the Covenants promote the tweaking of domestic law to conform to Covenant provisions and hearten a passionate effort by States parties and NGOs to report on measures taken to implement their human rights protections.[13] The next four years are crucial for determining Taiwan's level of commitment to the ICCPR and ICESCR.[14]

This Note discusses two major themes that have emerged from Taiwan's ratification of the Covenants. The first regards the salient meaning and implications of ratification and non-membership of international treaties along

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relevant legal information is provided by Taiwan Law Resources. *See* TAIWAN LAW RESOURCES, www.taiwanlawresources.com (last visited Jan. 14, 2012).

7. Taiwan Act, *supra* note 6, art. 1.

8. *See generally* Wen-Chen Chang, *An Isolated Nation with Global-Minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan*, 4 NAT'L TAIWAN U. L. REV. 203 (2009).

9. Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Reports: Taiwan*, U.S. DEP'T STATE (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119038.htm.

10. An opportunity for Taiwan's accountability to international human rights norms also occurred with its implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). *See infra* Part V.A.

11. *See* U.N. Office of the High Comm'r for Human Rights, Manual on Human Rights Reporting Under Six Major International Human Rights Instruments, at 262, U.N. Doc. HR/PUB/91/1 (Rev.1) (1997) [hereinafter *Manual*] ("The main function of the Committee is to assist States Parties in fulfilling their obligations under the Covenant, to make available to them the experience the Committee has acquired in its examination of other reports and to discuss with them any issue related to the enjoyment of the rights enshrined in the Covenant in a particular country.").

12. *See infra* Part VI.

13. *Id.*

14. This time frame takes into account the time necessary for Taiwan to make its domestic law conform to the Covenants and gives the Government and civil society time to complete one initial reporting cycle. *See infra* Figures 1, 2.

with the judicial adoption and the function of these international instruments.[15] This salience derives from the fact that Taiwan is not a member of the UN and, in general, cannot be a member of the Covenants.[16] At the same time, Taiwan has chosen to implement the ICCPR and ICESCR into its domestic law, leaving open the issue of these instruments' legal status in domestic law and courts.[17] The second theme is how and to what extent Taiwan, through both its government and civil society actors, plans to fulfill the duties embodied by the Covenants and ensure its accountability for those obligations.[18] To this end, the discussion in this Note is founded on Articles 5 and 6 of the Taiwan Act as they relate to the Covenants. Article 5 states that "[t]he government should cooperate with other national governments and international non-governmental organizations and human rights institutions to realize promotion and protection of human rights provisions in the two Covenants."[19] Article 6 states that "[t]he government should set up human rights reports system in accordance with the two Covenants."[20]

Specifically, this Note begins with a discussion of the rights embodied in the Covenants and briefly discusses their relation to Taiwan's constitutional and legislative guarantees of civil, political, economic, social, and cultural rights.[21] Further discussion includes the challenges of international human rights law in Taiwan and the judicial adoption and the function of international human rights law from both a monist and a dualist point of view.[22] This Note also discusses the meaning and implications of ratification and non-membership of an international treaty and suggests that Taiwan implement the reporting obligations established by Article 40 of the ICCPR and Article 16 of the ICESCR.[23] Along with an overview of this State reporting process, this Note discusses an "alternative" NGO reporting process.[24] It gives humble, yet

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15. *See infra* Parts II.B, III.

16. This Note will not discuss political issues regarding Taiwan's sovereignty. "Under precedent both *de jure* and *de facto* sovereignty are political questions—indeed, archetypal political questions." Lin v. United States, 561 F.3d 502, 507 (D.C. Cir. 2009). Human rights, on the other hand, "are based on what are assumed to be the permanent characteristics of human nature" and not transient political issues. K. Lee Boyd, *Are Human Rights Political Questions?*, 53 RUTGERS L. REV. 277, 308 (2001). Issues surrounding membership in the Covenants and being bound by the Covenants are distinguished and discussed below. *See infra* Parts II, III.

17. There have been changes to domestic law, but there are still laws that have yet to be amended. *See The Judicial Yuan Reviews Regulations in Response to the Promulgations of the Covenants; It also Promotes Legislation on Speedy and Fair Trials*, JUD. YUAN (Nov. 5, 2009) [hereinafter *Response to the Promulgations*], *available at* http://jirs.judicial.gov.tw/GNNWS/engcontent.asp?id=36952&MuchInfo=1.

18. *See infra* Parts IV, V.

19. Taiwan Act, *supra* note 6, art. 5.

20. *Id.* art. 6.

21. *See infra* Part I.A-C.

22. *See infra* Part II.

23. *See infra* Parts III, IV.B-C.

24. *See infra* Parts IV, V.

comprehensive suggestions for the mechanics of the Taiwanese government's reporting obligations under the Covenants, Taiwanese NGOs' participation in this process, and the makeup of the ad hoc committee on human rights and economic, social and cultural rights.[25] This Note concludes with remarks regarding the future of treaty implementation in Taiwan.[26]

Since Taiwan is not an official member of the UN, participation in international fora is difficult, but it is not impossible.[27] Taiwan has experience participating with the international community through non-governmental entities as well as ad hoc bodies that have an international nature.[28] This Note takes the point of view that Taiwan will be able to accomplish the tasks of conforming its domestic law to the Covenants while holding itself accountable to the Covenant provisions through ad hoc committees made up of international actors.[29]

A. Background of the Covenants

There exists a variety of human rights, which can be categorized in a myriad of ways.[30] The current trend, however, is to classify human rights as either civil and political rights or economic, social, and cultural rights.[31] In 1997 the Office of the High Commissioner for Human Rights, the UN Institute for Training and Research, and the UN Staff College Project published a Manual on Human Rights Reporting, which explains the birth of the Covenants as follows:

> The Universal Declaration of Human Rights comprises these two major categories of human rights in one document. However, when the other component parts of the International Bill of Human Rights were elaborated, it was decided to split these two categories of human rights into two separate documents, an International Covenant on Civil and Political Rights, and an International Covenant on Economic, Social and Cultural Rights. The rationale for this division was that the two sets of rights differed in nature—one category of rights was subject to immediate application, whereas the other

25. *See infra* Parts VI, VII.

26. *See infra* Part VII.

27. Taiwan was able to participate as an observer in the 62nd World Health Assembly in May, 2009. Che-ming Yang, *The Road to Observer Status in the World Health Assembly: Lessons from Taiwan's Long Journey*, 5 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 331, 331 (2010).

28. *See infra* Part IV.

29. *See infra* Part V.

30. *Manual*, *supra* note 11, at 5.

31. *Id.*

> category required progressive realization—and therefore different implementation measures were called for.[32]

Notwithstanding the popular distinction between these human rights categories, the UN has emphasized the indivisibility and interdependence of all human rights;[33] it has also emphasized that these rights must first be implemented at national and local levels.[34]

B. ICCPR Rights and Civil and Political Rights Embodied in the Constitution of Taiwan

The Office of the UN High Commissioner for Human Rights (High Commissioner for Human Rights) describes the ICCPR as elaborating "the civil and political rights set out in the [Universal Declaration of Human Rights]."[35] That Covenant incorporates key civil and political rights and freedoms,[36] and it also requires States to report periodically to the Human Rights Committee.[37]

Civil and political rights can be found generally throughout the Constitution of the Republic of China (Taiwan) (Constitution of Taiwan) but specifically in Chapter II, Rights and Duties of the People,[38] and Chapter XIII, Fundamental National Policies.[39] Some civil and political rights can also be found in Article 10 of the Additional Articles of the Constitution of the Republic of China (Taiwan) (Additional Articles).[40]

C. ICESCR Rights and Economic, Social, and Cultural Rights Embodied in the Constitution of Taiwan

The High Commissioner for Human Rights describes the ICESCR as developing "the corresponding rights in the Universal Declaration [of Human Rights] in considerable detail, specifying the steps required for their full realization."[41] Thus, the ICESCR elaborates on the right to education, health,

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32. *Id.*

33. *Id.* at 6.

34. *Id.* at 8, 16.

35. Office of the U.N. High Comm'r for Human Rights, The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies 7, Fact Sheet No. 30 (June 2005), http://www.unhcr.org/refworld/docid/479477490.html [hereinafter Factsheet No. 30].

36. *Id.*

37. *Id.*

38. *See* ZHONGHUA MINGUO XIANFA [MINGUO XIANFA] [THE CONSTITUTION OF THE REPUBLIC OF CHINA] ch. II (1947) (Taiwan).

39. *See id.* ch. XIII.

40. ZHONGHUA MINGUO XIANFA ZHENGXIU TIAOWEN [ZHENGXIU TIAOWEN] [ADDITIONAL ARTICLES OF THE CONSTITUTION OF THE REPUBLIC OF CHINA] art. 10 (2005) (Taiwan).

41. Factsheet No. 30, *supra* note 35, at 8.

and work, using the Universal Declaration of Human Rights as a model and sometimes mirroring its specific language.[42] Part IV of this Covenant, like the ICCPR, requires periodic reporting by States parties.[43] The Human Rights Council created the Committee on Economic, Social and Cultural Rights (CESCR) to carry out these monitoring activities.[44] One notable difference between the two Covenants is

> the principle of progressive realization in Part II of the [ICESCR]. Article 2(1) specifies that a State party "undertakes to take steps, [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in [the Covenant]." The principle of progressive realization acknowledges the constraints States parties may face due to the limits of available resources.[45]

The ICCPR does not recognize such progressive realization.

Relevant social, economic, and cultural rights can be found throughout the Constitution of Taiwan and are further enumerated in Article 10 of the Additional Articles.[46] Article 10 guarantees the promotion of universal health insurance and encourages "research and development of both modern and traditional medicines."[47] It also safeguards the dignity of women by promoting the elimination of sexual discrimination and gender inequality,[48] and it guarantees the allocation of social resources to physically and mentally handicapped persons.[49] In addition, Article 10 emphasizes the need for social welfare services, funding for education, science, and culture.[50] Further, Article 10 recognizes the need to preserve and develop aboriginal cultures,[51] guarantees ethnic cultures' political participation, and provides assistance and encouragement for their education, culture, transportation, water conservation, health and medical care, economic activity, land, and social welfare.[52] Significantly, all Article 10 guarantees are practiced and promoted in Taiwan, not just enunciated on paper.[53]

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42. *Id.*
43. *See infra* Part IV.B.
44. Factsheet No. 30, *supra* note 35, at 9.
45. *Id.* (citations omitted).
46. *See generally* ZHENGXIU TIAOWEN.
47. *Id.* art. 10, para. 5.
48. *Id.* para. 6.
49. *Id.* para. 7. These protections include the guarantee of an obstacle-free environment. *Id.*
50. *Id.* para. 8.
51. *Id.* para. 12.
52. *Id.*
53. *See International Covenant on Economic, Social and Cultural Rights – Its Value and Stipulations on Human Rights*, MINISTRY OF JUSTICE, http://www.moj.gov.tw/ct.asp?xItem=154750&ctNode=11387&mp=095 (last updated Apr. 10, 2009) ("The enactment of the law of

II. ADOPTION OF THE ICCPR AND ICESCR: THE CHALLENGES OF INTERNATIONAL HUMAN RIGHTS LAW IN TAIWAN

A. Introduction

Throughout history, Taiwanese culture has been significantly influenced by various parts of the world.[54] Taiwan has been a European possession (1624-1661), a kingdom (1661-1683), a prefecture (1684-1885), a province (1885-1895), a colony (1895-1945), and a province once again (1945-1949).[55] Recently, Taiwan was claimed as a province by the People's Republic of China (PRC), but it has never been under PRC control.[56] From 1949 to 1991, Taiwan was the only province effectively controlled by the Republic of China (ROC), even though the ROC claimed control over all of China's territories.[57] Finally, in 1991 the ROC claimed that its effective control was limited to Taiwan, Penghu, Jinmen, and Mazu.[58]

Although the dominion labels placed on Taiwan have been disputed throughout history,[59] it is of ultimate importance for domestic implementation of international human rights norms that, despite so-called regime changes and portions of history where state institutions have been particularly oppressive, Taiwan has remained largely in charge of its own affairs.[60] As such, years of struggle have yielded a strong democratic government system in Taiwan.[61] Its justice system has independent courts, judges, prosecutors, and lawyers,[62] and there is a thriving, well-established, and deeply-rooted legal education system; one with internationally respected scholars and a bar that is strong and ethical.[63] The Constitution of Taiwan guarantees basic human rights and emphasizes rule

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enforcement represents Taiwan's embracement of the two covenants, which is helpful to Taiwan in its promotion of human rights and in its effort to establish [a] link with the international system. In compliance with the President's instruction, the Ministry of Justice has worked out a plan for enforcing the two covenants.").

54. *See generally* DENNY ROY, TAIWAN: A POLITICAL HISTORY xi-xiii (2002).

55. *See generally id.* at 11-76.

56. *See generally id.* at 76-105.

57. *Id.* at 81-82, 152.

58. *Id.* at 184.

59. *See* MARK HARRISON, LEGITIMACY, MEANING AND KNOWLEDGE IN THE MAKING OF TAIWANESE IDENTITY 5 (1st ed. 2006) (discussing identity issues in Taiwan).

60. *See* Mark Shope, On the Taiwanese Identity as Shaped by the Development of Its Legal System (2009) (unpublished LL.M. thesis, National Taiwan University College of Law) (on file with National Taiwan University Library, National Taiwan University).

61. MINGUO XIANFA art. 1 (1947) (Taiwan) (noting that Taiwan is "a democratic republic of the people to be governed by the people and for the people").

62. *See id.* art. 80 ("Judges shall be above partisanship and shall, in accordance with law, hold trials independently, free from any interference.").

63. *See* ZHONGHUA MINGUO LÜSHI GONGHUI QUANGUO LIANHEHUI (中華民國律師公會全國聯合會) [TAIWAN BAR ASS'N], http://www.twba.org.tw/index.asp (last visited Jan. 14, 2012).

of law and democracy.[64] It also has a mechanism for constitutional review through the Council of Grand Justices.[65] Taiwan further has a strong consumer protection framework, robust property laws,[66] and laws aimed at preventing domestic violence and maintaining equality among the sexes.[67] In addition, civil dispute resolutions in Taiwan are in keeping with international practice, and there is an arbitration mediation system that is international in character.[68] Taiwanese labor protection laws also are very strong, and the criminal code and code of criminal procedure maintain high standards of human dignity and are transparent and fair.[69]

The passing of the Taiwan Act is simply a natural consequence of Taiwan's democratic system, which places a great deal of emphasis on the rights of its citizens. These protections have arisen through domestic legislation, but special situations arise when governments are limited in entering into agreements with other governments but want to strengthen their domestic commitments with international instruments.[70]

B. Judicial Adoption and Function of International Human Rights Law

There exist two very basic theories regarding the relationship between international and domestic law: monism and dualism.[71] The monist view holds that international law and domestic law function as the same legal system, meaning domestic courts may employ international law in making decisions.[72] The dualist view holds that international law and domestic law exist separately; therefore, domestic courts may incorporate or reject international principles at their discretion.[73] One commentator, Melissa A. Waters, has discussed the incorporation of human rights treaties into domestic law in light of these two

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64. *See* MINGUO XIANFA (1947) (Taiwan); *see supra* notes 41-53 and accompanying text..

65. *Justices of the Constitutional Court*, JUD. YUAN, http://www.judicial.gov.tw/constitutionalcourt/ EN/p01_03.asp (last visited Jan. 14, 2012).

66. Xiaofeizhe Baohu Fa (消費者保護法) [Consumer Protection Law] (amended Feb. 5, 2005) (Taiwan); Minfa (民法) [Civil code] (amended May 26, 2010) (Taiwan).

67. Jiating Baoli Fangzhi Fa (家庭暴力防治法) [Domestic Violence Prevention Act] (amended Apr. 29, 2009) (Taiwan); Xingbie Gongzuo Pingdeng Fa (性別工作平等法) [Gender Equality in Employment Act] (amended Jan. 5, 2011) (Taiwan); Xingbie Pingdeng Jiaoyu Fa (性別平等教育法) [Gender Equity in Education Act] (amended May 26, 2010) (Taiwan).

68. Minshi Susong Fa (民事訴訟法) [Code of Civil Procedure] (amended July 8, 2009) (Taiwan); Zhongcai Fa (仲裁法) [Arbitration Law] (amended Dec. 30, 2009) (Taiwan).

69. Zhonghua Minguo Xingfa (中華民國刑法) [Criminal Code] (amended Jan. 26, 2011) (Taiwan); Xingshi Susong Fa (刑事訴訟法) [The Code Of Criminal Procedure] (promulgated July 28, 1928, amended June 23, 2010) (Taiwan).

70. *See supra* note 16 and accompanying text.

71. John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 656, n.1 (2010); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 201 (1993).

72. Coyle, *supra* note 71.

73. Turley, *supra* note 71.

theories.[74] Waters advocates a "narrow lens approach" that focuses on exploring the variety of techniques that enable courts to utilize a particular international source in interpreting domestic law.[75] In areas with a civil law tradition, international instruments, such as human rights treaties, are often "automatically" incorporated into domestic law.[76] The reason for automatic incorporation of these instruments is that there is less of a distinction between international and domestic law, in part because they have the same natural law source.[77] Consequently, when governments from civil law traditions such as Taiwan[78] refer to international treaties,[79] they act perfectly in line with their legal tradition.[80] Giving treaties a higher normative status than that given to ordinary national legislation is not a new phenomenon.[81] Indeed, some States have given human rights treaties a normative rank higher than that of other treaties.[82]

Regarding monist and dualist viewpoints, Article 2 of the Taiwan Act states that the "[h]uman rights protection provisions in the two Covenants have domestic legal status" (*guoneifa de xiaoli*).[83] Thus, not only do the Covenants have domestic legal status because of the civil law monist approach, but Taiwan has *explicitly* given these Covenants domestic legal status *through* the Taiwan Act.

C. Use of International Instruments as Aids in Interpreting the Constitutionality of National Legislation – A Judicial Point of View

As of January 14, 2012, the Constitutional Court of the Republic of China (Taiwan) (Constitutional Court) had rendered 695 Interpretations.[84] The

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74. Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 628 (2007).

75. *Id.* at 632.

76. *Id.* at 641.

77. *Id.* (noting that civil law countries are monist in nature).

78. Andrew Jen-Guang Lin, *Common Law Influences in Private Law – Taiwan's Experiences Related to Corporate Law*, 4 NAT'L TAIWAN U. L. REV. 107, 132 (2009) ("Taiwan is a civil law country. However, common law rules, particularly those developed from the U.S. courts, have significant influences on Taiwan's private law."). *See also* Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 531-39 (2002).

79. "Refer" in this sense is interpreted broadly to also mean, *inter alia*, ratify, accept, approve, assent, and consent. *See* Vienna Convention on the Law of Treaties art. 2, para. 1(b), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

80. Waters, *supra* note 74, at 641.

81. *Id.*; Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 215 (1997).

82. Buergenthal, *supra* note 81, at 217.

83. Taiwan Act, *supra* note 6, art. 2.

84. *See Interpretations, Justices of the Constitutional Court*, JUD. YUAN, http://www.judicial.gov.tw/ constitutionalcourt/en/p03.asp (last visited Jan. 14, 2012). Article

Constitutional Court began referring to international human rights laws in the 1990s,[85] and in total, the Court has referred to international treaties in seven majority opinions and eighteen separate opinions.[86] So far, Taiwan has taken a limited approach to incorporating international law into these interpretations; however, when the judges of the Constitutional Court have made reference to international instruments, their stance has been very strict.[87]

The Bangalore Principles of Judicial Conduct require judges to stay "informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms."[88] This principle is listed under Value 6, regarding competence.[89] This means knowledge of these international norms is necessary for a judge to be competent, but that a judge is not necessarily required to refer to such instruments.[90] But since the Constitutional Court began referring to international laws in the 1990s, judges in Taiwan have been living up to the international norms embodied in the Bangalore Principles and have been adopting the monist tradition of incorporating international law.[91]

Importantly, the Constitutional Court has not only referenced international treaties in its opinions, it has also utilized these treaties to interpret the meaning of certain domestic legal concepts.[92] For instance, Interpretation 392 states, "In light of the abovementioned international conventions, it is obvious that the prosecutor shall not have the detention power enumerated in the Code of Criminal Procedure."[93] In Interpretation 549, the Justices similarly held that "an overall examination and arrangement, regarding the survivor allowance, insurance benefits and other relevant matters, should be conducted

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78 of the Constitution states that "[t]he Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders." MINGUO XIANFA art. 78. For more information regarding Constitutional review in Taiwan, see Nuno Garoupa et al., *Explaining Constitutional Review in New Democracies: The Case of Taiwan*, 20 PAC. RIM L. & POL'Y J. 1 (2011).

85. Chang, *supra* note 8, at 212.

86. *See id.* (referring to Interpretations No. 372 (Feb. 24, 1995), No. 392 (Dec. 22, 1995), No. 549 (Aug. 2, 2002), No. 578 (May 21, 2004), No. 582 (Sept. 23, 2004), No. 587 (Dec. 30, 2004), No. 623 (Jan. 26, 2007), the CRC, ICCPR, ECHR, ACHR, International Labor Conventions, and the UDHR).

87. *See infra* notes 92-103 and accompanying text.

88. BANGALORE PRINCIPLES OF JUDICIAL CONDUCT art. 6.4, U.N.E.S.C. Res. 2006/23 (2002) [hereinafter BANGALORE PRINCIPLES] (adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, Nov. 25-26, 2002).

89. *Id.* Value 6.

90. *See id.* Value 6.

91. *See supra* Part II.B.

92. *See, e.g.*, J.Y. Interpretation No. 392 (Dec. 22, 1995).

93. *Id.* (Referencing the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Convention for Citizens and their Political Rights, the Continental American Human Rights Convention, and a European Court of Human Rights decision.).

in accordance with the principles of this Interpretation, *international labor conventions* and the pension plan of the social security system."[94] Likewise, Interpretation 578 states, "The provisions of international labor conventions . . . *shall* also be taken into account."[95] Although the Constitutional Court has not used international instruments frequently, the instruments have clearly been given great deference, to the level of being heavily influential on the outcome of an interpretation.[96] Accordingly, reference to international treaties by the Taiwanese courts is perfectly congruent with the precepts of Taiwan's legal tradition.[97] By stating that "[h]uman rights protection provisions in the two Covenants have domestic legal status," Article 2 of the Taiwan Act simply reinforces the fact that these international instruments will be given equal or possibly higher normative status than ordinary national legislation.[98]

To fulfill the Taiwan Act's desire to strengthen Taiwan's human rights protection system, the Judicial Yuan (the highest judicial organ of Taiwan), in addition to incorporating international instruments into court Interpretations, has drafted legislation to harmonize Taiwan laws with the Taiwan Act.[99] This includes the Act for Speedy and Fair Criminal Trials, many provisions of the Code of Criminal Procedure, and the Law Governing the Disposition of Juvenile Case.[100] In addition, the Judicial Yuan established a task force to research amending the Compulsory Execution Act,[101] and amendments are planned for the Legal Aids Act as well.[102] If Taiwan, like other civil law countries, takes the monist view, the ICCPR, ICESCR, and domestic law will continue to function as the same legal body currently available to the Constitutional Court.[103]

D. Overriding Rights in the ICCPR and ICESCR and the Monist and Dualist Theories – Legislative Point of View

While civil law traditions grant higher normative status to human rights

94. J.Y. Interpretation No. 549 (Aug. 2, 2002) (emphasis added).
95. J.Y. Interpretation No. 578 (May 24, 2004) (emphasis added).
96. *Id.*
97. Waters, *supra* note 74, at 641.
98. Taiwan Act, *supra* note 6, art. 2.
99. *Id.* art. 1; *Response to the Promulgations*, *supra* note 17.
100. *Response to the Promulgations*, *supra* note 17; Xingshi Tuosu Shenpan Fa (刑事妥速審判法) [Act for Speedy and Fair Criminal Trials] (promulgated May 19, 2010) (Taiwan); Xingshi Susong Fa (刑事訴訟法) [The Code Of Criminal Procedure] (promulgated July 28, 1928, amended June 23, 2010) (Taiwan); Shaonian Shijian Chuli Fa (少年事件處理法) [Law Governing the Disposition of Juvenile Cases] (promulgated May 18, 2005) (Taiwan).
101. *Id.*; Qiangzhi Zhixing Fa (強制執行法) [Compulsory Execution Act] (amended June 29, 2011) (Taiwan).
102. *Id.*; Falü Fuzhu Fa (法律扶助法) [Legal Aid Act] (amended Dec. 30, 2009) (Taiwan).
103. *See* Coyle, *supra* note 71, at 656, n.1.

treaties,[104] Monistic traditions do not draw a bright line distinction between domestic and international law.[105] This is due in part to the fact that laws in civil law traditions have the same natural law source and are automatically incorporated into domestic law.[106] Elaborating on the theme of incorporating international legal norms into national legal systems, one commentator, George Slyz, notes that "[m]onism views international and national law as part of a single legal corpus, with the various national legal systems being derived from the broader framework provided by international law."[107] Therefore, within a monist framework, human rights norms are not only part of the Taiwanese legal order as local law, they may be superior to it.[108] In this regard, since "no theoretical barrier exists to applying international law,"[109] the Taiwan Act would bind the Taiwanese Legislature to the requirements of the ICCPR and ICESCR in enacting legislation.[110] Furthermore, not only would the legislative and judicial branches[111] be obliged to observe these human rights instruments, but presumably, the executive branch would be equally obliged to ensure the laws are carried out.[112]

The dualist view, however, holds that domestic courts may incorporate or reject international elements as they see necessary.[113] Slyz notes that "a nation is responsible to other nations for carrying out mutual obligations, but each state determines the means and form by which it carries out its obligations."[114] Therefore, dualist states are usually required to change domestic law because international law applies by virtue of the domestic law's recognition and incorporation of such rules only.[115] The international law is thereby transformed into domestic law and avoids any question of supremacy.[116] Since Taiwan is of a civil law tradition, it should grant a higher normative status to human rights treaties like the ICCPR and ICESCR.[117]

If there was any debate as to whether Taiwan utilizes the concepts of

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104. Waters, *supra* note 74, at 641.

105. *Id.*

106. *Id.*

107. George Slyz, Note, *International Law in National Courts*, 28 N.Y.U. J. INT'L L. & POL. 65, 67 (1996) (emphasis added).

108. *Id.*

109. *Id.*

110. *Id.*

111. "The central government consists of the Office of the President and five branches, or *yuan*—the Executive Yuan, the Legislative Yuan, the Judicial Yuan 司法院, the Examination Yuan 考試院 and the Control Yuan." *The Republic of China Yearbook 2010*, GOV'T INFO. OFFICE 61, *available at* http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/04Government.pdf.

112. Slyz, *supra* note 107, at 67.

113. Coyle, *supra* note 71, at 656, n.1.

114. Slyz, *supra* note 107, at 67.

115. *Id.*

116. *Id.* at 67-68.

117. Waters, *supra* note 74, at 641.

monism or dualism, it should be dispelled by a plain reading of Article 2 of the Taiwan Act. Article 2 states that the "[h]uman rights protection provisions in the two Covenants have domestic legal status,"[118] meaning Taiwan "avoids any question of the supremacy of one system of law over the other" regardless. Both concepts legitimize the application of international human rights instruments to Taiwanese domestic law. Therefore, looking forward, the Taiwanese legislature should be bound by the Covenants in enacting legislation; no barrier exists to applying international law into domestic legislation.

III. MEANING AND IMPLICATIONS OF RATIFICATION AND NON-MEMBERSHIP OF AN INTERNATIONAL TREATY

Taiwan's unique history "has trapped [its] inhabitants . . . in political purgatory. [T]he people of Taiwan have lived without any uniformly recognized government[, and i]n practical terms, this means they have uncertain status in the world community which infects the population's day-to-day lives."[119] The existence of this political purgatory and the special status that arises from its ambiguity will almost certainly influence a non-State actor's participation in a treaty, mainly because it not clear whether a non-State can be a "party." Article 2 of the Vienna Convention on the Law of Treaties (VCLT) defines "party" as "a State which has consented to be bound by the treaty and for which the treaty is in force."[120] A plain reading of the VCLT indicates that a "party" must be a "State."[121] With regard to whether an entity would be entitled "State" status, Article 1 of the Montevideo Convention on the Rights and Duties of States provides, albeit somewhat oversimplified, that "[t]he state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."[122] Although Taiwan is not recognized as a State, it may meet the requirements to be considered a "State" for *purposes of a treaty*.[123] And since Taiwan has consented to be bound by the Covenants, it may be said that Taiwan is a kind of party to the Covenants, just not in the conventional sense.[124]

The VCLT also states that a treaty is an "international agreement

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118. Taiwan Act, *supra* note 6, art. 2.

119. Lin v. United States, 561 F.3d 502, 503 (D.C. Cir. 2009).

120. VCLT, *supra* note 79, art. 2, para. 1(g).

121. *See id.*

122. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (1934). For perspectives on how the Montevideo Conventions may be imperfect, see Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403 (1999).

123. *See generally* Tai-Heng Cheng, *Why New States Accept Old Obligations*, 2011 U. ILL. L. REV. 1, 47 (2011). The conventional view is that States do not need to be a member of the club to guarantee human rights. *See infra* note 132 and accompanying text.

124. *See generally* Tai-Heng Cheng, *supra* note 123.

concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[125] Since Taiwan did not conclude the Covenants with other States, it cannot be said that the agreements, as recognized by Taiwan, are "treaties" in the traditional sense. But the VCLT goes on to say that "'ratification,' 'acceptance,' 'approval,' and 'accession' mean in each case the international act so named whereby a State establishes *on the international plane* its consent to be bound by a treaty."[126] Taiwan no doubt has expressed, through the Taiwan Act, its desire to implement (*shishi*) the Covenants.[127] Implementation is an expression of an international act and suggests Taiwan's willingness and consent to be bound by the Covenants on an international level. Furthermore, by declaring that "[a]ll laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years after the Act enters into force by new laws, law amendments, law abolitions and improved administrative measures," Taiwan accepts that domestic laws, regulations, directions, and administrative measures should be compatible with the Covenants and that it has consented to be bound domestically, and arguably internationally, by their provisions.[128]

A. Participant Discontent of the Exclusion of Parties

The biased nature of Covenant membership has narrowed the participation of certain parties, causing twelve Member States to each make declarations upon signature of the ICCPR and ICESCR.[129] In essence, these declarations recognize the discriminatory and limiting nature of Article 48 of the ICCPR and Article 26 of the ICESCR.[130] Article 48 of the ICCPR, which is similar to Article 26 of the ICESCR, states that

> [t]he present Covenant is open for signature by *any State Member of the United Nations* or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United

125. VCLT, *supra* note 79, art. 2, para. 1(a).

126. *Id.* para. 1(b) (emphasis added).

127. Taiwan Act, *supra* note 6, art. 1.

128. *Id.* art. 8.

129. International Covenant on Civil and Political Rights, Declarations and Reservations, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter Declaration]. The States are the Russian Federation, Romania, Guinea, Afghanistan, Bulgaria, Hungary, Mongolia, Syrian Arab Republic, Vietnam, and Ukraine. *Id.*

130. *See, e.g.*, *infra* note 132.

> Nations to become a Party to the present Covenant.[131]

The Russian Federation made the following declaration regarding Article 48 and Article 26:

> The Union of Soviet Socialist Republics declares that the provisions of paragraph 1 of article 26 of the International Covenant on Economic, Social and Cultural Rights and of paragraph 1 of article 48 of the International Covenant on Civil and Political Rights, under which a number of States cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, *should be open for participation by all States concerned without any discrimination or limitation.*[132]

This declaration recognizes that, with regard to human rights treaties, all States should be allowed to participate.[133] The spirit of the declaration also could support the conclusion that all territories or non-State actors should be granted participation as well.[134] The conventional wisdom is that "the promotion and encouragement of respect for human rights and fundamental freedoms is an undertaking to be carried out *for all.*"[135] To this end, issues of human rights, arguably, should not be confused with issues of politics concerning sovereignty.[136]

Although it did not sign the Covenants with other States parties, Taiwan should realize that by implementing the Covenants it is bound by their provisions and that it has opened itself up to international scrutiny.[137] Through both domestic and international scrutiny, Taiwan will have more types of human rights enforcement than would be possible with its domestic legislation alone.[138] As a non-State actor, Taiwan should be able to freely implement the Covenants into its domestic law, and at the same time, the international community should recognize and respect this implementation.

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131. ICCPR, *supra* note 4, art. 48, para. 1 (emphasis added).

132. Declaration, *supra* note 129 (emphasis added).

133. *See id.*

134. *See id.*

135. *Manual*, *supra* note 11, at 4.

136. *See* Boyd, *supra* note 16.

137. The author of this Note is of the opinion that scrutiny has been largely domestic, but for examples of international scrutiny, see SHIRLEY A. KAN, DEMOCRATIC REFORMS IN TAIWAN: ISSUES FOR CONGRESS (2010); Jerome A. Cohen & Yu-Jie Chen, *Jerome A. Cohen and Yu-Jie Chen on Taiwan's Incorporation of the ICCPR and ICESCR into Domestic Law*, U.S. ASIA L. INST. (May 29, 2009), http://www.usasialaw.org/?p=1142.

138. Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 215-16 (2008).

B. Validating Alterations in Domestic Law through Human Rights Law Mechanisms

The Constitutional Court is charged with interpreting the Constitution of Taiwan,[139] and it has historically incorporated international human rights laws into interpretations as a kind of "benchmark for domestic legal change."[140] Interpretation No. 549[141] and Interpretation No. 578[142] advise the government to "overhaul the entire statutory regime with relevant international labor conventions."[143] There, the Justices were urging the government to alter domestic law so that it observes international law.[144] Alterations in domestic law may be similarly justified by the Taiwan Act. Article 8 states,

> All levels of governmental institutions and agencies should review laws, regulations, directions and administrative measures within their functions according to the two Covenants. All laws . . . incompatible to the two Covenants should be amended within two years after the Act enters into force by new [or abolished] laws.[145]

The Human Rights Committee's General Comment 31 expresses the comprehensiveness of implementation required by the ICCPR and acts as a reminder to the State that the provisions of that Covenant should not be taken lightly.[146] All branches of government must take responsibility, and any one branch cannot excuse itself of a violation by pointing to another.[147]

Even though Taiwan, through Article 8 of the Taiwan Act, has affirmatively committed to amend or abolish laws incompatible with Covenant rights within two years, its commitment to conformity is already implicit in the ICCPR.[148] General Comment 31 states that States parties must take the

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139. MINGUO XIANFA art. 78 (1947) (Taiwan).

140. Chang, *supra* note 8, at 216.

141. J.Y. Interpretation No. 549 (Aug. 2, 2002).

142. J.Y. Interpretation No. 578 (May 21, 2004).

143. Chang, *supra* note 8, at 218.

144. *Id.*

145. Taiwan Act, *supra* note 6, art. 8.

146. *See* Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 3, 80th Sess. (2004), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter General Comment No. 31]. "Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith." *Id.*

147. *See id.* para. 7. "Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large." *Id.*

148. Taiwan Act, *supra* note 6, art. 8.

necessary measures "to give effect to the Covenant rights in the domestic order."[149] In this regard, both the judiciary and the legislature have given the green light to alter Taiwan's domestic law to achieve conformity with the Covenants.[150]

IV. STATE REPORTING PROCESS

The nine articles of the Taiwan Act no doubt were implemented to strengthen Taiwan's human rights protection system.[151] But a government's responsibilities towards its domestic population do not end with implementation alone; each State is required to engage in a comprehensive campaign to see that every Covenant obligation is addressed.[152] As such, it is crucial for States to have a correct and comprehensive understanding of the object and purpose of the Covenants as well as an accurate grasp of the scope and meaning of the obligations they create.[153]

How the Covenant provisions can be implemented in the domestic legal system has proven to be an ongoing learning process for both Taiwan's government and its civil actors.[154] Through an initial reporting process, however, Taiwan may learn how to further implement and realize these human rights guarantees.[155] Implementation in the domestic legal system and the concurrent reporting process represent just the birth of the Covenants, which will continue far beyond the administration that initiated the process. Indeed, "[a]ll politicians face problems committing to their promises," so the policies of

149. General Comment No. 31, *supra* note 146, para. 13. "Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order." *Id.*

150. Although comment 31 only discusses the ICCPR, similar arguments may be made for the ICESCR.

151. Taiwan Act, *supra* note 6, art. 1 ("This Act is made . . . to strengthen our country's human rights protection system."). *See also id.* arts. 2-9.

152. For one perspective on the current state of implementation, see Vincent Y. Chao, *Human Rights Day: Little Action on UN Human Rights Covenants: NGOs*, TAIPEI TIMES (Dec. 11, 2010), http://www.taipeitimes.com/News/taiwan/archives/2010/12/11/2003490659.

153. *See generally* PEGGY BRETT & PATRICK MUTZENBERG, UN HUMAN RIGHTS COMMITTEE PARTICIPATION IN THE REPORTING PROCESS: GUIDELINES FOR NON GOVERNMENTAL ORGANISATIONS (NGOs) (1st ed. 2008) [hereinafter GUIDELINES], *available at* http://ccprcentre.org/doc/CCPR/Handbook/full%20version.pdf.

154. For one example of such plan, see Renquan Dabuzou Jihua (人權大步走計畫) [Human Rights Program of Action], MINISTRY OF JUSTICE, http://www.humanrights.moj.gov.tw/public/Attachment/151910551973.doc.

155. *See generally* GUIDELINES, *supra* note 153 ("The Committee has often emphasized that the drafting of State reports should be an opportunity to review the national legislation, as well as administrative rules and procedures.").

one politician must live beyond his or her term of office.[156] The domestic and international scrutiny that should result from Taiwan's implementation of the Covenant's will generate valuable performance information and engage domestic and international governance. This will create political consequences for politicians who do not live up to their promises,[157] and ultimately enhance the quality of human rights for current and future generations.[158]

A. Motivations for the Implementation of the ICCPR and ICESCR into Domestic Law

Admittedly, there may be motivations for signing or implementing treaties into domestic law other than the mutual gain from cooperative activity.[159]

> Governments form treaties to achieve mutual gains from coordinated or cooperative activity at the international level. Without such gains, there is no reason for governments to enter into treaties. This approach[, however,] ignores the domestic sources of government policy and, thereby, underemphasizes the impact of domestic lobbying and the structure of the domestic political system in foreign affairs.[160]

While international instruments indicate to the international community the positions of their ratifying parties, domestic lobbying and the influence on the domestic political system, with regard to domestic interactions, are also of importance.[161] This interest-group lobbying approach may be a more applicable way of viewing Taiwan's implementation of the Covenants because Taiwan's international interaction is limited.[162] Ultimately, international commitments have three functions: (1) creating information by "utilizing international monitors, beyond the reach of any domestic politician, to generate neutral and valuable information on performance"; (2) creating costs for future violations; and (3) shifting decision-making authority to international actors.[163]

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156. Ginsburg, *supra* note 138, at 213.

157. *Id.* at 214-15.

158. *See supra* Part II.

159. Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 540 (2004).

160. *Id.*

161. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940-41 (2002).

162. Taiwan's unique situation makes it difficult for the government to interact with other Nations. *See generally* Eric Ting-Lun Huang, *The Modern Concept of Sovereignty, Statehood and Recognition: A Case Study of Taiwan*, 16 N.Y. INT'L L. REV. 99 (2003).

163. Ginsburg, *supra* note 138, at 214.

B. Reporting Obligations Under Article 40 of the ICCPR

Taiwan recognizes the importance of reporting the implementation status of the Covenants. This is evident in Article 6 of the Taiwan Act,[164] which states, "The government should set up human rights reports system in accordance with the two Covenants."[165] Articles of the ICCPR regarding reporting include Article 40:

> 1. The States Parties to the present Covenant undertake to *submit reports* on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
>
> (a) *Within one year* of the entry into force of the present Covenant for the States Parties concerned;
>
> (b) Thereafter whenever the Committee so requests.
>
> 2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. *Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.*
>
> 3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
>
> 4. The *Committee shall study the reports* submitted by the States Parties to the present Covenant. It shall transmit *its reports*, and such general comments as it may consider appropriate, to the States Parties.
>
> 5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.[166]

Notwithstanding the initial reporting requirements under ICCPR, Article 40, paragraph 1 section (a), this Note recommends that a review process be conducted in the fall of 2013, with the state submitting its initial report in the

164. *See* Taiwan Act, *supra* note 6, art. 6.

165. *Id.*

166. ICCPR, *supra* note 4, art. 40 (emphasis added).

summer of 2012.[167] The Taiwan Act states that "[a]ll laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years after the Act enters into force by new laws, law amendments, law abolitions and improved administrative measures."[168] This gives Taiwan time to adjust laws incompatible with the ICCPR and to submit a comprehensive report.[169] During the beginning of 2013, the ad hoc Human Rights Committee will have time to draft a List of Issues, to which the State will have time to respond.[170] Additionally, NGOs will have time to respond to the State Report and the State's response to the List of Issues.[171]

Article 40 also states that reports should be submitted to the Secretary-General of the UN, who in turn should transmit them to the specialized UN agencies; the Secretary-General should also transmit the comments of the Committee to the Economic and Social Council.[172] It is impossible for Taiwan to fulfill these procedural aspects because of its non-membership. Nonetheless, Taiwan should take responsibility for submitting a report to a neutral Committee.[173]

C. Reporting Obligations Under Article 16 of the ICESCR

The CESCR notes that, "in accordance with the letter and spirit of the [ICESCR], the processes of preparation and submission of reports by States

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167. *See infra* Figure 1.

168. Taiwan Act, *supra* note 6, art. 8. The Presidential Office Human Rights Consultative Committee was established to "formulate human rights policies and review the nation's annual human rights reports." News Release, Office of the President, President Ma and Vice President Siew Attend First Meeting of the Presidential Office Human Rights Consultative Committee, (Dec. 10, 2010), [hereinafter Consultative Committee], *available at* http://english.president.gov.tw/Default.aspx?tabid=491&itemid=23067&rmid=2355. The President of Taiwan has set up The Presidential Office Human Rights Consultative Committee to address these issues. *Id.*

169. It also takes into account the time Taiwan has given itself to make changes to domestic law. *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 149-52 (1999) (discussing different domestic applications of international human rights treaties).

170. *See infra* Figures 1, 2.

171. *Id.*

172. ICCPR, *supra* note 4, art. 40, paras. 2-3.

173. The Human Rights Committee reminds States parties that they "have undertaken to submit reports in accordance with article 40 of the Covenant within one year of its entry into force for the States parties concerned and, thereafter, whenever the Committee so requests." Human Rights Comm., General Comment No. 30: Reporting Obligations of States Under Article 40 of the Covenant, para. 1, 75th Sess., CCPR/C/21/Rev.2/Add.12 (2002), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, p. 242, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008) [hereinafter General Comments].

can, and indeed should, serve to achieve a variety of objectives."[174] The first objective recognizes the importance of the initial report so as to "ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant."[175] This spirit of reporting is much like that expressed in the ICCPR.[176]

Like the ICCPR, and notwithstanding the initial reporting requirements under Article 16 of the ICESCR,[177] this Note recommends that a review process should occur in the fall of 2013, with the state submitting its initial report in the summer of 2012.[178] Again, the two-year timeframe for compatibility under the Taiwan Act[179] will allow Taiwan to adjust its incompatible laws and to submit a comprehensive report.[180] The ad hoc CESCR will have time to draft a List of Issues during the beginning of 2013, and the State and NGOs will have time to respond accordingly.[181]

All reports will ultimately go to ad hoc committees for review.[182] Since the Covenant prohibits members of the state being reviewed from serving as committee members, it would be beneficial for Taiwan to cooperate with other national governments and international NGOs to develop these ad hoc committees.[183] The ad hoc Human Rights Committee and the ad hoc CESCR

174. Comm. on Econ., Soc. & Cultural Rights [CESCR], General Comment No. 1: Reporting by States Parties, para. 1, 3rd Sess., U.N. Doc. E/1989/22, annex III at 87 (1989) [hereinafter CESCR General Comment No. 1], *reprinted in* General Comments, *supra* note 173, p.1-2. The Committee specifically notes seven objectives in their comment. *Id.* paras. 2-9.

175. *Id.* para. 2 ("Such a review might, for example, be undertaken in conjunction with each of the relevant national ministries or other authorities responsible for policy-making and implementation in the different fields covered by the Covenant.").

176. *See supra* Part V.B.

177. "The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein." ICESCR, *supra* note 5, art. 16(1). "All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant. *Id.* art. 16(2)(a). "The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments." *Id.* art. 16(2)(b).

178. *See infra* Figure 1.

179. Taiwan Act, *supra* note 6, art. 8.

180. *See infra* Figure 1.

181. *See infra* Figures 1, 2.

182. *See infra* Part VI.

183. *Id.*

may be separate committees or combined into one;[184] one committee may be a more practical option, but the concluding observations will likely be more fruitful if the committees are separate.

D. ICCPR and ICESCR Reporting Process

Generally, State Reports are divided into two parts.[185] The first describes basic information about the reporting State, such as its land and people, general political structure, general legal framework within which human rights are protected, and information and publicity used to promote human rights awareness.[186] The second part describes measures the State has taken to implement the specific provisions of the Covenants and should, as a rule, address every relevant substantive article.[187] The remainder of this Note uses the terms "State Report" and "NGO report" when referring to the reporting process as it relates to the ICCPR.[188] Although the specific reporting processes under the ICCPR and ICESCR are slightly different, these ICCPR concepts can easily be translated to the reporting requirements of the ICESCR.[189]

1. Initial State Report

According to the Commission for Human Rights' Manual on Human Rights Reporting Under Six Major International Human rights Instruments, the second part of the initial report, which is important for Taiwan and its implementation process, should contain the following with regard to *each* article:

> (a) The legislative, administrative or other measures in force in regard to each right;
>
> (b) Any restrictions or limitations, even of a temporary nature, imposed by law or practice or any other manner on the enjoyment of the right;

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184. *See* Caroline Dommen, *The UN Human Rights Regime: Is it Effective?*, 91 AM. SOC'Y INT'L L. PROC. 460, 483 (1997) (discussing the possibility of consolidation of human rights treaty bodies).

185. *Manual*, *supra* note 11, at 59-61.

186. *Id.*

187. *Id.* at 173. *See also infra* note 190 and accompanying text.

188. For an in depth explanation of the reporting process for The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, The International Convention on the Elimination of All Forms of Racial Discrimination, The Convention on the Elimination of All Forms of Discrimination Against Women, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and The Convention on the Rights of the Child, see *Manual*, *supra* note 11.

189. *Id.*

> (c) Any other factors or difficulties affecting the enjoyment of the right by persons within the jurisdiction of the State, including any factors affecting the equal enjoyment by women of that right;
>
> (d) Any other information on the progress made in the enjoyment of the right.
>
> The report should be accompanied by copies of the principal legislative and other texts referred to in the report.[190]

The Human Rights Committee has emphasized that "[i]t is of critical importance that States ensure that they describe the factual situation, or, in other words, the practical realities regarding the implementation and enjoyment of Covenant rights, rather than limiting themselves to a description of the formal situation as represented in the State's laws and policies."[191] Of course, the legal norms should be described and elaborated, but the practical availability of remedies for violations of the ICCPR is equally important.[192] Taiwan will need to report its principal legislative measures as well as other non-legislative or judicial measures it has taken to ensure the enjoyment of Covenant rights.[193]

In its Consolidated Guidelines for State Reports under the ICCPR, the Human Rights Committee emphasizes that it is particularly important for a State party to explain how Article 2 of the Covenant is applied.[194] Article 2 includes the following two provisions:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or

190. *Manual, supra* note 11, at 174.

191. Factsheet No. 30, *supra* note 35, at 16.

192. *See* U.N. Secretary-General, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, ch. III, sec. D.2.1, U.N. Doc. HRI/GEN/2/Rev.6 (June 3, 2009) [hereinafter *Compilation of Guidelines*].

193. *See id.*

194. U.N. Human Rights Comm., Consolidated Guidelines for State Reports Under the International Covenant on Civil and Political Rights, sec. D.2.2, U.N. Doc. CCPR/C/66/GUI/Rev.2 (Feb. 26, 2001).

> other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, *to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*[195]

Article 2 also includes the availability of remedies for violations of the ICCPR.[196] Given the requirements set forth by the Human Rights Committee, Taiwan will need to address how its government will ensure to all individuals the rights recognized in the ICCPR, to what extent the laws or measures give effect to those rights, and what remedies are available for their violations.[197]

2. Response to the list of issues generated by the ad hoc committee

In the case of reporting under the ICESCR, a working group is established for each State.[198] This working group is "to identify in advance the questions that will constitute the principal focus of the dialogue with the representatives of the reporting States."[199] The Human Rights Committee asks each State party to provide in writing its replies to the lists of issues, far enough in advance of the reporting session so as to enable the replies to be made available to the Committee.[200] These replies also should be timed so that NGOs will have a chance to comment on their content.[201] As explained above, this Note recommends that a review process should happen in the fall of 2013, with the state submitting its initial report in the summer of 2012.[202] This timeframe gives Taiwan time to amend or abolish laws incompatible with the ICESCR (and the ICCPR) and submit a comprehensive report.[203] It also leaves time for the ad hoc committees to draft a List of Issues during the beginning of 2013 and allows the State time to respond to that list.[204] Additionally, NGOs will have time to respond to the State Report and the State's response to the List of

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195. ICCPR, *supra* note 4, art. 2, paras. 1-2 (emphasis added).

196. *Id.* art. 2. para. 3; *see Compilation of Guidelines*, *supra* note 192, ch. III, sec. D.2.1.

197. This list is not comprehensive and should be expanded along with national NGO participation. For a discussion regarding highly effective NGOs, see George E. Edwards, *Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) From the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs*, 18 MICH. ST. J. INT'L L. 165 (2010).

198. CESCR, *Working Methods*, OHCHR.ORG, http://www2.ohchr.org/english/bodies/cescr/workingmethods.htm (last visited Jan. 14, 2012).

199. *Id.*

200. *Manual*, *supra* note 11, at 163.

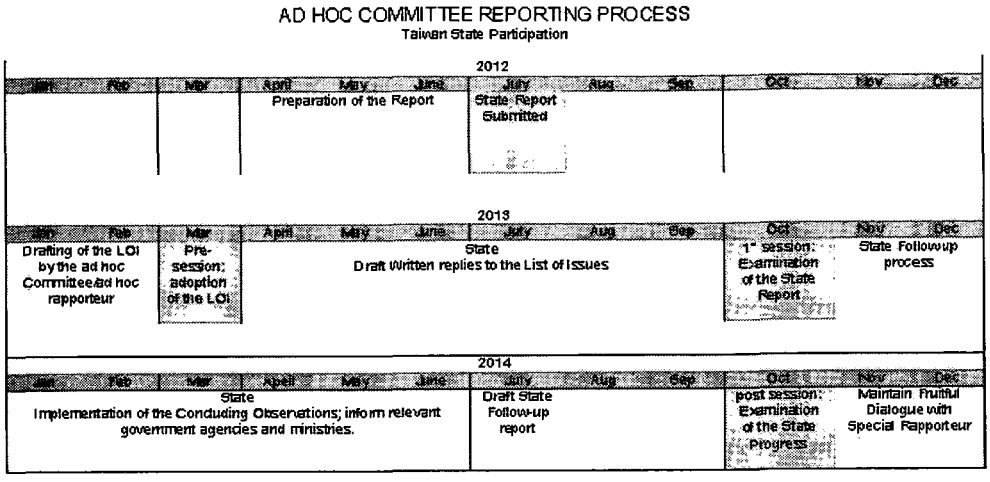
201. *See generally* GUIDELINES, *supra* note 153.

202. *See infra* Figure 1.

203. *Id.*

204. These committees may be combined. *See infra* Part VI.

Issues.[205] Below is a chart with the timeline for State reporting suggested above.[206]



V. NGO REPORTING PROCESS

There is no doubt that NGOs have held an increasingly prominent role in the Covenant reporting process.[207] The Human Rights Committee encourages NGOs to provide detailed, country-specific reports on States parties whose reports will be reviewed by the Committee.[208] The Committee also invites NGOs to submit reports to the country task forces in charge of drafting the lists of issues.[209] Breakfast or lunchtime briefings are often organized for the members of the Human Rights Committee so that NGOs can have a personal dialogue with and provide current information to the members.[210] NGOs also are important once the concluding observations have been issued.[211] Among the activities in which NGOs are engaged after the issuance of the concluding observations are reporting the steps taken by the government to the Human Rights Committee or CESCR, lobbying national government for the effective implementation of the concluding observations, and raising awareness about the

205. *See infra* Figure 2.

206. Figure 1 source: Author.

207. *See* Comm. on the Elim'n of Discrim'n Against Women [CEDAW], *Statement by the Committee on the Elimination of Discrimination Against Women on its Relationship With Non-governmental Organizations* paras. 5-7, 45th Sess. (2010), *available at* http://www2.ohchr.org/english/bodies/cedaw/docs/statements/NGO.pdf.

208. Office of the U.N. High Comm'r for Human Rights, Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process, para. 112, U.N. Doc. HRI/ICM/2010/2 (May 10, 2010).

209. *Id.*

210. *Id.* para. 117.

211. *See generally* GUIDELINES, *supra* note 153.

concluding observations through media and other appropriate outlets.[212] Therefore, at each step of the reporting process, it is important for NGOs to be actively involved in providing region-specific information.[213] Taiwan has a number of national NGOs with the capacity to provide detailed reports to the ad hoc Human Rights Committee.[214] These NGOs are capable of and should be pro-active in providing useful information in every aspect of the reporting process.

A. Consulting NGOs

As stated above, the Human Rights Committee welcomes NGO reports.[215] In the case of Taiwan,

> It is clear that NGOs and citizens have been pivotal in mediating international human rights and domestic constitutional/legal rights. In the course of their rights advocacies, they have taken commitments as well as responsibilities to make Taiwan into part of international human rights community and incorporating these international human rights laws firmly into the domestic legal soil. What these NGOs have built is not merely a domestic constitutional regime providing only domestic constitutional protections for individual rights. Rather, with their domestic/transnational natures of agency, they have built an intermediating transnational/constitutional regime where both international and domestic human rights laws meet with each other.[216]

The change has not been easy, but the following commitments by NGOs paved the way for greater progress in the area of human rights.

In the late 1980s NGOs began pushing for the enactment of the Convention on the Rights of the Child (CRC).[217] These NGOs asked the government to formally recognize the CRC and to enact or revise domestic laws in accordance with its provisions.[218] Their demands were heard, and the

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212. *Id.* at 14-15.

213. *See generally id.*

214. *Infra* note 225. For detailed information regarding NGOs in Taiwan, see Ministry of Foreign Affairs, *About NGO Affairs Committee*, TAIWANNGO.TW, http://www.taiwanngo.tw/english/about.asp (last visited Jan. 14, 2012).

215. *See* CEDAW, *supra* note 207.

216. Chang, *supra* note 8, at 229.

217. Chang, *supra* note 8, at 222-23. Among these NGOs are the Garden of Hope Foundation, Taiwan Branch of the International Campaign to End Child Prostitution in Asian Tourism (ECPAT Taiwan), Taipei Women's Rescue Foundation (TWRF), and the Rainbow Project of the Presbyterian Church in Taiwan. *Id.* at n.59.

218. Chang, *supra* note 8, at 222-23.

Government of Taiwan amended its Child Welfare Act[219] to reflect many of the CRC principles embodied.[220] This ultimately led to full compliance with the CRC in 1993.[221]

> [T]he CRC has since occupied a prominent normative status regarding rights of the child. In all subsequent legal processes, whenever relevant laws were to be made or amended, the CRC has been always referred to and even served as a firm ground for such legal change. Even the Constitutional Court referred to it twice in constitutional interpretations related to children's rights.[222]

In August 2004 numerous NGOs joined forces, forming a league for promoting the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[223] The League pressed the issue of CEDAW accession with the Government of Taiwan, and on January 5, 2007, the Legislative Yuan passed the accession.[224] This NGO coalition was also key in lobbying the government for its initial state report, which was published in March 2009.[225]

The increased involvement of NGOs in lobbying the Taiwanese government to ratify these agreements should continue under the Taiwan Act.[226] It is also highly important that Taiwanese NGOs be actively involved in providing relevant information regarding the Covenants.[227]

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219. Ertong ji Shaonian Fuli yu Qianyi Baozhang Fa (兒童及少年福利與權益保障法) [Children and Youth Welfare Act] (amended May 12, 2010) (Taiwan).

220. Chang, *supra* note 8, at 222-23.

221. *Id.*

222. *Id. See also* Int'l Campaign to End Child Prostitution in Asian Tourism, *[O]rigin and History*, ECPAT TAIWAN, http://www.ecpat.org.tw/english/history.htm (last visited Jan. 14, 2012) (discussing issues relating to children's rights).

223. Chang, *supra* note 8, at 225. These included NATWA, the Awakening Foundation, the Taipei Chapter of the Awakening Foundation, Chang Fo-Chuan Center for the Study of Human Right, Human Rights Program Center at Soochow University, Women's Research Program Center at National Taiwan University, ECPAT Taiwan, Taiwan Women's Film Association, the Garden of Hope Foundation, and the Taiwanese Feminist Scholars Association. *Id.*

224. *Id.* at 226 & n.82

225. *Id.*

226. "These NGOs and citizens . . . advocated much more strongly for treaty accessions as well as domestic statutory incorporation. Even after the attempts at accession failed, these NGOs continued pressing the government to voluntary compliance with the treaties and incorporation into domestic laws. In the course of their rights advocacies, these NGOs and citizens have become much more informed, more transnational in their knowledge and connections, and last but not the least, pivotal in mediating transnational /constitutional norms." *Id.* at 228.

227. *See generally* GUIDELINES, *supra* note 153.

B. Follow-up Procedures and NGO Involvement

Once the concluding observations have been issued, "[t]he [Human Rights] Committee may request the State party to give priority to such aspects of its concluding observations as it may specify."[228] Regarding "such aspects," the Special Rapporteur for follow-up on concluding observations, Sir Nigel Rodley, has suggested:

> Once the follow-up information has been received by the Special Rapporteur, he undertakes an assessment, with the assistance of the Secretariat, by carefully analysing whether all the recommendations of the Committee which were selected for follow-up have been addressed by the State party. Based on this assessment, the reply is classified as incomplete, partially incomplete or complete. *Where information from non-governmental organizations is available, it is also taken into consideration in the Special Rapporteur's assessment.* Currently, most follow-up information provided is classified as partially incomplete and, based on such finding, the Special Rapporteur sends a letter to the State party requesting additional information, detailing the exact information needed by the Committee. A draft letter is provided by the Secretariat.[229]

It is therefore important that NGOs are involved in the follow-up process, not only to fulfill reporting obligations but also to inform the public of Covenant challenges.

The Special Rapporteur classifies the State follow-up information according to the following five categories: (1) "Largely satisfactory," (2) "Cooperative but incomplete," (3) "Recommendation(s) not implemented," (4) "Receipt acknowledged," or (5) "No response."[230] Basically, the Special Rapporteur should remain in contact with a State until the next periodic report is due, and that State's cooperation should be noted in the next concluding observations.[231] NGOs should also maintain contact with the State and Special Rapporteur so they may provide relevant information to the public. Communications between the Special Rapporteur and the States parties are published on the High Commissioner for Human Rights website, and it is

228. U.N. Human Rights Comm., Rules of Procedure of the Human Rights Committee, R. 71(5), U.N. Doc. CCPR/C/3/Rev.8 (Sept. 5, 2005).

229. *Paper of the Special Rapporteur for Follow-up on Concluding Observations: Strengthening of the Follow-up Procedure*, para. 5, U.N. Doc. CCPR/C/CCPR/C/95/3 (July 2, 2009) (emphasis added).

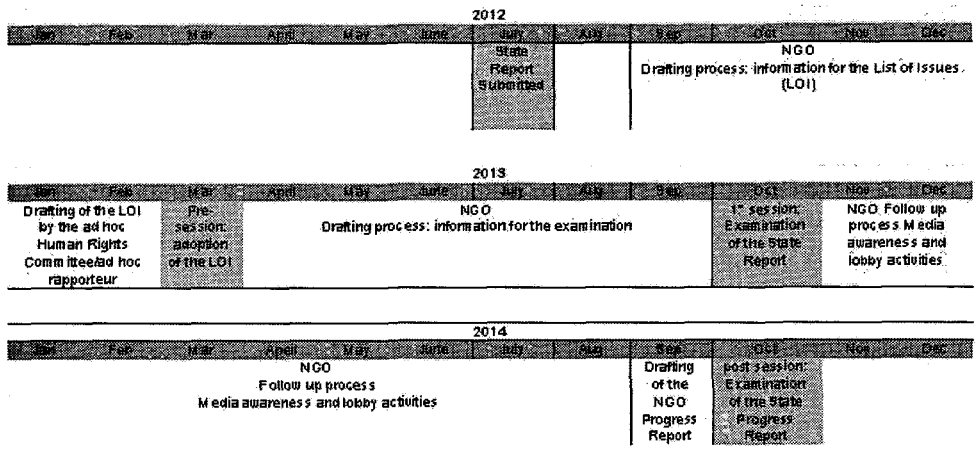
230. *Id.* para. 32.

231. *See id.* paras. 31, 33.

important for NGOs to be aware of these communications and to transmit this information to the relevant authorities and media outlets.[232] The website contains country specific information as well as follow-up information for all States parties.[233] Equally as important, Taiwan must be aware of the communications of the ad hoc Rapporteur in order to aid in appropriate lobbying of relevant governmental bodies.[234] The Government of Taiwan should maintain a similar website so that stakeholders may be aware of similarly relevant information.

Additionally, the UN Office in Geneva maintains a website that contains press releases and meeting summaries.[235] These summaries are fairly comprehensive and are valuable for NGOs who cannot attend Human Rights Committee sessions.[236] This Note suggests Taiwan have a similar media outlet so that NGOs and media outlets may stay current with issues during the reporting to the ad hoc committees.[237] Below is a chart reflecting the suggested NGO reporting timeline.[238]

AD HOC COMMITTEE REPORTING PROCESS
Taiwan NGO Participation



232. *Id.* para. 34.

233. *See* Office of the High Comm'r for Human Rights, *Human Rights Bodies*, OHCHR.ORG, http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (last visited Jan. 14, 2012).

234. Lobbying activities have been seen as an important means to ensure Covenant rights. *See* GUIDELINES, *supra* note 153, at 15.

235. *See* U.N. Office at Geneva, *Press Releases & Meeting Summaries*, UNOG, http://www.unog.ch/80256EDD006B9C2E/%28httpPages%29/CBD301FF98AF69B980256EE700376D86?OpenDocument&count=10 (last visited Jan. 14, 2012).

236. *See id.*

237. Currently, a non-profit umbrella organization called "Covenants Watch" maintains updates on Covenant activities. *See* COVENANTS WATCH, http://covenants-watch.blogspot.com/ (last visited Jan. 14, 2012).

238. Figure 2 source: Author.

VI. MAKEUP OF THE AD HOC COMMITTEE(S)[239]

Articles 28 and 31 of the ICCPR refer to the composition of the Human Rights Committee.[240] Article 28 states that the eighteen-member Committee "shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience."[241] In addition, Article 28 provides that Committee members serve in their personal capacity and not on behalf of a country.[242] The Secretary-General of the UN invites States parties to submit nominations for Human Rights Committee membership.[243] The Secretary-General then submits a list of the nominees to the current Committee for a vote.[244] Article 31 states that "[t]he Committee may not include more than one national of the same State" and, further, that "consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems."[245]

The UN Economic and Social Council (ECOSOC) created the CESCR to monitor ICESCR implementation by State parties.[246] ECOSOC resolution 1985/17 states that "[t]he Working Group established by [ECOSOC] decision 1978/10 and modified by Council decision 1981/158 and resolution 1982/33 shall be renamed 'Committee on Economic, Social and Cultural Rights.'"[247] The renamed committee should have eighteen human rights experts elected for a term of four years[248] by the Council from nominees submitted by States parties.[249] Similar to the Human Rights Committee, the CESCR shall give due consideration "to equitable geographical distribution and to the representation

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239. Ideally, there would be two committees – one for the ICCPR and one for the ICESCR. *But see* Dommen, *supra* note 184, at 483 ("What is needed, in my opinion, is the consolidation of the six committees into two bodies: one with power to review country reports under all six treaties, the other to deal with individual communications under the treaties that confer such jurisdiction.").

240. *See* ICCPR, *supra* note 4, arts. 28, 31.

241. *Id.* art. 28, para. 2.

242. *Id.* art. 28, para. 3.

243. *Id.* art. 30, para. 2.

244. *Id.* art. 30, para. 3.

245. *Id.* art. 31, paras. 1-2. Considering the requirements of article 31, the so-called Presidential Office Human Rights Consultative Committee cannot be the body that *reviews* the implementation of the Covenants. This body is there to "implement the covenants" and not to oversee the review of the implementation. Consultative Committee, *supra* note 168.

246. U.N. Econ. & Soc. Council Res. 1985/17, Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, pmbl., para. a, 22nd plen. mtg., May 7-31, 1985, ECOSOC, Supp. No. 1, U.N. Doc. E/1985/85, at 15 (May 28, 1985).

247. *Id.*

248. *Id.* para. c(i).

249. *Id.* para. b.

of different forms of social and legal systems."[250]

For Taiwan, this Note recommends that an ad hoc coalition of both international and domestic academics and NGOs convene to prepare a list of nominees for one or more ad hoc committees. This list, along with the *curricula vitae* of nominated parties, should then be voted on by the ad hoc coalition, resulting in around twenty members for each ad hoc committee.

Rule 17 of the Rules of Procedure of the Human Rights Committee states that the "Committee shall elect from among its members a Chairperson, three Vice-Chairpersons and a Rapporteur."[251] These officers are normally elected for a term of two years, but this Note recommends that the ad hoc committee officers be elected for four years to account for the time it will take Taiwan to go from initial report to follow-up report.[252] The procedures also provide for Human Rights Committee appointed special rapporteurs.[253] These rapporteurs may have the specific function of communications under the Optional Protocols, which does not apply to Taiwan.[254] The third rapporteur is in charge of the follow-up to the Concluding Observations, which is crucial to the reporting process.[255] Ultimately, Taiwan's ad hoc committee should mirror as much as possible the composition of the Human Rights Committee and the CESCR.

A. Duty to Create and Importance of the Ad Hoc Committee(s)

The purpose of the meeting with the reporting State is to "establish a constructive dialogue between the Committee and the State Party."[256] The Human Rights Committee and the CESCR are neither judicial nor quasi-judicial but are there to "assist States Parties in fulfilling their obligations under the Covenant, to make available to them the experience the committee has acquired in its examination of other reports and to discuss with them any issue related to the enjoyment of the rights enshrined in the Covenant."[257] The ad hoc committee too should exist to engage representatives in fruitful dialogue.[258]

The Human Rights Committee has noted that its task is to "supervise and monitor the implementation of Covenant obligations by States parties."[259] Since the Committee is made up of actors from all over the world, there is no "single

250. *Id.* para c(ii).
251. U.N. Human Rights Comm., *supra* note 228, R.17.
252. *Id.* R.18.
253. *Id.* R.95(3).
254. *Id.* R.101.
255. *Id.* R.97.
256. *Manual*, *supra* note 11, at 262.
257. *Id.*
258. *Id.*
259. Office of the U.N. High Comm'r for Human Rights, Civil and Political Rights: The Human Rights Committee 14, Fact Sheet No. 15 (May 2005), http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf.

geographical or national perspective, the Committee speaks with a global voice."[260] Similarly, Taiwan should strive to have an ad hoc committee made up of international actors with specialties in human rights;[261] the intent being to mirror, as much as possible, the philosophy of the Human Rights Committee and the CESCR.[262]

B. Lessons from the CEDAW Ad Hoc Committee

In Taiwan, the CEDAW was ratified by the Legislature and signed by the President in 2007.[263] Professor Wen-Chen Chang notes that the accession "was passed by an overwhelming parliamentary majority . . . ."[264] The first official State CEDAW report was published in March 2009 and addressed the substantive articles in the Convention, including an overview of the island.[265] Further, an international symposium was organized with the aim of having independent experts examine the reports, much like if a state were to submit its report to the CEDAW in Geneva.[266] The three ex-CEDAW committee members were invited to this symposium and published their findings.[267] Taiwan should use a similar approach but should include more committee members.[268] As with the ad hoc committee's membership and philosophy, this Note recommends that Taiwan aim to mirror the procedure of the UN committees.[269]

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260. *Id.*

261. This Note accepts that the current system of reporting to the UN is sufficient. *But see* Dommen, *supra* note 184, at 483 ("In short, the current UN treaty body system with its six committees, ranging in size from ten to twenty-three members, and a mandate calling for the administration of six human rights treaties with frequently overlapping human rights guarantees, is every day less able to discharge its responsibilities.").

262. Taiwan's previous experience with the CEDAW ad hoc committee was less than ideal; the Committee had only three members. *See* NAT'L ALLIANCE OF TAIWAN WOMEN'S ASSOC'NS, http://www.natwa.org.tw/ (last visited Jan. 14, 2012).

263. *Id.*

264. *Id.* at 221.

265. *Id.*; *Initial Report of Republic of China (Taiwan)*, CEDAW, (Mar. 25, 2009), *available at* http://www.womenweb.org.tw/doc/CEDAW_Initial_Report.pdf.

266. Chang, *supra* note 8, at 226.

267. *See* Dr. Anamah Tan et al., *Findings of the Taiwan CEDAW Committee*, FOUND. WOMEN RTS. PROMOTION & DEV. (Mar. 27, 2009), http://wrp.womenweb.org.tw/Uploads/%7B18F510E4-B8B8-4920-8F7D-12F8EE2189CE%7D_CEDAW%E5%BD%99%E6%95%B4NEW+%E6%A2%9D%E6%96%87.pdf.

268. Taiwan had three foreign experts, but the CEDAW is comprised of 23 experts. For a general discussion regarding the CEDAW committee, see Hanna Beate Schöpp-Schilling, *Treaty Body Reform: The Case of the Committee on the Elimination of Discrimination Against Women*, 7 HUM. RTS. L. REV. 201 (2007).

269. In addition, the Human Rights Committee has often emphasized the importance of civil society input. *See* GUIDELINES, *supra* note 153, at 12.

VII. CONCLUDING REMARKS

Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. "It is possible," answers the doorkeeper, "but not at this moment."[270]

- Franz Kafka, *Before the Law*

Taiwan pays a high level of respect to the human rights of its citizens, and making its laws conform to higher human rights standards is at the forefront of judicial activity.[271] The Constitutional Court notes that "[t]he maintenance of personal dignity and the protection of personal safety are contained in the Universal Declaration of Human Rights, and are also two of the *fundamental concepts* underlying [Taiwan's] constitutional protection of the people's freedoms and rights."[272] Referencing and incorporating international instruments in Taiwan is not a new concept.[273] In a single Interpretation, the Constitutional Court reference the Sixth Amendment to the United States Constitution, Article 37-II of the Japanese Constitution, Article 304 of the Code of Criminal Procedure of Japan, Article 239 of the Code of Criminal Procedure of Germany, Article 6-III(iv) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 14-III(e) of the International Covenant on Civil and Political Rights.[274] Other Interpretations reference Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedom, Article 9 of the International Covenant on Civil and Political Rights, and Article 7 of the American Convention on Human Rights.[275] Such references have helped legitimize international instruments in Taiwan's domestic legal system.[276]

Since Taiwan is of a civil law tradition, it should grant at least an equal normative status to human rights treaties like the ICCPR and ICESCR.[277] There should be no "question of the supremacy of one system of law over the other" because each is "supreme in its own sphere."[278]

But human rights law, indeed, may be superior to the Taiwanese legal

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270. Franz Kafka, *"Before the Law," The Trial, reprinted in* LAW AND LITERATURE: TEXT AND THEORY 255 (Lenora Ledwon ed. 1996).

271. *See History*, JUD. REFORM FOUND, http://www.jrf.org.tw/newjrf/english.htm (last visited Jan. 14, 2012). The Judicial Reform Foundation "aims to reform and improve the judicial system." *Id.*

272. J.Y. Interpretation No. 372 (Feb. 24, 1995) (emphasis added).

273. *See supra* Part II.

274. J.Y. Interpretation No. 582 (July 23, 2004).

275. *See, e.g.*, J.Y. Interpretation No. 392 (Dec. 22, 1995).

276. *See supra* note 139-50 and accompanying text.

277. Waters, *supra* note 74, at 641.

278. Slyz, *supra* note 107, at 68.

order.[279] Since "no theoretical barrier exists to applying international law,"[280] the Taiwanese legislature, through the Taiwan Act, should be bound by the requirements of the ICCPR and ICESCR in enacting legislation.[281] The next four years are crucial for Taiwan to prove its commitment to the Covenants.

The incorporation of the ICCPR and ICESCR into domestic law has provided Taiwan with an exciting opportunity to hold itself accountable for human rights issues and to realize further protections of human rights already enjoyed to a large extent by Taiwanese citizens.[282] This Note has legitimized Taiwan's domestic implementation of these international human rights instruments [283] and has given suggestions for proper reporting procedures under each Covenant's mandate.[284] Already, the commitments of Taiwan's Constitutional Court, legislature, NGOs, and stakeholders have been pivotal in imbedding international human rights norms into the domestic legal landscape.[285] The formation of ad hoc committee(s) in conjunction with other foreign experts can facilitate a fruitful and constructive dialogue between these actors so that the human rights situation in Taiwan may become even stronger.[286] The international community should, indeed must, respect this implementation and provide its honest scrutiny of the ongoing implementation of Covenant rights into Taiwanese domestic law.

279. *Id.* at 67-68.

280. *Id.*

281. *Id.*

282. For current information regarding the Covenants in Taiwan, see COVENANTS WATCH, *supra* note 238.

283. *See supra* Parts II, III.

284. *See supra* Parts IV, V.

285. Chang, *supra* note 8, at 229.

286. *See id.*

AUTOMATIC INFORMATION EXCHANGE AS A MULTILATERAL SOLUTION TO TAX HAVENS

Tyler J. Winkleman*

"In theoretical physics, dark matter is the stuff in the universe that we can identify only by its gravitational pull. [In theoretical economics], dark matter is foreign wealth, the existence of which we can infer from the income it provides."[1] On April 9, 1998, the Organization for Economic Cooperation and Development (OECD) issued a report spotlighting countries that facilitate the accumulation of dark matter.[2] Generally referred to as "tax havens," these countries are problematic not only to economists, who are forced to infer the amount of wealth held within their jurisdictions, but also to the international community;[3] tax havens facilitate tax avoidance, tax evasion, and criminal activity, such as money laundering and embezzlement.[4]

Tax avoidance and tax evasion jeopardize government revenues worldwide.[5] U.S. revenue losses have been estimated at $100 billion a year, and many European countries suffer losses exceeding billions of euros.[6] "Individually tax havens may appear small and insignificant, but in combination they play an important role in the world economy."[7] This is especially true in the financial services industry,[8] where the use of tax havens is particularly relevant.[9] Because all industries utilize banks and insurance companies, the scope of the financial services industry and the resulting influence of tax havens on the global economy are particularly broad.[10] For example, offshore entities were integral to the Enron and Bayou Management

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1. *America's Dark Materials*, THE ECONOMIST (Jan. 19, 2006), http://www.economist.com/node/5408129.

2. ORG. FOR ECON. CO-OPERATION & DEV., HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE, (1998), http://www.oecd.org/dataoecd/33/0/1904176.pdf [hereinafter OECD].

3. RONEN PALAN ET AL., TAX HAVENS: HOW GLOBALIZATION REALLY WORKS 238 (Eric Helleiner & Jonathan Kirshner eds., 2010).

4. *Id.*

5. Background Info. for Press Briefing, OECD, Promoting Transparency and Exchange of Information for Tax Purposes, para. 1 (Jan. 19, 2010), *available at* http://www.oecd.org/dataoecd/26/28/44431965.pdf.

6. *Id.*

7. PALAN ET AL., *supra* note 3, at 3.

8. *See* Lynnley Browning, *An Offshore Spotlight for Madoff*, N.Y. TIMES, Dec. 31, 2008, at B1.

9. *Id.*

10. *Id.*

investment scandals in 2001 and 2005, respectively.[11]

While the OECD's report was issued over a decade ago, it has regained relevancy since the organization's "campaign to regulate international tax competition" failed in 2002.[12] "The near-collapse of the West's banking industry [in 2008] has drastically increased governments' need to raise funds, brutally exposed the risks inherent in small countries with large financial sectors, and raised questions about the role of offshore centres in destabilizing the [economic] system."[13] Tax havens are once again under heavy attack,[14] and the OECD's report listed four key factors to help identify such harmful, preferential regimes.[15] This Note focuses on two of the four listed factors—lack of regime transparency and ineffective exchange of tax information. Specifically, this Note explores how effective exchange of information can remedy the lack of transparency problem.

Part I of this Note analyzes tax havens, their characteristics and controversial nature, and how they became the subject of international scrutiny. This Part first addresses the difficulty in defining tax havens and discusses their typical characteristics;[16] it then examines statistics about the relevance of tax havens with regard to the assets held within their jurisdictions.[17] Next, this Part chronicles the steps taken by the international community in response to the continual shift of assets into tax haven jurisdictions.[18] Finally, it discusses sovereignty, the influence of sovereignty on tax related matters, and why tax solutions should not implicate nations' sovereign rights.[19]

Part II examines the steps taken by the OECD to support regime transparency and the effective exchange of tax information among nations. This Part first provides a brief history of the OECD's campaign against harmful, preferential tax regimes[20] and then highlights the primary strength of the OECD's initiative—its inclusive definition of key terms.[21] Finally, this Part discusses the weaknesses of the OECD's initiative, highlighting its failures to be truly multilateral and to require automatic exchange of information.[22]

Part III examines the steps taken by the European Union (EU) to support transparency and the effective exchange of information. This Part highlights the primary strengths of the EU's initiative, which are its call for automatic

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11. *Id.*
12. J. C. SHARMAN, HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION 1 (Peter J. Katzenstein ed., 2006).
13. Vanessa Houlder, *Harbours of Resentment*, FIN. TIMES, Dec. 1, 2008, at 11.
14. *Id.*
15. *See infra* Part I.A.
16. *See infra* Part I.A.
17. *See infra* Part I.B.
18. *See infra* Part I.C.
19. *See infra* Part I.D.
20. *See infra* Part II.
21. *See infra* Part II.A.
22. *See infra* Part II.B.

exchange of information and its multilateral nature.[23] This Part also discusses the initiative's weaknesses, including the under-inclusiveness of its key defined terms and its allowance of a withholding tax in lieu of automatic information exchange.[24]

Part IV offers a comparative analysis of the actions taken by the OECD and the EU[25] and proposes a hybrid approach for eradicating harmful, preferential tax regimes.[26] Part V addresses the political challenges of enacting such an approach, primarily, a requisite change in existing domestic secrecy laws.[27] It also discusses how the unrest in the Middle East may serve as a conduit to effectuating change in secrecy laws internationally[28] and how Ireland is primed to serve as an effective leader of that change.[29] Ultimately, this Note proposes that, in the wake of the worldwide financial crisis, there exists a window of political opportunity, which countries implementing austerity measures should seize in order to unite developed countries and tax havens in implementing a multilateral, mutually beneficial solution.[30]

I. TAX HAVENS

It is important to recognize that there are no hard and fast rules regarding what constitutes a "tax haven."[31] The term "lacks a clear definition, and its application is often controversial and contested."[32] Individual organizations have opted to categorize tax havens using different criteria,[33] resulting in varying lists that range from twenty to one hundred countries.[34] This Note utilizes the OECD's categorization.[35]

A. What is a Tax Haven?

The OECD categorizes tax havens according to four key factors: (1) "[n]o or low effective tax rates,"[36] (2) "'[r]ing-fencing' of regimes,"[37] (3) "[l]ack of

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23. *See infra* Part III.A.
24. *See infra* Part III.B.
25. *See infra* Part IV.A.
26. *See infra* Part IV.B.
27. *See infra* Part V.
28. *See infra* Part V.A.
29. *See infra* Part V.B.
30. *See infra* Part V.C.
31. *See* SHARMAN, *supra* note 12, at 21.
32. *Id.*
33. *See id.*
34. *Id.*
35. OECD, *supra* note 2, paras. 61-64.
36. *Id.* para. 61. "A low or zero effective tax rate on the relevant income is a necessary starting point for an examination of whether a preferential tax regime is harmful. A zero or low effective tax rate may arise because the schedule rate itself is very low or because of the way in which a country defines the tax base to which the rate is applied. A harmful preferential tax

transparency,"[38] and (4) "[l]ack of effective exchange of information."[39] A tax haven is identified by the requisite presence of the first factor, together with one or more of the remaining three,[40] and in June 2000, thirty-five jurisdictions qualified as tax havens under this analysis.[41]

There are generally three types of tax haven regimes: pure tax havens, liberal tax havens, and tax treaty havens.[42] Pure tax havens "have no direct taxes on income, profits or capital gains, death duties, succession taxes or gift and estate taxes."[43] Rather, they may levy employment, customs, duty, or real property taxes as well as corporate licensing or registration fees.[44] Liberal tax havens "tax income from domestic sources but exempt all income from foreign sources. [Thus, a] company incorporated in one of these havens can earn unlimited amounts of foreign source income without paying any local income tax."[45] Tax treaty havens are "parties to tax treaties under which they offer access to attractive markets to individuals and corporations who are not residents of the tax havens."[46] All three types of havens can be used to facilitate tax evasion or tax avoidance.[47]

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regime will be characterised by a combination of a low or zero effective tax rate and one or more [of the] other factors . . . ." *Id.* at 27, Box II.

37. *Id.* para. 62. "Some preferential tax regimes are partly or fully insulated from the domestic markets of the country providing the regime. The fact that a country feels the need to protect its own economy from the regime by ring-fencing provides a strong indication that a regime has the potential to create harmful spillover effects. Ring-fencing may take a number of forms, including: a regime may explicitly or implicitly exclude resident tax payers from taking advantage of its benefits"; or "enterprises which benefit from the regime may be explicitly or implicitly prohibited from operating in the domestic market." *Id.* at 27, Box II.

38. *Id.* para. 63. "The lack of transparency in the operation of a regime will make it harder for the home country to take defensive measures. Non-transparency may arise from the way in which a regime is designed and administered. Non-transparency is a broad concept that includes, among others, favourable application of the laws and regulations, negotiable tax provisions, and a failure to make widely available administrative practices." *Id.* at 27, Box II.

39. *Id.* para. 64. "The lack of effective exchange of information in relation to taxpayers benefiting from the operation of a preferential tax regime is a strong indication that a country is engaging in harmful tax competition." *Id.* at 27, Box II.

40. *Id.* para. 61.

41. OECD, TOWARDS GLOBAL TAX CO-OPERATION, at 17, (2000), http://www.oecd.org/dataoecd/25/27/44430257.pdf [hereinafter GLOBAL TAX CO-OPERATION]. The thirty-five jurisdictions were: Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia, Liechtenstein, Maldives, Marshall Islands, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, Samoa, Seychelles, St. Lucia, St. Christopher and Nevis, St. Vincent and the Grenadines, Tonga, Turks and Caicos, U.S. Virgin Islands, and Vanuatu. *Id.*

42. Charles R. Irish, *Tax Havens*, 15 VAND. J. TRANSNAT'L L. 449, 452 (1982).

43. Vincent P. Belotsky, Jr., *The Prevention of Tax Havens via Income Tax Treaties*, 17 CAL. W. INT'L L.J. 43, 53 (1987).

44. *Id.*

45. *Id.* at 54.

46. *Id.*

47. *Id.* at 50.

B. Why are Tax Havens Controversial?

The fact that the term "tax haven" lacks a clear definition has allowed harmful, preferential tax regimes to argue:

1. They are not tax havens;
2. It is not their fault that other parties use them as tax havens;
3. They are doing their best to cooperate with other countries to root out abuse; and
4. They are highly regulated economies.[48]

Understandably, nations whose taxes are being unlawfully evaded via tax havens view these contentions as controversial, and this controversy is amplified by the magnitude of wealth held offshore.[49] It has been estimated that $11.5 trillion of assets are held offshore and that the tax not paid on these assets exceeds $255 billion.[50]

"Statistics about tax havens are notoriously confusing" and vary significantly across the spectrum of tax haven definitions.[51] Moreover, data on offshore finance is often dramatically incomplete.[52] The Cayman Islands, for example, "does not report dollar amounts on nonbank activity," leaving its "huge investment and hedge fund industry off the official radar."[53] Despite such gaps, the Bank for International Settlements (BIS) has established itself as an abundant and growing source of offshore financial services information.[54]

BIS is a bank-controlled institution that records bank deposits by country.[55] According to its estimate in June 2004, offshore bank deposits total $2.7 trillion, nearly twenty percent of the $14.4 trillion in total bank deposits.[56] Notably, the BIS estimate includes only cash deposits,[57] meaning the $2.7 trillion does not reflect financial assets such as stocks, bonds, real estate, and interests held in private companies.[58] Applying a 3.5 ratio[59] of cash to total

48. PALAN ET AL., *supra* note 3, at 237.

49. *Id.* at 237-38. For the purposes of this Note, "offshore" means "legal space that decouples the real and the legal location of a transaction with an aim to avoid some or all kind of regulation (tax regulation, financial regulation, etc.)." *Id.* at 250.

50. Richard Murphy, Tax Research LLP, *The Price of Offshore*, TAX JUST. NETWORK (2005), http://www.taxjustice.net/cms/upload/pdf/Briefing_Paper_-_The_Price_of_Offshore_14_MAR_2005.pdf.

51. PALAN ET AL., *supra* note 3, at 46.

52. Martin A. Sullivan, *Tax Analysts Offshore Project*, 117 TAX NOTES 87, 87 (2007).

53. *Id.*

54. *Id.*

55. Murphy, *supra* note 50. More information on the BIS is available at the organization's website, http://www.bis.org.

56. *Id.* (citing data confirmed by the BIS on January 3, 2005).

57. *Id.*

58. *Id.*

financial assets to the cash deposits reported by BIS "yields a figure for total financial assets held offshore amounting to $9.45 trillion."[60] And after accounting for assets that are harder to value, such as real estate, the estimated value of assets held offshore begins to approach $12 trillion.[61]

C. How Did Tax Havens Become Subjected to International Scrutiny?

In May 1996 the heads of state of the G7 nations met in Lyon, France,[62] where they "called upon the OECD to 'develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases . . . .'"[63] The OECD reported back in 1998, issuing *Harmful Tax Competition: An Emerging Global Issue*.[64] The organization also established the Forum on Harmful Tax Practices,[65] which subsequently compiled a list of thirty-five jurisdictions deemed to be tax havens.[66] Further, the OECD recommended that its members implement a number of defensive measures against tax havens unwilling to cooperate with the OECD initiative.[67]

The alleged "tax havens" responded obstinately to the OECD's efforts. Their protests "included promises to not sign up for the initiative, publically challenging the OECD, and bilateral lobbying to more sympathetic OECD states."[68] These efforts helped soften the blow of the OECD initiative, which was further weakened by U.S. Treasury Secretary Paul O'Neill's criticism in a May 10, 2001 press release.[69] In relevant part, he stated:

[T]he underlying premise that low tax rates are somehow suspect and . . . the notion that any country, or group of countries, should interfere in any other country's decision about how to structure its own tax system [is troubling] . . . . [Consequently,] [t]he work of this particular OECD initiative . . . must be

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59. When examining the typical composition of net worth, "[t]he ratio of cash to total financial assets . . . [ranges from] 3.3 to 3.85." *Id.*

60. *Id.*

61. *Id.*

62. The Group of Seven that met at the 1996 Lyon Summit included: Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. Doug Saunders, *Weight of the World Too Heavy for these Shoulders; At This Year's G8 Summit, There's One Issue that Will Overshadow the Rest: A Growing Call for the Group's Abolition*, GLOBE & MAIL, July 5, 2008, at A10.

63. OECD, *supra* note 2, at 3, 7 (quoting OECD Ministerial Communiqué, May 1996).

64. *See id.* at 3. All but two OECD member nations approved the report; Luxembourg and Switzerland abstained. *Id.* at 73-78, Annex II.

65. GLOBAL TAX CO-OPERATION, *supra* note 41, para. 1, at 8.

66. *Id.* para. 17, at 17 (listing the thirty-five tax haven jurisdictions).

67. *Id.* para. 35, at 25.

68. Martin A. Sullivan, *Lessons from the Last War on Tax Havens*, 116 TAX NOTES 327, 328 (2007) [hereinafter *Lessons*].

69. *See* Press Release, U.S. Dep't of the Treasury, Statement of Treasury Secretary Paul O'Neill on OECD Tax Havens Project, PO-366 (May 10, 2001), *available at* http://www.treasury.gov/press-center/press-releases/Pages/po366.aspx.

refocused on the core element that is our common goal: the need for countries to be able to obtain specific information from other countries upon request in order to prevent the illegal evasion of their tax laws by the dishonest few. In its current form, the project is too broad . . . .[70]

D. Sovereignty

According to Treasury Secretary O'Neill, the OECD initiative had become too broad, in large part, because it was infringing on nations' sovereign rights.[71] Foundationally, "sovereignty" is defined by the existence of territory, people, and government,[72] and "[i]n possessing these elements, a sovereign state should display internal control and supremacy, along with external independence from other states."[73] But "states do not exercise unimpeded control over tax policy choices – they are influenced and constrained by the political economy within their own domestic system . . . and by the need to account for the implications of their tax rules globally . . . ."[74]

The issue of sovereignty weighs heavily on states considering international tax cooperation,[75] as it should: "the lack of absolute control does not render a state's interest in maintaining substantial control an implausible or irrational position . . . [and] an expression of interest in retaining more control over tax policy does not translate into a blanket unwillingness to cooperate."[76] It is therefore problematic that, of the four factors set forth by the OECD, only the existence of "low or no effective tax rates" is required to constitute a tax haven.[77] While tax rates may seem to be a logical starting point, "countries are highly reluctant to give up their right to set generally acceptable tax rates, because that right is a core attribute of sovereignty."[78]

Choice of tax rate implicates sovereignty on two fundamental issues, revenue and fiscal policy control.[79] "Taxes are necessary to raise revenue for public goods and infrastructure, as well as to provide other sorts of public

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70. *Id.*

71. *Id.*

72. Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 FLA. TAX REV. 555, 557 (2009).

73. *Id.*

74. *Id.* at 559.

75. Diane M. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT'L L. 155, 167 (2008) [hereinafter *What's at Stake*].

76. Ring, *supra* note 72, at 559-60.

77. OECD, *supra* note 2, para. 61, at 26.

78. Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1629 (2000).

79. *What's at Stake*, *supra* note 75, at 167.

services conducive to general welfare and economic growth."[80] Concurrently, "'[a]ny tax that produces revenue will in some way alter the social and economic order.' Taxes that only raise revenue without effecting other changes do not exist in the real world."[81] For example, a high excise tax on tobacco not only raises revenue but also discourages smoking.[82] Likewise, taxing investment income at a lower rate relative to other types of income raises revenue and encourages investing.[83]

In the context of tax havens, the relationship between revenue and fiscal policy "raise[s] important questions about the sovereign rights of smaller countries . . . [and] about the nature of sovereignty more broadly . . . ."[84] This is particularly true "where the rights of one state impinge, or are perceived to impinge, on the sovereign rights of other states . . . ."[85] "In these cases governments may find themselves in a 'prisoners dilemma' where they collectively would be better off by not offering incentives but each feels compelled to offer the incentive to maintain a competitive business environment."[86] If a nation's choice of tax rate merely implicated revenue, it would be difficult, at best, to achieve equilibrium among nations with differing perspectives on appropriate taxation rates.[87] But because tax rate sovereignty also implicates fiscal policy control, the balancing act is next to impossible.[88]

Due to the sovereignty issues inherent in discussions of a nation's choice of tax rate, the solution for tax havens should be sought outside the realm of setting tax floors. For the sake of analysis, this Note accepts Treasury Secretary O'Neill's proposition that the OECD initiative had become too broad and examines information exchange among countries as a remedy to illegal tax evasion in particular jurisdictions.[89]

II. THE OECD MODEL AGREEMENT

In 2002 the OECD published the *Agreement on Exchange of Information on Tax Matters* (*Model Agreement*) for Member States to utilize in forming Tax Information Exchange Agreements (TIEAs).[90] The *Model Agreement* serves as

80. *Id.* (quoting Kenneth L. Sokoloff & Eric M. Zolt, *Inequality and Taxation: Evidence from the Americas on How Inequality May Influence Tax Institutions*, 59 TAX L. REV. 167, 167-68 (2006)).

81. *Id.* at 168 (quoting Randolph E. Paul, TAXATION FOR PROSPERITY 214 (1st ed. 1947)).

82. *Id.* at 169, n.60.

83. *Id.* at 168-70.

84. PALAN ET AL., *supra* note 3, at 238.

85. *Id.*

86. OECD, *supra* note 2, para. 80, at 34.

87. *See What's at Stake*, *supra* note 75, at 167.

88. *See id.* at 168.

89. Press Release, *supra* note 69.

90. OECD, Agreement on Exchange of Information on Tax Matters, ch. I, para. 5 (2002), *available at* http://www.oecd.org/dataoecd/15/43/2082215.pdf.

a baseline for negotiations, and because the exchange of tax information can arise in both bilateral and multilateral agreements,[91] it offers countries the choice of negotiating with each individual tax haven (bilateral) or with a group of tax havens (multilateral).[92] Among the countries operating under the OECD guidelines in 2011, 511 maintained TIEAs.[93]

Aside from the transactional costs associated with negotiating either variety of TIEA, one fundamental principle becomes highly relevant in determining which type is preferable—asset shifting. Under a bilateral agreement, tax evasion will be thwarted only to the extent that tax evaders are unable to move their assets to a different tax haven.[94] As long as other tax havens are willing and able to accept the assets of tax evaders located in jurisdictions party to the bilateral agreement, the assets will simply shift to another tax haven, necessitating another bilateral agreement.[95] Each successive bilateral agreement likely will lead to a similar shift in assets, making tax haven status increasingly lucrative.[96] Consequently, successive bilateral agreement negotiations will become more and more difficult, as the negotiating tax haven will have more to lose.[97]

Under a multilateral agreement, however, tax evaders will have greater difficulty finding an acceptable tax haven to accept their shifted assets because multiple jurisdictions will be parties to the same agreement.[98] Even if non-parties to a multilateral agreement are willing and able to accept some assets, their ability to accommodate the glut of assets needing to be shifted will be far less likely than in a bilateral scenario.[99] Therefore, multilateral negotiations are less likely to suffer from the "hold-out" problem that might result from bilateral treaty negotiations.[100] While the *Model Agreement* includes both a "Bilateral Version" and a "Multilateral Version,"[101] this Note focuses on the latter due to the fundamental advantages of multilateral negotiations.

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91. OECD, MANUAL ON INFORMATION EXCHANGE: MODULE ON GENERAL AND LEGAL ASPECTS OF EXCHANGE OF INFORMATION, at 4-5 (2006), *available at* http://www.oecd.org/dataoecd/16/23/36647823.pdf [hereinafter MANUAL].

92. *Id.* at ch. I, para. 5.

93. *Tax Information Exchange Agreements (TIEAs)*, OECD, http://www.oecd.org/document/7/0,3343,en_2649_33767_38312839_1_1_1_1,00.html (last visited Feb. 2, 2012) (listing TIEAs by date of signature).

94. Steven A. Dean, *Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation*, 58 HASTINGS L.J. 911, 958 (2007).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 959.

100. *Id.* at 958.

101. MANUAL, *supra* note 91, ch. II.

A. Strengths of the Model Agreement

The *Model Agreement*'s primary strength is that it inclusively defines the term, "person," and the types of tax to which the agreement applies. According to Article 4, "'person' *includes* an individual, a company and any other body of persons."[102] By using the word "includes," the scope of the *Agreement* extends to all organizational structures, from trusts and partnerships to collective investment schemes.[103] This broad, inclusive definition of "person" prevents potential tax evaders from simply changing the form in which they hold their assets in order to circumvent the *Agreement*.[104] Another strength is that the *Model Agreement* broadly "applies to taxes on income or profits, taxes on capital, taxes on net wealth, and estate, inheritance or gift taxes."[105] By inclusively defining the various types of covered tax, the *Agreement* prevents potential tax evaders from choosing income-generating investments outside of its scope.[106]

B. Weaknesses of the Model Agreement

The *Model Agreement*'s primary weaknesses are that it is not truly multilateral in nature and that it does not require automatic exchange of information. While the OECD's model TIEAs include a "Multilateral Version,"[107] the *Model Agreement* concedes in its introduction:

> The multilateral instrument is not a "multilateral" agreement in the traditional sense. Instead, it provides the basis for an integrated bundle of bilateral treaties. A party to the multilateral Agreement would only be bound by the Agreement vis-à-vis the specific parties with which it agrees to be bound. Thus, a party wishing to be bound by the multilateral Agreement must specify in its instrument of ratification, approval or acceptance the party or parties vis-à-vis which it wishes to be so bound. The Agreement then enters into force, and creates rights and obligations, only as between those parties that have mutually identified each other in their instruments of ratification, approval or acceptance that have

102. *Id.* ch. II, art. 4, para. 1(c) (emphasis added).

103. *Id.* ch. III, para. 16.

104. For example, if the term "person" is limited in scope to individuals, then an individual with a bank account in a tax haven could set up a business entity, make a capital contribution consisting of the entire balance of their existing bank account, and continue to hold assets in the tax haven in the name of the entity in order to avoid the *Agreement*.

105. *Id.* ch. III, para. 8.

106. *See infra* notes 136-40 and accompanying text.

107. MANUAL, *supra* note 91, ch. II.

> been deposited with the depository of the Agreement.[108]

Thus, the OECD's "multilateral" TIEA actually serves as a "bundle of bilateral treaties," destroying the agreement's multilateral effectiveness.

Moreover, the OECD's Multilateral Version does not effectuate agreements between tax havens and developing countries.[109] Since an agreement based on this version will require tax havens to agree to be specifically bound to each negotiating country, in effect, developing countries will not have sufficient leverage to strike a deal with larger countries and will likely slow the process.[110] For the sake of efficiency, larger countries may instead choose to utilize the Bilateral Version, leaving developing countries without negotiating power and with no benefit from the agreement.[111]

Another weakness of the *Model Agreement* is that it "only covers exchange of information upon request (*i.e.*, when the information requested relates to a particular examination, inquiry or investigation) and does not cover automatic or spontaneous exchange of information."[112] "Automatic exchange of information . . . involves the systematic and periodic transition of 'bulk' taxpayer information by the source country to the residen[t] country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc)."[113] The alternative, exchange of information on request, "is a cumbersome process."[114] The requesting country must make a detailed case for the information "with the criteria set out in a lengthy legal document."[115] For example, the Bahamas-U.S. TIEA requires that

> requests for tax information be in writing and contain specified details that include the name of the person, the type of information requested, the period for which the information is requested, the likely location of the information, the applicable U.S. federal tax law, whether the matter is criminal or civil in nature, and the reasons for believing that the requested information is "foreseeably relevant or material" to

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108. *Id.* ch. I, para. 5.

109. Tax Justice Network, *Tax Information Exchange Agreements* sec. 4.7 (2009), http://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf.

110. *Id.* "[E]ven medium-sized developing countries like Chile, India or South Africa . . . would [lack] sufficient leverage to strike a good deal with, for instance, Switzerland, on similar terms to those struck between Switzerland and the [United States] or Germany." *Id.*

111. *Id.*

112. MANUAL, *supra* note 91, ch. III, para. 39.

113. OECD, MANUAL ON INFORMATION EXCHANGE: MODULE 3 ON AUTOMATIC (OR ROUTINE) EXCHANGE OF INFORMATION, at 3 (2006), *available at* http://www.oecd.org/dataoecd/61/19/40502506.pdf.

114. *Lessons*, *supra* note 68, at 332.

115. Tax Justice Network, *supra* note 109, sec. 5.1.

U.S. tax administration.[116]

"This means that the authorities requesting the information must already have a strong case even before they request the information."[117] It is therefore impossible "to follow up a suspicion without already having significant evidence."[118] Since the Multilateral Version of the *Model Agreement* makes automatic exchange of information optional and is not truly multilateral in nature, the steps taken by the OECD to support transparency and the effective exchange of information are less than optimal.

III. THE EU SAVINGS DIRECTIVE

In 2003, in response to "residents of Member States . . . [being] able to avoid any form of taxation in their Member State of residence on interest they receive[d] in another Member State,"[119] the Council of the EU adopted the *Savings Directive* "on [the] taxation of savings income in the form of interest payments."[120] The *Directive* is multilateral, and it generally provides for the automatic exchange of information. In those Member States that opted not to participate in the automatic exchange of information—Austria, Belgium, and Luxemburg—a withholding tax is levied as an alternative.[121]

A. Strengths of the Savings Directive

One of the *Savings Directive*'s primary strengths is its call for automatic exchange of information "at least once a year, within six months following the end of the tax year of the Member State of the paying agent, for all interest payments made during that year."[122] "Effective information sharing between jurisdictions . . . [has] a strong deterrent effect on companies and individuals hiding assets in tax havens and [assists] tax authorities in pursuing those who evade tax."[123] In contrast, inefficient information exchange provides "ample opportunities to hinder and block requests for information . . . ."[124] Because of the complexity of tax evasion cases, a delay in obtaining information could

116. *Lessons*, *supra* note 68, at 332.

117. Tax Justice Network, *supra* note 109, sec. 5.1.

118. *Id.*

119. Council Directive 2003/48, pmbl., para. 5, 2003 O.J. (L 157) 38 (EC) [hereinafter Savings Directive].

120. *Id.*

121. *Id.* art. 11, para. 1; art. 12, para. 1.

122. *Id.* art. 9, para. 2.

123. Letter from Actionaid et al. to Ministers of the Council of Development and Foreign Affairs of the EU (May 20, 2010), *available at* http://www.eurodad.org/uploadedFiles/CSO%20Recommendations%20for%20the%20EU%20Council%20Conclusions_DEV.pdf?n=6917.

124. Tax Justice Network, *supra* note 109, sec. 5.2.

extend beyond the expiration of the statute of limitations, spoiling the opportunity to litigate.[125] Therefore, if the end game is preventing and prosecuting tax evaders, information exchange must be automatic and prevent obstacles to accessing relevant information.

Another strength of the *Savings Directive* is its truly multilateral nature. A multilateral agreement enables larger members of the EU to leverage their economic and political prowess to compensate for smaller members.[126] For example, Germany, which had a Gross Domestic Product (GDP) of €2,498.8 billion in 2010, can compensate for Malta, which had a GDP of €6,245.8 million[127] and lacks the economic influence to bargain with countries in a superior negotiating position.[128] Significantly, the *Savings Directive* issues a multilateral call for automatic exchange of information without impinging Member States' sovereign rights to set their own tax rates.[129] The *Savings Directive* also has helped assess the interrelation of tax evasion and tax competition. Critics of the international effort to eradicate harmful, preferential tax regimes argue that it diminishes tax competition,[130] but to the contrary, the *Directive* has diminished tax evasion while "intensifying" tax competition in the EU.[131] Independent factors, such as reduced trade barriers, enhanced mobility of goods, labor, capital, and countries' inclination to seize opportunities to attract additional investment, support tax competition despite the eradication of tax havens.[132]

B. Weaknesses of the Savings Directive

The primary weakness of the *Savings Directive* is the under-inclusiveness

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125. Lee A. Sheppard, *Don't Ask, Don't Tell, Part 4: Ineffective Information Sharing*, 122 TAX NOTES 1411, 1412 (2009).

126. *See* Tax Justice Network, *supra* note 109, sec. 4.7.

127. *Gross Domestic Product at Market Prices*, EUROSTAT, http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&init=1&pcode=tec00001&language=en (last visited Dec. 16, 2011). In 2010 the Member States of the EU, in order from largest GDP to smallest, were as follows: Germany, France, United Kingdom, Italy, Spain, Netherlands, Turkey, Switzerland, Poland, Belgium, Sweden, Norway, Austria, Denmark, Finland, Portugal, Ireland, Czech Republic, Romania, Hungary, Slovakia, Croatia, Luxembourg, Slovenia, Bulgaria, Lithuania, Latvia, Cyprus, Estonia, Iceland, Macedonia, Malta. GDP statistics were unavailable for Liechtenstein, Montenegro, and Macedonia. *Id.*

128. *See* Tax Justice Network, *supra* note 109, sec. 4.7.

129. Unlike the OECD, whose starting point for analysis is "no or low effective tax rates," the EU's *Savings Directive* makes no mention of jurisdictions' effective tax rates.

130. *See generally* CHRIS EDWARDS & DANIEL J. MITCHELL, GLOBAL TAX REVOLUTION: THE RISE OF TAX COMPETITION AND THE BATTLE TO DEFEND IT (2008).

131. Oleksandr Pastukhov, *Counteracting Harmful Tax Competition in the European Union*, 16 S.W. J. INT'L LAW 159, 165-66 (2010).

132. *See id.*

of some of its key defined terms.[133] Article 1 provides:

> The ultimate aim of this Directive is to enable savings income *in the form of interest payments* made in one Member State to *beneficial owners who are individuals* resident for tax purposes in another Member State to be made subject to effective taxation in accordance with the laws of the latter Member State.[134]

Under this provision, the term, "savings income," is limited to "interest," and the term, "beneficial owner," is limited to an "individual."[135]

By narrowly defining "savings income" as "interest," all other forms of savings income escape the scope of the *Directive*.[136] Common forms include dividends, capital gains, and royalties.[137] Thus, by "moving [an] investment out of cash and into any other form of investment,"[138] or by "[p]utting the investment in an insurance 'coat' or 'wrapper,'"[139] the *Savings Directive* becomes inapplicable.[140] Since those forms of savings income are not covered by the *Savings Directive*, they are subject neither to the automatic exchange of information nor the withholding tax.

Likewise, by narrowly defining "beneficial owner" as an "individual," the *Savings Directive* becomes inapplicable to all other forms of ownership.[141] Common forms of ownership include recognized business entities, such as limited liability partnerships and trusts.[142] Limited liability partnerships are "tax transparent," having legal existence but no tax residence in a tax haven.[143] "This allows the separation of legal ownership of assets from the location of income arising from them."[144] By owning assets in a capacity other than as an "individual," beneficial owners will not be subject to the *Savings Directive*; thus, they are subject neither to the automatic exchange of information nor the withholding tax.

Another weakness of the *Savings Directive* is the withholding tax it imposes on countries choosing not to participate in automatic information

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133. *See* Tax Justice Network, *European Union Savings Tax Directive* sec. 8.1 (2008), http://www.taxjustice.net/cms/upload/pdf/European_Union_Savings_Tax_Directive_March_08.pdf [hereinafter *European Union Savings*].

134. Savings Directive, *supra* note 119, pmbl., para. 8 (emphasis added).

135. *See id.*

136. *European Union Savings*, *supra* note 133, sec. 8.2.3–4.

137. *Id.* sec. 8.2.3.

138. *Id.*

139. *Id.* sec. 8.2.4.

140. *Id.* sec. 8.2.

141. *European Union Savings*, *supra* note 133, sec. 8.2.1–2.

142. *Id.*

143. PALAN ET AL., *supra* note 3, at 88.

144. *Id.*

exchange.[145] The *Directive* requires non-participating countries to "levy a withholding tax at a rate of 15% during the first three years of the transitional period, 20% for the subsequent three years and 35% thereafter."[146] Further, it directs these states to "retain 25% of their revenue and transfer 75 % of the revenue to the Member State of residence of the beneficial owner of the interest."[147]

The withholding tax is intended to be an alternative to automatic information exchange, but in practice, it does not provide parties with a viable alternative. In 2010 the average top personal income tax rate in the EU was 37.5%.[148] Thus, even after the withholding tax increases to the *Savings Directive*'s 35% ceiling, a Member State of residence would only receive an effective tax rate of 26.25%,[149] well below the EU average. By choosing the withholding tax instead of automatic information exchange Member States of residence stand to lose an average of 11.25%[150] in tax otherwise owed to them.

Moreover, since one of the primary benefits of holding assets in an outside jurisdiction is the reduction in tax liability owed to the jurisdiction of residence, intuition[151] suggests that the vast majority of beneficial owners are subject to high personal income tax rates in their Member State of residence.[152] As a result, beneficial owners are presumably more likely to be residents of Member States with top personal income tax rates greater than the EU average. Even at 37.5%, beneficial owners stand to save 2.5% in tax by subjecting themselves to the *Savings Directive*'s 35% withholding tax rather than the top personal income tax rate of their Member State of residence. Depending on the amount of assets being held, 2.5% in tax savings alone could justify the use of an outside jurisdiction—and some tax evaders could save more.

For example, residents of Sweden, which imposes a top personal income

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145. *European Union Savings*, *supra* note 133, sec. 3.2.

146. Savings Directive, *supra* note 119, art. 11, para. 1.

147. *Id.* art. 12, para. 1.

148. EUROPEAN COMM'N, TAXATION TRENDS IN THE EUROPEAN UNION, at 8 (2010), *available at* http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2010/2010_main_results_en.pdf. The highest top personal income tax rate was 56% (Sweden) and the lowest was 10% (Bulgaria). *Id.* at 8, Graph 3. The countries included in the average are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. *Id.*

149. 35% × 75% = 26.25%.

150. 37.5% - 26.25% = 11.25%.

151. Due to a lack of transparency, information about beneficial owners as a class is largely unknown, and thus must be logically presumed or inferred. *See supra* notes 51-53 and accompanying text.

152. As a beneficial owner's personal income tax rate in their jurisdiction of residence lowers, so to does the beneficial owner's derived benefit from holding assets in an outside jurisdiction.

tax rate of 56%,[153] would stand to save 21%[154] in tax on interest income by holding their assets in an outside jurisdiction. By accepting its portion of the withholding tax rather than receiving information exchanged automatically, Sweden would stand to lose 29.75%[155] in tax that would otherwise be owed. Thus, while the withholding tax may make tax evasion less attractive, tax evaders could still realize substantial tax savings by opting for the withholding tax rather than automatic information exchange.

The *Savings Directive* also suffers from the inability to extend to tax havens outside of the EU.[156] The EU has asked Singapore, Hong Kong, Macao, Bermuda, and Barbados to participate, but thus far these countries have declined.[157] As long as there are other tax havens willing and able to accept the assets of tax evaders held in jurisdictions subject to the *Savings Directive*, the assets will simply shift outside the reach of the EU.[158] Overall, the EU's intent to support transparency and the effective exchange of information on a multilateral basis is optimal, albeit on a suboptimal scale.

IV. COMPARATIVE ANALYSIS AND RECOMMENDATION

A. Comparative Analysis

The main similarity between the OECD initiative and the EU initiative is their acknowledgement that transparency and exchange of information are paramount to curbing tax havens.[159] Their biggest difference is that the *Model Agreement* does not require the automatic exchange of information while the *Savings Directive* does.[160] On the surface, this distinction may appear to be of little consequence, but its impact on the initiatives' common goals reveals the ideality of automatic information exchange.

In order for a tax-evading individual's host nation[161] to request relevant information, the host nation must first know that the individual is evading taxes.[162] But with the secrecy laws currently in place in many tax havens, the

153. EUROPEAN COMM'N, *supra* note 148, at 9. Sweden has the highest top personal income tax rate of any European Union country. *See id.* at 8, Graph 3.

154. 56% - 35% = 21%.

155. 56% - 26.25% = 29.75%.

156. *See European Union Savings*, *supra* note 133, sec. 8.2.5.

157. *Id.* sec. 2.4.

158. *See generally* Dean, *supra* note 94, at 958.

159. *Compare* MANUAL, *supra* note 91, ch. III, para. 6, *with* Savings Directive, *supra* note 119, paras. 14-16.

160. *Compare* MANUAL, *supra* note 91, ch. III, para. 39, *with* Savings Directive, *supra* note 119, para. 15.

161. For the purposes of this Note, "host nation" means the tax evader's country of residence.

162. Tax Justice Network, *supra* note 109, sec. 5.1.

probability of the host nation learning of the tax evasion is very remote.[163] "Bank accounts in bank secrecy jurisdictions are ideal for concealment of illegally earned funds . . . or [other] funds that represent unreported income in the residence country. Even if the source of funds is completely legitimate, future earnings can be concealed from the home country's taxes."[164] As a result, request-based exchange of information is neither effective nor transparent. The OECD may point to the 511 TIEAs as progress, but because the TIEAs only require information exchange upon request,[165] the relationship between the tax haven and the host nation has not changed in a truly meaningful way since the implementation of those agreements.

Another difference of consequence between the two initiatives is the scope of authority of the OECD and EU. Since the EU has limited reach, its ability to prevent tax evasion is minimal; evaders can simply shift their assets to a jurisdiction outside the EU's sphere of influence.[166] The OECD, however, as an international body, has the influence to facilitate multilateral agreements for potentially every nation in the world while avoiding the perception of an inherent conflict of interest. Moreover, as a nongovernmental entity, the OECD can indirectly represent countries' "collective economic interest."[167] The EU, however, directly represents the interests of only its Member States.[168] Large nations such as the United States might balk at the idea of the EU leading the world in its quest to eradicate harmful preferential tax regimes, but a largely unaffiliated entity such as the OECD would allow countries to remain politically neutral should the initiative be successful.

B. Recommendations

It is this Note's recommendation that the OECD adopt a new standard modeled on the EU's *Savings Directive* with a few key changes. First, the new standard must have an inclusive definition of "income," including all common forms of savings income, such as interest, dividends, capital gains, and royalties.[169] This will prevent tax evaders from moving their investments into forms not covered by the initiative.[170] In addition, the new standard should define asset ownership to include recognized business entities, such as limited liability partnerships and trusts.[171] This will prevent tax evaders from changing

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163. *Id.* sec. 5.2.

164. Cynthia Blum, *Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail?*, 6 FLA. TAX REV. 579, 596 (2004).

165. Tax Justice Network, *supra* note 109, sec. 5.1.

166. *See supra* notes 156-58 and accompanying text.

167. Sullivan, *supra* note 52, at 327.

168. *Id.*

169. *See European Union Savings*, *supra* note 133, sec. 8.2.3-4.

170. *See id.*

171. *See id.* sec. 8.2.1–2.

the nature of their asset ownership to structures beyond the initiative's scope.[172]

Second, the OECD should eliminate the withholding tax as an alternative to automatic information exchange.[173] This would ensure that assets held within any jurisdiction party to the agreement are not evading tax.[174] While the withholding tax guarantees that host nations will receive some revenue from their tax evaders,[175] eliminating illegal tax evasion, rather than minimizing losses, should be the initiative's goal. The withholding tax also serves as a *de facto* tax floor, inviting accusations that the effort is infringing on nations' sovereign rights, eliminating tax competition, and seeking tax harmonization.[176]

Admittedly, eliminating the withholding tax alternative would deprive tax havens of their 25% withholding tax retention,[177] creating a problem for tax havens that depend on the revenue generated by offering tax haven jurisdiction. "[T]he majority of the tax havens . . . are very small jurisdictions; very few of them possess universities or research centers that teach the skills required to support a thriving global business community; and very few have local resources that would allow them to sustain a high standard of living."[178] Because they will need to generate revenue to assist in the transition to a legitimate economic system, some form of revenue must be assigned to them in any agreement.

This Note proposes that home jurisdictions share with a tax haven a percentage of the revenue generated by their exchange of information with that tax haven. The revenue sharing could operate much like the EU withholding tax, albeit inversely. Rather than sharing a lower percentage of revenue in the beginning and moving upward during a transitional period,[179] home jurisdictions should begin by sharing a high percentage of revenue and move downward. For example, revenue sharing could be 35% for the first three years, 20% for the subsequent three years, and 15% thereafter.[180] The shared revenue would represent tax to the home jurisdiction and would otherwise go uncollected. This "tax" could help the tax haven develop a legitimate economy, and as a result, its dependence on the revenue sharing would wane until the transitional period ultimately expired. The concept is similar to purchasing information in order to impose tax. Under a purchasing scheme, home jurisdictions would bargain with tax havens for the right to receive information

172. *See id.*
173. *See* Savings Directive, *supra* note 119, art 11.
174. *See supra* notes 148-55 and accompanying text.
175. Savings Directive, *supra* note 119, art. 12, para. 1.
176. *See generally* EDWARDS & MITCHELL, *supra* note 130, at 186-87.
177. *See* Savings Directive, *supra* note 119, art. 12, para.. 1.
178. PALAN ET AL., *supra* note 3, at 3.
179. Savings Directive, *supra* note 119, art. 11, para. 1.
180. This example is purely illustrative and intended to mirror the EU *Savings Directive*'s withholding tax. Serious consideration would be needed to determine what percentage of revenue to share, and into the length of the transition period.

regarding their taxpayers' income.[181]

Sharing the tax revenue generated in the home jurisdiction might be a lengthy and inefficient process, but it would solve many of the difficulties associated with purchasing tax information.[182] Instead of bargaining, setting the compensation for information at a percentage of newly generated tax revenue assures all parties that their compensation will be commensurate with their contribution. Tax havens currently sheltering the most assets would receive the most compensation, while those not currently sheltering assets would be prevented from holding out in an attempt to secure better payment for their information. Moreover, since the revenue sharing would decrease over the course of the transitional period, holdouts would stand to lose potential compensation by choosing not to cooperate with the initiative.

A multilateral revenue sharing arrangement would also prevent the potential hold-out problem that could arise from negotiating bilateral tax information purchases.[183] In these negotiations, purchasing the needed tax information would become progressively more expensive as more tax havens sold information,[184] and any tax havens refusing to sell would receive an influx of assets from individuals seeking information secrecy.[185] Consequently, negotiating each successive purchase of information would become increasingly expensive until the information is unaffordable and the process stalls.[186]

V. CHANGING SECRECY LAWS

The proposed tax information exchange standard will only be effective to the extent that a taxing authority possesses the information sought. In order for the taxing authority to access the information, countries must change their laws and administrative practices so that exchanging information for tax purposes is allowed.[187] "The changes to internal laws may be very significant and may depend on political approval . . . ."[188]

Critics commonly argue that changing secrecy laws constitutes an invasion of privacy.[189] Such arguments, however, are disingenuous because the

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181. Steven A. Dean, *The Incomplete Global Market for Tax Information*, 49 B.C. L. REV. 605, 659 (2008).

182. *See id.*

183. *Id.*

184. Dean, *supra* note 94, at 958.

185. *Id.*

186. *Id.*

187. Tax Justice Network, *supra* note 109, sec. 4.3.

188. *Id.*

189. *See* Daniel J. Mitchell, *An OECD Proposal to Eliminate Tax Competition Would Mean Higher Taxes and Less Privacy*, 21 TAX NOTES INT'L 1799, 1813 (2000) (arguing that "Financial privacy historically has been viewed as an essential safeguard of the citizen against the power of dictatorship.").

information is only shared by states to which taxpayers have availed themselves, and the information being shared is only that to which respective governments rightfully have access to.[190]

Antagonists also argue that privacy plays an important role in sheltering the assets of individuals under oppressive governments.[191] In fact, the Swiss "point to Nazi efforts to identify and seize Jewish assets in Swiss banks as the original basis for their financial secrecy statutes . . . ."[192] While such an argument may sound theoretically convincing, in reality, the primary motivation for holding assets in tax havens is not likely linked to the fear of their seizure by an oppressive government. Rather, it is the fear of a government taxing the earnings the assets generate. However, the inverse scenario, oppressive governments sheltering assets from their citizens, should be of greater concern.

A. The Middle East: A Cautionary Tale

Sovereign wealth funds "are actively managed, state-owned, and state-controlled investment funds."[193] They represent an alternative to "investing additional dollars domestically in infrastructure or distributing money to citizens," and "some developing countries . . . [use them] to amass resources, achieve higher financial returns, and gain a foothold in global capital markets."[194] In 2008, the countries controlling the largest sovereign wealth funds included Abu Dhabi, Saudi Arabia, and Kuwait.[195] The Abu Dhabi fund alone is valued at $875 billion.[196]

Given the amount of wealth Middle Eastern governments are sheltering from their citizens in sovereign wealth funds, civil unrest in that region highlights the potential harm secrecy laws present to the international community and provides an opportunity to generate support for their change. Beginning in December 2010, "mass protests . . . brought down [Tunisian] President Zine El Abidine Bin Ali[,] . . . toppled autocratic Egyptian President Hosni Mubarak, launched an armed rebellion against Libyan despot Moammar

190. Residents choosing to maintain citizenship in their host nation are implicitly authorizing their host nation to tax them accordingly. *See supra* notes 72-73 and accompanying text.

191. *Id.; See also* Mitchell, *supra* note 189, at 1813.

192. Ethan A. Nadelmann, *Unlaundering Dirty Money Abroad: U.S. Foreign Policy and Financial Secrecy Jurisdictions*, 18 U. MIAMI INTER-AM. L. REV. 33, 61 (1986).

193. Michael S. Knoll, *Taxation and the Competitiveness of Sovereign Wealth Funds: Do Taxes Encourage Sovereign Wealth Funds to Invest in the United States?*, 82 S. CAL. L. REV. 703, 706 (2009).

194. Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440, 454 (2009).

195. Knoll, *supra* note 193, at 707.

196. *Id.*

Gadhafi, and rattled governments in Yemen, Bahrain and elsewhere."[197] Amongst the embattled countries were regimes such as Libya's, which control a sovereign wealth fund valued at over $50 billion.[198] Other oil-rich monarchies tried to preempt protests by offering to distribute money to citizens.[199] Saudi Arabia offered social benefits for civil servants, a fifteen percent pay raise for state employees, and an increase in funds for housing loans; Bahrain offered a thirty percent reduction in the mortgage costs of 30,000 households; Oman offered a monthly allowance of $390 for each registered job seeker and gave orders to provide 50,000 new jobs; and Kuwait offered 1,100,000 citizens $3,570, free distribution of basic food items for fourteen months, and a 115% pay raise for servicemen.[200]

In the event of civil uprisings in these countries, newly installed democratic governments should be entitled to control of their country's respective sovereign wealth fund. However, tax havens and their secrecy laws present a significant obstacle to locating and gaining control of such funds. Even sovereign wealth funds that "are legally independent from the governments that own them . . . are not practically independent. When pressed, the managers of such funds are likely to act as their home country government wants them to act."[201] Should the leaders of Arab nations feel they are on the verge of being ousted, they could pressure the managers to transfer assets into tax havens with bank secrecy laws. Thereafter, the leaders could siphon assets from the fund and keep them within secrecy jurisdictions. This would ensure the leader would retain great wealth after being removed from power.

What is more, a significant percentage of Middle Eastern assets are already held in secrecy jurisdictions, increasing the likelihood that assets could be siphoned and making the siphoning process easier.[202] In their Global Wealth Report for 2003, Boston Consulting Group estimated that the Middle East and Asia had $10.2 trillion in total wealth, $4.1 trillion of which is probably held offshore.[203] This estimate was the highest monetary amount and the second highest percentage of total wealth of any continent's offshore holdings.[204] These

197. Karin Laub, *In Birthplace of Arab Uprising, Discontent Lingers*, WASH. POST (Mar. 12, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/12/AR2011031201289.html. While armed rebels fought for control of Libya, a separate battle for control of Libya's sovereign wealth fund was also underway. Landon Thomas Jr., *Libya's Hidden Wealth May Be Next Battle*, N.Y. TIMES, Mar. 4, 2011, at B1.

198. Fleischer, *supra* note 194.

199. Jacques Charmelot, *Oil-Rich Arab States Open Their Coffers*, AGENCE FRANCE-PRESSE, Feb. 27, 2011.

200. *Id.*

201. Knoll, *supra* note 193, at 708.

202. Murphy, *supra* note 50.

203. *Id.*

204. It was estimated that North America had total wealth of $16.2 trillion, $1.6 trillion of which was probably held offshore, or about ten percent of total wealth; Europe was estimated to have total wealth of $10.3 trillion, $2.6 trillion of which was probably held offshore, or about

assets rightfully belong to the citizens of the sovereign nations, and the inability to access them may serve as a catalyst for secrecy law reform.

B. Ireland: The Face of the Initiative

In order for the OECD to generate the political prowess necessary to change tax havens' internal secrecy laws, it will need to strategically select a country to serve as the "face" of the initiative. Because OECD initiatives typically suffer from the perception that Member States are favored at the expense of tax haven,[205] the organization struggles with an image of representing the "big guys against the little guys."[206] Inevitably, a new initiative will need "to achieve consensus within a diverse group [of] . . . countries,"[207] and Ireland may provide the best opportunity for leadership. Ireland is a country to which tax havens can relate and behind which they can rally.

In February 2007, Ireland "was one of the wealthiest countries in Europe, with a booming construction industry, an average per capita income of €200,000 ($270,000) and economic growth of 6% per year."[208] By February 2011, Ireland was "in a state of financial ruin, struggling under €95 billion ($130 billion) of debt, spiraling unemployment and a crippled housing market."[209] A coalition government led by Enda Kenny of the Fine Gael party gained control in parliament after the February 2011 national elections.[210] The coalition's 113-seat parliamentary majority is the largest majority in Ireland's history.[211] Prime Minister Kenny "vowed to solve a bank-bailout crisis that overwhelmed Ireland's finances and required an emergency rescue by the European Union and International Monetary Fund," saying, "terms of the EU-IMF loans must be renegotiated to make them more affordable for Ireland and enable that country's recovery from deficits and double-digit unemployment."[212]

In November 2010, Ireland agreed to borrow €85 billion from Member States of the EU through the European Financial Stability Fund, bilateral loans from the United Kingdom, Sweden, and Denmark, and the International

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twenty-five percent of total wealth; Latin America had total wealth of $1.3 trillion, $700 billion of which was probably held offshore, or about fifty-four percent of total wealth; the report estimated that $9 trillion in total was probably held offshore, roughly 23.7% of total wealth. *Id.*

205. SHARMAN, *supra* note 12, at 2.

206. *See* PALAN ET AL., *supra* note 3, at 213.

207. Avi-Yonah, *supra* note 78, at 1662.

208. Genevieve Carbery, *All Change as Ireland Goes to the Polls*, TIME (Feb. 25, 2011), http://www.time.com/time/world/article/0,8599,2053605,00.html.

209. *Id.*

210. Shawn Pogatchnik, *Enda Kenny Elected Ireland's Premier*, WASH. POST (Mar. 9, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/09/AR2011030900799.html.

211. *Id.*

212. *Id.*

Monetary Fund.[213] Ireland itself contributed €17.5 billion of the funds from their National Pension Reserve Fund, decreasing the amount of external assistance to €67.5 billion.[214] The borrowing was necessitated by the "high yields on Irish bonds," which "curtailed [Ireland's] ability to borrow. Without [the] external support, [Ireland] would not be able to raise the funds required to pay for key public services for [Irish] citizens . . . [or] provide a functioning banking system to support economic activity."[215] As a condition to lending the money, Ireland had to comply with EU mandates.[216] "The [2011] budget implement[ed] the first stage of the four-year National Recovery Plan . . . . It [sought] to trim €15 billion from Ireland's deficit to bring it under the EU-mandated level of 3 percent of GDP in 2014."[217] The National Recovery Plan "call[ed] for two-thirds of deficit reductions to come from spending cuts, with one-third to come from tax increases."[218] Under the National Recovery Plan, Ireland's corporate tax rate of 12.5% remained unchanged.[219]

Many Member States of the EU are unhappy with the fact that they are lending money to Ireland while its corporate tax rate remains unchanged, feeling as if they are subsidizing their competition.[220] After all, Ireland set the trend of tax competition in Europe "by resisting the EU pressure for tax harmonization and enacting a 12.5% corporate tax rate."[221]

The EU charge against Ireland's 12.5% corporate tax rate is led by France and Germany.[222] These nations have called "for a common consolidated corporate tax base (CCCTB), which would allow companies to use a single tax regime instead of the [EU's] 27 different corporate tax systems."[223] Prime Minister Kenny, however, has "made it perfectly clear" that "the corporation tax and the consolidated tax base are of absolute fundamental importance to Ireland and that [the country] could not concede any movement on [them]."[224] The proposition would not only undermine the competitiveness of Ireland's corporate tax base, but it would be an affront to popular opinion in Ireland,

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213. Government Statement, Gov't of Ir., Dep't of Fin., Announcement of Joint EU - IMF Programme for Ireland (Nov. 28, 2010), *available at* http://www.finance.gov.ie/viewdoc.asp?DocID=6600.

214. *Id.*

215. *Id.*

216. *Id.*

217. David D. Stewart, *Lenihan Announces Austere 2011 Budget*, 57 TAX NOTES INT'L 838, 838 (2010).

218. *Id.*

219. *Id.*

220. *See* Stephanie Berrong, *Irish Opposition Leader Responds to Proposed Eurozone Tax Reforms*, 61 TAX NOTES INT'L 564, 564 (2011).

221. Pastukhov, *supra* note 131, at 165-55.

222. Berrong, *supra* note 220, at 564.

223. *Id.*

224. *Id.*

which supports respecting national sovereignty on taxation.[225]

Ireland is noteworthy because it is a country with low corporate tax rates and is desperately in need of increased tax revenues. Residents of Ireland, which imposes a top personal income tax rate of 41%,[226] do not enjoy the same low tax rates as Irish corporations:

> As Europe's major economies focus on belt-tightening, they are following the path of Ireland. But the once thriving nation is struggling, with no sign of a rapid turnaround in sight. . . . [A]n economic collapse forced Ireland to cut public spending and raise taxes, the type of austerity measures that financial markets are now pressing on most advanced industrial nations. . . . Politicians [in Ireland] have raised taxes and cut salaries for nurses, professors and other public workers by up to 20[%]. . . . [Ireland] lured knowledge-based multinationals . . . with a 12.5[%] tax rate, giving Ireland one of the most export-dependent economies in the world. Now, the government is pinning nearly all its hopes on an export revival to lift the economy. . . . Many voters, having experienced the pain of austerity, are expected to express their anger in . . . [future] elections.[227]

As a country whose population is feeling the weight of tax burdens on an individual level, Ireland represents the type of political environment that presents an opportunity for those seeking the eradication of harmful preferential tax practices. While Ireland remains committed to retaining its sovereignty by maintaining its corporate tax rate, the EU's bailout of Ireland pressures the country to comply with EU mandates. Having been swept into power by the Irish people, Prime Minister Kenny has the political capital to lead the international effort against tax havens. If he hopes to keep solutions outside the realm of setting tax floors, Prime Minister Kenny should consider spearheading the campaign for multilateral, automatic exchange of tax information.

C. Conclusion

With countries throughout the world implementing austerity measures in the wake of the worldwide financial crisis and credit crunch, a window of

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225. *See* Charles Gnaedinger, *Irish Voters Approve Lisbon Treaty*, 56 TAX NOTES INT'L 96, 96-97 (2009).

226. EUROPEAN COMM'N, *supra* note 148, at 8, Graph 3. Ireland's top personal income tax rate is above the average European Union country's top personal income tax rate of 37.5%. *See id.*

227. Liz Alderman, *In Ireland, a Picture of the High Cost of Austerity*, N.Y. TIMES (June 28, 2010), http://www.nytimes.com/2010/06/29/business/global/29austerity.html?_r=1.

political opportunity has been opened through which international bodies such as the OECD can and should implement a new, truly multilateral agreement that facilitates the automatic exchange of tax information. This standard agreement should inclusively define its terms so that it *requires* automatic information exchange.[228] In order to aid in the legitimization of tax haven economies, the agreement should also require revenue sharing among its parties, and the revenue shared should represent a percentage of tax revenue realized as a result of tax information exchange.[229]

Prior to implementation, the bank secrecy laws of participating countries must be changed so that they can efficiently access each other's relevant tax information.[230] The unrest in the Middle East provides an opportunity to generate popular support for these changes.[231] In order to accomplish the politically difficult task of changing secrecy laws, countries such as Ireland will need to reach out to similarly situated countries throughout the world and articulate why reform is needed.[232] Ireland traditionally has lower tax rates but is badly in need of tax revenues, and in light of the increased political pressure international governing bodies have been able to place on Ireland for receiving bailouts during the financial crisis, the country should be eager to move the debate away from setting tax floors and to re-focus it on automatically exchanging tax information.[233] The increased revenue received from revenue sharing would be a much-needed stimulus in the interim, while allowing sovereign nations to retain their right to set and define tax rates in the future. Sovereign nations with low tax rates are not the problem; lack of transparency is the problem. The solution is effective exchange of information.

228. *See supra* notes 169-72 and accompanying text.
229. *See supra* notes 179-81 and accompanying text.
230. *See supra* notes 187-88 and accompanying text.
231. *See supra* Part V.A.
232. *See supra* Part V.B.
233. *See supra* notes 222-23 and accompanying text.