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The *Charming Betsy* Canon, American Legal Doctrine, and the Global Rule of Law

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ABSTRACT

In the 1803 The Schooner Charming Betsy *case, Chief Justice Marshall announced a canon of interpretation that "an act of Congress ought never to be construed to violate the laws of nations if any other possible construction remains." The* Charming Betsy *canon has become as venerable as its name is felicitous: as recently as 1988 the Supreme Court noted that the doctrine "has for so long been applied by this Court that it is beyond debate."*

After exploring the traditional justifications for Charming Betsy*, this Article proposes that the canon should be justified, not just by Congressional intent or separation of powers, but by our desire to promote "rule of law" globally. Based on this justification for the canon, the Article reasons that it should be applied more vigorously in relation to legal norms established by treaty than in relation to customary international law. The Article also proposes a nuanced relationship between the* Charming Betsy *canon and another key interpretative tool*

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of American courts, the Chevron *doctrine. Finally, the Article explores whether and how* Charming Betsy *should be brought to bear in trade disputes where Congress has crafted special rules for recognition and implementation of WTO decisions.*

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I. INTRODUCTION

The 2016 election brought to the US presidency a person who publicly questioned, criticized, and attacked the post-1945 international order more than any major American political leader since, well, 1945. This relentlessly harsh rhetoric against the international status quo was combined with only a few blatant defections from the United States' international legal commitments—the best-known examples being the US withdrawal from the Paris climate accords and the Iran nuclear deal as well as the massive tariffs imposed in the trade dispute with China (in violation of our World Trade Organization [WTO] tariff bindings). But away from the headlines, any executive branch intent on disrupting the status quo, especially in defense of American sovereignty, should be expected to try to chip away at the United States' compliance with its international legal obligations.

In that context, one of the judiciary's best tools to defend American compliance with international law is the *Charming Betsy* canon. Arguably the most felicitously named doctrine in an American judge's toolbox, the 1804 *Charming Betsy* canon says that federal statutes "ought never to be construed to violate the law of nations if any other possible construction remains."[1] For over two centuries, this principle for the interplay of domestic and international law has been "a rule of statutory construction sustained by an unbroken line of authority,"[2] a canon "deeply embedded in American jurisprudence,"[3] and "the bedrock for a series of later decisions involving international law and judicial construction."[4] In the words of the Supreme Court, *Charming Betsy* "has for so long been applied by this Court that it is beyond debate."[5]

Yet the *Charming Betsy* canon exists in a radically changed world—a world in which the doctrine unquestionably has more coverage and arguably is under more stress. It may be an exaggeration to say that "globalization makes everything international,"[6] but "well-known developments have radically increased the number of cases that

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

2. United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988). Of course, the court in 1988 could only say "for over a century and a half." *Id.*

3. Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1215 (2008) [hereinafter 2008 HARV. L. REV. Note]. *See also* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretative Role of International Law*, 86 GEO. L.J. 479, 536 (1998) ("The *Charming Betsy* canon has, to date, been largely uncontested.") [hereinafter Bradley, *Charming Betsy*].

4. Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 213 (1993).

5. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr., 485 U.S. 568, 575 (1988).

6. Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT'L L. & POL. 567, 578 (2000).

directly implicate foreign relations"[7] and everyone agrees that international legal norms increasingly "address[] substantive matters of our political and economic life traditionally reserved to exclusive domestic jurisdiction."[8] In 2016, Justice Stephen Breyer published a book dedicated to exploring the issues and challenges of a world in which our Supreme Court "must increasingly consider foreign and domestic law together, as if they constituted parts of a broadly interconnected legal web."[9]

Simply put, in an era in which there are international legal norms on everything from children's education to chloroflourocarbons, a doctrine that says that federal statutes "ought never to be construed to violate the law of nations" is more and more likely to conflict with other interpretative canons, including the *Chevron* doctrine's deference to agency determinations. All this was true before the American people elected a president bent on reshaping, challenging, or sometimes ignoring our country's international obligations. Many of these actions by the Trump administration have been either within the ambit of executive power or so contrary to domestic statutory law that international legal obligations have little role to play. But *Charming Betsy* remains a valuable judicial tool to address some of the mischief when executive branch officials attempt to ignore international obligations in the context of ambiguous congressional direction.

This Article offers a new explanation for *Charming Betsy* separate from what has been emphasized in the legal scholarship: that the *Charming Betsy* canon manifests concerns for a variation of the "rule of law," what we might call "global rule of law." Part I of this Article walks through the *Charming Betsy* jurisprudence, from the original 1803 dispute through the canon's current use to interpret the substantive content of federal laws. Part I also proposes that *Charming*

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7. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law,* 116 YALE L.J. 1230, 1258 (2007).

8. Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1111 (1990) (observing the changes in international law toward more norms governing more subjects are universal). *See also* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 92 (2006) ("[I]nternational law has evolved to address new areas of domestic economic, social, and political life . . . international law now is arguably relevant to more, and different, constitutional questions than in the past."); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 420 (2002); Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1649 (1999); Paul B. Stephan, *The New International Law—Legitimacy, Accountability, and Freedom in the New Global Order,* 70 U. COLO. L. REV. 1555, 1556–57 (1999); Yasmin Ahmed, *Why Every Aspiring Lawyer Should Study International Law,* GUARDIAN (Apr. 8, 2015, 4:53 AM), https://www.theguardian.com/law/2015/apr/08/aspiring-lawyers-international-law [https://perma.cc/FHZ3-2QN5] (archived July 11, 2020) (quoting lawyer Robert Volterra, "[t]here are treaties regulating almost every human activity, including child custody, the content of breakfast cereals, and what compensation travellers receive if an airline loses luggage[.]").

9. STEPHEN BREYER, THE COURT AND THE WORLD 91 (2016).

Betsy is best understood as a "coordinating" canon for different levels or sources of law rather than as part of "comity" analysis, as suggested by some commentators and court opinions. Part II then discusses the traditional congressional intent and separation of powers explanations of the canon and proposes that an equally significant foundation for the canon is the defense and advancement of the *rule of law* globally. Of course, "rule of law is a notoriously plastic concept,"[10] so Part II will explain what is meant here by global rule of law.

Building from this alternative understanding of the *Charming Betsy* canon, Part III proposes that the canon should have more robust application with treaty-based legal norms than with customary international law; Part IV explores the relationship between *Charming Betsy* and the *Chevron* doctrine; and Part V takes up the specific problem of the proper use of *Charming Betsy* in relation to WTO decisions. It is easy to imagine either of these last two topics becoming a flashpoint in litigation anytime an administration claims what is in the best interests of the country is to ignore existing international obligations.

II. UNDERSTANDING THE *CHARMING BETSY* DOCTRINE

The dispute in *Murray v. The Schooner Charming Betsy* concerned application of the 1800 Non-Intercourse Act, a law promulgated in a period of undeclared hostilities at sea with France.[11] The Act prohibited commercial transactions "between any person or persons resident within the United States or under their protection, and any person or persons resident within the territories of the French Republic, or any of the dependencies thereof."[12] A vessel used to violate the prohibition was subject to forfeiture, seizure, and condemnation *if* that vessel was "owned, hired, or employed wholly or in part" by a US citizen or resident.[13]

In July 1801, the schooner *Charming Betsy* was seized by the crew of the *U.S.S. Constellation* under the command of Captain Alexander Murray. The seized ship had been built in the United States; it had initially been owned by American citizens, but had just been sold in St.

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10. Matthew Stephenson, *A Trojan Horse in China?*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 191, 196 (Thomas Carothers ed., 2006).

11. Murray v. Schooner Charming Betsy, 6 U.S. 64, 79 (1804). *See generally* ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801 (1966).

12. *Murray*, 6 U.S. at 77; Act of Feb. 27, 1800, ch. 10 § 1, 2 Stat. 7, 10.

13. Act of Feb. 27, 1800, ch. 10 § 1 ("[A]ny ship or vessel, owned, hired, or employed wholly or in part by any person or persons resident within the United States, or any citizen or citizens thereof resident elsewhere . . . shall be wholly forfeited, and may be seized and condemned . . ..").

Thomas—then a Danish possession[14]— to one Jared Shattuck. With a new cargo purchased by Shattuck and flying under a Danish flag, the ship had set sail in late June for the French island of Guadeloupe.

Upon boarding the *Charming Betsy,* Captain Murray learned that Shattuck had been born in Connecticut[15] and reasonably concluded that the ship was actually American. Murray seized the *Charming Betsy*, disposed of its perishable cargo, and sent the ship to Philadelphia for adjudication under the Non-Intercourse Act. But in Philadelphia, the Danish consul sought recovery of the ship as the property of a Danish subject.[16] Although Jared Shattuck had been born in the United States, he had moved "while an infant"[17] to St. Thomas. There he had grown up, apprenticed, married, carried on trade as a Danish subject, "became a *Danish* burgher,"[18] and had "taken the oath of allegiance to the crown of Denmark in 1797."[19] Both the district court and the court of appeals concluded that the facts as a whole constituted "proof of expatriation" and that Shattuck was "*bona fide* a *Danish* adopted subject."[20]

Writing for the Court, Chief Justice Marshall avoided the citizenship issue,[21] focusing instead on the Non-Intercourse Act's broader prohibition of commerce "between any person or persons resident within the United States or under their protection" and France.[22] For Justice Marshall, the "whole combination" of facts "certainly place[d Shattuck] out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance, and consequently t[ook] him out of the description of the act."[23] To galvanize this interpretation, Marshall relied on the principle that "an act of Congress ought never to be construed to violate the laws of nations if any other possible construction remains."[24] The Court believed that any other interpretation of the Non-Intercourse

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14. *See A Brief History of the Danish West Indies, 1666-1917*, VIRGIN ISLANDS HISTORY, http://www.virgin-islands-history.dk/eng/vi_hist.asp (last visited Sept. 19, 2020) [https://perma.cc/Y2BH-QBZE] (archived Sept. 19, 2020) (describing how the Danish crown controlled St. Thomas from 1754 until the island's sale to the United States in 1917 as part of what became the U.S. Virgin Islands).

15. *See Murray*, 6 U.S. at 66.

16. *See id*. at 116.

17. *Id.*

18. *Id.* at 66.

19. *Id.* at 116.

20. *Id.* at 68. *See* Frederick C. Leiner, *The Charming Betsy and the Marshall Court*, 45 AM. J. LEGAL HIST. 1 (2001) (setting out a fuller, enjoyable tale of the schooner *Charming Betsy* before, during, and after the litigation).

21. *See Murray*, 6 U.S. at 120.

22. *Id.* at 118.

23. *Id.*

24. *Id.*

Act might "violate neutral rights, or affect neutral commerce" contrary to customary international law.[25]

In the two centuries since, the Supreme Court has never wavered in its adherence to *Charming Betsy* and the canon has become enshrined in a significant, if patchy, body of case law. Indeed, it might be said that *Charming Betsy* has had multiple personalities or been used as a moniker for two, perhaps three, different canons. First, *Charming Betsy* has been considered the source of a canon limiting the extraterritorial application of domestic US laws, a canon which has effectively spun off from it. Nowadays, *Charming Betsy* is more properly identified as an interpretative canon to align the substantive content of American law with the United States' commitments in international law. The 1803 decision effectively did both these things, using the law of nations to bolster a substantive interpretation of US statutory law to find that the statute did not reach Jared Shattuck, who lived in "the territory of [a foreign] sovereign to whom he has sworn allegiance." Let us consider each of these distinct canons—as well as a third, questionable use of Marshall's original opinion.

A. Charming Betsy *as a Limit on Extraterritorial Application of Laws*

A pair of mid-twentieth century cases, *Lauritzen v. Larsen*[26] and *McCulloch v. Sociedad Nacional de Marineros de Honduras,*[27] reinforced *Charming Betsy* as a tool to limit the reach of American law. In an echo of the *Charming Betsy* facts, the 1953 *Lauritzen* decision addressed whether the federal cause of action for "any seaman who shall suffer personal injury in the course of his employment" extended to a Danish seaman who had been hired in the United States but negligently injured on a Danish ship in Cuban waters. Reversing the lower courts, the Supreme Court concluded that US shipping and maritime laws, although written in broad and general terms, should be "construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."[28]

A decade later, *McCulloch v. Sociedad Nacional de Marineros de*

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25. Indeed, this resolution of the case critically depended on the lack of a declared war between the US and France because the Danish were not obligated to curb trade with either Americans or French, *i.e.*, "neutrals are not bound to take notice of hostilities between two nations, unless war has been declared." *Id.* at 70. Three years earlier Marshall had announced a similar, if arguably more vague, principle. In Talbot v. Seeman, 5 U.S. 1, 43 (1801), the Court concluded that a broad interpretation of a salvage statute would be contrary to "the common principles and usages of nations" and that "the laws of the United States ought not, if it be avoidable, so be construed as to infract the common principles and usages of nations."

26. *See generally* Lauritzen v. Larson, 345 U.S. 571 (1953).

27. *See generally* McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10 (1963).

28. *Lauritzen*, 345 U.S. at 577.

Honduras presented yet another question of the application of American law to a foreign-flagged ship. Confronting the question whether the National Labor Relations Act "as written was intended to have any application to foreign-registered vessels employing alien seamen," the Court concluded that the statute did not apply to a vessel flying a Honduran flag, even if the vessel was owned by the Honduran subsidiary of an American corporation and was going back and forth between the two countries.[29] The Court based its decision on "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship"[30] as well as the 1927 Treaty of Friendship, Commerce, and Consular Rights between Honduras and the United States.[31] In other words, the *Charming Betsy* doctrine in *McCulloch* applied both to customary international law *and* to treaty obligations.

While lower courts have used *Charming Betsy* in the same way,[32] questions regarding the international reach of US domestic law are now usually resolved under a distinct line of cases establishing a presumption against extraterritorial application of US domestic statutes, i.e., "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[33] This interpretative presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters."[34] The interpretative presumption against extraterritorial application of domestic statutes avoids any need to

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29. The National Maritime Union of America (AFL-CIO) had contended that the case was different than the earlier because "here there is a fleet of vessels not temporarily in United States waters but operating in a regular course of trade between foreign ports and those of the United States; and, second, the foreign owner of the ships is in turn owned by an American corporation." *McCulloch*, 372 U.S. at 18–19.

30. *Id.* at 20–21.

31. *See id.* at 21 n.12 ("Article X of the Treaty of Friendship, Commerce, and Consular Rights between Honduras and the United States, 45 Stat. 2618 (1927), provides that merchant vessels flying the flags and having the papers of either country 'shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.'").

32. *See* Spector v. Norwegian Cruise Line, Ltd., 356 F.3d 641, 646–48 (5th Cir. 2004), *rev'd on other grounds*, 545 U.S. 119 (2005) (limiting the reach of the Americans with Disabilities Act pursuant to U.S. obligations under the International Convention for Safety of Life at Sea); FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1304 (D.C. Cir. 1980) (narrowly construing general language in the FTC Act as to methods to serve compulsory process abroad); United States v. James-Robinson, 515 F. Supp. 1340, 1342 (S.D. Fla. 1981) (interpreting Marijuana on the High Seas Act to prohibit marijuana possession only where U.S. jurisdiction could be asserted under customary international law).

33. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting *Foley*); Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (stating the presumption against extraterritorial application as quoted above); United States v. Garcia Soto, 948 F.3d 356, 357 (D.C. Cir. 2020) (discussing presumption "that American laws do not apply outside of the United States—unless Congress directs otherwise").

34. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

consider whether there *are* relevant international legal norms and whether the domestic statute has a "possible construction" to line up with those norms.[35]

B. Charming Betsy *as a Tool for Substantive Interpretation*

Meanwhile Justice Marshall's admonition that federal statutes "ought never to be construed to violate the law of nations if any other possible construction remains" became a vehicle to use international law for substantive interpretation of US domestic law. This understanding of *Charming Betsy* was galvanized in modern times by the Supreme Court's 1982 decision in *Weinberger v. Rossi*[36] concerning a 1971 law enacted by Congress to bar discrimination against Americans in hiring for civilian jobs at US military bases overseas. The law was passed in the wake of a US Army memorandum "encouraging the recruitment and hiring of local nationals instead of United States citizens" at stores on US bases in Germany.[37] The statutory provision—section 106—read as follows:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense . . . in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States.[38]

Prior to the passage of this legislation, the President had entered into 13 *executive agreements* with countries hosting US military bases providing for preferential employment of local nationals in civilian jobs at the US bases. Subsequent to the 1971 law, "four more such agreements ha[d] been concluded."[39]

The question before the *Weinberger* court was substantive interpretation of the phrase "[u]nless prohibited by treaty." Did it mean only Article II treaties ratified by the US Senate, or did it include all executive agreements with foreign sovereigns that would be considered "treaties" under international law?[40] The former

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35. In keeping with that, judges across the political spectrum from Thurgood Marshall to Antonin Scalia have viewed the presumption against extraterritoriality as entirely distinct from the presumption in favor of international law. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (describing the two as "wholly independent"); *Arabian Am. Oil Co.*, 499 U.S. at 264.

36. *See generally* Weinberger v. Rossi, 456 U.S. 25 (1982).

37. *Id.* at 33.

38. *Id.* at 28–29 (emphasis in original).

39. *Id.* at 32. The particular executive agreement at issue in *Weinberger v. Rossi* was a 1968 "Base Labor Agreement" with the Philippines related to the U.S. Navy base at Subic Bay. *Id.* at 27–28.

40. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 1, ch. 1, introductory note 18 (AM. LAW INST. 1987) [hereinafter RESTATEMENT (THIRD)] (defining a treaty as a "purposeful agreement among states").

interpretation of "treaty" would mean that Congress "must have intended to repudiate these executive agreements,"[41] putting the United States out of compliance with 17 bilateral obligations.

The Court concluded that Congress had not consistently used the word "treaty" to refer only to Article II treaties and had, on occasion, clearly used the word to refer to executive agreements;[42] this gave the Court multiple "possible interpretations" to which it could apply the *Charming Betsy* "maxim of statutory construction."[43] The Court unanimously "conclude[d] that the 'treaty' exception in the statute extended to executive agreements as well as to Art. II treaties,"[44] ensuring that Congress's 1971 law conflicted neither with the international obligations undertaken before 1971 nor the four commitments undertaken after the law's passage.

Just a few years after *Weinberger*, the Restatement (Third) of United States Foreign Relations Law expressed the doctrine in words that track Justice Marshall but expands it to include all public international law:

> Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.[45]

The Restatement Third tweaks Marshall's interpretative standard ("fairly possible")[46] while also clarifying that the canon—couched in the nineteenth century idea of the "law of nations"—applies to both customary international law and the specific international legal obligations that the United States undertakes through agreements.

In this spirit, lower courts have relied on *Charming Betsy* to sculpt their substantive interpretations of ambiguous statutes. For example, in its 1981 *Rodriguez-Fernandez v. Wilkinson*[47] decision, the Tenth Circuit based its substantive interpretation of federal immigration laws on international legal principles. The issue before the court was

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41. *Weinberger*, 456 U.S. at 31.

42. *See id.* at 30–31. There was also no evidence in the legislative history of this particular provision to point to a meaning of "treaty" limited to Article II treaties. Instead, "the brief congressional debates on this provision indicate that Congress was not concerned with limiting the authority of the President to enter into executive agreements with [a] host country, but with the ad hoc decisionmaking of military commanders overseas." *Id.* at 33.

43. *Id.* at 32.

44. *Id.* at 36.

45. RESTATEMENT (THIRD), *supra* note 40, § 114.

46. Chief Justice Marshall had said "any other possible construction," so at least one commentator has offered that the *Restatement* language ('fairly possible') "is more diluted than the Chief Justice's statement." PROCEEDINGS OF THE EIGHTH JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF INTERNATIONAL TRADE, 149 F.R.D. 245, 258 (1992) (remarks of Leonard M. Shambon).

47. *See generally* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

whether or not ambiguous provisions on "excludable aliens" could be read "to permit indefinite detention as an alternative to exclusion."[48] The court said no, adopting a statutory construction "consistent with accepted international law principles that individuals are entitled to be free of arbitrary imprisonment."[49] On this basis, the court held that Rodriguez-Fernandez should be released.[50] In 2001, a Ninth Circuit panel similarly held that immigration laws did not "authorize detention of an alien, pending removal, indefinitely"[51] both to avoid Constitutional issues and to comply with "'a clear international prohibition' . . . against prolonged and arbitrary detention."[52]

At the same time—and unlike the presumption against extraterritorial application of domestic statutes—the *Charming Betsy* canon does not always point toward a *narrow* interpretation of domestic law.[53] In decisions a decade apart, the D.C. Circuit and Second Circuit construed the statutory phrase "found in the United States" broadly in order to fulfill the United States' obligations under two different treaties[54] obliging the United States to assert jurisdiction over any airline hijacker "present in" the country.[55]

Other sophisticated jurisdictions deploy a similar interpretative principle in their jurisprudence. According to the Court of Justice of the European Union, "EU legislation must, moreover, so far as possible, be interpreted in a manner that is consistent with

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48. *Id.* at 1389.

49. *Id.* at 1390. Rodriguez-Fernandez had been serving a felony prison term in Cuba before arriving in the U.S. as one of the Cuban "boat people" in the 1980s; as a felon, he was an "excludable alien." *Id.* at 1384.

50. *Id.* at 1390 (holding that "the burden is upon the government to show that the detention is still temporary pending expulsion, and not simply incarceration as an alternative to departure") .

51. Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1098 (9th Cir. 2001).

52. *Id.* at 1114 (quoting Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998)). In the Kim Ho Ma case, the court seemed to rely on both a norm of customary international law against prolonged and arbitrary detention and, separately, the United States obligations under the International Covenant on Civil and Political Rights (ICCPR). The court commented "[g]iven the strength of the rule of international law [against prolonged detentions], our construction of the statute renders it consistent with the *Charming Betsy* rule." *Id.*

53. *See generally* United States v. Garcia Soto, 948 F.3d 356, 357 (D.C. Cir. 2020) ("[T]he *Charming Betsy* [doctrine] is different from the presumption against extraterritoriality.")

54. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1643, 1645, T.I.A.S. No. 7192 [hereinafter Hague Convention]; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570 [hereinafter 1971 Montreal Convention].

55. *See* United States v. Prado, 933 F.3d 121, 137 n.8 (2d Cir. 2019); United States v. Yousef, 327 F.3d 56, 90 (2d Cir. 2003) (same interpretation of "found in the United States" in relation to parallel "present in" language in 1971 Montreal Convention); United States v. Yunis, 924 F.2d 1086, 1091–92 (D.C. Cir. 1991) ("Congress intended the statutory term 'found in the United States' to parallel the Hague Convention's 'present in [a contracting state's] territory,' a phrase which does not indicate the voluntariness limitation urged by Yunis.").

international law."[56] In 1908, Australian High Court Justice Richard O'Connor declared "every statute is to be interpreted and applied so far as its language admits so as not to be inconsistent with the comity of nations or with the established rules of international law;"[57] the Indian Supreme Court considers that it is "well accepted that in construing any provision in domestic legislation which is ambiguous, in the sense that it is capable of more than one meaning, the meaning which conforms most closely to the provisions of any international instrument is to be preferred";[58] and in New Zealand, "it has become established in recent years that there is a presumption that Parliament intends to legislate consistently with international obligations."[59]

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56. Case C-263/18, Nederlands Uitgeversverbond v. Tom Kabinet Internet BV, 2019 E.C.R. 38 ("EU legislation must, moreover, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union"); Case C-306/05, Sociedad General de Autores y Editores de España v. Rafael Hoteles SA, 2016 E.C.R. I-11519, ¶ 35 ("Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community. . ..").

57. *Jumbunna Coal Mine NL v Victorian Coal Miners' Ass'n* (1908) 6 CLR 309, 363 (Austl.). *See generally* Michael Kirby, *The Growing Impact of International Law on the Common Law*, 33 ADEL. L. REV. 7 (2012) (highlighting the complexity in Australia as it relates to the relationship between international legal norms and the interpretation of the common law).

58. People's Union for Civil Liberties v. Union of India, (2003) 2 SCC 1136 (India) ("This Court has relied upon them for statutory interpretation, where the terms of any legislation are not clear or are reasonably capable of more than one meaning. In such cases, the courts have relied upon the meaning which is in consonance with the treaties, for there is a prima facie presumption that Parliament did not intend to act in breach of international law, including State treaty obligations. It is also well accepted that in construing any provision in domestic legislation which is ambiguous, in the sense that it is capable of more than one meaning, the meaning which conforms most closely to the provisions of any international instrument is to be preferred, in the absence of any domestic law to the contrary.").

59. Susan Glazebrook, *Do They Say What They Mean and Mean What They Say?,* OTAGO L. REV. 61, 82 (2015). *See* Sellers v. Maritime Safety Inspector (1999) 2 NZLR 44 (N.Z.) (finding that authority of Director of Maritime Safety to require safety equipment on ships had to be interpreted to be consistent with United Nations Convention on the Law of the Sea). In 1988, a Bangalore, India meeting of Commowealth jurists (and then Judge Ruth Bader Ginsburg as the one American attendee) concluded "there is a growing tendency for national courts to have regard to these international [legal] norms for the purposes of deciding cases where the domestic law – whether constitutional, statute, or common law – is uncertain or incomplete." Kirby, *supra* note 57, at 24; P.N. Bhagwati, Chairman, Concluding Statement at the Fourth Judicial Colloquium on the Domestic Application of International Human Rights Norms in Bangalore, India (Feb. 24, 1988), https://read.thecommonwealth-ilibrary.org/commonwealth/governance/developing-human-rights-jurisprudence/the-bangalore-principles_9781848594968-18-en#page1 [https://perma.cc/G5QP-WZBN] (archived July 28, 2020).

C. *A Comity Doctrine or a Canon of Coordination?*

Courts and commentators sometimes describe the *Charming Betsy* canon as a "comity" doctrine.[60] For example, Eric Posner and Cass Sunstein put the canon in a category of "comity doctrines" which they consider a subset of what they call "international relations doctrines."[61] But identifying *Charming Betsy* as a "comity" doctrine oversimplifies the matter. Comity operates as a norm when a court finds that it *has* jurisdiction, but concludes that there are prudential reasons to decline the exercise of that jurisdiction based on the concurrent jurisdiction of another nation. In cases where *Charming Betsy* was used to curtail the jurisdictional reach of a domestic statute, the court concludes that the US law *does not reach the activity in question, period*. In many cases where *Charming Betsy* is used to interpret the substance of American law—from asylum cases to intellectual property disputes—no other country has jurisdiction over the matter. The practical result is the same, but the reasoning is different. While comity and *Charming Betsy* can both be said to involve respect for the international order, comity is better understood as a matter of respect for *another sovereign* and its immediate interests while *Charming Betsy* is better understood as respect for *international law* and the collective, long-term interests of the international community.

Of course, it is easy to meld the two. Writing for the Court in 2004, Justice Breyer noted that the "Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations" and, citing *Charming Betsy,* noted that "[t]his rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."[62] Choosing an interpretation of US domestic law to "avoid unreasonable interference with the sovereign authority of other nations"[63] sounds like a *comity* analysis, but to the degree that there is a customary international legal norm that each sovereign has a

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60. *See* Hartford Fire Ins. v. California, 509 U.S. 764, 815–17 (1993) (Scalia, J., delivering opinion in part; dissenting in part); United States v. Carvajal, 924 F. Supp. 2d 219, 241 (D.D.C. 2013); FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1304 (D.C. Cir. 1980) (blending a *Charming Betsy* analysis with a comity analysis).

61. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1173 (2007) (lumping the canon into a category of "comity doctrines" which they consider a subset of what they call "international relations doctrines").

62. F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004). *See also* BREYER, *supra* note 9, at 102–03 (determining that "[c]ourts have long invoked [comity] in case that present potential conflicts among the law of nations, because it is reasonable to assume that Congress seeks to avoid such conflicts when possible.").

63. Or, put another way, interpreting the domestic law in a way "less likely to conflict directly with [domestic] regulations of other nations." *Compagnie De Saint-Gobain-Pont-a-Mousson,* 636 F.2d at 1327.

reasonable zone of enforcement of that sovereign's domestic laws *and* deferring to another sovereign is necessary to respect that international legal norm, then such a decision reflects both comity and *Charming Betsy*. If international law is agnostic as to who exercises jurisdiction over a matter and a court still finds that resolution in another sovereign's court is preferable, that decision is pure comity, not *Charming Betsy*.

As a doctrine to reconcile international and domestic law in a certain range of circumstances, the proposal here is that *Charming Betsy* is better understood as falling into a cluster of what might be called canons of "coordination" or "accommodation"[64] similar to these interpretative canons:

> (a) statutes are presumed not to derogate from common law principles;[65]
> (b) multiple statutory provisions are to be interpreted, whenever possible, as consistent with each other;[66]
> (c) statutes are to be interpreted, whenever possible, as consistent with the Constitution;[67]

and

> (d) *Charming Betsy*—statutes are to be interpreted, whenever possible, as consistent with the United States' international legal obligations.

Each of these doctrines "coordinate" different "levels" of our legal system. In its own coordination function, *Charming Betsy* does not require us to know the exact relationship between domestic and

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64. Steinhardt, *supra* note 8, at 1124.

65. *See* Samantar v. Yousuf, 560 U.S. 305, 320 (2010) (recognizing "canon of construction that statutes should be interpreted consistently with the common law"); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (internal quotation marks and citation omitted) ("[W]here a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident."); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long established and familiar principles, except when a statutory purpose to the contrary is evident.").

66. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (determining that, when considering different provisions of a statute, the court's objective should be to "fit, if possible, all parts into an harmonious whole"); FTC v. Mandel Brothers, Inc., 359 U.S. 385, 389 (1959).

67. *See* Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) ("[B]etween two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."); Hooper v. California, 155 U.S. 648, 657 (1895) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."); Parsons v. Bedford, 28 U.S. 433, 448–49 (1830) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.").

international law; it only requires that one believe, as Steinhardt notes, "that domestic and international law [should] be accommodated, not necessarily as equals, but as two legitimate sources of norms binding on the United States and enforceable in its courts."[68] As long as one accepts that international legal norms have *some* role in the American legal system (without needing to agree on the precise role), *Charming Betsy* becomes a corollary of other "coordinating" canons.

Article VI of the Constitution expressly names "Treaties made, or which shall be made, under the Authority of the United States" as part of "the supreme Law of the Land."[69] So whatever the precise realm of "Treaties,"[70] application of *Charming Betsy* to a treaty obligation can be understood as an accommodation mechanism to coordinate different types of *written* "law of the land," i.e., as part and parcel of the doctrine that statutes should be read as consistent whenever possible.

At this point, one might be drawn to the rich debate about self-executing and non-self-executing treaties, that is, those treaties which by their terms are directly enforceable by domestic courts versus those treaties which require implementing legislation from Congress.[71] But this distinction need not have much practical importance when mapping the impact of the *Charming Betsy* canon. Once a "non-self-executing" treaty has been ratified and its implementing legislation passed into law, almost no one doubts that *Charming Betsy* would properly apply in the interpretation of the implementing legislation *and* any other relevant laws. Once a self-executing treaty has been ratified by the Senate, again, almost no one doubts that *Charming Betsy* would properly apply in the interpretation of any relevant, pre-existing laws. The last scenario—the Senate ratifies a "non-self-executing" treaty, but no implementing legislation is passed—is a fact

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68. Steinhardt, *supra* note 8, at 1106.

69. U.S. CONST. art. VI, cl. 2 ("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"). Article VI is one of four references to treaties in the Constitution; Article III states that federal courts may hear cases arising under treaties. *See id.* art. III, § 2, cl. 1.

70. It is reasonable to think that Article VI does not apply to executive or executive/ legislative agreements that are not Senate-approved "treaties."

71. A debate that includes those who argue that the practice of declaring ratified treaties non-self executing facially violates Article VI of the Constitution. *See, e.g.*, Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties,* 36 COLUM. J. TRANSNAT'L L. 211, 222 (1997); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995) (suggesting Senatorial claims that treaties are non-self-executing is unconstitutional); *see generally* David Sloss, *Non-Self-Executing Treaties: Exposing A Constitutional Fallacy,* 36 U.C. DAVIS L. REV. 1, 4 (2002); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding,* 99 COLUM. L. REV. 1955 (1999); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties,* 89 AM. J. INT'L L. 695, 695 (1995).

pattern that just does not happen.[72]

While customary international law does not have the constitutional status of treaties,[73] the notion that "the law of nations" is part of Anglo-Saxon common law was embraced in both Blackstone's *Commentaries*[74] and numerous early Supreme Court opinions. Post-*Erie*[75] scholarly debate about the status of customary international law (CIL)[76] did not erode the conventional wisdom that whatever federal common law remains, customary international law should be treated as part of it.[77] In 2004, a six-member majority of the Supreme Court

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72. But even if there were non-self executing treaties for which there is no implementing legislation, *Charming Betsy* still applies if you find compelling the argument that those treaties still "have the status of supreme federal law because the Supremacy Clause grants them that status." Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 124 (2004).

73. Its only mention being that Congress has the power to "define and punish . . . Offenses against the Law of Nations." *See* U.S. CONST. art. I, § 8, cl. 10.

74. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *67 ("the law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land.").

75. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (concluding that "[t]here is no general federal common law").

76. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852–53 (1997) (asserting that courts applying customary international law as federal common law is inconsistent with *Erie*); Harold H. Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1835 (1998) [hereinafter Koh, *State Law*] (rebutting Bradley and Goldsmith); *see also* Ingrid B. Wuerth, *Authorization for the Use of Force, International Law, and the* Charming Betsy *Canon,* 46 B.C. L. REV. 293, 299–300 (2005) ("The status of customary international law in our domestic legal system is contested—some argue that it is federal law that binds the states and provides a basis for the jurisdiction of the federal courts, others argue that it is not, and still others take an intermediate position.").

77. RESTATEMENT (THIRD), *supra* note 40, § 111 n.3 ("[T]he modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts."); Young, *supra* note 8, at 367 ("The conventional wisdom has been that such law is (or is equivalent to) federal common law for purposes of creating federal subject matter jurisdiction and preempting state law."); *see* Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (describing "settled proposition that federal common law incorporates international law"); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992) ("It is . . . well settled that the law of nations is part of federal common law."). The U.S. Government has often taken the position that customary international law is "federal law." *See* Brief for the United States as Amicus Curiae, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) ("[c]ustomary international law is federal law, to be enunciated authoritatively by the federal courts"), *reprinted in* 19 I.L.M. 585, 606 n. 49 (1980); *see also* Brief for the United States as Amicus Curiae at 2, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069); Brief for the United States as Amicus Curiae at 3–4, 34–36, Republic of Argentina v. City of New York, 250 N.E.2d 698 (N.Y. 1969). These submissions are discussed in Koh, *State Law*, *supra* note 76. Similarly, the Senate Report on the 1991 Torture Victim Protection Act states that "[i]nternational human rights cases predictably raise legal issues--such as interpretations of international law--that are matters of Federal common law and within the particular expertise of Federal courts." S. REP. NO. 102-249, at 6 n.6 (1991). *See also* Louis Henkin, *International Law as Law*

settled some of this debate, concluding that nothing since the founding of the Republic "has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law" and endorsing a "restrained conception" of new causes of action based on specifically defined CIL norms.[78] This continued understanding of CIL as common law makes *Charming Betsy* as applied to a CIL part and parcel of the presumption that statutes should not be interpreted to repudiate the common law.

While courts still do (and should) apply *Charming Betsy* with both types of international legal norms, Part III will propose that the doctrine's application should be more robust with regards to norms arising from treaty provisions than CIL norms. This follows from the proposal in Part II that *Charming Betsy* is justified in part as a tool to promote the rule of law globally and to reinforce the post-World War II global system the United States has pursued.

III. THE *CHARMING BETSY* CANON AS EMBODYING GLOBAL RULE OF LAW

The *Charming Betsy* doctrine and its resilience are typically explained with two justifications: (1) courts abiding by congressional intent, and/or (2) courts sagely respecting separation of powers when it comes to foreign affairs. But these explanations overlook a simpler explanation for the canon: what *should* animate the *Charming Betsy* canon is commitment to and promotion of the rule of law at the global level.

Promotion of the rule of law through the canon happens on two planes. First, if one believes that international legal norms are legitimate sources of law in our domestic system and are integrated

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in the United States, 82 MICH. L. REV. 1555, 1561 (1984) (stating that customary international law has "the status of federal law for purposes of supremacy to state law").

78. Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004) ("We assume, too, that no development in the two centuries from the enactment of [the Alien Tort Statute] to the birth of the modern line of cases beginning with *Filartiga v. Pena–Irala*, 630 F.2d 876 (C.A.2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended [the Alien Tort Statute] or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."). This tracks the view in at least some other common law jurisdictions. *See* Glazebrook, *supra* note 59, at 84–85 ("It has long been accepted that customary international law is automatically a part of the [New Zealand] common law as long as it is not inconsistent with an Act of Parliament or with a prior judicial decision of final authority.").

into that system through federal common law and Article VI of the Constitution, then the *Charming Betsy* canon promotes the rule of law domestically by promoting consistency and predictability among the different sources of our domestic law. The canon reduces "dissonance" among different sources of legal norms. But separate from that reasoning, the *Charming Betsy* canon should also be recognized for its role in promoting the rule of law *globally*.

There is nothing in the federal judges' oath that prevents a judge from seeking to promote the rule of law globally.[79] And promotion of the rule of law, in *each* society and *across* societies, should be a goal shared by all members of the legal profession. In short, American judges should promote the strengthening of the rule of law globally both (a) because it is good for people in other societies, and (b) because it is good for the United States' interests.

This is not an argument that judges should put international legal norms above the legislative decisions of the democratically elected government in which they serve; the *Charming Betsy* canon has no traction when Congress's legislation is clearly inconsistent with international legal norms. Sometimes government officials may wish to defect from international legal norms for *short-term gains*; as an interpretative canon, *Charming Betsy* only insists that such defections from international commitments should be express decisions of our legislative representatives.

Let us consider the traditional justifications for the *Charming Betsy* canon, then what the global rule of law explanation might add.

A. *Congressional Intent and Separation of Powers*

Perhaps the dominant explanation for the *Charming Betsy* canon has been that it is rooted in congressional intent—that the canon "tracks Congress's desire to abide by international law,"[80] whether simply "as an assumed set of background conditions"[81] or from a heartfelt "*duty* to comply with international law."[82] This congressional intent rationale has ample support in Supreme Court and lower court

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79. *See* 28 U.S.C. § 453 (2018) ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.'").

80. 2008 HARV. L. REV. Note, *supra* note 3, at 1218.

81. Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 660 (2019) ("Traditional principles of statutory interpretation hold that Congress legislates with international law as an assumed set of background conditions.").

82. Bradley, *Charming Betsy*, *supra* note 3, at 493.

statements;[83] as the D.C. Circuit recently noted, "we presume that Congress legislates with international law in mind."[84] This does not require Congress to know the details of the relevant international law; one can intend to comply with a body of law without knowing its details.

An alternative explanation for *Charming Betsy* is "that the case, and the doctrine which developed from it, is animated from a concern for separation of powers, not compliance with international law per se."[85] Under the *separation-of-powers* explanation, the legislative and executive branches of the federal government are charged with the country's foreign relations, and a court decision putting American domestic law in conflict with international law could touch off foreign relation problems best left to the other branches of government. In this *separation-of-powers* analysis, the Article III component of the federal government should *not* be engaged in activities by which the United States would be "compromised or embarrassed in its foreign relations."[86]

Again, one can find case law that speaks to this separation-of-powers/avoid-foreign-embarrassment rationale. In its 1963 *McCulloch v. Sociedad Nacional de Marineros de Honduras* decision, the Court was quite explicit in its belief that anything other than its ruling that the National Labor Relations Act did *not* apply to a foreign-flag ship would "arouse[] vigorous protests from foreign governments and create[] international problems for our government."[87] In *Benz v.*

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83. *See. e.g*, Talbot v. Seeman, 5 U.S. 1, 44 (1801) (adopting a narrow interpretation of the statute and reasoning "[b]y this construction the act of [C]ongress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred"); Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (O'Connor, J.) (plurality opinion) ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles."); *see also* FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1306 (D.C. Cir. 1980) (per curiam) ("Congress is customarily presumed, unless a plain intention appears to the contrary, to avoid conflict with such principles [of international law].").

84. United States v. Garcia Sota, 948 F.3d 356, 362 (D.C. Cir. 2020) (internal citation omitted) (noting "[t]hat presumption [was] originally set forth in *Murray v. Schooner Charming Betsy*").

85. Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of* Charming Betsy, 67 OHIO ST. L.J. 1339, 1344 (2006).

86. Steinhardt, *supra* note 8 at 1130. Alford proposes a different separation of powers explanation for *Charming Betsy*: that it is a doctrine by which the judicial branch prevents Congress from inadvertently complicating the executive branch's conduct of international affairs. Alford, *supra* note 85 at 1342 ("As a doctrine of separation of powers, the *Charming Betsy* canon seeks to eliminate international discord in furtherance of an executive prerogative to comply with international obligations without inadvertent congressional circumscription.").

87. McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 17 (1963); *see In re* Erato, 2 F.3d 11, 14 (2d Cir. 1993) (describing other instances in which courts slip into political "goals" discourse, concluding "that the statutory language and our country's foreign policy goals support" the lower court's decision).

Compania Naviera Hidalgo,[88] the Court also expressed concern that extending NLRB jurisdiction to picketing at an American port of "a foreign ship operated entirely by foreign seamen under foreign articles" would trigger international reaction and concluded "[f]or us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."[89] The D.C. Circuit has also described *Charming Betsy* as "embody[ing] concerns for preserving the relationships between the branches of government in a system of separation of powers."[90]

Yet each of these two explanations for the canon can lead one to question *Charming Betsy*'s relevance in contemporary circumstances.

Commentators sometimes remind us that *Charming Betsy* comes from a time when the fledgling American Republic was both militarily weak and a suspect form of government—a young country in need of peaceful relations with more established sovereigns.[91] In those circumstances, sensible members of Congress would have wanted the new country to be perceived as law-abiding by European powers (the

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88. *See generally* Benz v. Compania Naviera Hidlago, 353 U.S. 138 (1957).

89. *Id.* at 147 (adding that Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."). Describing the *Benz* decision almost 20 years later, Justice Rehnquist approvingly noted "the Court in that case made clear its reluctance to intrude domestic labor law willy-nilly into the complex of considerations affecting foreign trade, absent a clear congressional mandate to do so." Windward Shipping (London), Ltd. v. American Radio Ass'n, 415 U.S. 104, 110 (1974). Later the *Windward* majority seemed to indicate that "retaliatory action," if the US did assert jurisdiction, was unlikely. *Id.* at 114–15.

90. Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 494, n.13 (D.C. Cir. 1984) (internal citations omitted) ("The Constitution commits to the Legislative and Executive Branches, not to the Judicial Branch, the conduct of foreign relations. Our rules of statutory construction in the instant case embody concerns for preserving the relationships between the branches of government in a system of separation of powers. Hence, we hesitate to infer from 7 U.S.C. § 15, absent clear congressional intent, enforcement jurisdiction that arouses foreign sensibilities and implicates international law concerns."). The canons under discussion were the *Charming Betsy* doctrine and the related *Foley Bros.* canon against extraterritorial application of domestic law.

91. *See* Stewart Jay, *The Status of the Law of Nations in Early American Law,* 42 VAND. L. REV. 819, 839 (1989) ("The primary consideration that forced the United States to pay respect to the law of nations was the country's weakness in relation to European powers."); *see also* Bradley, *Charming Betsy*, *supra* note 3, at 492; Harold H. Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004) ("[T]he global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance."); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 464 (1997) ("As new members in the community of nations, the Founders felt bound, both ethically and pragmatically, to inherit and abide by the law of nations."). It is true that Chief Justice Marshall's decision came just six years after the United States started its own navy—with six frigates—in response to piracy attacks on U.S. merchant shipping while, in contrast, the British Empire had a naval fleet in 1800 of over 700 ships. *See Commissioned Ships of the Royal Navy*, GENERALIST, http://www.generalist.org.uk/docs/navy1800.html (last visited July 12, 2020) [https://perma.cc/G9W3-AE3Q] (archived July 12, 2020).

congressional intent explanation) and for courts to steer clear of triggering any international problems (separation-of-powers explanation). A potential implication is that the pragmatic underpinnings for *Charming Betsy* have largely dissipated: governing a nuclear-armed global empire, so the reasoning goes, Congress may no longer be much concerned with the niceties of international law and decisions about whether the United States should respect or ignore international legal norms can be more confidently left to the executive (when that branch of government is interpreting ambiguous laws of Congress).[92] In short, if the canon is justified by presumed congressional respect for international law, why think that now?

On the separation-of-powers side, one could also reason that if the canon was to keep the judiciary from undermining the conduct of foreign affairs, in modern circumstances is there really much danger in any court decision having a significant impact on the United States' foreign affairs given its global footprint economically, militarily, and diplomatically?[93]

Another way to look at the two explanations is that a *congressional intent* explanation of *Charming Betsy* casts Article III courts as carrying out the Article I legislators' grand, if implicit, intentions while the *separation-of-powers* explanation of *Charming Betsy* is a negative justification; in other words, Article III courts should stay out of the way of the grand designs of the other branches of government as they ply "the devious and intricate path of [international] politics."[94] But does *Charming Betsy* really keep Article III courts *out* of international affairs?

When a relevant dispute comes before a federal court, the United States may or may not already be viewed as complying with or violating international law. Foreign reactions to the statutory law when passed, to the agency regulations when promulgated, or to the particular executive branch determination (as with a customs or immigration action) may have already caused some groups or

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92. *But see* Hegna v. Islamic Republic of Iran, 287 F. Supp. 2d 608, 611 (D. Md. 2003) (noting *Charming Betsy* "was the proper rule of construction for an honorable young nation facing an uncertain future, and it remains the proper rule of construction for a mature, powerful, and confident republic confronting a hostile and dangerous world").

93. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 664 (2000) ("[I]t is not clear to what extent judicial enforcement of foreign affairs law will actually impede the ability of the United States to act effectively in international relations.") [hereinafter Bradley, *Chevron Deference*].

94. The Nereide, 13 U.S. (9 Cranch) 388, 421–23 (1815) (recognizing norms of customary law as it relates to the character of cargo (neutral or belligerent) shipped in vessels (neutral or belligerent) and, furthermore, that the US had deviated from those norms in different bilateral treaties. The court further held that questions of retaliation for "unjust proceedings toward our citizens" are strictly for the political branches: "It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics.").

governments abroad to characterize the United States as complying with or violating its international legal obligations. In those cases, the court decision is likely to *confirm* or *revise* the conclusion that others have already reached as to America honoring its international obligations.

In other situations, the court decision might be the first time the international implications of a domestic statute have come to the fore, and it is the court's decision by which the United States will be viewed as in compliance or in violation of international law.[95] When other countries question the United States as to its compliance with international law after significant court decisions—as happens in the various councils of the World Trade Organization—this diplomatic ballet again reflects the fact that court rulings are acts of state for international law.[96] The courts simply cannot avoid their "position of oversight" as to the "international liability for the country as a whole."[97]

So *Charming Betsy* will not keep the Article III courts *out* of "foreign affairs"; court decisions, as acts of state, will have international implications.[98] Instead, the canon only keeps courts, *in narrow circumstances*, from the "embarrassment of declaring a statute in violation of international law."[99] One could just as well construct a "separation of powers" argument for *eliminating* the *Charming Betsy* canon altogether: that if an administration wants to execute a law in a way that violates our international legal obligations, that should be the

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95. Jonathan Turley has made much the same point that the courts will to some extent be making judgments that impact foreign policy regardless of how the canon points. Turley, *supra* note 4, at 238.

96. Mitchum v. Foster, 407 U.S. 225, 240 (1972) (holding that the Fourteenth Amendment applies "against State action, . . . whether that action be executive, legislative, or judicial"); Ex parte Virginia, 100 U.S. 339, 347 (1879) (noting " a State acts by its legislative, its executive, or its judicial authorities. It can act in no other way"). *See also* Int'l Law Comm'n, Draft Arts. on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, art. 4, (Oct. 24, 2001) (noting "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State").

97. Steinhardt, *supra* note 8, at 1128.

98. In a recent litigation brought by Qatar against Arab banks claiming that they were participating in the economic boycott of Qatar, the banks sought to remove the New York state law suit to federal court on the grounds that the United States had been neutral in the Saudi/Qatari dispute and "reaching a final judgment in this suit will violate the United States policy of neutrality." Qatar v. First Abu Dhabi Bank, 432 F. Supp. 3d 401, 414 (S.D.N.Y. 2020). The court rejected this as a grounds for removing the case to federal court, noting that under the banks theory "by adjudicating this matter, the United States will 'take a side' in this international dispute, contrary to its policy of neutrality. . . . Under their theory, one nation or another will be displeased no matter which way the Court rules." *Id.* at 419.

99. Steinhardt, *supra* note 8, at 1115.

prerogative of the Article II branch. Indeed, Eric Posner and Cass Sunstein have made such an argument,[100] a proposal discussed below.

But saving courts from the "embarrassment of declaring a statute in violation of international law" contains the kernel for another explanation of the vitality of the *Charming Betsy* canon. After a period when the importance of the judiciary as a check on the executive branch has become especially pronounced, we can better appreciate *Charming Betsy* as a canon of interpretation that supports the rule of law.

B. *Support for Both Domestic and Global Rule of Law*

The *rule of law* justification—or bundle of justifications—for the *Charming Betsy* canon says that distinct from whatever Congress *intends* and distinct from the Constitution's separation of the different branches of government, judges have (and should have) a normative commitment to advancing what is commonly called "the rule of law" *and* that judicial decisions that align domestic American law with the international legal obligations of the United States are both expressions of and endorsements of the rule of law.

Few would quibble with Justice Sotomayor when she said she "believe[s] in the rule of law as the foundation for all our basic rights,"[101] but the notion of "rule of law" is "elusive," [102] if not "contested."[103] Different people mean different things—of varying complexity and rigor—when they say "rule of law."[104] This is not the place to summarize the vast "rule of law" literature, but given how frequently lawyers and law professors use this concept,[105] it may be

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100. *See generally* Posner & Sunstein, *supra* note 61.

101. *Judges Explain Rule of Law, Why It Matters*, U.S. COURTS (Aug. 8, 2019), https://www.uscourts.gov/news/2019/08/08/judges-explain-rule-law-why-it-matters [https://perma.cc/YP6U-Y52F] (archived July 12, 2020) [hereinafter *Judges Explain Rule of Law*].

102. Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SING. J. LEGAL STUD. 232, 232 (2012) ("[T]his universally popular notion is elusive.").

103. *See generally* Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137 (2002).

104. BRANDEIS INSTITUTE FOR INTERNATIONAL JUDGES, TOWARD AN INTERNATIONAL RULE OF LAW 8 (2010) ("[T]he semantic content of the term 'rule of law' is not constant but instead depends on who uses it and to what purpose.") [hereinafter 2010 BRANDEIS REPORT].

105. *See* FRANK J. GARCIA, CONSENT & TRADE: TRADING FREELY IN A GLOBAL MARKET 98 (2019) (discussing "rule of law gains" from a WTO agreement). The idea that we all use the phrase accepting that we are all saying the same thing comes, in part, from its early 21st century currency in international institutions. *See* Thomas Carothers, *The Rule of Law Revival*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3 (Thomas Carothers ed., 2006) (describing "rule of law" in international aid programs at the turn of the millennium as "suddenly everywhere—a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization").

helpful to specify how the phrase is used here and where this use falls in rule of law thinking.

The notion of "rule of law" can be traced back to Aristotle, and the phrase itself appeared in the 1610 English Petition of Grievances, arguing that English subjects enjoy the right "to be guided and governed by the certain rule of law."[106] There are scores of modern formulations of the "rule of law,"[107] but this Article will focus on a "thin" version.[108] One of the most minimal formulations would be Brian Tamanaha's "[t]he rule of law means that government officials and citizens are bound by and abide by the law,"[109] which is not too different from federal judge Jill Otake's defining "rule of law" as "[e]veryone understands what the law is and that everyone will be held to that law."[110] Some additional commitments are typically considered part of the basic idea of "rule of law":

[a] that laws should be stable, public, consistent, and known in advance;
[b] that these laws are applied nonarbitrarily[111] and equally to all citizens, without regard to their individual circumstances;
[c] that these laws are applied equally to government and its actions;[112] and
[d] that the application of law is done through adjudication by an independent judiciary.

In addition to these components (in one form or another), some add

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106. *Petition of temporal grievances*, *in* PROCEEDINGS IN PARLIAMENT 1610: HOUSE OF COMMONS 257, 257–58 (Elizabeth Read Foster ed., 1966) (In a petition to the King on secular ("temporal") matters, Parliament wrote "[a]mongst many other points of happiness and freedom which your Majesty's subjects of this kingdom have enjoyed under your royal progenitors, Kings and queens of this realm, there is none which have accounted more dear and precious than this, to be guided and governed by the certain rule of law, which giveth both to the head and the members that which of right belongeth to them and not by any uncertain or arbitrary form of government.").

107. *See* A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 171 (MacMillan, 1st ed. 1885) (analyzing the original "rule of law" concept).

108. *See* Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 340–41 (2008) (discussing "thin" and "thick" conceptions of "rule of law").

109. Tamanaha, *supra* note 102, at 233.

110. *Judges Explain Rule of Law*, *supra* note 101.

111. *See* Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 RATIO JURIS. 79, 82–83 (1989) (noting that arbitrariness is corrosive to the rule of law).

112. *See* Civics (History and Government) Questions for the Naturalization Test, U.S. CITIZENSHIP & IMMIGR. SERVS., (Jan. 2019), https://www.uscis.gov/sites/default/files/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20Site/Publications/100q.pdf [https://perma.cc/V4PJ-R8QV] (archived July 12, 2020) (setting out the test for U.S. citizenship regarding a question and answer exchange as related to the rule of law: "What is the 'rule of law'? Everyone must follow the law. Leaders must obey the law. Government must obey the law. No one is above the law.").

respect for human rights or that the domestic laws must be consistent with international human rights norms.[113] But this additional component moves beyond the "thin" understanding of rule of law.

Understood this way, promoting *domestic* rule of law in developing countries has been a centerpiece of international development programs for decades. It is an agenda that can attract support from both financial investors and human rights activists.

Separate from this concern for what happens in each jurisdiction, there has been much discussion and debate over "international rule of law" to govern the *interaction of sovereign nations*. This "international rule of law" is frequently conceptualized at the level of state-to-state, government-to-government interaction, i.e., how states resolve border or resource disputes between themselves, how states and international organizations abide by the laws of war and occupation, etc. At this level, much has been written about whether, when, and how "international rule of law" shapes the interaction of sovereign states[114] as well as constrains international organizations.[115] There is a rich debate on how much international rule of law is truly separate from

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113. The federal judiciary's own website describes "[r]ule of law [as] a principle under which all persons, institutions, and entities are accountable to laws that are: [p]ublicly promulgated; [e]qually enforced; [i]ndependently adjudicated; [a]nd consistent with international human rights principles." *See Overview – Rules of Law*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (last visited July 12, 2020) [https://perma.cc/J4MJ-V8HA] (archived July 12, 2020); *see also* 2010 BRANDEIS REPORT, *supra* note 104 ("general consensus" that the "essential elements" of the rule of law are "equality before the law, strict observance of due process, and judicial independence" but adding that "[t]he law to which everyone submits" is "one that protects human rights"). The United Nations gives the following description:

> [T]he rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

What is the Rule of Law, UNITED NATIONS, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ (last visited July 12, 2020) [https://perma.cc/W9XD-Z6GW] (archived July 12, 2020).

114. *See generally* Chesterman, *supra* note 108; Dennis Jacobs, *What is an International Rule of Law?*, 30 HARV. J.L. & PUB. POL'Y 3 (2006); Ian Hurd, *The International Rule of Law: Law and the Limits of Politics*, 28 ETHICS & INT'L AFF. 39 (2014); William W. Bishop, *The International Rule of Law,* 59 MICH L. REV. 553 (1961).

115. *See generally* JOSE E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW (2017).

international politics[116] or whether there is a "distinctively *international* version of rule of law."[117]

But there is also the "rule of law" concern that each nation implement domestically its international legal obligations—in other words, that nations fulfill their international legal obligations to each other through the substance of their own domestic laws. In a world thick with international legal norms created by multilateral, plurilateral, and bilateral agreements, *pacta sunt servanda* happens *less* with state-to-state interaction on the international plane and *more* with domestic implementation of international obligations (in immigration law, trade law, civil rights, criminal law, contract law, environmental regulations). Eliciting commitments from a nation in any of these areas is pointless unless there is "rule of law" consistency between the international legal obligation and the nation's domestic law. Instead of "international rule of law" one can think of this as concern for the rule of law *globally*— or "global rule of law."[118]

So, how does the *Charming Betsy* canon as used by American courts fit into these considerations? The canon is clearly "a tool for the judiciary to advance the normatively desirable goal of harmonizing domestic law with international law,"[119] but we need to say more. In terms of domestic rule of law, to the degree that treaty commitments of the United States are part of the "supreme Law of the Land" and customary international legal norms are part of federal common law, *Charming Betsy* is a doctrine harmonizing different elements of our domestic legal regime—and thereby avoiding arbitrariness that corrodes rule of law.[120] By shaping domestic law to meet international obligations, *Charming Betsy* makes the state itself accountable to laws it publicly accepted as binding;[121] the canon applies "law" to the

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116. *See, e.g.*, Oscar Schachter, *Dag Hammerskjold and the Relation of Law to Politics*, 56 AM. J. INT'L L. 1, 6 (1962); Hurd, *supra* note 114, at 48 ("To deploy international law in defense of one's policy is continuous with political strategy of the state—it is not a step outside of politics.").

117. Hurd, *supra* note 114, at 47.

118. This is very different than some other commentators' use of "global rule of law." *See* Chesterman, *supra* note 108, at 355–56 (suggesting "global rule of law" "might denote the emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions").

119. 2008 HARV. L. REV. Note, *supra* note 3, at 1218.

120. *See* 2010 BRANDEIS REPORT, *supra* note 104, at 9 (one participant describing "an overall absence of the rule of law" as when "the laws were not applied, or they were applied arbitrarily").

121. *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, at 4, U.N. Doc. S/2004/616 (Aug. 23, 2004) ("[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.").

sovereign—one of the basic elements of rule of law.[122] As Rachel Kleinfeld observes, "[r]eining in the state by forcing it to govern through a known set of laws has been accepted as a goal of rule of law since the ancient Greeks."[123] In its narrow realm of application, *Charming Betsy* forces the state to govern consistent with public commitments the state has undertaken *vis-à-vis* other states and known laws in the law of nations.

In short, *Charming Betsy* advances both our own "domestic rule of law" narrowly understood and "global rule of law" in terms of the United States honoring *pacta sunt servanda*.

At the level of "international law," the *Charming Betsy* doctrine will not have significant impact on the "rule of law" understood as state-to-state interaction, but the canon engages American judges with international legal norms (versus, say, an interpretative canon that said international legal norms were irrelevant to interpretation of domestic statutes). And to the degree *Charming Betsy* compels American judges to recognize and interpret international legal norms, it has the salutary effect of bringing a cohort of relatively well-trained, disciplined jurists into the business of helping shape international law. Even if that is not "rule of law" *per se*, it is surely a salutary effect of the canon. Separate from the effect on domestic law, all or almost all American policymakers would choose *more* American influence over substantive interpretation of international legal norms versus *less*.

Turning to domestic rule of law in other countries—and those countries implementing in their domestic laws the treaty obligations they have undertaken, *pacta sunt servanda*, it should be clear that the *Charming Betsy* doctrine provides an example for other countries. Each American court decision interpreting an ambiguous statute to fulfill our treaty obligations sends a signal to judges in other jurisdictions to do the same. One can debate how strong a signal and how much American courts can lead by example, but there is no question that the

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122. Tamanaha, *supra* note 102, at 236 ("The broadest understanding of the rule of law, a thread that has run for over two thousand years, is that the sovereign, the state and its officials, are limited by the law. . . . Restraining the sovereign's awesome power has been a perennial struggle for societies as long as they have existed.").

123. Rachel Kleinfield, *Competing Definitions of the Rule of Law*, *in* PROMOTING THE RULE OF LAW ABROAD – IN SEARCH OF KNOWLEDGE 31, 35 (Thomas Carothers ed., 2006).

American legal system—judicial decisions,[124] regulations,[125] and statutes[126]—provides an important role model for other countries.

Strengthening this global rule of law serves both the United States' ideals and its pragmatic needs. Idealistically, in the post-1945 world the thicket of international legal norms has grown more vast and dense—and that thicket of norms has been largely shaped by the United States.[127] The great international project of the United States—the *Pax Americana*—has not just been relative peace, but the spread of democratic institutions and human rights as well as the increasing economic prosperity of the world based on increasingly transparent, predictable market conditions. It may be diplomatically awkward to discuss, but it is simply hard to overstate how much the post-1945 international human rights, trade, and finance regimes have

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124. *See, e.g.*, LAW LIBRARY OF CONGRESS, GLOBAL LEGAL RESEARCH CENTER, THE IMPACT OF FOREIGN LAW ON DOMESTIC JUDGEMENTS (2010) (surveying 12 jursidictions and describing influence of American case law, including in Argentina, Canada, China, and India); JUDICIAL COSMOPOLITANISM: THE USE OF FOREIGN LAW IN CONTEMPORARY CONSTITUTIONAL SYSTEMS (Giuseppe Ferrari ed., 2019) (offering a variety of essays on the use of foreign law in European, American, and East Asian courts)*; see also* Shreya Singhal v. Union of India, (2015) Writ Petition No. 167 of 2012 (India) https://indiankanoon.org/doc/110813550/ (last visited July 12, 2020) [https://perma.cc/R7BP-AAFT] (archived July 12, 2020) (quoting four U.S. Supreme Court decisions on freedom of expression)*; see generally* Peter Herzog, *United States Supreme Court Cases in the Court of Justice of the European Communities*, 21 HASTINGS INT'L & COMP. L. 903 (1998); Philip M. Moremen, *National Court Decisions as State Practice: A Transnational Judicial Dialogue*, 32 N.C. J. INT'L L. & COMM. REG. 259 (2006); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

125. *See, e.g.*, Max Bearak, *India's Environment Ministry Appears to Have Thoroughly Plagiarized a U.S. Document*, WASH. POST (July 8, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/07/08/indias-environment-ministry-appears-to-have-thoroughly-plagiarized-a-u-s-document/ [https://perma.cc/33YC-HERK] (archived July 12, 2020) (finding that, of the Indian Government's new Environmental Supplement Plan, "a full 2,900 words of the 3,850 in the Indian plan were lifted word for word" from the counterpart U.S. document).

126. *See* Justin Hughes, *Fair Use and Its Politics – at Home and Abroad*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth Okediji ed., 2016) (describing how U.S. fair use – 17 U.S.C. § 107 – was copied into other national copyright laws).

127. *See, e.g.*, LEIF WENAR, BLOOD OIL: TYRANTS, VIOLENCE, AND THE RULES THAT RUN THE WORLD 171 (2015) ("[T]he United States, of all nations, has been the lead architect of the international system since 1945."); Max Boot & Ben Steil, *Selling America Short*, WKLY. STANDARD (Feb. 26, 2016), www.weeklystandard.com/selling-america-short/article/2001271 [https://perma.cc/9AR2-S78M] (archived July 12, 2020) (observing that "[o]ne of America's greatest accomplishments in the early postwar era was the creation of a rules-based international trade regime"); Joseph R. Biden, *Why America Must Lead*, FOREIGN AFF. (March/April 2020), available at https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again [https://perma.cc/DG2X-K6W9] (archived Sept. 20, 2020) (lamenting that "the international system that the United States so carefully constructed is coming apart at the seams.").

been built along American outlines.[128] The rule of law's strengthening in as many jurisdictions as possible undergirds these projects.

On the practical side, nothing is more important for the efficient, affordable maintenance of America's far-flung geopolitical and commercial interests than rule of law in as many of those jurisdictions as possible. In 2007, Eric Posner and Cass Sunstein argued that *Charming Betsy* should give way to *Chevron*-style deference to executive interpretations of statutes that concern foreign affairs[129]—an argument that we will explore in Part V. While recognizing that *Charming Betsy* produces the benefit of "a general strengthening of the system of international law,"[130] they reasoned that this should only trigger "an additional judgment about whether deference has systemic or rule of law benefits or disadvantages for the United States."[131] In the context of that calculus, Posner and Sunstein offered the stunning comment (then and now) that "[t]he United States generally has little interest in what occurs on foreign soil."[132] From that, they reasoned that calculated violations of international law will often enough accrue to the short-term benefit of the United States without long-term detriment that such decision should be left to the executive branch.[133]

The claim that "[t]he United States generally has little interest in what occurs on foreign soil" was and is fake news from law

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128. *See, e.g.*, Luisa Blanchfield & Cynthia Brown, *The United Nations Convention on the Rights of Persons with Disabilities: Issues in the U.S. Ratification Debate*, CONG. RES. SERV., (Jan. 21, 2015) https://fas.org/sgp/crs/misc/R42749.pdf [https://perma.cc/E27D-LNCQ] (archived Aug. 20, 2020) ("[S]ome CRDP provisions appear to be modelled after U.S. disabilities laws."); Cleveland, *supra* note 8, at 102 (determining the United States as "the primary instigator behind the establishment of the UN system and the creation of modern international treaties ranging from human rights and humanitarian law to international intellectual property and international trade" (footnotes omitted)); NATALIE KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE 93 (1990) (discussing U.S. influence over the drafting of the Human Rights Covenants and concluding that U.S. "proposals were for the most part accepted, and on the rare occasions when they were not, compromises protective of the U.S. system were reached"); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles,* 12 AUSTL. Y.B. INT'L L. 82, 94 (1992) (noting in international human rights "a remarkable correlation between the norms identified as customary rules, and the range of rights which has been incorporated into the U.S. Bill of Rights").

129. *See generally* Posner & Sunstein, *supra* note 61.

130. *Id.* at 1186 (conditionally recognizing the *Charming Betsy* doctrine: "[i]f respect for international law promotes cooperation and preserves long-term commitments").

131. *Id.*

132. *Id.* at 1188.

133. They focus on whether "a certain kind of litigation will offend a foreign sovereign, whether the sovereign is likely to respond by reducing cooperation, or whether such cooperation is valuable." *Id.* at 1205. For that reason, they "have trouble seeing a normative justification for many applications of the doctrines when the other state does not reciprocate and when the risk of retaliation is trivial." *Id.* at 1192.

professors.[134] The reality of the early twenty-first century is that 3 to 6 *million* American citizens live abroad and—as noted by Justice Breyer— on average, 23 million Americans travel abroad each year.[135] The reality is that the United States has over $4 trillion in accumulated investment on foreign soil (making it, as of 2012, the world's largest investor in other jurisdictions).[136] In short, the safety of a vast amount of American blood and treasure depends on "what occurs on foreign soil." Those lives and wealth are more secure when these *other jurisdictions* adhere to mutually-agreed international legal norms, whether on maritime navigation or civil litigation, freedom of religion or protection of trademarks.

As to customary international legal norms protecting individuals, a reason for us to respect those norms domestically is that "our State Department has often successfully insisted foreign nations must recognize [those norms] as to our nationals abroad."[137] On the treaty side, we have spent enormous diplomatic efforts for two centuries pursuing series after "series of treaties" seeking "in general to put the citizens of the United States and citizens of other treaty countries on a par with regard to trading, commerce and property rights."[138] What we secure in those treaties is worthless unless *rule of law* in other jurisdictions implements each country's international obligations in its domestic legal order. Indeed, even if no American ever set foot abroad, for transborder problems—from carbon emissions to human migration to protection of endangered species—*domestic* enforcement in *other* jurisdictions of agreed *international rules* is very much in our practical, local interests.

At the end of the day, a global rule of law explanation of *Charming Betsy* can either be the normative undertaking of a single judge or reflect the normative undertaking of the United States to produce a more law-abiding global community; either way, the use of the *Charming Betsy* canon in American jurisprudence sends a message of

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134. Jinks and Katyal ably responded to this myopia in relation to US military deployments and correctly emphasized our own interests in everyone strictly abiding by the law of war, including treatment of prisoners and humanitarian law. *See generally* Jinks & Katyal, *supra* note 7.

135. BREYER, *supra* note 9, at 102.

136. JAMES J. JACKSON, CONG. RESEARCH SERV., RS21118, U.S. DIRECT INVESTMENT ABROAD: TRENDS AND CURRENT ISSUES 2–3, (2013), https://fas.org/sgp/crs/misc/RS21118.pdf (last visited July 28, 2020) [https://perma.cc/4VC4-5CJQ] (archived July 28, 2020) ("[T]he overseas direct investment position of U.S. firms on a historical-cost basis, or the cumulative amount at book value, reached $4.4 trillion in 2012, the latest year for such investment position data.").

137. Hines v. Davidowitz, 312 U.S. 52, 65 (1941) ("[A]part from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents—duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad.").

138. Kolovrat v. Oregon, 366 U.S. 187, 195 (1961).

commitment to rule of law. That *should* be congressional intent, but even if it were not, it should be our *national* intent as the globe's "leading proponent of international human rights law,"[139] leading proponent of rules-based free markets, leading proponent of democratic institutions, etc.

Understanding the *Charming Betsy* canon as a manifestation of global rule of law, the discussion below considers different problems for the canon in contemporary circumstances.

IV. *CHARMING BETSY* IN A GLOBALIZED, PAX AMERICANA WORLD

As international legal norms increasingly address "substantive matters of our political and economic life traditionally reserved to exclusive domestic jurisdiction,"[140] the theoretical fiat of *Charming Betsy* grows and a canon of interpretation once only rarely dusted off and used could become a more common instrument in judicial decision-making.[141] Those concerned with preserving national sovereignty may find this alarming, even to the point of proposing the canon's elimination. But if one believes that *Charming Betsy* is justified in part by the promotion of rule of law *globally*—and that strengthened rule of law within other jurisdictions and among jurisdictions is a normatively desirable part of the American-sponsored, post-1945 order, then *Charming Betsy* is as relevant as it has ever been.

Once the canon is understood as advancing the rule of law in a globalized world, it is reasonable to conclude (a) that courts should be more comfortable in finding clear international legal norms in express treaty commitments than in customary international law, but (b) that American courts should *not* demur from contributing to the clarification of international legal norms through interpretations of treaty provisions and analyses that can either crystallize or debunk alleged customary international law.

On the first point, greater skepticism toward customary international law comports with concerns over inadvertent loss of sovereignty, while emphasis on treaty commitments is emphasis on (more) transparently negotiated legal norms resulting from multilateral, plurilateral, and bilateral discussions in which democratically elected governments, particularly ours, have almost

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139. Mojica v. Reno, 970 F. Supp. 130, 147 (E.D.N.Y. 1997).

140. Steinhardt, *supra* note 8, at 1111. *See also* Ahmed, *supra* note 8 (quoting lawyer Robert Volterra, "[t]here are treaties regulating almost every human activity, including child custody, the content of breakfast cereals, and what compensation travellers receive if an airline loses luggage").

141. Bradley, *Chevron Deference*, *supra* note 93, at 685 ("Indeed, lower court application of the [*Charming Betsy*] canon appears to be on the rise, perhaps because the number of potential conflicts between federal statutory law and international law has been growing.").

always had a dominant voice. The reason for the second point should be self-evident: American courts discussing, analyzing, and interpreting international legal norms, whether customary or treaty-based, provide a valuable "input" into the formation of international law—valuable because of the experience of our judges, the quality of our litigation, and the insights of the American perspective.

A. *Rigorous Identification of Customary International Law*

The first element in a proper application of *Charming Betsy* is an *unambiguous* international legal norm. This seems obvious, but as Ralph Steinhardt has noted, "[e]ven a court committed to giving international law its due under *Charming Betsy* may encounter considerable difficulty determining what 'international law' requires in these circumstances."[142] And there is probably considerable consensus that the difficulty is greater with customary international law (CIL) than with treaty provisions.[143]

Curtis Bradley and Jack Goldsmith have identified three fundamental changes in *potential* CIL since 1945 that cause discomfort for jurists, courts, and policymakers: that "new" CIL has the "the individual, and not just the state" as its subject;[144] that "it is less tied to state practice";[145] and that it "can develop very rapidly."[146]

Of course, the last of these cannot itself disprove CIL: American judges have always recognized that customary international law can

142. Steinhardt, *supra* note 8, at 1164.

143. *See* Bishop, *supra* note 114, at 567 (describing the displacement of CIL with express treaty provisions as a "gain in clarity of international rules and their suitability to human needs [that] may come at the expense of that habitual conformity to law and tradition which characterizes all customary law").

144. Bradley & Goldsmith, *supra* note 76, at 839. And that means it attempts to address "many matters that were traditionally regulating by domestic law alone." *Id.* at 840–41.

145. *Id.* at 839.

146. *Id.* at 840. For opposition to CIL being developed in all these ways, *see generally* Simma & Alston, *supra* note 128 (questioning whether efforts to "up-date" CIL do "fundamental . . . violence to the very concept"); J.S. Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law,* 1979 U. ILL. L.F. 609 (1979) (questioning foundations of "new" international law).

change,[147] sometimes rapidly. In the 1871 decision, *Scotia*,[148] the Supreme Court concluded that a new customary international legal norm had come into being only a few years previously. The Court held that an American ship that had displayed the wrong lights as prescribed by American law[149] was negligent in a nighttime collision with a British ship "independently of the act of Congress" because the US ship had violated a new customary legal norm.[150]

The new norm had arisen because "before the close of the year 1864, nearly all the commercial nations of the world had adopted the same regulations respecting lights"[151] and those rules once "accepted as obligatory rules by more than thirty of the principle commercial states of the world" had become part of "the laws of the sea."[152] The *Scotia* Court gave various formulations for how this change from the "ancient maritime law" had occurred: a new norm emerges "because it has been generally accepted as a rule of conduct";[153] the new norm "become[s] the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world"[154] and the change in norms is "accomplished . . . by the concurrent assent, express or understood, of maritime nations."[155]

When a claimed CIL norm is of recent vintage, courts should demand—as in *Scotia*—clear provenance and consistent practice from a substantial body of important jurisdictions; as the Court more recently said in *Sosa v. Alvarez-Machain* the new norm must be "accepted by the civilized world" and defined with the kind of specificity that characterized eighteenth century violations of the law of nations

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147. *See, e.g.*, Brown v. United States, 12 U.S. 110, 122 (1814) (relying on "mitigations" of the customary laws on wartime seizures); The Paquete Habana, 175 U.S. 677, 694 (1900) (determining that a principle which had once just been a matter of comity had ripened into a "settled rule of international law"); Harisiades v. Shaughnessy, 342 U.S. 580, 588 n.14 (1951) (citing the 1920 and 1948 editions of Oppenheim's treatise on international law showing a shift in state obligations vis-à-vis expulsion of aliens); Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (discussing *Paquete Habana* as standing for proposition that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."); Maria v. McElroy, 68 F. Supp. 2d 206, 233 (S.D.N.Y. 1999) ("Customary international law is not static but fluid and evolving."); Cleveland, *supra* note 8, at 93 ("The Court consistently applies international law as an evolving body of doctrine.").

148. *See generally* Scotia, 81 U.S. 170 (1871).

149. *Id.* at 183 ("The Berkshire was an American ship, belonging to the mercantile marine, and she was required by the act of Congress of April 29th, 1864, to carry green and red lights, which she did not carry, and she was forbidden to carry the white light, which she did carry. By exhibiting a white light, she, therefore, held herself forth as a steamer, and by exhibiting it from her deck, instead of from her masthead, she misrepresented her distance from approaching vessels.").

150. *Id.* at 184.

151. *Id.* at 186.

152. *Id.* at 188.

153. *Id.* at 187.

154. *Id.*

155. *Id.* at 188.

like piracy. As Ernest Young noted, "domestic courts should be extremely careful in 'finding' customary norms. They should insist, for example, on real and pervasive evidence of state practice and *opinio juris*."[156] In short, determinations of customary international law should be inductive: if the alleged *norms* are not being *practiced*, they may be laudatory standards for humanity, but not "*settled* rule[s] of international law."[157] As the Second Circuit panel said in the 1980 *Filartiga v. Pena-Irala* case, "the requirement that a rule command the 'general assent of civilized nations' is a stringent one."[158]

While this may not be the most encouraging position for people who want to use North American and European legal systems to hasten the formation of progressive CIL norms, this posture has one important side effect: having tough standards for establishing CIL is consistent with a preference that the global rule of law be built on legal norms more openly negotiated, debated, and settled upon by express consensus—that is, through multilateral treaties.

This is also not to say that American judges should be skeptical about taking up the question of the claimed customary international legal norm; by the lights of the rule of law explanation of *Charming Betsy*, American courts should *embrace* such questions, but be rigorous in identifying both that there is a relevant customary international legal norm and as to the content of that norm. As William Bishop noted in 1961, "[d]ecisions of the courts help to form custom, and they show us what courts have accepted as international law."[159] American judges should not shrink from their participation in this global process.

B. *Identifying the Clear Content of a Treaty Obligation*

In terms of identifying clear legal norms, it is reasonable to think that the *ex ante* precision of treaty obligations will generally exceed that of CIL norms. Many treaty provisions are, at their initiation, crystal clear or at least crystal clear in a substantial area of activity. Examples of this sort would be the protection accorded to civilian hospitals in wartime by the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War;[160] the twenty-year term of protection required for patents under the 1994 TRIPS Agreement;[161]

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156. Young, *supra* note 8, at 390.

157. United States v. Yousef, 327 F.3d 56, 92 (quoting The Paquete Habana, 175 U.S. 677, 694 (1900)).

158. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

159. Bishop, *supra* note 114, at 557.

160. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 18, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.").

161. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15,

the prohibition on export quotas in the 1947 General Agreement on Tariffs and Trade (GATT); or the total limit on "incidental dolphin mortality" in the Agreement on the International Dolphin Conservation Program.[162]

Of course, there are also treaty provisions that are vague when drafted, often intentionally so.[163] Such provisions may or may not be clarified over time by consistent state practice. And treaty provisions which seem to create focused obligations when read in isolation may be more ambiguous in context or may become more general through divergent state practice.[164] In short, treaty provisions themselves may require interpretative exercises to establish the substantive content of the international obligation.[165]

This is where the different justifications for *Charming Betsy* may give a person different intuitions on a court's best strategy. A court motivated to avoid foreign entanglements by its respect for the separation of powers might be tempted to find that a statute is *unambiguous*, making the international law inquiry irrelevant. Whereas the global rule of law perspective may point in a different direction: the system of international legal norms will generally be improved by the participation of jurists from sophisticated judicial systems. The more jurists from strong legal traditions provide thoughtful interpretations of international legal norms, the stronger and more robust the entire international legal system will be.

For example, the issue before the Federal Circuit in the 2005 *In re Rath* case was whether the United States was required under the Paris

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1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 ("The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.").

162. Agreement on the International Dolphin Conservation Program art. 5, May 15, 1998, L132, 27/05/1999.

163. One example is the definition of a "child" in the The United Nations Convention on the Rights of the Child. *See* LUISA BLANCHFIELD, CONG. RES. SERV., THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 13 (2013) https://fas.org/sgp/crs/misc/R40484.pdf [https://perma.cc/B7SN-5S7M] (archived Aug. 19, 2020) ("During negotiations on the treaty text, the issue of . . . where life begins was debated among U.N. member states. Ultimately, in the interest of compromise and to allow for the maximum number of ratifications, CRC drafters agreed to not address the issue in the main articles of the Convention. The intent was to leave the text purposefully vague so that ratifying countries could interpret the provisions to align with their own domestic law."). Another example would be what counts as a "conflict not of an international character" for purposes of Article 3 of the Geneva Conventions. *See generally* Debra Pearlstein, *How Everything Became War*, 111 AM. J. INT'L L. 792 (2017).

164. As I have argued is that case with Article 6b of the Berne Convention for the Protection of Literary and Artistic Works. *See generally* Justin Hughes, *American Moral Rights and Fixing the Dastar Gap*, 2007 UTAH L. REV. 659 (2007).

165. *See e.g.*, Washington v. Washington State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 662 (1979) (interpreting "the character of [a] treaty right to take fish" in a treaty between Indian tribes and the United States); Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977) (interpreting Warsaw Convention's limitation on liability for air carriers to extend to suits against employees of air carriers despite ambiguous treaty language).

Convention on Industrial Property to provide US registration to a particular trademark already registered abroad.[166] The USPTO trademark examiner had concluded that the foreign trademark was a surname, providing an initial bar to registration under US domestic law. The Federal Circuit concluded that the *Charming Betsy* was inapplicable because the statutory provision at issue was unambiguous (as it is).[167] On that basis, the court avoided determining the actual content of the international obligation.[168]

But the court might just as well have held—or held in the alternative—that the international obligation itself was sufficiently general that our domestic law met the obligation. The treaty provision at issue requires that "[e]very trademark duly registered in the country of origin shall be accepted for filing and protected"[169] in the United States and then provides some conditions ("reservations") for refusing registration, including when the foreign trademark is "devoid of any distinctive character."[170] Under American trademark law, when a trade name is a surname, it is presumed devoid of distinctive character until there is a showing that the trade name has acquired "secondary meaning." Thus, the court could as easily have found that the statutory surname bar falls within the "devoid of any distinctive character" reservation in the Paris Convention.[171] In the case of this particular treaty provision, a thoughtful interpretation by the Federal Circuit in 2005 might have been helpful to the Singapore Supreme Court when they dealt with the same provision a few years later.[172]

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166. *See In re* Rath, 402 F.3d 1207, 1209 (Fed. Cir. 2005).

167. *Id.* at 1211 ("However, even assuming that the surname provision of the Lanham Act is inconsistent with the Paris Convention, section 44(e) is not susceptible to a construction that the surname rule is overcome where there has been an earlier foreign registration, and the *Charming Betsy* presumption is inapplicable.").

168. *Id.* at 1214 ("Whether the surname rule conflicts with the requirements of the Paris Convention as applied to foreign registrants is a matter we need not decide.").

169. Paris Convention for the Protection of Industrial Propery, July 14, 1967, art. $6^{quinquies}$(A)(1), 21 U.S.T. 1583 [hereinafter Paris Convention].

170. *Id.* art. $6^{quinquies}$(B).

171. Indeed, the US Government presented interpretation of the Paris Convention as one way for the court to proceed. The argument that the U.S. domestic surname bar fulfills U.S. implementation of the "devoid of distinctiveness" reservation could be supported by Article 6(1) of the Paris Convention which provides that "[t]he conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation." This can be taken to provide further support for domestic flexibility in implementing the treaty's norms. In re *Rath*, 402 F.3d at 1209 ("The PTO urges that surname marks are descriptive, and therefore "devoid of any distinctive character" within the meaning of the Paris Convention, such that no conflict exists between the requirements of the Lanham Act and the Paris Convention.").

172. *See generally* Wee Loon Ng-Loy, *Trade Marks, Language and Culture: The Concept of Distinctiveness and Publici Juris*, SING. J. LEGAL STUD. 508 (2009).

V. *CHARMING BETSY* AND THE *CHEVRON* DOCTRINE

Of course, the *Charming Betsy* canon is one of many interpretative tools employed by courts. *Charming Betsy* does not have an opposing, "anti-canon" as semantic interpretive doctrines do,[173] but it can often find itself paired with administrative law's *Chevron* doctrine by which courts defer to reasonable agency interpretations of ambiguous statutory law. As Judge Jane Restani and Professor Ira Bloom put it:

> The difficult issues arise when the courts are faced with divining the meaning of domestic international trade statutes not just with the guidance of . . . the agencies administering these laws, but also with the guidance of the international agreements giving rise to those laws.[174]

Simply put, "The relationship between the *Charming Betsy* canon and *Chevron* deference is uncertain."[175]

When the agency advocates a statutory construction expressly compatible with the relevant international law, *Charming Betsy* and *Chevron* simply reinforce each other.[176] But what should a court do when an ambiguous statute has been applied by an agency in a way that seems in conflict with the international obligations of the United States? In these rare circumstances, should the court apply *Charming Betsy* to interpret the statute so as to comply with international law and undo the agency action? Or should a court accept the agency's expertise per *Chevron,* upholding (and thereby *causing*) what the court believes will be the United States' violation of an international obligation?

Generally, lower courts have been unwilling to conclude that *Chevron* automatically trumps the *Charming Betsy* canon,[177] and the

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173. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed,* 3 VAND. L. REV. 395 (1950) (describing how each canon on interpretation of the grammar and syntax of legislation usually as a "mirror" or opposing canon).

174. Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the* Charming Betsy *Sinking?*, 24 FORDHAM INT'L L.J. 1533, 1541 (2001).

175. Bradley, *Chevron Deference*, *supra* note 93, at 685.

176. *Id.* Wuerth also notes that the two doctrines can work "in tandem." Wuerth, *supra* note 76, at 344; *see, e.g.*, George E. Warren Corp. v. EPA, 159 F.3d 616, 623–24 (D.C. Cir. 1998) (using the *Charming Betsy* canon and a WTO decision to conclude that the agency's interpretation of the statute was reasonable under *Chevron*); Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581–82 (Fed. Cir. 1995) (reversing the Court of International Trade and deferring to the Department of Commerce's interpretation of the statute in part because it was consistent with the international obligations of the United States).

177. Cases truly go both ways. *See, e.g.*, Usinor v. United States, 26 C.I.T. 767, 776 (2002) ("[A]lthough *Chevron* states that a reasonable interpretation of an ambiguous statute by an agency should ordinarily be afforded deference, where international obligations arise, the reasonability of the agency's interpretation must be gauged against such obligations."); Allegheny Ludlum Corp. v. United States, 367 F.3d 1343, 1348 (Fed. Cir. 2004) (holding, based in part on the *Charming Betsy* canon and a decision of the

Supreme Court has muddled the discussion by citing *Charming Betsy* as a source of the constitutional avoidance doctrine and saying that doctrine trumps *Chevron* (making it easy for people to think that the Court has already held that *Charming Betsy* trumps *Chevron*).[178] On the other hand, some commentators believe that *Chevron* should have a kind of priority over *Charming Betsy*.

A. Chevron *Doctrine*

In its 1984 *Chevron v. Natural Resources Defense Council* decision,[179] the Court established the now "canonical"[180] framework for deference to agency interpretations, regulations, and rulings:

> If the intent of Congress is clear, that is the end of the matter: for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress . . . if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[181]

This led to an initial formulation of *Chevron* as a two-part test: (1) a court must determine "if the statute is silent or ambiguous with respect to the specific issue"[182] and, after the statute is determined to be ambiguous, (2) whether the agency's interpretation is "a permissible construction of the statute"[183] because "the agency [has] leeway to

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WTO, that the language of the statute spoke directly to the issue in question and that the agency's interpretation was due no deference under *Chevron*); Timken Co. v. United States, 354 F.3d 1334, 1342–44 (Fed. Cir. 2004) (deferring to the Commerce Department's interpretation of the statute, and refusing to apply the *Charming Betsy* canon in part because the WTO ruling in question was distinguishable); Hyundai Elec. Co. v. United States, 53 F. Supp. 2d 1334, 1343–45 (Ct. Int'l Trade 1999) (reasoning that "unless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce's regulatory authority under the *Charming Betsy* doctrine"); Caterpillar, Inc. v. United States, 941 F. Supp. 1241, 1247 (Ct. Int'l Trade 1996) (applying the *Charming Betsy* canon to construe the 1930 Tariff Act contrary to the "proffered construction" of U.S. Customs).

178. In Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988), the Court concluded that *Chevron* analysis yields to the constitutional avoidance doctrine, citing *Charming Betsy* for this "trumping" interpretative canon. *Id.* at 575. The *DeBartolo* citation was based on an earlier mistaken attribution of the constitutional avoidance doctrine to the *Charming Betsy* case in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979). The mix-up as to what interpretative canons the *Charming Betsy* case presents has since been repeated in a number of opinions from the Court. See Bradley, *Chevron Deference*, *supra* note 93, at 686 n.154.

179. *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

180. City of Arlington v. FCC, 569 U.S. 290, 296 (2013) (establishing the "now canonical formulation").

181. *Chevron*, 467 U.S. at 842–43.

182. *Id.* at 843.

183. *Id.*

enact rules that are reasonable in light of the text, nature, and purpose of the statute."[184]

Belief that Congress *intended* to delegate interpretation and further specification of the law is the formal basis for *Chevron* deference; in Chief Justice Roberts' succinct statement, "[c]ourts defer to an agency's interpretation of law *when* and *because* Congress has conferred on the agency interpretive authority over the question at issue."[185] Thus, *Chevron* applies when the intent to delegate is express[186] or when that intent can be implied.

This has led to the development of another "step" in *Chevron* jurisprudence, sometimes called "Step Zero," that is an "initial inquiry into whether the Chevron framework applies at all"[187] or "whether and to what extent the agency's interpretation is entitled to deference."[188] The agency interpretation being entitled to deference depends on Congress having delegated authority, agency expertise, and procedural aspects of the agency's action.

That "the particular statute is within the agency's jurisdiction to administer"[189] seems to be a *necessary* condition for implied delegation of authority under *Chevron*, but may not be a sufficient condition. In *United States v. Mead Corp.*, the Supreme Court noted that implied

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184. Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2142 (2016).

185. *City of Arlington*, 569 U.S. at 312 (Roberts, J., dissenting) (emphasis added). *See id.* at 296 ("*Chevron* is rooted in a background presumption of congressional intent."); Smith v. Berryhill, 139 S. Ct. 1765, 1778 (2019) (*quoting* King v. Burwell, 576 U.S. 473, 485 (2015)) (Chevron deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps"); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."); Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); s*ee also* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 195 (1992) ("Under this now common view of the theoretical underpinning of judicial deference, the need for and extent of deference is a function of congressional intent.").

186. Such as when the Communications Act delegated to the Federal Communications Commission the authority to "execute and enforce" the statute and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

187. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

188. Lovgren v. Locke, 701 F.3d 5, 21 (1st Cir. 2012). *See also* Sierra Club v. Trump, 929 F.3d 670, 692 (9th Cir. 2019); Martin v. Soc. Sec. Admin., 903 F.3d 1154, 1159 (11th Cir. 2018) ("Since *Chevron*, the Supreme Court has clarified what some refer to as 'step zero' of *Chevron*: the threshold requirement that an agency interpretation be of the sort that warrants *Chevron* analysis in the first instance."); Vullo v. Office of Comptroller of Currency, 378 F. Supp. 3d 271, 292 (S.D.N.Y. 2019) ("Courts begin the multi-step Chevron deference analysis by answering the Chevron 'step zero' question.").

189. *Brand X Internet Servs.*, 545 U.S. at 969 (2005) ("*Chevron* requires a federal court to defer to an agency's construction . . . if the particular statute is within the agency's jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency's construction is reasonable.").

delegation "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[190]

In addition to congressional intent, other additional justifications for *Chevron* are agency expertise and the relative political accountability of executive agencies compared to the judiciary.[191] These secondary justifications also inform *Chevron* "Step Zero" which considers "the interpretive method used and the nature of the question at issue";[192] in that context, the Court has concluded that *Chevron* deference is inappropriate for statutory interpretation from nonexpert agencies[193] as well as decisions on tariff classifications[194] or the scope of judicial review.[195] *Chevron* deference is appropriate for agency-promulgated "legislative rules"[196] but inappropriate for statutory interpretations contained only in agency opinion letters, policy statements, agency manuals, or enforcement guidelines.[197]

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190. United States v. Mead Corp., 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.").

191. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("Federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do."). Scholars, of course, disagree about the "real" justifications for the doctrine. *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 191 (1998) ("[T]he [*Chevron*] Court ultimately supported its deference principle with two intertwined policy reasons--agency expertise and democratic accountability."); Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 432 (2006) (*Chevron* deference is rooted "primarily (but not exclusively) in notions of political accountability").

192. Barnhart v. Walton, 535 U.S. 212, 222 (2002).

193. The *Oregon v. Gonzalez* Court found that the Attorney-General's interpretation of the Controlled Substances Act was not an interpretation from an agency with medical expertise and that *Chevron* deference would be appropriate only if the administrative action "reflected the considerable experience and expertise the [agency] had acquired over time with respect to the complexities of the [statute]." Oregon v. Gonzalez, 546 U.S. 243, 256 (2006). *See also* Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1010 (1999) ("Chevron deference is not appropriate when an agency is asserting authority outside its core powers.").

194. Where the U.S. Court of International Trade would have equal expertise. *Mead*, 533 U.S. at 234.

195. Smith v. Berryhill, 139 S. Ct. 1765, 1778 (2019) ("The scope of judicial review, meanwhile, is hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency.").

196. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 24 (D.C. Cir. 2019)

197. Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations in policy statements agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant Chevron-style deference."). But labels are not dispositive. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (allowing a Department of Labor rule called an "interpretation" to be entitled to Chevron deference "where the agency uses full notice-and-comment procedures to promulgate a rule").

At the other end of the analysis, "Step Two" of *Chevron* looks to whether the agency interpretation is "permissible." Many believe that the *Chevron* step two inquiry "is all but toothless,"[198] which might be true *except* when *Chevron* confronts *Charming Betsy*.

B. *Views that* Chevron *Should Trump*

Some believe that broad and extensive *Chevron* deference is desirable for the administrative state; among these commentators, there are those who argue that *Chevron* deference should particularly have more traction when the executive branch is managing the foreign affairs of the country. Two such proposals warrant discussion.

One of the most sustained critiques of the *Charming Betsy* in relation to the *Chevron* doctrine and executive power comes from a 2007 article by Eric Posner and Cass Sunstein.[199] The Posner/Sunstein view was that all of what they call "international relations doctrines"[200] should give way to *Chevron*-style deference to executive interpretations of statutes that concern foreign affairs. Their rationale is that the executive "is in the best position to balance the competing interests" of the nation[201] and that the executive "has better information about the consequences of violating international law."[202] They believe that the *Charming Betsy* canon should have little or no role "in cases in which the executive has adopted an interpretation via rulemaking or adjudication, or is otherwise entitled to deference under standard principles of administrative law."[203]

The overall Posner/Sunstein proposal drew criticism when it was published on the grounds that it "would radically expand the authority of the executive to interpret and, in effect, to break foreign relations law,"[204] a criticism that carries more sting after the experience of the Trump presidency. But for people who care about the rule of law globally, something always seemed amiss in the Posner/Sunstein proposal. By lumping *Charming Betsy* with "comity" doctrines, Posner and Sunstein are led to think that *Charming Betsy*'s "conventional explanation" is to avoid giving offense to "foreign sovereigns"[205] or that

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198. Mohon v. Agentra, LLC, 400 F. Supp. 3d 1189, 1220 (D.N.M. 2019). ("Courts essentially never conclude that an agency's interpretation of an unclear statute is unreasonable."). *See also* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law,* 79 U. COLO. L. REV. 767, 775 (2008) ("Due to the difficulty in defining step two, courts rarely strike down agency action under step two.").

199. *See generally* Posner & Sunstein *supra* note 61.

200. *Id.* at 1173.

201. *Id.*

202. *Id.* at 1174.

203. *Id.* at 1204; *see also id.* at 1198 ("The international relations doctrines should not operate as constraints on the executive under Chevron Step One.").

204. Jinks & Katyal, *supra* note 7, at 1233.

205. Posner & Sunstein, *supra* note 61, at 1175.

a "common explanation" of *Charming Betsy* is to "avoid unnecessary entanglements with foreign states"[206] and to "reduce the risk that courts will inadvertently cause foreign policy tensions or crises by offending other nations."[207]

While it *may* be true that our country being perceived as complying with international law should "reduce the risk" of foreign policy tensions, *Charming Betsy* is not a doctrine for "deferring to foreign sovereigns"[208] as true comity doctrines are.[209] For example, Posner and Sunstein write that *Charming Betsy* "requires courts to determine what international law is and such determinations will often require a court to evaluate the acts of foreign states,"[210] implying that such determinations might produce "tensions" or "entanglements." But what "acts of foreign states" are we talking about when the case will involve the application of a US statute? It is true that determinations of customary international law or interpretations of vague treaty provisions *could be* based on the acts of foreign states, but this will be *rare* (not "often") and it will be state actions in the *aggregate*. Focus on the acts of one or two states would typically be used to *defeat* the existence of an international legal norm—and, if there is no international norm, the *Charming Betsy* doctrine would have no traction at all.

Curtis Bradley has offered another approach that prioritizes *Chevron*. Bradley pushes back against what he perceives as an "unrealistic" separation of law and policy, identifying *Charming Betsy* with an "insistence on a pure 'rule of law' approach."[211] He concludes that the *Charming Betsy* canon "should not trump *Chevron* deference, at least where there is a 'controlling executive act.'"[212]

If a court is confronted with an unclear international obligation, it will naturally look to the views of the executive branch on the question. But how much should the court *defer* to those views? Bradley proposes that *treaty* interpretation itself (not *statutory* interpretation) should be subject to a kind of *Chevron* deference, proposing that *Chevron* provides "a framework for understanding and controlling deference in

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206. *Id.* at 1183.

207. *Id.* at 1184.

208. *Id.* at 1185.

209. *See* RESTATEMENT (THIRD), *supra* note 40, § 101 cmt. e ("Comity has been variously conceived and defined. A well-known definition is: 'Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.'").

210. Posner & Sunstein, *supra* note 61, at 1185.

211. Bradley, *Chevron Deference*, *supra* note 93, at 651; *see also id.* at 667 ("It is not clear, however, that foreign affairs law can be neatly divorced from foreign affairs.").

212. *Id.* at 679.

what is an otherwise very amorphous area."[213] Bradley reasons that in the first step of *Charming Betsy* (determining the content of the international legal obligation), the court would give deference to the executive agency's interpretation of a treaty or CIL *where the* Chevron *conditions are met*— declining any deference where the court finds "that the plain language of the treaty clearly resolves the issue, or if the executive branch's interpretation is unreasonable" and, past those conditions, only giving deference when "the agency in question is charged with administering the treaty."[214]

As an *analogy*, this is fine, partly because the court's independent judgment as to the likely range of meanings for the ambiguous treaty provision is already present in the determination if "the executive branch's interpretation is unreasonable." Yet *actually* applying *Chevron* would not make sense because the cornerstone assumption of Chevron is that Congress intended to delegate *its law-making authority* to an expert agency. But a treaty is not the product of a single legislature; it is "an agreement among sovereign powers"[215] and the interpretation of any treaty depends not on the unilateral intent of the United States' Senate (or Congress), but on the "shared expectations of the contracting parties,"[216] determined by the text, negotiations, drafting history, and the "'the postratification understanding' of signatory nations."[217] This is even truer with CIL, where there is literally *no* interpretative or law-making authority to delegate. To the degree that CIL is federal common law, that simply galvanizes the conclusion that its interpretation is primarily a matter for courts.

C. *A Nuanced Interaction of* Chevron *and* Charming Betsy

Instead of a view that simply sweeps away inconvenient canons of interpretation because the executive "is in the best position to balance the competing interests" of the nation, one can attempt a more formal analysis of the interaction between the two doctrines. It can be presented schematically as follows:

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213. *Id.* at 674; s*ee also* Evan Criddle, *Chevron Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1929 (2003) (describing Bradley's proposal as "analogizing" to *Chevron* as "a useful framework for disciplining U.S. courts relatively vague standards for deference to executive treaty interpretations").

214. Bradley, *Chevron Deference*, *supra* note 93, at 703.

215. Medellin v. Texas, 552 U.S. 491, 507 (2008) (quoting Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996)).

216. Michael P. Van Alstine, *The Judicial Power and Treaty Delegation,* 90 CALIF. L. REV. 1263, 1301 (2002) (reasons treaties are not like legislative text); Criddle, *supra* note 213, at 1930; Bradley, *Chevron Deference, supra* note 93, at 705.

217. *Medellin*, 552 U.S. at 507 (quoting *Zicherman*, 516 U.S. at 226); *see also* United States v. Stuart, 489 U.S. 353, 365–66 (1989); Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943).

STEP 1: Is congressional intent unambiguous in the statute? Assuming this is the same test as whether the statute is unambiguous, then the two canons start with the same premise.

YES,	NO, *there is ambiguity*
Inquiry ends	
no *Charming Betsy*	
no *Chevron*	

STEP 2: Is there a relevant international legal norm, and what is its content?

NO,	YES, *relevant norm exists*
No possible conflict	
no *Charming Betsy*	
possible *Chevron*	

STEP 3: Does the executive branch interpretation satisfy *Chevron* step Zero? (Analysis of Congressional delegation, agency expertise, and procedural aspects of the agency decision)

NO,	YES, *satisfies Chevron Step Zero*
no *Chevron*	POTENTIAL CONFLICT OF CANONS
possible *Charming Betsy*	

STEP 4: Is the executive branch interpretation a permissible construction of the statute?

If one gets this far, this is where one must decide if and how *Charming Betsy* applies. Let us review the steps.

The First Step

The first step is needed by both doctrines: the court must determine whether the federal statute at issue is ambiguous, both by the terms of the *Chevron* doctrine and the *Charming Betsy* canon. If the statute is unambiguous, then neither doctrine has any claim to a role in the court's decision.

But this raises two issues. First, is a statute being "silent or ambiguous with respect to the specific issue" under *Chevron* the same thing as multiple "possible interpretations" of a statute under *Charming Betsy?* It is reasonable to think the answer is yes, but this raises the question whether in "Step One" of *Chevron* congressional intent *must* be *expressed* to be "clear" or whether there are implicit congressional intentions that are "clear" enough by the lights of *Chevron* to negate delegation of interpretative authority to executive agencies. *Chevron* itself seems to require explicit expression of

intent,[218] but Justice Breyer concurring in the 2013 *City of Arlington v. FCC* case believed that clear congressional intent making *Chevron* inapplicable can be found otherwise:

> [T]he statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statute is ambiguous . . . . Statutory purposes, including those revealed in part by legislative and regulatory history, can be similarly relevant.[219]

If Breyer's view is correct, where Congress indicated that it was passing legislation, in whole or in part, to address US obligations in human rights, international trade, criminal law, intellectual property, or environmental protection (to name a few), is that enough to render the statute *un*ambiguous "with respect to [a] specific issue" and keep the problem outside *Chevron*?

This was the plurality analysis in the Court's *I.N.S. v. Cardoza-Fonseca* decision: that in its 1980 amendments to US immigration law "one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees,"[220] a United States treaty commitment. On that basis, the administration's interpretation of a "well-founded fear" for establishing refugee status was rejected as inconsistent with the clear intent of the statute, i.e., a clear intent to abide by a particular international legal norm to which the United States had subscribed.[221]

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218. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) ("At the first step, [the Court] ask[s] whether the statute's plain terms 'directly addres[s] the precise question at issue.'") (quoting Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984)). *See id.* at 982 (deriving clear Congressional intent "from the unambiguous terms of the statute").

219. City of Arlington v. FCC, 569 U.S. 290, 309–10 (2013) (Breyer, J., concurring in part).

220. Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987). Similarly, in a pair of cases from the 1980s the issue was whether a stateless boat in international waters was properly intercepted and its crewmen indicted for conspiracy to possess and distribute marijuana in violation of 21 U.S.C. § 955(a). United States v. James-Robinson, 515 F. Supp. 1340, 1343 (S.D. Fla. 1981); United States v. Marino-Garcia, 679 F.2d. 1373, 1378 (11th Cir. 1983). Both court found that the legislative history of Section 955a clearly showed that Congress intended to extend jurisdiction only to the "maximum . . . permitted under international law." *James-Robinson*, 515 F. Supp. at 1343 ("Congress intended for the Marijuana on the High Seas Act to give the 'maximum prosecutorial authority permitted under international law.'"); *Marino-Garcia*, 679 F.2d. at 1380. While Congressional intent concerning 21 U.S.C. § 955(a) was clear, the Eleventh Circuit panel noted that if that intent had *not* been clear, *Charming Betsy* would apply: "Moreover, even had the intent of Congress been less than pellucid, the Supreme Court has long admonished that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains….'" *Id.* at 1380 (citing Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804) and Weinberger v. Rossi, 456 U.S. 25 (1982)).

221. *Cardoza-Fonseca*, 480 U.S. at 436–37. Not only did the statutory definition of "refugee" track the Protocol "but there were also many statements indicating Congress'

Second Step

In the second step—necessary to *Charming Betsy*, not *Chevron*—the court determines whether there is a relevant international legal norm and, if so, the contents of that norm. If there is no relevant international legal norm, then there is no *Charming* Betsy analysis. This is where we must decide how much deference the court will give to the executive branch views as to the potential international obligation—and this elicits one of the *Chevron* rationales: agency expertise. On the basis of expertise, courts already recognize that executive branch interpretations as entitled to "respect," "great weight," and "deference."[222]

Should they do more, adopting *Chevron* deference to agency interpretations of treaty obligations? To the degree that treaties are legal instruments, the answer would be no: courts consider themselves especially capable at interpreting written documents.[223] And to the degree a treaty's meaning depends on the "post-ratification understanding" of signatory nations, that is a question of public behavior easily presented as evidence to the court.[224] Express adoption of *Chevron* deference to executive interpretations of US treaty commitments would also be a bad precedent for other countries, signaling that courts in those countries should also cede ground to executive interpretation of treaties. Meanwhile, at home, it would be a treatment without a disease. There are no glaring examples of the

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intent that the new statutory definition of 'refugee' be interpreted in conformance with the Protocol's definition." *Id.* at 437.

222. *See, e.g.*, *Medellin*, 552 U.S. at 513 ("[T]he United States' interpretation of a treaty 'is entitled to great weight.'"); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *see* El Al Isr. Airlines v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); United States v. Stuart, 489 U.S. 353, 369 (1989) (giving "great weight" to "IRS's construction" of a tax treaty); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While 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."); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) ("of weight"); Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (6th Cir. 1985) ("considerable deference"); *see also* RESTATEMENT (THIRD), *supra* note 40, at § 326(2) ("Courts . . . will give great weight to an interpretation made by the Executive Branch."); BREYER, *supra* note 9, at 169 ("One particular feature of treaty interpretation is that the Court will often give special weight to the views of the Department of State, which . . . may understand better what the signatories had in mind.").

223. *See* Markman v. Westview Instruments, 517 U.S. 370, 388 (1996) ("The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis.").

224. In Medellin v. Texas, the Court bolstered its own interpretation of the various treaties by pointing out that 47 nations were party to one treaty and 171 nations party to another, but the defendant and amici could not identify "a single nation" conducting itself pursuant to the defendant's interpretation. *See Medellin*, 552 U.S. at 516.

world going amiss because federal judges do not expressly embrace *Chevron* in relation to treaties; the *Skidmore* deference[225] that courts give agencies for their "specialized experience and broader investigations and information"[226] should be more than an adequate basis for the executive to persuade the court for its own interpretation of a treaty obligation.

Third Step

In the third step, the court needs to conduct the *Chevron* "Step Zero" analysis, determining whether *this* agency in reaching *this* interpretation is entitled to *Chevron* deference. If the answer is no, then, again, there is no conflict between the doctrines. If the answer is yes, then we finally have a *potential* conflict between *Chevron* and *Charming Betsy*.

Fourth Step

It is at this fourth step—where one will conduct "Step Two" of *Chevron*—that *Charming Betsy* does or does not play a role. The "Step Two" question at this point is whether the executive interpretation "is based on a permissible construction of the statute."

Here a court should still use *Charming Betsy* to conclude that an executive interpretation of a statute that puts the United States in violation of international obligations is "capricious" or not "reasonable."[227] As one Commerce Department attorney described, "the reviewing court, as an aid to assessing the *reasonableness of the agency's interpretation*, may turn to a pertinent international obligation of the United States, and construe the statute in harmony with it, if possible."[228] Restani and Bloom also effectively recommend this sort of approach when they propose that if "the statute is intended to implement the [international] agreement . . . the relevant WTO agreement may be viewed as secondary legislative history" and on that

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225. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

226. United States v. Mead Corp., 533 U.S. 218, 234 (2001) (internal quotation marks and citations omitted).

227. The two words reflect the bifurcated standard in *Chevron* between when Congress has explicitly left "gaps" for an agency to fill and when it has impliedly left such gaps. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

228. Elizabeth C. Seastrum, *Chevron Deference and The Charming Betsy: Is There a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Duty Determinations?*, 13 FED. CIR. B.J. 229, 232 (2003–2004).

basis "an agency interpretation contrary to clear WTO language probably should be considered 'manifestly contrary to the statute.'"[229]

Let us return to *Cardoza-Fonseca*, discussed above. *Cardoza-Fonseca* was technically not a *Charming Betsy* case: the plurality concluded that Congress' intent was *express* and that compliance with a specific treaty "provided the motivation for the enactment of the Refugee Act of 1980."[230] That express intent took the analysis out of *Chevron* at *Chevron* "Step One" *and/or* would make the administration's interpretation "impermissible" under *Chevron* "Step Two."

Cardoza-Fonseca also emphasized that courts determine congressional intent "[e]mploying traditional tools of statutory construction,"[231] and the *Charming Betsy* canon is one of the most unimpeachable of those "traditional tools." So, can we just use the background presumption of congressional intent to abide by international legal obligations as the grounds to conclude that the executive branch action is "impermissible" under this fourth step (which is *Chevron* "Step Two")?

There is much in "Step Two" *Chevron* jurisprudence that would allow this approach. For example, consider Justice Scalia's formulation in *City of Arlington v. FCC:* "[w]here Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity *will fairly allow*."[232] As *Charming Betsy* is an interpretative canon as to what to do with such ambiguities, *Charming Betsy* does not "fairly allow" a statutory interpretation in contravention of our international obligations. After all, the "reasonableness" here is "a reasonable policy choice for the agency to make"[233] and one can view

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229. Restani & Bloom, *supra* note 174, at 1543; *see also* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 739–40 (2003) (concluding that "the [*Charming* Betsy] presumption that Congress does not intend to act in a manner inconsistent with international law leads to the corollary that a *Chevron* step two analysis leaves no room for a construction that is not consistent with an international obligation").

230. Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 424 (1987). But as Steinhardt notes, the plurality decision is Charming Betsy-like because a statutory provision ""was interpreted not in accordance with jurisdictional norms but under substantive principles of international refugee law," Steinhardt, *supra* note 8 at 1156, and that "the actual result reflects a predisposition to interpret a mixed legislative history to maximize respect for international norms." *Id.* at 1165.

231. *Cardoza-Fonseca*, 480 U.S. at 446. In *City of Arlington v. FCC*, Justice Breyer used this phrase to describe the *Chevron* inquiry as follows: "The judge, considering 'traditional tools of statutory construction,' [Cardoza-Fonseca] will ask whether Congress has spoken unambiguously. If so, the text controls. If not, the judge will ask whether Congress would have intended the agency to resolve the resulting ambiguity." *See* City of Arlington v. FCC, 569 U.S. 290, 308 (2013) (Breyer, J., concurring in part).

232. *City of Arlington*, 569 U.S. at 307 (emphasis added).

233. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 845 (1984).

discretionary interpretations of domestic law that put us in violation of international law as both "unreasonable" and "capricious."

VI. *CHARMING BETSY* AND THE SPECIAL PROBLEM OF WTO DECISIONS

After the establishment of the United Nations in 1945, perhaps no single event "thickened" international law more than the creation of the World Trade Organization (WTO) in 1994. With approximately 60 agreements of different sorts totaling 550 pages of text (without including national tariff bindings),[234] WTO law provides a different sort of terrain, both for determining when we have an unambiguous international legal norm and for whether and when Congress may have given special contours to the application of *Charming Betsy*. When the question is simply consistency of US statutory law with the textual obligations of any one of the WTO Agreements, courts should proceed as usual—looking for a clear treaty obligation and an ambiguous domestic law. But matters become complicated when the WTO obligation at issue has been the subject of a "dispute settlement" process.

The WTO was founded with a particularly adjudicatory approach to resolving disagreements as to compliance with treaty obligations. Under the WTO's "Dispute Settlement Understanding" (DSU), any WTO jurisdiction can bring another jurisdiction before a "panel" of arbitrators appointed to resolve whether the respondent's domestic law meets its WTO obligations.[235] A WTO Member unhappy with the "panel report" can take an appeal to the DSU "Appellate Body."[236] Although the appellate portion of "dispute settlement" has become paralyzed because of actions (or inaction) by the Obama and Trump administrations,[237] there remains an enormous body of decisions rendered from 1995 to 2019—and panels at least continue to issue decisions. While all these decisions do not constitute a formal system

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234. *See generally WTO legal texts*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited July 28, 2020) [https://perma.cc/Y4XF-QHK7] (archived July 28, 2020).

235. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 4, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 2, 33 I.L.M. 1125, 1228–29 [hereinafter Dispute Settlement Understanding].

236. *Id.* art. 17.

237. Justin Hughes, *Globalization, Revising the Terms of Trade, and the Return of 'History*,*'* 14 OHIO STATE BUS. L. J. 15, 62 (2020) (recognizing paralysis of WTO Appellate Body as a strategy that started under Obama Administration); Alan Beattie, *U.S. is about to cripple the World Trade Organization's dispute-settling system,* L.A. TIMES, Dec. 9, 2019, at https://www.latimes.com/business/story/2019-12-09/us-to-cripple-world-trade-organizations-appeals-system.

of *stare decisis*,[238] commentators tend to treat WTO decisions as a *de facto* system of precedent. That practice is understandable, but masks substantial complexity that bears on how the *Charming Betsy* canon may interact with WTO jurisprudence.

A. *Was the United States the Respondent in the Dispute?*

For a panel or Appellate Body report to become final and effective it must go to the collective WTO membership meeting as the Dispute Settlement Body (DSB): the DSB can, by consensus, reject any report.[239] Thus, one could argue that where a panel or appellate decision is not *rejected* by the DSB, it has been *accepted* by the WTO membership—and arguably becomes a "subsequent agreement between the parties regarding the interpretation of [a WTO] treaty" under Article 31 of the Vienna Convention on the Law of Treaties.[240]

But this view of WTO processes was definitively rejected early in the organization's existence. In the 1996 *Japan—Taxes on Alcoholic Beverages* dispute[241] the Appellate Body concluded that DSU decisions could not be considered "agreements" of the WTO Contracting Parties because of the history of the GATT,[242] specific provisions of the WTO

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238. *See* Seastrum, *supra* note 228, at 233; Corus Staal I, 259 F. Supp. 2d 1253, 1264 n.17 (Ct. Int'l Trade 2003) (citation omitted) ("While commentators argue that there is de facto *stare decisis* within the WTO and that future panels do in fact follow previous decisions, . . . the fact remains that these decisions have no express legal effect beyond the boundaries of the particular case.") *modified*, 279 F. Supp.2d 1363 (Ct. Int'l Trade 2003), *and* 283 F. Supp. 2d 1357 (Ct. Int'l Trade 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005).

239. Dispute Settlement Understanding, *supra* note 235, art. 16(4) ("Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting (7) unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report."); *id.* art. 17(14) ("An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.").

240. Article 31(3) of the Vienna Convention on the Law of Treaties provides that interpretation of a treaty's provisions may take account of "(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" as well as "(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties art. 31(3), *opened for signature* May 23, 1969, 1155 U.N.T.S. 33.

241. Panel Report, *Japan—Taxes on Alcoholic Beverages*, WTO Docs. WT/DS8/R, WT/DS10/R, WT/DS11/R (adopted Nov. 1, 1996), *modified*, Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, ¶ 12, WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) [hereinafter Appellate Body, *Japan—Alcoholic Beverages*].

242. Appellate Body, *Japan—Alcoholic Beverages*, *supra* note 241, at 13 ("The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report.").

Agreements that reserve "interpretations" of the treaties to treaty assembly bodies,[243] and the DSU's own provision reserving the "rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement."[244] The upshot of this 1996 decision is that, *stricto senso*, a decision from the DSU process interprets treaty obligations only for the disputing parties.

That means that the first question is whether the WTO decision at issue concerned a specific American law (meaning the United States was the respondent in the WTO dispute). If *the United States was not the respondent in the dispute,* even if a WTO decision *seems* to address the content of a US domestic law, the WTO decision technically does *not* establish an international obligation of the United States; it only signals what the international obligation would be in some subsequent WTO dispute involving the United States. Even commentators well-versed in international law sometimes overlook this point.[245]

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243. *See id.* ("Article IX:2 of the *WTO Agreement* provides: 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.'"). Such decisions require a three-fourths majority, although consensus would likely be needed in practice. *See* Claus-Dieter Ehlermann & Lothar Ehring, *The Authoritative Interpretation Under Article XI:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8 J. INT'L ECON. L. 803, 805–06 (2005).

244. Appellate Body, *Japan—Alcoholic Beverages, supra* note 241, at 14 (quoting Dispute Settlement Understanding, *supra* note 235, art. 3.9). Few now question that "interpretations and findings developed within reports of the DSM only bind parties in the context of a specific dispute." *See* Cosette D. Creamer & Zuzanna Godzimirska, *Deliberative Engagement within the World Trade Organization: A Functional Substitute for Authoritative Interpretations* 4 (Univ. of Copenhagen, Working Paper No. 9, 2014) (suggesting a proactive views of Members to aid in the functioning of the DSM to "fulfill obligations to *all* WTO Members" (emphasis in original)); Petros C. Mavroidis, *Outsourcing of Law? WTO Law as Practiced*, 102 AM. J. INT'L L. 421, 464 (2008) ("As a formal matter, WTO panel and AB reports, like GATT panel reports before, bind only the parties to the particular dispute and do not create binding precedent."). But there are plenty of observers prepared to argue that the DSU is developing into a precedential or quasi-precedential system. *See, e.g.*, Alec S. Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J.L. & CTS. 61, 62 (2013) (characterizing DSU decisions as "virtually impossible" for WTO Members to reverse); Zhu Lanye, *The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Specific Disputes Only or Making Precedent at the Same Time?*, 17 TEMP. INT'L & COMP. L.J. 221, 230 (2003) ("If we regard precedents as decisions furnishing a basis for determining later cases involving similar facts or issues we can say without heistations that large amounts of such precedents exist in the WTO dispute settlement system.").

245. *See, e.g.*, Restani & Bloom, *supra* note 174, at 1544–47 (discussing how to address WTO decisions without drawing this distinction); Lisa P. Ramsay, *Free Speech and International Obligations To Protect Trademarks*, 35 YALE J. INT'L L. 405, 455–58 (describing "binding" rules or "new rule[s]" being created in WTO dispute settlement proceedings).

For example, in the Federal Circuit's 2004 *Timken Co. v. United States* decision,[246] the issue was whether the U.S. Department of Commerce properly calculated dumping margins against imports of Japanese roller bearings.[247] In a dumping case, shipments of an imported product have allegedly been sold at an "export price" that is less than "normal value," i.e., some shipments of a product were "dumped" into the US market at a loss. Additional tariffs are imposed to bring the market price of the product up to the normal value.

But other shipments of the same product (during the same period) may have been imported at *greater* than normal value, i.e., typical commercial transactions. This leads to the question: Should those profitable shipments be offset against the "dumped" unprofitable shipments? In *Timken*, the importers contested Commerce's practice of "zeroing" the profitable import shipments—that is, not allowing shipments sold at a profit to be offset against shipments sold at a loss. In other words, Commerce took the view that *all* shipments into the United States should be normal, for-profit transactions.

The Federal Circuit concluded that Commerce's "zeroing" practice, while not mandated by the statute,[248] "makes sense,"[249] was a permissible interpretation of the statute, and warranted *Chevron* deference.[250] In other words, having determined that the statutory provision was ambiguous,[251] the *Timken* court relied on a *Chevron* analysis to embrace Commerce's interpretation.

The importer, Koyo Seiko, argued that the practice of "zeroing" in dumping investigations had been held impermissible by the WTO Appellate Body. That 2001 decision, *EC—Bed Linens*,[252] had concerned a dispute between India and the then-European Communities (EC) over duties on bed sheets.[253] Koyo reasoned "that the EC and United States have functionally identical practices that demand similar treatment,"[254] such that Commerce should bring its own procedures into line with the WTO decision. The Federal Circuit's response to this argument was muddled, relying mainly on the distinction between an

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246. Timken Co. v. United States, 354 F.3d 1334, 1336 (Fed. Cir. 2004).

247. *Id.* at 1337.

248. *Id.* at 1342.

249. *Id.* ("This approach makes sense; it neutralizes dumped sales and has no effect on fair-value sales.").

250. *Id.* at 1343 ("According Commerce its proper deference, we hold that it reasonably interpreted § 1677(35)(A) to allow for zeroing.").

251. *See* SNR Roulements v. United States, 341 F. Supp. 2d 1334, 1345–46 (Ct. Int'l Trade 2004) (holding that the statute does not unambiguously mandate zeroing); Serapore Indus. Pvt., Ltd. v. United States Dep't of Commerce, 675 F. Supp. 1354, 1360 (Ct. Int'l Trade 1987).

252. *See generally* Appellate Body Report, *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WTO Doc. WT/DS141/AB/R (adopted Mar. 1, 2001) [hereinafter *EC—Bed Linen*].

253. *Timken Co.*, 354 F.3d at 1343.

254. *Id.* at 1344.

"antidumping investigation" (what was at issue in the India/EC dispute at the WTO) and "an administrative review of dumping" (the dispute before the court).[255]

The better analysis in *Timken* would have been to explain that the WTO Appellate Body's interpretation of a WTO treaty provision *in a dispute that did not involve the United States* had not crystallized the treaty obligation *vis-à-vis* the United States. In other words, the United States' obligation in the WTO Anti-Dumping Agreement remained as vague as it had been before the *EC—Bed Linens* decision.[256] This is the formal teaching of the *Japan—Taxes on Alcoholic Beverages* analysis: decisions of WTO panels and the appellate body are not "authoritative interpretation[s]" of the WTO obligations applicable to all members and must be distinguished from consensus agreements reached by GATT and WTO working groups, committees, Councils, or Ministerial Conferences.[257]

In contrast, a DSU decision *does* express an international legal norm to which the United States becomes bound when the United States has been the respondent in a completed WTO dispute, and that dispute concerned the domestic American law now before the domestic court. In that case, the DSU decision may have converted what was an otherwise ambiguous obligation into one which has more certain content. If a US statute is found to be inconsistent with that newly crystallized obligation then it is up to the political branches to either (1) get amendment of the obligation at the WTO, or (2) change the domestic law. But if (a) the US statutory law is ambiguous, and (b) it was applied by the executive branch in a WTO-inconsistent manner, and (c) the United States is not seeking to change the WTO obligation,[258] then one might think it is time for courts to apply *Charming Betsy*.

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255. *Id.* at 1344–45 .

256. The Court of International Trade made this point properly the year before. PAM S.p.A. v. United States Dep't of Com., 265 F. Supp. 2d 1362, 1372 (Ct. Int'l Trade 2003) ("WTO panel and appellate decisions are non-binding on third parties.").

257. For example, in Luigi Bormioli Corp., Inc. v. United States, 304 F.3d 1362 (Fed. Cir. 2002), the Federal Circuit properly considered three GATT agreements/decisions as clarifying the United States' obligations under the GATT: the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, T.I.A.S. No. 10,402 (also called the "GATT Valuation Code"), *id.* at 1366; the Decision of the Treatment of Interest Charges in the Customs Value of Imported Goods, GATT Committee on Customs Valuation, April 26, 1984, *id.* at 1368; and a 1994 Interpretative Note to Article 1, "Price Actually Paid or Payable" *id.* at 1367 n.3. Since the United States participated in and agreed to these, they qualify under Vienna Article 31 as subsequent agreements among the parties informing the substance of the international obligations.

258. That is, the U.S. has not appealed a panel decision nor made efforts to trigger renegotiation of the WTO obligation through the WTO General Council and Ministerial Conference. Cosette Creamer and Zuzanna Godzimirska have studied the number of statements made by WTO Members on DSB adoption of panel and Appellate Body decision. Not surprisingly, the United States leads the pack with 169 statements made

Congress, however, has added another layer of process—and courts have only infrequently opined on the effect of these additional provisions.

B. *The Statutory Scheme to Address Adverse WTO Rulings*

Congress implemented the WTO Agreements through the "Uruguay Round Agreements Act" (URAA).[259] Among a multitude of changes in US law, the URAA established three specific procedures to reconcile US domestic law with WTO decisions ("WTO reconciliation provisions"). These provisions have been characterized as a "comprehensive scheme for the Executive Branch . . . to determine whether and how to implement an adverse WTO report."[260]

The first provision lays out a general process: 19 U.S.C. § 3533(f) provides that in the case of a panel or Appellate Body report "adverse to the United States" the U.S. Trade Representative (USTR) is to promptly "consult with the appropriate congressional committees concerning whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation." [261] While written in general terms, this subsection seems directed to WTO decisions against US statutory provisions.

Section 3533(f) is followed by § 3533(g) which governs situations in which a WTO "dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements." [262] In such situations, "that regulation or practice may not be amended, rescinded, or otherwise modified" until USTR has undertaken various consultations and "the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification."[263]

1995–2012. Creamer & Godzimirska, *supra* note 244, at 26. But in none of those statements did the United States say it would refuse to comply with a final DSB outcome (whether Appellate Body decision or unappealed panel decision). According to Creamer and Godzimirska, "[p]arties to a dispute typically reiterate legal arguments made within their submissions and highlight particular report findings or procedural aspects with which they strongly agree or that they find problematic." *Id.* at 15.

259. *See generally* Uruguay Round Agreements Act of 1994, Pub. L. 103-465, 108 Stat. 4809.

260. Appellate Body, *United States Final Dumping Determination on Softwood Lumber from Canada,* WTO Doc. WT/DS264/AB.R (adopted Mar. 9, 2007) [hereinafter *US—Softwood Lumber*] (U.S. Department of Commerce argument, citing September 28, 2004 Transcript at 147).

261. 19 U.S.C. § 3533(f) (2018).

262. *Id.* § 3533(g)(1).

263. *Id.* § 3533(g)(1), (1)(A)–(F) (describing multi-step process of consultations with "appropriate congressional committees" and "relevant private sector advisory committees"; "head of the relevant department or agency" providing opportunities for

The third provision—19 U.S.C. § 3538—addresses WTO determinations that "an action by the International Trade Commission in connection with a particular proceeding is not in conformity with the [WTO] obligations of the United States" in relation to antidumping, countervailing, and safeguard measures.[264] In addition to these three provisions, the URAA codified 19 U.S.C. § 3512(a) that "[n]o provision of any of the Uruguay Round Agreements nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."

What is the relationship of these WTO reconciliation procedures to the *Charming Betsy* doctrine? One might conclude that Congress intended to override *Charming Betsy* in regard to WTO dispute settlement decisions—that courts should uphold any WTO-inconsistent regulations or interpretations of statutes until the statutory-described processes have worked to bring US domestic law into alignment with WTO rules. If one believes that the *Charming Betsy* canon is grounded only in congressional intent, one could reason that the URAA's "comprehensive scheme" makes *Charming Betsy* inapplicable to this area of trade law; similarly, one who believes that the canon is grounded in separation of powers might conclude that the URAA shows an intent by the political branches that Article III courts not meddle in WTO issues.

This is arguably how a Federal Circuit panel approached the issues in *Corus Staal BV v. Department of Commerce*.[265] The *Corus Staal* case involved essentially the same dispute as the earlier *Timken* decision (discussed above) concerning Commerce's "zeroing methodology" in antidumping cases.[266] But between *Timken* (decided in March 2004) and *Corus Staal* (decided in May 2005), the WTO Appellate Body had issued an opinion directly addressing the US practice, *United States—Final Dumping Determination on Softwood Lumber from Canada* (decided 11 August 2004).[267] In other words, as of the time of the Federal Circuit's deliberation, a final WTO decision binding on the United States had found "that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of 'zeroing.'"[268]

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public comment on any change in regulation or practice; further consultations with Congressional committees; and publication in the Federal Register).

264. *Id.* § 3538.

265. *See generally* Corus Staal BV v. United States Dep't of Com., 395 F.3d 1343 (Fed. Cir. 2005).

266. *Id.* at 1346.

267. *See generally US—Softwood Lumber*, *supra* note 260.

268. *US—Softwood Lumber*, *supra* note 260, ¶ 117.

Yet the appellate panel took the view that the issue had already been decided in *Timken*;[269] that as to any intervening WTO decisions, "WTO decisions are 'not binding on the United States, much less this court'";[270] and that "if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress."[271]

This was a case where *Charming Betsy* might have been brought to bear by a willing court. Instead, the panel found that the statute in question was ambiguous and, per *Chevron*, upheld the Commerce Department's methodology on the grounds that "[i]n recognition of Commerce's expertise in the field of antidumping investigations, we accord deference to its statutory interpretation in the presence of ambiguity." [272] The court expressly rejected the plaintiff's argument "that Commerce unreasonably refused to interpret the statute in a manner consistent with U.S. international obligations under the *Charming Betsy* doctrine." [273] In the fourth step of the *Chevron/Charming Betsy* interaction proposed above, the Federal Circuit panel declined to consider that the Commerce Department interpretation was not a *Chevron* "reasonable" construction because it *now* conflicted with a clarified international legal obligation of the United States. Indeed, the appellate court held just the opposite.[274]

Of course, there are other perspectives on how *Charming Betsy* can or should interact with the WTO reconciliation provisions of the URAA. That § 3533(g) provides an elaborate notice-and-comment process before which "that regulation or practice may not be amended, rescinded, or otherwise modified" says nothing about courts upholding or overturning "that regulation or practice." Similarly, the § 3533(f) reconciliation provision for statutes requires only that USTR "consult with the appropriate congressional committees" on whether "to implement the [WTO] report's recommendation" without limiting the timing or scope of Article III court review. So, where a DSB proceeding has found a US statutory law to be inconsistent with WTO

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269. *Corus Staal BV*, 395 F.3d at 1347 ("Our decision in Timken addressed Commerce's interpretation of section 1677(35); it is of no consequence that it was decided in the context of a review. Therefore, Timken governs, and the Court of International Trade was correct to find Commerce's zeroing methodology permissible in the context of administrative investigations.").

270. *Id.* at 1348.

271. *Id.*

272. *Id.* at 1346.

273. *Id.* at 1347.

274. Noting that "the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government," the panel concluded "[w]e will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme." *Id.* at 1349. The same reasoning was followed in Dillinger France S.A. v. United States, 350 F. Supp. 3d 1349 (Ct. Int'l Trade 2018).

commitments and that law is sufficiently ambiguous that it is genuinely susceptible to a WTO-compliant interpretation, a court could arguably use *Charming Betsy* to arrive at that interpretation—even while USTR and Capitol Hill might be in the midst of their consultations.

Interestingly, the third WTO reconciliation provision—addressing International Trade Commission (ITC) determinations—reads like its own application of the *Charming Betsy* canon. Section 3538(a) provides that in the face of problematic ITC action, USTR

> may request the Commission to issue an advisory report on whether title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] or title II of the Trade Act of 1974 [19 U.S.C.A. § 2251 et seq.], as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body concerning those obligations. The Trade Representative shall notify the congressional committees of such request. [275]

In keeping with the reasoning in this Article, § 3538(a) can be understood as asking the ITC to reexamine one of its own interpretations of US trade laws in light of an international obligation newly clarified or crystallized by a WTO dispute settlement panel or appellate report; the statutory goal is to reach a decision "not inconsistent with the findings of the [dispute settlement] panel or the Appellate Body concerning [US] obligations." In other words, § 3538(a) asks the ITC to apply *Charming Betsy*.

Even if one believes that the URAA provisions curtail some application of *Charming Betsy,* the canon can still be applied in a "clean-up" role. One example of this is the Federal Circuit's 2004 decision in *Allegheny Ludlum Corp. v. United States.*[276] *Allegheny Ludlum* concerned a "same-person methodology" used by the Department of Commerce to determine whether the effects of a one-time subsidy to a French company, Unisor, survived the company's sale by stock privatization. In 2002, the same-person methodology was struck down by the Court of International Trade as inconsistent with the statute.[277] Separately, the same-person methodology was found to violate the United States' WTO commitments in a DSU decision.[278] In response, Commerce implemented a new "privatization methodology" to determine the effects of one-time subsidies; it implemented this new regulation pursuant to § 3533(g). The new "privatization methodology"

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275. 19 U.S.C. § 3538(a) (2018).

276. *See generally* Allegheny Ludlum Corp. v. United States, 367 F.3d 1339 (Fed. Cir. 2004).

277. Allegheny Ludlum Corp. v. United States, 246 F. Supp. 2d 1304, 1366–69 (Ct. Int'l Trade 2002).

278. Appellate Body, *United States—Countervailing Measures Concerning Certain Products from the European Communities,* WTO Doc. WT/DS212/AB/R (adopted Jan. 8, 2003).

was to be applied to countervailing duty investigations initiated after June 30, 2003.[279] Nonetheless, Commerce sought to continue use of the older "same-person methodology" for the ongoing Unisor investigation.

Relying on both the statute and its legislative history, the appellate panel affirmed that the statute forbade use of the "same-person methodology." Given that the court found clarity in the statute,[280] the decision could have ended there. Instead, the court bolstered their statutory readings with the *Charming Betsy* canon: "[m]oreover, this court's interpretation of § 1677(5) avoids unnecessary conflict between domestic law and the international obligations of this country."[281] The Federal Circuit was correct in this: since *in a dispute involving the United States law*, the WTO "specifically rejected the argument that sales of assets should be treated differently from sales of stocks for assessing countervailing duties,"[282] that interpretation had indeed become "an international obligation[s] of this country."[283] The § 3533(g) process had produced a *prospective* alignment of domestic statute and WTO obligation; the Federal Circuit endorsed using *Charming Betsy* to produce a retroactive alignment between domestic statute and WTO obligation.

If one believes the URAA provisions do not force the *Charming Betsy* canon to retire from the field completely, then *Allegheny Ludlum Corp. v. US* was correctly decided and the *Corus Staal* court failed to understand that a treaty-inconsistent regulation should not be a "permissible construction" of an ambiguous statute under *Chevron*. But one can still think that the *Corus Staal* panel was right in one sense—probably not the sense they meant—when they noted that **"**WTO decisions are 'not binding on the United States.'"[284] It is the fundamental nature of the WTO—not the URAA—which may counsel against the use of *Charming Betsy* in some of these cases.

Most treaty obligations are just that—obligations. This is true of arms-control treaties, tax treaties, extradition treaties, intellectual property treaties, etc. But the dispute settlement system of the WTO

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279. *Allegheny Ludlum*, 367 F.3d at 1343.

280. The issue on which the appellate panel focused was whether Commerce had to treat transfers by asset sale and transfers by stock sale the same, finding that a disjunctive between two kinds of transfers (a change in ownership of "a foreign enterprise" versus "the productive assets of a foreign enterprise") "indicates that the law does not permit Commerce to treat a change of ownership differently based on the form of the transaction." *Id.* at 1345. But the legislative history was not as equivocally clear as the court suggests on whether Commerce would have to use the *same* methodology for each type of transaction. *Id.* at 1346.

281. *Id.* at 1345. In addtion to citing *Charming Betsy*, the panel cited its own precedents on this point, Luigi Bormioli Corp. v. United States, 304 F.3d 1362, 1368 (Fed. Cir. 2002) and Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

282. *Allegheny Ludlum*, 367 F.3d at 1345.

283. *Id.*

284. Corus Staal BV v. United States Dep't of Commerce, 395 F.3d 1343, 1348 (Fed. Cir. 2005).

expressly contemplates defections from WTO obligations, allowing countries to decide on a certain amount of noncompliance with WTO trade disciplines without endangering WTO membership or its overall benefits.

When § 3533(f) provides that after an adverse DSU report USTR will promptly "consult with the appropriate congressional committees *concerning whether to implement the report's recommendation*," this may well express congressional recognition that sometimes the United States will prefer to defect from a WTO legal norm—and abide by the WTO meta-norms that a jurisdiction "pay" for the defection from WTO trade disciplines through lost trade concessions or simple financial payments.[285] In this sense, one could argue that "WTO decisions are 'not binding on the United States'" until the executive branch in consultation with Congress decides that they are binding.[286]

For example, a NAFTA arbitration panel took this approach in the 2005 *US—Softwood Lumber* case.[287] In keeping with *Allegheny Ludlum*, the arbitral panel concluded that the §§ 3533/3538 processes are only for *prospective* modification of US domestic laws[288] and employed *Charming Betsy* to give NAFTA and WTO-compliant interpretations retroactively affecting countervailing duty determinations. Yet while applying *Charming Betsy* to prior discretionary agency action that was not addressed by a § 3533 reconciliation process, the panel noted that it might have reached a different analysis if "USTR determined, after appropriate consultation, to *not* direct implementation of the DSB's ruling (by paying compensation or accepting the imposition of sanctions)."[289] When the US government responds to an adverse WTO report by saying it is willing to pay compensation or accept loss of trade concessions, the combination of the WTO dispute settlement decision and the US government response arguably reshapes that particular WTO obligation of the United States. This is a sound basis to argue that a court should *not* apply the *Charming Betsy* canon to any WTO obligation of the United States that has been crystallized or clarified in a new form until the executive branch, through the §§ 3533/3538 processes, has signaled its acceptance of the newly clarified obligation.

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285. 19 U.S.C. § 3533 (2018) (emphasis added).

286. *Corus Staal BV*, 395 F.3d at 1348.

287. *See generally* NAFTA Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada – Final Affirmative Antidumping Determination*, Secretariat File USA-CDA-2002-1904-02 (June 9, 2005).

288. *Id*. at 35 ("USTR does not have the power, under Section 129(b)(4) or any other statute, to direct the Department to implement an adverse DSB decision retroactively.").

289. *Id.* at 37.

VII. CONCLUSION

No one—or almost no one—questions the basic insight of *Charming Betsy* that domestic law "ought never to be construed to violate the law of nations if any other possible construction remains." The traditional explanations given for the *Charming Betsy* canon are based on congressional intent (to abide by international law) and separation of powers (to keep courts out of foreign affairs). But there is another explanation: *Charming Betsy* is a doctrine by which American jurists contribute to the global rule of law.

As Stephen Breyer noted, "[b]y engaging the world and the borderless challenges it presents, we can promote adherence and adoption to [those] basic constitutional and legal values," values which we hope to pass to others.[290] *Charming Betsy* is part of the proper posture for that engagement, comporting with the importance that the American legal system has played on the world stage as a role model. More than ever, it is in our national interest that courts, bureaucracies, and enforcement structures in other countries believe that they too should ensure, whenever possible, that internationally-agreed legal norms are honored on the ground.

As against the argument that *Charming Betsy* may unduly constrain executive power, the proper response is that in the handling of our country's international *relations* the Executive branch should not—in the absence of congressional direction—violate international *law*. The interests of the United States in the rule of law globally are too important to conflate or confuse short-term policy goals with long-term legal obligations, no matter how heated or demagogic the rhetoric of our election campaigns become.

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290. BREYER, *supra* note 9, at 246.