THE YALE LAW JOURNAL

REBECCA CROOTOF

Judicious Influence: Non-Self-Executing Treaties and the *Charming Betsy* Canon

ABSTRACT. Despite their seeming impotency, non-self-executing treaties play an important role in domestic jurisprudence. When a statute permits more than one construction, judges have a number of interpretive tools at their disposal. One of these is the *Charming Betsy* canon, which encourages judges to select an interpretation of an ambiguous statute that accords with U.S. international obligations—including those expressed in non-self-executing treaties. This Note concludes that the judicial practice of giving indirect force to all treaties through the *Charming Betsy* canon is both justified and beneficial.

AUTHOR. Yale Law School, J.D. expected 2011. I am grateful to Professor Oona A. Hathaway for her encouragement, guidance, and unflagging support. I would also like to thank Professor W. Michael Reisman, Cameron Kistler, Professor Curtis A. Bradley, Professor Lea Brilmayer, and especially Julia Malkina for their challenging and thoughtful comments on earlier drafts. Thanks are also due to the *Journal*'s excellent editorial board.

NOTE CONTENTS

When the United States ratifies a treaty,[1] it accepts and is bound by the treaty's requirements as a matter of international law.[2] Not all of these international obligations, however, may be enforced directly. In the United States, treaties are divided into "self-executing treaties"—which can be immediately enforced in courts[3] and may create private rights of action[4]—and "non-self-executing treaties"—which may not be judicially enforceable or may have no status as domestic law unless Congress passes implementing legislation.[5] In light of this distinction, the political branches often ratify treaties with language identifying them as self- or non-self-executing. When the self-executing status of a treaty is unclear, courts examine its text, its history, and subsequent state practice to determine the parties' intentions.[6]

In *Medellin v. Texas*, the Supreme Court appeared to endorse the presumption that, unless their text indicates otherwise, treaties are not self-

1. For the purposes of this Note, a "treaty" refers to an international agreement established through the traditional Article II process. *See* U.S. CONST. art. II, § 2. It is beyond the scope of this Note to address how other international agreements influence domestic courts.

2. *See* Vienna Convention on the Law of Treaties, art. 26, *done* May 23, 1969, 1115 U.N.T.S. 331, 8 I.L.M. 679; Head Money Cases, 112 U.S. 580, 598 (1884).

3. *See Head Money Cases*, 112 U.S. at 598.

4. The question of whether a treaty is self-executing is distinct from the question of whether the treaty creates a private right of action. *See* Medellin v. Texas, 552 U.S. 491, 506 n.3 (2008); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987). For a comprehensive analysis of the relationship between self-execution, private rights, and private rights of action, see Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. (forthcoming 2011).

5. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833). Professor Carlos Vázquez has identified four types of non-self-executing treaties. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) [hereinafter Vázquez, *The Four Doctrines of Self-Executing Treaties*]. This Note's analysis may not apply to the subset of treaties that are non-self-executing because "they call for judgments of a nonjudicial nature." *See* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 631 (2008) [hereinafter Vázquez, *Treaties as Law of the Land*].

6. *See* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 222-23 (2006). Professor Curtis Bradley notes that "[t]here is some debate over whether a U.S. court should look to the intent of the parties in deciding whether a treaty is self-executing, or simply to the intent of the United States." Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 522 n.249 (1997). Although other courts have found additional factors relevant, *see, e.g.*, Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985), *Medellin* rejects a multifactor analysis, *see* 552 U.S. at 514-15.

executing.[7] On a practical level, *Medellin* increases the likelihood that future treaties will include text clarifying whether they are self-executing,[8] but the status of numerous treaties passed without such language remains unclear.[9] The narrowest reading of *Medellin* in the context of treaty law is that, because the treaties that were at issue were not self-executing, an adverse decision of the International Court of Justice was unenforceable in domestic courts.[10] However, application of the Court's reasoning will likely result in more treaties being deemed non-self-executing,[11] and some lower courts appear to read *Medellin* as approving the presumption in favor of non-self-execution.[12]

Even before *Medellin*, non-self-executing treaties were commonly dismissed as ineffectual agreements,[13] and even the most informed and definitive international law texts suggest that such treaties are domestically impotent in the absence of implementing legislation.[14] As non-self-executing treaties, standing alone, are perceived as having little to no effect on domestic

7. 552 U.S. at 505 ("[W]hile treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms.'" (quoting Igartúa-de la Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc))); *see, e.g.*, Vázquez, *Treaties as Law of the Land*, *supra* note 5, at 608 ("Parts of the Court's analysis in *Medellin* could be read to adopt a presumption that treaties are non-self-executing.").

8. *See* Bradley, *supra* note 6, at 139-40 (finding that the Senate is adjusting its practices to clarify new treaties' self-execution status).

9. *See* Medellin v. Texas, 552 U.S. 491, 552-53 (2008) (Breyer, J., dissenting).

10. *See* Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 541 (2008) ("[*Medellin*] is best read as requiring self-execution to be resolved on a treaty-by-treaty basis, without resort to any general presumption."); AM. BAR ASS'N & AM. SOC'Y OF INT'L LAW, ABA/ASIL JOINT TASK FORCE IN TREATIES IN U.S. LAW (2009), *available at* http://www.asil.org/files/TreatiesTaskForceReport.pdf (describing possible interpretations of *Medellin*).

11. *See* Meera Rajnikant Shah, Note, *Unnecessary Complications for Basic Obligations:* Medellin v. Texas *and Common Article 3*, 41 COLUM. L. REV. 883, 891-92 (2010); David H. Moore, *Law(makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. F. 32, 46 (2009), http://www.harvardlawreview.org/media/pdf/moore.pdf.

12. *See, e.g.*, Al-Bihani v. Obama, 619 F.3d 1, 15-16 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

13. *See, e.g.*, *Medellin*, 552 U.S. at 553 (Breyer, J., dissenting) (implying that the creation of non-self-executing treaties is a "near useless act"); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 261 (2001) (describing how non-self-executing human rights treaties are perceived as "ineffective, dead letters of the law").

14. *See, e.g.*, MURPHY, *supra* note 6, at 222; W. MICHAEL REISMAN, MAHNOUSH H. ARSANJANI, SIEGFRIED WIESSNER & GAYLE S. WESTERMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1311 (2004).

jurisprudence, *Medellin*'s seeming new presumption triggered a flurry of commentary in the academic community.[15] Internationalist scholars deplored *Medellin*'s apparent approval of a presumption against self-execution.[16] Meanwhile, given that nationalists had already made an argument for such a presumption,[17] it is unsurprising that they celebrated its endorsement by the Supreme Court.[18]

Both sides missed the essential point.[19] Self-execution is important insofar as it increases the likelihood that a treaty will create a private right of action, but treaties are rarely cited in domestic decisions on that basis.[20] Instead, treaties most often influence domestic jurisprudence indirectly, when used as

15. *See, e.g.*, Oona Hathaway, Medellin v. Texas *and Treaties' End*, OPINIO JURIS (Mar. 26, 2008, 12:15 PM), http://opiniojuris.org/2008/03/26/medellin-v-texas-and-treaties-end; Margaret E. McGuinness, Medellin v. Texas*: Supreme Court Holds ICJ Decisions Under the Consular Convention Not Binding Federal Law, Rejects Presidential Enforcement of ICJ Judgments over State Proceedings*, ASIL INSIGHTS (Apr. 17, 2008), http://www.asil.org/insights080418.cfm; Debate, Medellin v. Texas, *Part I: Self-Execution*, FEDERALIST SOC'Y (Mar. 28, 2008), http://www.fed-soc.org/debates/dbtid.17/default.asp (featuring Ted Cruz, David Sloss, Nick Rosenkranz, and Edwin Williamson); Edward Swaine, *Comment on* Medellin, OPINIO JURIS (Mar. 26, 2008, 10:24 AM), http://opiniojuris.org/2008/03/26/comment-on-medellin; Ernie Young, Medellin v. Texas*: Another Set of Early Thoughts*, OPINIO JURIS (Mar. 25, 2008, 4:36 PM), http://opiniojuris.org/2008/03/25/medellin-v-texas-another-set-of-early-thoughts.

16. *See, e.g.*, Vázquez, *Treaties as Law of the Land*, *supra* note 5, at 608 ("If read to establish a presumption of non-self-execution, *Medellin* would be a radical holding indeed, requiring rejection of the holdings of many Supreme Court decisions."); Shah, *supra* note 11, at 923 (describing a default presumption of non-self-execution as a "worst case interpretation of the Court's holding in *Medellin*").

17. *See* John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2255 (1999). For responses to Yoo's arguments, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); and Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

18. *See, e.g.*, Benjamin Beiter, Note, *Beyond* Medellin*: Reconsidering Federalism Limits on the Treaty Power*, 85 NOTRE DAME L. REV. 1163, 1187 (2010) ("By adopting a presumption against self-executing treaties, *Medellin* amounts to a preservation of state law absent a clear congressional statement to the contrary.").

19. Professor Curtis A. Bradley is unusual in his acknowledgment that "the [*Medellin*] decision need not be read as entailing a significant reduction in the extent to which treaties will be enforced by U.S. courts," Bradley, *supra* note 10, at 551, and that a self-executing determination will not affect the interpretive role of a treaty, *id.* at 549 n.62.

20. *See* Bradley, *supra* note 6, at 482-83; *cf.* MURPHY, *supra* note 6, at 223 (noting the predominant influence of treaties' implementing statutes and regulations).

interpretive tools in conjunction with the *Charming Betsy* canon.[21] The *Charming Betsy* canon of statutory interpretation is a rebuttable presumption that, when interpreting an ambiguous domestic statute, a judge should select a reading that accords with U.S. international obligations.[22] Because most judges employing the *Charming Betsy* canon use it—and should continue to use it—without regard to whether the relevant treaty is self-executing, *Medellin*'s seemingly monumental presumption is relatively insignificant.[23]

Non-self-executing treaties may describe two types of U.S. international obligations: they will always define treaty commitments, and they may sometimes codify customary international law.[24] Scholars correctly assume that non-self-executing treaties describing customary international law may be used with the *Charming Betsy* canon in statutory construction.[25] This Note expands

21. *See* Bradley, *supra* note 6, at 483 ("[C]ourts regularly rely on the *Charming Betsy* canon in interpreting domestic law.").

22. In this Note, the term "statute" is used primarily to describe nonincorporative statutes. Incorporative statutes—statutes enacted specifically to incorporate the terms of a treaty or customary international law—occupy a unique position and should be interpreted in accordance with the instrument they were meant to implement. For a closer examination of how the *Charming Betsy* canon should be applied to incorporative and nonincorporative statutes, see John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655 (2010).

23. *See, e.g.*, Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1226 (D. Minn. 2008) (holding, post-*Medellin*, that the World Intellectual Property Organization treaties are non-self-executing and that they are therefore "relevant insofar as [the statute at issue] is ambiguous and there is a reasonable interpretation of [the statute] that aligns with the United States' treaty obligations").

24. *See* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1181 & n.332 (1990) (observing that courts may use unratified and non-self-executing treaties as evidence of customary international law). In keeping with the Supreme Court's terminology, this Note uses the terms "customary international law" and "law of nations" interchangeably. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 764 n.75 (2005) ("[R]eferences to [the *Charming Betsy*] canon of statutory construction often equate Marshall's reference to the law of nations with international law.").

25. *See, e.g.*, Elizabeth R. Sheyn, *An Accidental Violation: How Required Gardasil Vaccinations for Female Immigrants to the United States Contravene International Law*, 88 NEB. L. REV. 524, 554-55 & n.139 (2010); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 1008 n.373 (1995); Lisa Cox, Comment, *The Legal Limbo of Indefinite Detention: How Low Can You Go?*, 50 AM. U. L. REV. 725, 752-53 (2001); M. Gavan Montague, Note, *Should Aliens Be Indefinitely Detained Under 8 U.S.C. § 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny*, 69 FORDHAM L. REV. 1439, 1461-65 (2001).

upon this assumption, demonstrating that ambiguous statutes may be construed in light of *all* non-self-executing treaties. While there is a growing consensus that courts may interpret ambiguous statutes in light of non-self-executing treaties, scholarly pieces acknowledging this possibility either offer insufficient support for this claim or are too narrowly focused to provide a comprehensive argument in favor of this practice.[26] Despite relatively weak academic support, however, scholars are increasingly relying on this interaction as a foundational assumption for more complex arguments.[27] By describing the various ways in which courts have given indirect force to non-self-executing treaties and by reviewing the normative justifications for this practice, this Note provides needed support for future scholarship.

After reviewing the creation, animating principles, and application of the *Charming Betsy* canon, Part I describes how non-self-executing treaties currently influence statutory interpretation. When evaluating questions of U.S. international obligations, domestic courts may turn to non-self-executing (or even nonratified) treaties for guidance on the status and text of customary international law. Courts then use these treaties, in conjunction with the

26. Professor Carlos Vázquez is often cited for the proposition that non-self-executing treaties may play an interpretive role in construing domestic statutes. Vázquez writes, "In countless cases, the vast majority of those raising treaty-based claims, the Court has resolved the case without even mentioning the self-execution issue." Vázquez, *The Four Doctrines of Self-Executing Treaties*, *supra* note 5, at 716. While this statement bears on the argument that non-self-executing treaties may be used in conjunction with the *Charming Betsy* canon, Vázquez himself never explicitly makes that connection. Other scholars make similar claims, but none of their pieces provides significant evidence or normative justification for this judicial practice. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 368-70 (1996); Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421, 426 n.30 (2000); John Cerone, *"Dangerous Dicta": The Disposition of U.S. Courts Toward Recourse to International Standards in Gay Rights Adjudication*, 32 WM. MITCHELL L. REV. 543, 552-53 (2006); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 118 (2006); William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 VAND. L. REV. 419, 434 & n.78 (1997); Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 AM. SOC'Y INT'L L. PROC. 412, 415 (2008); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 660-61 (2007); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 86 (2009); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 350-57 (2005).

27. *See, e.g.*, David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 645-47 (2006); Alicia Triche Naumik, *International Law and Detention of US Asylum Seekers: Contrasting* Matter of D-J- *with the United Nations Refugee Convention*, 19 INT'L J. REFUGEE L. 661, 672-74 (2007); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1365 (2007).

Charming Betsy canon, to interpret ambiguous statutes to accord with customary international law. Some non-self-executing treaties do not codify customary international law but nonetheless describe U.S. international obligations. Courts also employ the *Charming Betsy* canon to select statutory constructions that do not violate these treaty commitments. Furthermore, at least one court has interpreted an ambiguous statute to accord with a non-self-executing treaty, even though there was no domestic law nexus.

Part II analyzes the normative justifications for permitting non-self-executing treaties' indirect influence through the *Charming Betsy* canon. When interpreting a statute that permits multiple constructions, courts should favor those that accord with ratified treaties.[28] While a treaty may have been ratified as non-self-executing for a variety of reasons, the act of ratification formally binds the United States to the treaty's terms and creates international obligations. A court's selection of statutory interpretations that do not accord with a ratified treaty may result in judicially created, readily avoidable, and possibly undesirable breaches of these obligations. Giving non-self-executing treaties limited, indirect force through statutory construction supports separation-of-powers principles and encourages relatively costless compliance with U.S. international commitments. Additionally, by elucidating treaty provisions and participating in the international judicial dialogue, domestic judges promote the international adoption of U.S. treaty interpretations: the more U.S. judges contribute to the growing transnational corpus of law by interpreting treaty provisions, the more international law will evolve in tandem with U.S. law.

I. HOW NON-SELF-EXECUTING TREATIES INFLUENCE STATUTORY INTERPRETATION

All non-self-executing treaties, by virtue of their ratification, describe treaty commitments. Some may also codify customary international law, permitting separate but similar *Charming Betsy* analyses. After reviewing the creation and application of the *Charming Betsy* canon, this Part examines how it is used to preserve these international obligations. Section I.B describes how courts may rely on non-self-executing treaties as evidence of customary international law. Once a court has established that a treaty provision constitutes customary international law, it can then employ the *Charming Betsy* canon to select a

28. Because the *Charming Betsy* canon is a rebuttable presumption and not a clear statement rule, later-in-time statutes that clearly contradict treaty obligations will be given full effect. *See infra* text accompanying notes 125-144.

compatible construction. Courts have also determined that those provisions that are both customary international law and treaty commitments may support two separate *Charming Betsy*-based arguments. As demonstrated in Section I.C, even when the treaty commitment does not constitute customary international law, courts have reasoned that the *Charming Betsy* canon is still applicable. Furthermore, at least one court has employed this second analysis in a case that did not otherwise involve international law.

A. The Charming Betsy *Canon*

Both customary international law and treaty law are subject to the later-in-time rule: a subsequent statute that clearly contradicts an international obligation will eliminate its domestic effect.[29] The *Charming Betsy* canon, however, shields customary international law and treaties from being unintentionally overwritten by apparently contradictory statutes with multiple fairly possible interpretations.

In *Murray v. Schooner Charming Betsy*, Chief Justice Marshall wrote for the Court: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."[30] While Marshall's language appears to announce a clear statement rule, the holding has proven most influential in its softer reincarnation as a canon of statutory construction.[31] This canon takes the form of two rebuttable presumptions: (1) the "[p]resumption that Congress does not intend to pass statutes which violate international law"[32] and (2) the "[p]resumption that Congress does not intend to pass statutes which violate treaty obligations."[33] The presumptions are merged in the *Restatement (Third) of the Foreign Relations Law of the United States*: "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

29. *See* United States v. Georgescu, 723 F. Supp. 912, 921 (E.D.N.Y. 1989) ("While the courts must make a fair effort to interpret domestic law in a way consistent with international obligations, in the event of irreconcilable conflict, the courts are bound to apply domestic law if it was passed more recently." (citations omitted)); *infra* notes 57 & 77.

30. 6 U.S. (2 Cranch) 64, 118 (1804).

31. See *infra* text accompanying notes 139-144 for a review of the evolution of the canon.

32. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 883 (4th ed. 2007) (citing Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); *Charming Betsy*, 6 U.S. at 118).

33. *Id.* (citing Hamdan v. Rumsfeld, 548 U.S. 557 (2006)).

United States."[34] Neither Marshall's holding nor the modern formulations of the canon distinguish between self- and non-self-executing treaties.

As currently formulated, the canon has limited application, in that it may be used only when a statute is ambiguous.[35] A statute is ambiguous if, after "employing traditional tools of statutory construction,"[36] a court "determines that Congress did not resolve the issue under consideration."[37] Ambiguous statutes allow for multiple permissible constructions; an "interpretation clearly contrary to the plain and sensible meaning of the statute"[38] would not be fairly possible and would not create ambiguity. Furthermore, the canon is merely presumptive[39] and therefore may be rebutted by "*any* potential evidence of statutory meaning (e.g., statutory text, legislative history, statutory purposes, policy arguments, and so on)."[40]

Courts regularly employ the *Charming Betsy* canon to reconcile U.S. international obligations and subsequent, ambiguous statutes. In deciding *McCulloch v. Sociedad Nacional de Marineros de Honduras*, for example, the Supreme Court relied on the Treaty Between the United States and Honduras of Friendship, Commerce, and Consular Rights.[41] The question before the Court was whether the National Labor Relations Board had correctly ordered representation elections on vessels owned by a corporation organized and doing business in the United States, given that all of the organization's vessels flew the flag of a foreign nation, carried a foreign crew represented by a foreign union, and had other contacts with the foreign nation. Article X of the treaty provided 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

34. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

35. *See, e.g.*, United States v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003) ("The *Charming Betsy* canon comes into play only where Congress's intent is ambiguous.").

36. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

37. Negusie v. Holder, 129 S. Ct. 1159, 1183 (2009) (Stevens, J., concurring in part and dissenting in part).

38. Kankamalage v. I.N.S., 335 F.3d 858, 862 (9th Cir. 2003) (evaluating when a statute may be ambiguous for *Chevron* purposes).

39. However, some courts apply the canon inconsistently. *See infra* text accompanying notes 170-174.

40. ESKRIDGE ET AL., *supra* note 32, at 884 (emphasis added); *see infra* text accompanying notes 135-138.

41. 372 U.S. 10 (1963).

is flown.'"[42] This treaty provision proved instrumental to the Court's holding that the jurisdictional provisions of the National Labor Relations Act did not extend to foreign flagships employing foreign seamen. Writing for the Court, Justice Clark noted the importance of deferring to the intentions of the political branches when the extraterritorial application of a statute would violate a treaty[43]:

> The presence of such highly charged international circumstances brings to mind the admonition of Mr. Chief Justice Marshall in The Charming Betsy . . . . [F]or us to sanction the exercise of local sovereignty . . . in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."[44]

Finding no such expression, the Court held that the Board did not have jurisdiction to order the election.[45] Justice Clark did not address the treaty's self-executing status, presumably because it was irrelevant to the application of the canon.

Until the 1980s, courts employed the *Charming Betsy* canon only in the context of jurisdictional or maritime disputes. In *Weinberger v. Rossi*, however, the Court applied it in an international employment discrimination case to interpret an ambiguous statute in accordance with an executive agreement.[46] In so doing, the Court dramatically expanded the canon's scope.[47] The canon has

42. *Id.* at 21 n.12 (quoting Treaty Between the United States and Honduras of Friendship, Commerce, and Consular Rights, U.S.-Hond., art. X, Dec. 7, 1927, 45 Stat. 2618).

43. *But see* Al-Bihani v. Obama, 619 F.3d 1, 35 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) (arguing that *McCulloch*'s citation of *Charming Betsy* stands only for the presumption against extraterritoriality). For an argument that the *Charming Betsy* canon cannot be limited to a presumption against the extraterritorial application of statutes, see Steinhardt, *supra* note 24, at 1144.

44. *McCulloch*, 372 U.S. at 21-22 (citation omitted) (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

45. *Id.* at 22.

46. 456 U.S. 25 (1982).

47. *See* Steinhardt, *supra* note 24, at 1154. There is a growing body of scholarship addressing the question of how the *Charming Betsy* canon relates to the deference due to agency interpretations, sometimes in the context of non-self-executing treaties. *See, e.g.*, Mary Jane Alves, *Reflections on the Current State of Play: Have U.S. Courts Finally Decided To Stop Using International Agreements and Reports of International Trade Panels in Adjudicating International Trade Cases?*, 17 TUL. J. INT'L & COMP. L. 299 (2009); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 689 & n.166 (2000); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1212 (2007). This is a

since been applied with international agreements whose subject matter spans a variety of issues, including immigration, diplomatic relations, and treaties with Native American tribes.[48]

The animating concept of the canon is influential even in those cases in which it is not mentioned by name.[49] In *Cook v. United States*, for example, the Supreme Court had to determine whether the Tariff Act of 1930 applied to British vessels allegedly smuggling alcohol into the United States.[50] The Court held that the reenactment of an earlier statute that contradicted the intervening and self-executing treaty did not demonstrate a legislative intent to supersede the treaty, because a "treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[51] Although a court may not explicitly evaluate the self-executing nature of a treaty, as evidenced by the case studies discussed in the next Section, domestic courts generally seem to accept the use of the canon in conjunction with non-self-executing treaties.[52] As evidenced by the case studies discussed in the next Section, domestic courts generally seem to accept the use of the canon in conjunction with non-self-executing treaties. It should be

different question from the one addressed in this Note, as it focuses on the current intent of the executive branch (as represented by the agencies) rather than the past intent of both the legislature and the executive (as represented by ratified treaties and enacted statutes).

48. *See* Bradley, *supra* note 6, at 488-89 & nn.49-52 (citing United States v. Dion, 476 U.S. 734, 738-39 (1986); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979); Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968); Mojica v. Reno, 970 F. Supp. 130, 147-52 (E.D.N.Y. 1997); United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1464-65 (S.D.N.Y. 1988)).

49. *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (stating that "a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action" is applicable to a self-executing treaty); Chew Heong v. United States, 112 U.S. 536 (1884) (finding that an immigration law, written to execute the relevant treaty, did not have an effect on the treaty rights of resident Chinese aliens to reenter the country).

50. 288 U.S. 102 (1933).

51. *Id.* at 120. This formulation echoes the canon disfavoring implied repeals. *See infra* text accompanying note 134.

52. *See, e.g.*, Clark v. Allen, 331 U.S. 503, 508-10 (1947) (reading the amended Trading with the Enemy Act as compatible with a treaty granting German aliens inheritance rights); Liberato v. Royer, 270 U.S. 535 (1926) (concluding that the Workman's Compensation Act was not in conflict with a treaty with Italy); MacLeod v. United States, 229 U.S. 416, 434 (1913) (finding, contrary to the executive's interpretation, that the relevant statute should be construed without assuming "that Congress proposed to violate the obligations of this country to other nations"); United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491, 496 (1883) ("The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language.").

acknowledged, however, that some courts deny the possibility of such an application entirely,[53] while others decline to address the matter.[54]

B. *The Role of Non-Self-Executing Treaties Describing Customary International Law in Statutory Interpretation*

In interpreting ambiguous statutes, domestic courts may refer to non-self-executing treaties as evidence of internationally binding customary international law. A country need not ratify a treaty describing customary international law to be constrained by it, provided that the country has not persistently objected to the codified norm.[55] Although there is judicial and academic debate regarding the domestic status of customary international law,[56] it is generally accepted that because it is subject to the later-in-time rule,

53. *See* Al-Bihani v. Obama, 619 F.3d 1, 10, 16 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) (arguing that the *Charming Betsy* canon "does not permit courts to alter their interpretation of federal statutes based on international-law norms that have not been incorporated into domestic U.S. law," where "norms" would include customary international law and treaty commitments expressed in non-self-executing treaties); Norsk Hydro Can., Inc. v. United States, 472 F.3d 1347, 1360 n.21 (Fed. Cir. 2006) (determining that the *Charming Betsy* canon does not apply to a non-self-executing treaty); Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 880 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (suggesting that the *Charming Betsy* canon cannot be used with "non-self-executing treaties, which have no force as a matter of domestic law"); *cf. Al-Bihani*, 619 F.3d at 53 (Williams, J., concurring in the denial of rehearing en banc) ("Judge Kavanaugh, I think, fails to adequately distinguish between treatment of international law norms as 'judicially enforceable limits' on Presidential authority, or as 'domestic U.S. law,' and use of such norms as a 'basis for courts to alter their interpretation of federal statutes.'" (citations omitted) (quoting Judge Kavanaugh's opinion concurring in the denial of rehearing en banc)).

54. *See, e.g.*, Guaylupo-Moya v. Gonzales, 423 F.3d 121, 136 (2d Cir. 2005) (declining, in light of clear congressional intent, to determine whether or how international law and non-self-executing treaties may be used to construe ambiguous statutes); *In re* Rath, 402 F.3d 1207, 1211 (Fed. Cir. 2005) (recognizing the relevant international agreement as non-self-executing, noting that the court interprets statutes as being consistent with international obligations, and ultimately deeming the *Charming Betsy* canon inapplicable due to subsequent, explicitly expressed congressional intent).

55. *See* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 458 (1985). U.S. reservations, understandings, and declarations to a non-self-executing treaty may be used to demonstrate that the United States has not accepted a developing customary international law norm, which may assist a court in determining whether a particular norm exists and whether it is binding on the United States.

56. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004) (affirming that federal courts have the power to recognize claims arising under the law of nations as common law); *Al-*

customary international law may be stripped of any domestic force by subsequent statutes.[57] However, customary international law is partially shielded from possibly contradictory but ambiguous statutes by the *Charming Betsy* canon. Legal interpreters should, where fairly possible, read ambiguous subsequent statutes so that the two sources of law harmonize: when domestic law and customary international law apply equally to a situation, "the courts, regulatory agencies, and the Executive Branch will endeavor to construe them so as to give effect to both."[58]

Determining which norms have obtained the status of customary international law can be difficult.[59] Because treaties may formally describe

Bihani, 619 F.3d at 10, 16-17 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("[I]nternational-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. d, § 115 cmt. e (1987) (stating that customary international law is federal law and supreme over state law).

For an argument conceding that customary international law is commonly recognized as "federal common law" and critiquing this conceptualization, 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, 821 (1997) [hereinafter Bradley & Goldsmith, *A Critique*]. *But see* Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). For a response to Koh's points, see Curtis A. Bradley & Jack L. Goldsmith, Commentary, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998). Others have taken a more intermediate approach. *See* Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555 (2002); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002).

57. *See* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (stating that the Court would be "bound by the law of nations" until Congress passed a contrary enactment); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987) ("An act of Congress supersedes an earlier rule of international law . . . as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule . . . cannot be fairly reconciled."); *see also* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (noting that judges must enforce unambiguous statutes even if that causes violations of customary international law).

58. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. a (1987).

59. The Constitution allocates the power "[t]o define and punish . . . [o]ffenses against the Law of Nations" to the legislature, U.S. CONST. art. I, § 8, cl. 10, and Congress often enacts laws under this power, *see, e.g.*, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 n.19 (1962). However, Congress has not yet explicitly defined what constitutes customary international law.

The Supreme Court has, in effect, acknowledged the binding nature of customary international law, but, because the Court examines alleged breaches of customary international law on a case-by-case basis, it is difficult to generalize a rule specifying when an international obligation will be recognized as customary international law. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 633, 634 (2006) (plurality opinion) (recognizing the

customary international law, they are useful in clarifying its content.[60] Further, as customary international law is established through a combination of state practice and *opinio juris*, treaty ratification itself may evidence a growing consensus among states that certain norms have acquired the status of customary international law.[61] Thus, if used as an interpretive lens with the *Charming Betsy* canon, treaties describing customary international law may encourage the selection of a compatible interpretation of a statute over an incompatible one. In practice, courts employ treaties as evidence of customary international law regardless of whether the United States has ratified the treaty and regardless of the treaty's self-executing status.[62]

One archetypical example of a treaty describing customary international law is the Vienna Convention on the Law of Treaties (Vienna Convention).[63] The United States has signed but not ratified the Vienna Convention; nonetheless, domestic courts recognize that many of its provisions provide guidance on how to answer questions regarding the formation and effects of treaties. In *Weinberger v. Rossi*, for example, Chief Justice Rehnquist cited the Vienna Convention to define "treaty" as including any international agreement between sovereigns, supporting his ultimate conclusion that Congress's use of

Geneva Conventions as the law of nations); *Sosa*, 542 U.S. at 738 (holding that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy"); F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (noting that the Court usually "construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations" and that "[t]his rule of construction reflects principles of customary international law"); New Jersey v. New York, 523 U.S. 767, 784 (1998) (noting that a sudden shoreline change has no effect on the boundary between two states and that this is "the received rule of law of nations on this point").

60. *See In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 261 (S.D.N.Y. 2009).

61. In examining a statute criminalizing prostitution, the Supreme Court of Hawaii noted as evidence of a "general consensus in the international community" the fact that the Convention on the Elimination of All Forms of Discrimination Against Women had been ratified by 185 countries. State v. Romano, 155 P.3d 1102, 1114 n.14 (Haw. 2007); *see also In re* S. African Apartheid Litig., 617 F. Supp. 2d at 250-51, 252-53 (finding the low ratification numbers of one treaty useful in determining that it did not codify customary international law and describing the large number of signatories to another non-self-executing treaty as indicative of its status as customary international law).

62. There is an ongoing scholarly debate regarding the legality of the United States being constrained by nonratified treaties describing customary international law. *See supra* note 56. For the purposes of this Note, it is sufficient to observe that, in practice, courts are using nonratified treaties codifying customary international law in conjunction with the *Charming Betsy* canon when interpreting ambiguous statutes.

63. Vienna Convention on the Law of Treaties, *supra* note 2.

the word "treaty" included executive agreements.[64] The Vienna Convention is regularly cited by lower courts as providing useful rules for treaty interpretation and implementation,[65] and the *Restatement* accepts the Vienna Convention as "a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States even though the United States has not adhered to the Convention."[66] Agencies and legal authorities also acknowledge that Vienna Convention provisions describe the customary international law of treaties and apply them accordingly. In its 1971 Letter of Submittal to the President, the U.S. Department of State noted that "the Convention is already generally recognized as the authoritative guide to current treaty law and practice."[67] The Department of State currently affirms on its website that the United States "considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties."[68]

Given that domestic courts recognize nonratified treaties such as the Vienna Convention as evidence of customary international law, it is unsurprising that they also find that ratified but non-self-executing treaties may describe customary international law.[69] Once a court has determined that a non-self-executing treaty codifies customary international law, it may use the treaty, in conjunction with the *Charming Betsy* canon, when interpreting an

64. 456 U.S. 25, 29 n.5 (1982).

65. *See, e.g.*, Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940-41 (D.C. Cir. 1988) (applying article 53 of the Vienna Convention as a source of guidance specifying when norms attain *jus cogens* status); Day v. Trans World Airlines, Inc., 528 F.2d 31, 33, 36 (2d Cir. 1975) (applying article 31 of the Vienna Convention to interpret the Warsaw Convention).

66. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 3, intro. note (1987).

67. Letter of Submittal from William P. Rogers, U.S. Sec'y of State, to President Richard M. Nixon (Oct. 18, 1971), *reprinted in* S. EXEC. DOC. L, 1 (1971). This description refers to the substantive sections and neither to the final provisions relating to the conclusion of the Vienna Convention nor to the methods for resolving disputes about international agreements. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 3, intro. note (1987).

68. *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Dec. 1, 2010).

69. Indeed, it seems probable that domestic judges will be more likely to determine that a treaty codifies debated customary international law when that treaty has received U.S. ratification as a stamp of approval. Ratification would also undermine any objections based on the assumption that the United States had persistently objected to the developing norm. *See supra* note 55.

ambiguous statute.[70] In *Filartiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit noted that, while the U.N. Charter was non-self-executing, it still serves as evidence of customary international law, and, with the *Charming Betsy* canon, the Charter influences the interpretation of the Alien Tort Statute.[71] The *Filartiga* court relied on an earlier Second Circuit opinion, *United States v. Toscanino*,[72] which had employed both the U.N. Charter and the Charter of the Organization of American States—also a non-self-executing treaty—to confirm the existence of a customary international law norm.[73] While narrowed by *Sosa v. Alvarez-Machain*, which found that norms must be sufficiently specific and generally accepted before courts may recognize them as customary international law,[74] the fundamental *Filartiga* reasoning remains unaltered.[75] Furthermore, at least one post-*Sosa* lower court has noted that "treaties that are not self-executing may be used as evidence of customary law and do not undermine the viability of a claim under the [Alien Tort Statute]."[76]

70. *See, e.g.*, Kane v. Winn, 319 F. Supp. 2d 162, 197, 201 (D. Mass. 2004) (noting that the non-self-executing International Convenant on Civil and Politicals Rights (ICCPR) and Convention Against Torture constitute state practice and *opinio juris*, evidence of customary international law that could then influence statutory interpretation); Ali v. Ashcroft, 213 F.R.D. 390, 405 (W.D. Wash. 2003) ("While Petitioners may not directly invoke rights under non-self-executing treaties, or challenge statutes when Congress has clearly abrogated international law, they certainly may argue that the Court should adopt the statutory interpretation that is consistent with international law. . . . Because Respondents' proposed interpretation of the statute may result in persecution or deprivation of life in violation of international law, Petitioners' proposed construction is preferred as it reconciles the statute with the law of nations." (citing Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001))), *rev'd on other grounds*, Ali v. Gonzales, 421 F.3d 795 (9th Cir. 2005); *see also* Mojica v. Reno, 970 F. Supp. 130, 147, 152 (E.D.N.Y. 1997) (responding to an argument based on the ICCPR and apparently viewing the ICCPR as potential evidence of a customary law obligation, noting that "where a statute can be construed so as to avoid conflict with international law, it should be so construed").

71. 630 F.2d 876, 881-82 (2d Cir. 1980).

72. 500 F.2d 267 (2d Cir. 1974).

73. *Filartiga*, 630 F.2d at 882 n.9.

74. 542 U.S. 692, 725 (2004) ("[C]ourts 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.").

75. *See id.* at 731-32 ("The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga* . . . . [W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.").

76. Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1091 (N.D. Cal. 2008).

In tandem with the *Charming Betsy* canon, non-self-executing treaties describing customary international law influence domestic jurisprudence. While those treaty provisions that have been recognized as codifying customary international law will be given appropriate deference in subsequent decisions, it is difficult to predict whether other provisions will be similarly recognized. Nonetheless, non-self-executing treaties describing treaty obligations—even if not customary international law—may also exert a powerful influence in domestic courts.

C. *The Role of Non-Self-Executing Treaties Describing Treaty Commitments in Statutory Interpretation*

Treaty law, like customary international law, is subject to the later-in-time rule.[77] However, when evaluating apparently contradictory terms in a non-self-executing treaty and a later-in-time ambiguous statute, domestic courts may use the *Charming Betsy* canon to interpret the statute to avoid violating treaty commitments.

The United States ratified the International Covenant on Civil and Political Rights[78] (ICCPR) on June 8, 1992[79] with a declaration that articles 1 through 27 of the ICCPR are not self-executing.[80] The ICCPR includes provisions that have not obtained the status of customary international law.[81] Regardless of the customary status of any particular provision, it constitutes a U.S. international

77. *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 600 (1889) ("If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control."); *cf.* Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 595-96 (2007) (observing that only one "important appellate case" applied a later-in-time treaty to overturn a statute).

78. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, S. EXEC. DOC. E, 95-2, 999 U.N.T.S. 171, 179.

79. *See* 1 UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 170 (2003).

80. S. REP. NO. 102-23, at 23 (1992).

81. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) ("Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, [the ICCPR] expresses an aspiration that exceeds any binding customary rule having the specificity we require."); Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001) (describing the ICCPR as evidence both of customary international law and of international treaty obligations).

obligation. Domestic courts regularly employ the ICCPR in conjunction with the *Charming Betsy* canon to avoid violating these obligations.[82]

In *Maria v. McElroy*, a federal district court examined the ICCPR to determine whether the retroactive application of a statute was lawful.[83] Eddy Maria, a national of the Dominican Republic, pled guilty to an attempted robbery in the second degree and was sentenced to two to four years of detention. Although Mr. Maria's crime did not constitute grounds for deportation at the time of his conviction, the court read subsequent statutes expanding the definition of "aggravated felon" as encompassing Mr. Maria's actions and rendering him deportable.[84] At the time of Mr. Maria's crime, a statutory humanitarian provision allowed the Attorney General to grant waivers of inadmissibility to potential deportees, including aggravated felons, who could demonstrate that their deportation would result in extreme hardship to lawfully resident immediate family members.[85] Between Mr. Maria's crime and his conviction, however, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which restricted relief under the humanitarian provision.[86] Shortly after Mr. Maria's conviction, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which revised the humanitarian provision to prohibit retroactive waivers of inadmissibility for aggravated felons.[87]

Because "[a]n act of Congress should be construed in accordance with international law where it is possible to do so without distorting the statute," the court concluded that the "retroactive deprivation of Mr. Maria's statutory right to humanitarian relief from deportation would arguably be contrary to both the [ICCPR] and customary international human rights law."[88] After finding the ICCPR to be non-self-executing, the court determined that it was nonetheless "an international obligation of the United States and constitutes a

82. *See* Wuerth, *supra* note 26, at 331 n.172 (discussing the Supreme Court's evaluation of the ICCPR in *Sosa* and its relevance with regard to the *Charming Betsy* canon).

83. 68 F. Supp. 2d 206 (E.D.N.Y. 1999), *abrogated on other grounds by* Restrepo v. McElroy, 369 F.3d 627 (2d Cir. 2004) (not discussing *Charming Betsy* arguments based on treaty commitments or international law).

84. *See id.* at 219-22.

85. *See id.* at 212-13.

86. *See id.* at 214.

87. *See id.*

88. *Id.* at 231. The court analyzed U.S. obligations under the ICCPR and customary international law separately and found that the retroactive application of the statute violated each. *See id.* at 231-34.

law of the land."[89] The court concluded that "[r]etroactive application . . . threatens precisely the type of arbitrary family break-up that the ICCPR guards against."[90] Other courts have employed the *Charming Betsy* canon to interpret ambiguous statutes to accord with treaty commitments described in the ICCPR without requiring that those commitments also constitute customary international law.[91]

While the ICCPR figures prominently in this jurisprudence, domestic courts also apply the *Charming Betsy* canon when evaluating the influence of other non-self-executing treaties. In *Khan v. Holder*, for example, Anjam Parvez Khan's application for asylum in the United States was denied because he had allegedly engaged in terrorist activity, a reason for dismissal under the Immigration and Nationality Act (INA).[92] Khan argued, inter alia, that the 1967 United Nations Protocol Relating to the Status of Refugees "compel[led] a narrower definition of 'terrorist activity'" than that provided in the statute.[93] After noting that the Protocol was non-self-executing and did not carry the force of law,[94] the U.S. Court of Appeals for the Ninth Circuit stated that it still might influence the interpretation of a statute: "Under *Charming Betsy*, we should interpret the INA in such a way as to avoid any conflict with the Protocol, if possible."[95] Although the court ultimately concluded that the INA

89. *Id.* at 231-32.

90. *Id.* at 233. The court then conducted an independent analysis based on customary international law, in which it relied on the ICCPR and other international agreements as evidence of customary international law norms. *Id.* at 233-34.

91. *See, e.g.*, Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001) (reading the ICCPR as counseling against construing a statute to authorize the indefinite detention of removable aliens); *cf.* O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1251-52 (D.N.M. 2002) (determining that, as the contested statute was unambiguous, it was not appropriate to apply the *Charming Betsy* canon in conjunction with the ICCPR to reconcile any disharmony), *aff'd*, 342 F.3d 1170 (10th Cir. 2003); Graham v. State, 982 So. 2d 43, 54 (Fla. Dist. Ct. App. 2008) (holding that sentencing a juvenile to life without possibility of parole did not violate the ICCPR, because while a non-self-executing treaty may affect federal law, it cannot limit state law), *rev'd on other grounds*, 130 S. Ct. 2011 (2010). *Graham*'s reasoning—that the ICCPR, as a non-self-executing treaty, cannot affect state law—is debatable. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. e (1987) ("Even a non-self-executing agreement of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be federal policy superseding State law or policy.").

92. 584 F.3d 773 (9th Cir. 2009).

93. *Id.* at 782.

94. *Id.* at 783.

95. *Id.*

and the Protocol did not conflict,[96] the court acknowledged in its analysis that non-self-executing treaties may influence statutory interpretation.[97]

Other courts are more explicit in observing that non-self-executing treaties, even when not describing customary international law, may affect domestic decisions. In *Hyundai Electronics Co. v. United States*,[98] the U.S. Court of International Trade evaluated whether the Department of Commerce's decision not to revoke an antidumping order breached U.S. obligations under the WTO's Agreement on Implementation of Article VI of the 1994 General Agreement on Tariffs and Trade (Antidumping Agreement). Although the Antidumping Agreement is not self-executing, the court reasoned that "the Antidumping Agreement is properly construed as an international obligation of the United States."[99] After observing that "absent express language to the contrary, a statute should not be interpreted to conflict with international obligations,"[100] the court found that the relevant statute did not violate the Antidumping Agreement.[101] Furthermore, at least one post-*Medellin* case has acknowledged that non-self-executing treaties may continue to affect statutory interpretation.[102]

Even in cases with no international law nexus, domestic courts interpret statutes in light of non-self-executing treaties.[103] *Kane v. Winn* focused on a federal prisoner's allegations that his medical treatment did not meet the Bureau of Prisons' regulations and constitutional standards and that the Bureau retaliated against him after he requested adequate medical care.[104] After noting that the United States was a party to treaties forbidding cruel treatment and requiring adequate remedies[105] and observing that the ICCPR was non-self-executing,[106] the court maintained that "[e]ven when a treaty is not self-

96. *Id.*

97. *See also* Usinor v. United States, 28 Ct. Int'l Trade 1107, 1120 n.11 (2004) (finding the *Charming Betsy* doctrine inapplicable because there was no inconsistency between a U.S. statute and the non-self-executing World Trade Organization (WTO) Agreement).

98. 23 Ct. Int'l Trade 302, 312-14 (1999).

99. *Id.* at 312.

100. *Id.*

101. *Id.* at 314.

102. *See* Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1226 (D. Minn. 2008).

103. *But see* Serra v. Lappin, 600 F.3d 1191, 1199 (9th Cir. 2010) (reasoning that, because the *Charming Betsy* canon is based on comity concerns, it is inappropriate to invoke it "in a case involving exclusively domestic parties and domestic acts").

104. 319 F. Supp. 2d 162, 166 (D. Mass. 2004).

105. *Id.* at 195-96.

106. *Id.* at 196 n.46.

executing, courts must strive not to interpret statutes to conflict with the international obligations expressed in such a treaty."[107] Later, the court clarified that the *Charming Betsy* canon applies to both treaty commitments and customary international law: "As discussed above with regard to treaties, venerable precedent makes clear that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'"[108] Although the court ultimately did not resolve the full extent to which treaties and customary international law might affect its decision,[109] it concluded that "[r]egardless of whether and to what extent treaties or customary law can provide an implied cause of action, courts must approach prisoner cases under domestic law with an appreciation for the United States' international obligations."[110] The *Charming Betsy* canon, as applied separately to treaty and customary international law, ultimately buttressed the court's holding that the prisoner did not fail to state a claim for relief.[111]

Professor John F. Coyle has analyzed how the *Charming Betsy* canon should be applied to incorporative and nonincorporative statutes.[112] It is worth noting briefly, however, that statutes passed to implement non-self-executing treaties are often interpreted in light of those treaties. For example, after the United States ratified the non-self-executing Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, it passed implementing legislation. In *United States v. Martinez*, this statute was interpreted in light of the Convention to apply extraterritorially because the statute at issue "was passed to enforce a multilateral treaty designed to protect children from *transnational and domestic* child sex prostitution and 'sex tourism.'"[113]

Non-self-executing treaties may describe two types of possibly coexisting international obligations: customary international law and treaty commitments. Domestic courts employ the *Charming Betsy* canon to support readings of ambiguous statutes that accord with these international obligations, even in purely domestic contexts. This application of the *Charming*

107. *Id.* at 196.

108. *Id.* at 201 (quoting Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

109. *See id.* at 202.

110. *Id.* (footnote omitted).

111. *Id.* at 220. *But see* United States v. Corey, 232 F.3d 1166, 1179 n.9 (9th Cir. 2000) (reasoning that the *Charming Betsy* canon does not apply in suits to which the United States is a party).

112. Coyle, *supra* note 22.

113. 599 F. Supp. 2d 784, 799 (W.D. Tex. 2009).

Betsy doctrine necessarily raises a number of normative questions, which are addressed in the following Part.

II. THE CASE FOR EMPLOYING NON-SELF-EXECUTING TREATIES IN CONCERT WITH THE *CHARMING BETSY* CANON

With Part I having described how domestic courts employ non-self-executing treaties in statutory interpretation, this Part turns to the normative arguments supporting this practice. Section II.A clarifies why a treaty's self-executing status should be immaterial when the treaty is used as an interpretive device. The remainder discusses justifications for and critiques of the use of the *Charming Betsy* canon in conjunction with non-self-executing treaties. It concludes that the canon's use in this context is both permissible and beneficial.

A. The Immaterial Distinction Between Self- and Non-Self-Executing Treaties in Statutory Interpretation

The relevance of the distinction between self- and non-self-executing treaties in their interpretive role may hinge on what "non-self-execution" actually entails.[114] If non-self-execution merely means that U.S. courts may not directly enforce a treaty until Congress passes implementing legislation, it is unclear why non-self-executing treaties could not still be used indirectly to avoid unintended violations. Alternatively, *Medellin* could be read as stating that a non-self-executing treaty is not meant to have any domestic status.[115] This understanding would weaken the argument for using non-self-executing treaties as interpretative aids.

While discussing how the *Charming Betsy* canon might have been used in interpreting the September 2001 Authorization for Use of Military Force,

114. *See* Wuerth, *supra* note 26, at 353.

115. *See* Medellin v. Texas, 552 U.S. 491, 505 n.2 (2008) ("[A] 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress."); *see also* Al-Bihani v. Obama, 619 F.3d 1, 16 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("[I]nternational-law principles found in non-self-executing treaties and customary international law, but not incorporated into statutes or self-executing treaties, are not part of domestic U.S. law."); *cf.* Bradley, *supra* note 6, at 174-75 (noting that the Court's statements in *Medellin* and a subsequent denial of a stay could be fairly interpreted as accepting non-self-executing treaties as federal law, albeit not judicially enforceable federal law).

Professor Ingrid Brunk Wuerth notes several reasons why the latter understanding is less sensible.[116] First, it would effectively privilege customary international law and sole executive agreements at the expense of non-self-executing Article II treaties.[117] This is problematic, given that Article II treaties, which require formal approval from the Senate and the President, are arguably more representative than customary international law (which is established through state practice and *opinio juris*) and sole executive agreements (which are created by the President and are only subsequently submitted for congressional approval). Second, in applying the *Charming Betsy* canon, courts only rarely suggest that its application depends on the self-executing nature of a treaty.[118] Indeed, as demonstrated above, courts often ignore the self-executing status of a treaty entirely.[119] Finally, due to the difficulty of determining a treaty's status, distinguishing between self-executing and non-self-executing treaties in statutory construction would muddy the canon for both courts and Congress.[120] Imposing this distinction now—after decades of courts' almost entirely unquestioned application of the canon[121]—might frustrate congressional assumptions that all treaties will serve as interpretive devices. Additionally, insofar as Congress passes statutes in the context of the longstanding *Charming Betsy* canon, the possibility that ambiguous ones may be interpreted to accord with non-self-executing treaties is built into the statute itself.[122] Because Congress may easily render this interpretative method inapplicable for individual statutes, employing the *Charming Betsy* canon with non-self-executing treaties does not privilege the interests of a Senate that approved a non-self-executing treaty over the interests of a Congress enacting a later statute.

116. Wuerth ultimately concludes that courts should construe the Authorization to accord with the ICCPR but acknowledges that the *Charming Betsy* canon's presumption may be more easily rebutted when evaluating whether action taken pursuant to international humanitarian law complies with international human rights law. Wuerth, *supra* note 26, at 355-56.

117. *See id.* at 353-54 & n.261 (citing *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), and *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982), as evidence that the Supreme Court has employed the *Charming Betsy* canon in conjunction with customary international law and sole executive agreements, respectively).

118. *See id.* at 354.

119. *See id.* at 354 & n.262 (citing Vázquez, *The Four Doctrines of Self-Executing Treaties*, *supra* note 5, at 716).

120. *See id.* at 354.

121. *See id.* at 330.

122. For similar reasoning regarding statutes that allow for retroactive reopening, see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 234 (1995).

Putting aside the domestic status of non-self-executing treaties, there remains an important normative justification for employing the *Charming Betsy* canon with a treaty without regard for its self-executing status. The act of treaty ratification creates U.S. international obligations. By applying the canon when a statute is ambiguous, courts avoid creating unintended breaches of those treaty commitments, leaving the final decision on whether to violate international obligations in the political branches' control. Avoiding inadvertent, judicially created breaches is critical given that "[v]iolating international-law norms and breaching international obligations may trigger serious consequences, such as subjecting the United States to sanctions, undermining U.S. standing in the world community, or encouraging retaliation against U.S. personnel abroad."[123]

Thus, the seeming paradox between courts' claims that applying the *Charming Betsy* canon reflects the political branches' intentions and the fact that courts regularly ignore declarations of non-self-execution when doing so is resolved: by abandoning the distinction, courts are more likely to avoid unintended breaches of U.S. international obligations and thereby avoid intruding on the political branches' sphere.[124] Given that the distinction between self- and non-self-executing treaties should be immaterial in evaluating the usefulness of the *Charming Betsy* canon, the remainder of this Part does not distinguish between them.

B. The Charming Betsy *Canon's Limited Application Fosters Relatively Costless Compliance with International Obligations*

The *Charming Betsy* canon plays a modest role in statutory interpretation.[125] If a later-in-time statute unquestionably contradicts customary international law or a treaty provision, the statutory text prevails.[126] However, if a statute is

123. Al-Bihani v. Obama, 619 F.3d 1, 11 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

124. It is worth noting that the self- and non-self-executing distinction is a judicial creation. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829), *overruled on other grounds by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833). As courts are bound only by precedent in applying the canon, the judiciary should be able to apply it as it deems appropriate, especially if doing so better comports with separation-of-powers principles. *See* Bradley, *supra* note 6, at 485.

125. *See Al-Bihani*, 619 F.3d at 7 (Brown, J., concurring in the denial of rehearing en banc).

126. *See, e.g.*, Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1009 (9th Cir. 2005) (acknowledging that statutes may not always accord with customary international law); Oliva v. U.S. Dep't of Justice, 433 F.3d 229, 233, 235 (2d Cir. 2005) (noting that customary international law cannot alter the plain language of the statute and that the *Charming Betsy* canon is irrelevant when a statute is not ambiguous).

ambiguous,[127] the canon may prove useful in selecting between multiple fairly possible interpretations.[128] The canon's presumption will privilege only reasonable interpretations of the statute.[129] It does not demand that courts play word games that warp the statutory text or purpose: "[T]he contents of [a non-self-executing treaty are] only relevant insofar as [a statute] is ambiguous and there is a reasonable interpretation of [the statute] that aligns with the United States' treaty obligations."[130] As a result, the canon "exerts a *negative* force on the meaning of statutes, pushing them away from meanings that would conflict with international law. Courts do not apply *Charming Betsy* as an *affirmative* indicator of statutory meaning."[131]

The *Charming Betsy* canon is not unlike the constitutional avoidance canon, which suggests that courts should "'first ascertain whether a construction of the statute is fairly possible by which [a constitutional] question may be avoided.'"[132] In fact, courts often cite the *Charming Betsy* case for the constitutional avoidance canon, demonstrating the two canons' similar foundational reasoning.[133] The *Charming Betsy* canon also bears some similarity to the canon against implied repeal of earlier statutes.[134] All three canons assume that the legislature does not intend to contradict other sources of law and allow the judiciary to avoid creating unnecessary conflicts.

The *Charming Betsy* canon functions best as a presumptive rule. Professor William Eskridge and his coauthors state that substantive interpretive canons, such as the *Charming Betsy* canon, may be treated as tiebreakers, presumptions, or clear statement rules. Tiebreakers are used when, "at the end of the basic interpretive process, the court is left unable to choose between the two

127. *See supra* text accompanying notes 36-38.

128. *See, e.g.*, Guaylupo-Moya v. Gonzales, 423 F.3d 121, 135-36 (2d Cir. 2005) (stating that customary international law cannot modify otherwise plain statutory language but that it can be used in conjunction with the *Charming Betsy* canon to resolve ambiguous statutes).

129. *See supra* text accompanying note 38.

130. Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1226 (D. Minn. 2008); *see also Cabrera-Alvarez*, 423 F.3d at 1009-10 (stating that, where it is possible to do so without distorting the statute, courts should construe statutes so as not to conflict with customary international law).

131. Al-Bihani v. Obama, 619 F.3d 1, 7 (D.C. Cir. 2010) (Brown, J., concurring in the denial of rehearing en banc).

132. Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

133. *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[The constitutional avoidance canon] has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy* . . . .").

134. *See, e.g.*, United States v. United Cont'l Tuna Corp., 425 U.S. 164, 168 (1976).

competing interpretations put forward by the parties."[135] Presumptive canons are those which, "at the beginning of the interpretive process, set up a presumptive outcome, which can be overcome by persuasive support for the contrary interpretation."[136] Presumptions may typically be overcome by "*any* potential evidence of statutory meaning (e.g., statutory text, legislative history, statutory purposes, policy arguments, and so on)."[137] Meanwhile, "clear statement rules" are those that "purport to compel a particular interpretive outcome unless there is a clear statement to the contrary."[138] Whereas tiebreaker and presumptive canons are interpretive tools that courts use to select among interpretations, clear statement rules generally mandate the consistent selection of one interpretation over others.

Chief Justice Marshall's original, inflexible statement in *Charming Betsy*[139] has evolved into a canon that is usually applied as a rebuttable presumption. Early Supreme Court decisions employing the statutory *Charming Betsy* canon seemed to view it as a clear statement rule, requiring Congress explicitly to invalidate earlier treaties before the Court endorsed a contradictory interpretation of the relevant statute. In 1933, the Court stated that "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been *clearly expressed*."[140] More recent cases, however, imply that the canon is merely a rebuttable presumption. In 1982, rather than demanding that Congress provide a clear statement, the Supreme Court required only "some affirmative expression of congressional intent to abrogate the United States' international obligations."[141]

Similarly, the *Restatement*'s description of the canon has altered over time. Early text that was more akin to a clear statement rule has since been revised to reflect the current, less strict presumptive version. The 1965 *Restatement*

135. ESKRIDGE ET AL., *supra* note 32, at 884. The *Charming Betsy* canon does not generally appear to have been used as a tiebreaker.

136. *Id.*

137. *Id.* (emphasis added).

138. *Id.*

139. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of congress ought *never* to be construed to violate the law of nations, *if any other possible construction remains*." (emphases added)).

140. Cook v. United States, 288 U.S. 102, 120 (1933) (emphasis added); *see also* McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 21-22 (1963) ("'[T]here must be present the affirmative intention of the Congress clearly expressed.'" (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957))).

141. Weinberger v. Rossi, 456 U.S. 25, 32 (1982).

advised courts to interpret statutes in accordance with international law whenever such an option existed;[142] the 1987 *Restatement* merely states that, if possible, statutes should not be construed to conflict with international laws.[143] However, the earlier bent toward a clear statement rule remains in the latter's commentary: "The courts do not favor a repudiation of an international obligation by implication and require *clear* indication that Congress, in enacting legislation, intended to supersede the earlier agreement or other international obligation."[144]

The *Charming Betsy* canon is most beneficial as a rebuttable presumption. If the canon were merely a tiebreaker, it would be employed only when arguments cut equally in favor of multiple interpretations, greatly reducing its usefulness in avoiding unintended breaches of international obligations. As the canon's application is already limited, using it only as a tiebreaker would effectively eliminate it. However, given the difficulty of passing corrective legislation when the judiciary requires a "super-strong clear statement rule,"[145] a clear statement rule would create separation-of-powers concerns. As a presumption, the canon is neither too weak nor too strong: it provides valuable weight to interpretations in accordance with international law, but it can easily be rebutted by other evidence commonly used in statutory interpretation.

Given that the *Charming Betsy* canon applies only when there are multiple fairly possible interpretations of an ambiguous statute, a rebuttable presumption enables the United States to acknowledge and comply with its international obligations at essentially no cost. When there is a choice between violating international law and cheaply complying with it, the judiciary should err in favor of compliance—not least because doing so is consistent with separation-of-powers principles.

142. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3(3) (1965) ("If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law.").

143. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) ("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.").

144. *Id.* § 115 cmt. a (emphasis added).

145. ESKRIDGE ET AL., *supra* note 32, at 935-36.

C. *The* Charming Betsy *Canon's Deference to the Political Branches Respects Separation-of-Powers Principles*

In his article on justifications for the *Charming Betsy* canon, Professor Curtis A. Bradley identifies the separation-of-powers conception as the most persuasive argument for the canon's use in statutory construction.[146] Bradley argues that, because the usual justifications for canons have eroded, the *Charming Betsy* canon "is best thought of today as a device to preserve the proper separation of powers between the three branches of the federal government."[147] Under this separation-of-powers conception, the canon (1) allows judges to interpret law, secure in the knowledge that possible misrulings will be corrected by subsequent legislation; (2) reduces the number of times the courts place the United States in violation of international obligations against the wishes of the political branches; and (3) defers to congressional decisions on when and how to violate international law, thereby reducing the instances in which the legislature unintentionally undermines executive diplomatic efforts.[148]

To avoid unintended court-created breaches of U.S. international obligations, Bradley argues that domestic courts should apply the presumption to favor fairly possible interpretations that reconcile the requirements of both

146. Bradley, *supra* note 6, at 485. Other justifications include the legislative intent conception and the internationalist conception. The former "rests on the assumption that Congress generally does not wish to violate international law because, among other things, such violations might offend other nations and create foreign relations difficulties for the United States." *Id.* at 495. The text of the *Talbot* decision supports this conception, as the Court reasoned that "[b]y this construction the act of congress 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." Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 44 (1801); *see also* Cabrera-Alvarez v. Gonzalez, 423 F.3d 1006, 1009 (9th Cir. 2005) (noting that the *Charming Betsy* canon exists as a "presumption that Congress intends to legislate in a manner consistent with international law"). Bradley believes that this justification has been undermined by the fact that, recently, the legislature has seemed uninterested or even hostile to international law. Bradley, *supra* note 6, at 517-23.

According to Bradley, the internationalist conception views the canon as a means of supplementing U.S. law and conforming it to the contours of international law: "Under this view, courts should use the canon not primarily to implement legislative intent, but rather to make it harder for Congress to violate international law, and to facilitate U.S. implementation of international law." *Id.* at 498. This justification raises separation-of-powers concerns, as it could conceivably result in pitting the judicial branch against the political branches when the latter have made a considered decision to breach U.S. obligations.

147. Bradley, *supra* note 6, at 484.

148. *See id.* at 525-26.

the statute and the treaty in question. Given that international law makes no distinction between self- and non-self-executing treaties and that the political branches are charged with fulfilling all U.S. international obligations, a presumption against an interpretation that would lead to a breach of a treaty commitment should apply equally to all ratified treaties.[149] Bradley's version "takes no view as to whether particular violations of international law are desirable . . . . It simply rests on the belief that, for formal and functional reasons, the political branches should determine when and how the United States violates international law."[150]

Bradley acknowledges that his justification does not entirely avoid separation-of-powers concerns, but he argues that there is a "difference between evaluating the content of international law and evaluating the proper U.S. stance toward this law," which is the domain of the political branches.[151] Additionally, consistent with the canon's character as a rebuttable presumption, the canon is designed to "avoid conflicts, not to give international law independent, affirmative effect" and, therefore, "does not pose a significant danger of committing the country to international law in a way not intended by the political branches."[152] Finally, the canon applies only when the statutory text is ambiguous, and yet even when the text is unclear, the judiciary will continue to give "substantial weight to the views of the political branches, especially the Executive, regarding the content of international law."[153] In addition to avoiding unintentional breaches of U.S. international commitments and respecting the political branches' intentions, use of the canon will increase the likelihood that domestic and international law develop in tandem.

D. The Charming Betsy *Canon Encourages Domestic Courts' Engagement with International Agreements and International Adoption of Domestic Norms*

The *Charming Betsy* canon "does not require that courts use international law to *override* domestic law, only that they try to harmonize the two."[154] In

149. Bradley does not distinguish between self- and non-self-executing treaties. *Id.* at 483 ("[T]he *Charming Betsy* canon presumably applies to *all* international obligations of the United States, regardless of whether they are viewed as enforceable domestic law.").

150. *Id.* at 526; *see also* Steinhardt, *supra* note 24, at 1132.

151. Bradley, *supra* note 6, at 531.

152. *Id.* at 531-32.

153. *Id.* at 532.

154. *Id.* at 484.

anticipation of potential critiques, the preceding discussion assumes a conflict between a statute and international law. However, the relationship between domestic and international law was intended and largely has continued to be one of mutual reinforcement.

Employing the *Charming Betsy* canon to interpret ambiguous statutes in accordance with non-self-executing treaties is consistent with constitutional commands. The Supremacy Clause provides: "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 . . . ."[155] According to Professor Carlos Manuel Vázquez, the Founders included "all Treaties" in the Supremacy Clause "to avoid treaty violations because such violations threatened to provoke wars and otherwise complicate relations with more powerful nations. The Founders also wanted to establish a reputation for treaty compliance to induce other nations to conclude beneficial treaties with the new nation."[156] Even if these reasons for respecting international law and judicial treaty enforcement no longer apply,[157] new reasons to do so have developed.[158] In an increasingly globalized world, it is imperative that the United States avoid unnecessary conflicts between its domestic law and its international obligations.

Much of domestic law already accords with international law, in large part because the United States actively influences the development of treaties. The United States often plays a pivotal role in drafting international treaties, and U.S. ratifications of multilateral treaties often are accompanied by declarations that U.S. obligations under the treaty are already fulfilled by domestic law. Therefore, aside from the fact that the *Charming Betsy* canon does not obligate or encourage courts to override domestic law, its proper application will likely favor interpretations that harmonize with provisions previously endorsed by the United States.

Finally, the *Charming Betsy* canon provides a mechanism by which the United States can continue to influence the development of international law by encouraging domestic interpretations of non-self-executing treaties. Domestic courts are engaged in a "transnational judicial dialogue," which

155. U.S. CONST. art. VI, cl. 2.

156. Vázquez, *Treaties as Law of the Land*, *supra* note 5, at 617-18.

157. *See* Bradley, *supra* note 6, at 491-95 (noting that the *Charming Betsy* canon was more reasonable at America's founding, given America's status as a weak state and customary international law's more explicit and discoverable nature).

158. *See* Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

consists of "informal networks of domestic courts worldwide, interacting with and engaging each other . . . . Transnational judicial dialogue is the engine by which domestic courts collectively engage in the co-constitutive process of creating and shaping international legal norms . . . ."[159] Domestic treaty interpretation also often influences the development of customary international law.[160] As the United States has historically played a vital role in developing international law and because it is a repeat player, foreign courts regularly examine U.S. jurisprudence in their decisions,[161] and U.S. interpretations of treaties and customary international law are often embraced internationally. The *Charming Betsy* canon encourages and facilitates thoughtful participation in the transnational judicial dialogue, thereby allowing domestic courts to promote U.S. interpretations of international law abroad.[162]

E. Critiques of the Canon and Its Application

Judges and international law scholars have raised a number of critiques to the general application of the *Charming Betsy* canon that would apply equally—if not even more strongly—to its use in conjunction with non-self-executing treaties. These critiques include (1) that the canon privileges international law—which is allegedly countermajoritarian[163] and antidemocratic[164]—at domestic law's expense; (2) that, in the alternative, the canon is useless, as it has no effect; (3) that, because of the breadth and variety of international law, judges apply the canon variably; (4) that the canon does not reflect legislative

159. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490 (2005). Additionally, to the extent that an international judicial system is emerging, it is in America's best interest for its courts to take steps to further its development. *See* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003).

160. *See, e.g.*, MURPHY, *supra* note 6, at 83-85 (discussing how the U.N. Charter and the 1949 Geneva Conventions have shaped customary international law).

161. *See* Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 183, 186.

162. Nonparticipation carries serious costs: it impoverishes domestic courts' decisionmaking, weakens international legal discourse, erodes the international influence of U.S. constitutional law, and reduces the probability that new norms are consistent with U.S. values. *See* Waters, *supra* note 159, at 555-59.

163. *See* Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT'L L. 57, 58-61 (2004) (arguing that employing the *Charming Betsy* canon in constitutional interpretation is countermajoritarian).

164. *See* John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739 (2009).

intent;[165] (5) that the canon is inapplicable after *Erie*; (6) and that the canon raises federalism issues. This Section addresses each of these concerns in turn.

The legitimacy of using international law in domestic courts is debated vigorously, raising complex questions beyond the scope of this Note. Nevertheless, because of its limited application[166] and its nature as a rebuttable presumption,[167] the *Charming Betsy* canon does not overly privilege international law. The *Charming Betsy* canon applies only to ambiguous texts and provides support only for those constructions deemed fairly possible by traditional interpretive practices. Consider Professors Eskridge and Frickey's cable-versus-chain metaphor: they argue that legal interpretations are most persuasive when they are fashioned as a cable of bundled threads, rather than as a chain.[168] The strength of the latter depends on its weakest link, while the strength of the former is cumulative. When deciding among interpretations, judges must consider contradictory arguments—threads pulling in different directions. In these situations, "[t]he cable metaphor suggests that . . . the result will depend upon the strongest overall combination of threads."[169] An argument interpreting text in light of a non-self-executing treaty is but a single thread among many, not a determinative weight on a scale. When enough threads pull the other direction, a treaty's influence is accordingly diminished.

Nor is the *Charming Betsy* canon useless, even if it will not always alter domestic decisions. In some cases the canon may prove determinative. When multiple arguments pull toward two different interpretations, the canon may provide the decisive line of reasoning. Further, even where the canon is mentioned only as dicta, it provides a useful means whereby judges can describe U.S. understandings of customary international law and treaty provisions. By participating in the developing transnational judicial conversation, judges increase the probability that domestic understandings of norms will influence international law.

When employing the *Charming Betsy* canon, the breadth of international and foreign law is not a weighty concern. Simply put, the use of the *Charming Betsy* canon in conjunction with non-self-executing treaties will be limited to the few germane non-self-executing treaties. The less relevant the treaty, the

165. *See* Al-Bihani v. Obama, 619 F.3d 1, 33 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc); Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1153 (7th Cir. 2001).

166. *See supra* text accompanying notes 125-131.

167. *See supra* text accompanying notes 139-144.

168. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 351 (1990).

169. *Id.*

easier it will be to rebut the presumption with other traditional interpretive methods.

However, it should be noted that courts are currently applying the canon in diverse ways, reducing its usefulness as a predictive and precedential tool. Because the Supreme Court has not provided an explicit description for how the canon is to be used, lower court practice varies widely. Some courts reason—problematically[170]—that the *Charming Betsy* canon necessarily requires a clear statement rule,[171] and at least one court has appeared to rely on the canon to evade apparently plain legislative commands.[172] At the opposite end of the spectrum, some courts use the canon—again, problematically[173]—only as a tiebreaker. Given the growing number of citations to treaties in domestic courts,[174] it would be useful for the Supreme Court to provide guidance on how to use the canon appropriately in statutory interpretation. Such direction would standardize the application of the canon, limit judicial discretion, and avoid erosion of the canon's benefits through inconsistent application.

While the extent to which the canon reflects legislative intent is debatable,[175] when applied correctly, it is relatively nonintrusive. The canon's justification sounds in separation-of-powers principles. When fairly possible, it provides a means for judges to avoid potentially breaching U.S. international obligations, leaving such vital foreign policy decisions to the political branches.

170. *See supra* text accompanying note 145.

171. *See, e.g.*, Beharry v. Reno, 183 F. Supp. 2d 584, 599 (E.D.N.Y. 2002) ("This rule interacts with the 'Charming Betsy' principle to create a principle of clear statement: since Congress may overrule customary international law (*Paquete Habana*), but laws are to be read in conformity with international law where possible (*Charming Betsy*), it follows that in order to overrule customary international law, Congress must enact domestic legislation which both postdates the development of a customary international law norm, and which clearly has the intent of repealing that norm." (citations omitted)), *rev'd on other grounds sub nom.* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).

172. *See* United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988) ("This court acknowledges the validity of the government's position that Congress *has the power* to enact statutes abrogating prior treaties or international obligations entered into by the United States. . . . However, unless this power is *clearly and unequivocally* exercised, this court is under a duty to interpret statutes in a manner consonant with existing treaty obligations." (second emphasis added) (citations omitted)).

173. *See supra* text accompanying note 145.

174. A Westlaw search indicates that in the 1960s, few treaties were cited per year, ranging from two in 1962 to eleven in 1967, 1968, and 1969. Since 1999, over one hundred federal and state cases each year have cited treaties, reaching a new peak of 159 cases citing treaties in 2010.

175. *See* Bradley, *supra* note 6, at 517–23.

Erie established that there is no general federal common law.[176] Insofar as that decision is understood as having rendered customary international law and non-self-executing treaty commitments entirely inapplicable in federal court absent implementing legislation, the rationale for applying the *Charming Betsy* canon would be weakened.[177] While this is a complicated and ongoing argument,[178] for the purposes of this Note, it is sufficient to observe that the Supreme Court and most lower courts have continued to apply the *Charming Betsy* canon to avoid breaches of customary international law and other treaty commitments after *Erie*, with little discussion of *Erie*'s potential applicability. Judicial silence on this issue suggests that it is not of grave concern.

Employing the *Charming Betsy* canon raises potential federalism concerns, as individual states do not have much influence over whether the federal government encourages or accedes to the development of a customary international law norm or ratifies a non-self-executing treaty. While the extent to which customary international law and non-self-executing treaty commitments should affect state statutory interpretation is still undetermined, the above arguments still favor its application. The canon has limited effect, it may be easily rebutted through traditional methods of statutory interpretation, and it avoids possibly unintended breaches of international obligations.

All in all, the indirect influence of both self- and non-self-executing treaties through the use of the *Charming Betsy* canon provides an appropriate level of deference to domestic and international law. As such, this practice should be recognized as an ideological meeting ground for nationalists and internationalists. The former can champion the canon's structural subordination of international law to clear, contradictory domestic statutes; the latter can celebrate this relatively costless method of acknowledging and developing international law.[179]

176. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

177. *But see* Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Misuse of* Charming Betsy, 67 OHIO ST. L.J. 1339, 1352 (2006) (arguing that the *Charming Betsy* canon came into its own in the 1950s).

178. *See supra* note 56.

179. Given how useful the *Charming Betsy* canon is in the statutory context, would it be similarly valuable to develop a constitutional *Charming Betsy* canon? While a broad constitutional presumption favoring accordance with international obligations would almost certainly be impermissible, it does not appear that any scholar has yet considered whether the use of a narrowed version would be acceptable. While answering this question is beyond the scope of this Note, it merits further consideration.

CONCLUSION

There are legitimate reasons to celebrate and criticize *Medellin*'s reasoning. The case clarifies murky areas of domestic law, but it does so at the expense of the United States fulfilling its international commitments. However, those who rejoice in or bemoan *Medellin*'s seeming presumption in favor of non-self-execution mistake the case's import. While high-profile decisions like *Medellin* will draw fire, treaties' influence in domestic jurisprudence remains largely unaffected.

Treaties, even self-executing treaties, are rarely used directly. Instead, in concert with the *Charming Betsy* canon, both self- and non-self-executing treaties serve as useful tools in statutory construction. Existing court practice reflects this understanding, and normative arguments support it. The limited application of the *Charming Betsy* canon results in relatively costless compliance with international law, accords with separation-of-powers principles by avoiding unintended and possibly undesirable breaches of international obligations, and allows domestic courts to engage with and influence developing norms. In giving meaning to U.S. international obligations while respecting the limits of international law in domestic jurisprudence, judicious application of the *Charming Betsy* canon in conjunction with non-self-executing treaties reconciles often-opposing interests.