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## THE CHARMING BETSY CANON, SEPARATION OF POWERS, AND CUSTOMARY INTERNATIONAL LAW

### INTRODUCTION

Two centuries have passed since the Supreme Court decided *Murray v. Schooner Charming Betsy*.<sup>1</sup> In those years, the canon of statutory construction for which that case is famous — that ambiguous congressional statutes should be construed in harmony with international law — has become deeply embedded in American jurisprudence.<sup>2</sup> While other canons of construction have attracted scholarly criticism on doctrinal and pragmatic grounds,<sup>3</sup> and while the citation of international and foreign law by U.S. courts for substantive meaning has created much academic and popular debate,<sup>4</sup> the “*Charming Betsy*” canon has surprisingly escaped unscathed.<sup>5</sup> This is so even though Chief Justice Marshall’s announcement of the canon in *Charming Betsy* curiously failed to explain the canon’s origin or justification.<sup>6</sup> Rather than attract criticism, this silence on the logic of the canon has enabled commentators to justify it in various ways,<sup>7</sup> expand the

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<sup>1</sup> 6 U.S. (2 Cranch) 64 (1804).

<sup>2</sup> See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 685 (2000).

<sup>3</sup> See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950); Richard Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805–22 (1983) (criticizing traditional canons).

<sup>4</sup> See, e.g., *The Supreme Court, 2004 Term—Introduction: The Debate over Foreign Law in Roper v. Simmons*, 119 HARV. L. REV. 103 (2005); Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. TIMES, Jan. 1, 2005, at A10 (discussing congressional statements and pending resolutions criticizing the Supreme Court’s citation of foreign law).

<sup>5</sup> See Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 FORDHAM INT’L L.J. 1533, 1541 (2001) (stating that the canon “continues to sail onward”). Only one article, Jonathan Turley, *Dualistic Values in the Age of International Legislation*, 44 HASTINGS L.J. 185 (1993), has called for the “decanonization” of the *Charming Betsy* canon. Turley, *supra*, at 262, 265–70. However, Professor Turley does not so much propose to abandon the canon as he does to make it unnecessary by expanding the role of courts in international matters. *Id.* at 271 (“Yet, by moving beyond the traditional rationales of institutional legitimacy [and considering international and foreign law], courts can serve a central political function in the developing transnational arena.”).

<sup>6</sup> See Frederick C. Leiner, *The Charming Betsy and the Marshall Court*, 45 AM. J. LEGAL HIST. 1, 1 (2001) (“The opinion in the *Charming Betsy* seems Delphic and unanswerable, as if Marshall and his brethren merely were uncovering fundamental, natural principles.”).

<sup>7</sup> See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 115 cmt. a (1987) [hereinafter RESTATEMENT (THIRD)] (“It is generally assumed that Congress does not intend to repudiate an international obligation . . .”); John Choon Yoo, Note, *Marshall’s Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1618 n.59 (1992).

canon's scope,<sup>8</sup> or harmonize other areas of law with the canon's edict.<sup>9</sup> The Rehnquist Court described the *Charming Betsy* canon's relevance as "beyond debate."<sup>10</sup>

But should the canon truly be beyond debate? In the 200 years since *Charming Betsy*, the nature of international law has drastically changed, the scope of international law has expanded, and America has grown from the Western world's backwater to the world's only superpower. In light of these major changes, it is important to cast a fresh eye on the logical underpinnings of the *Charming Betsy* canon. Canons of construction are essentially doctrinal "shortcuts," rules of thumb that judges employ to quickly and assuredly reach the proper balance of interpretive and policy equities at play in statutory construction. It is therefore necessary to scrutinize the rationales justifying canons to confirm their soundness and, in turn, bolster the legitimacy and quality of judicial decisions that apply canons.

This Note examines the logic of the *Charming Betsy* canon, focusing on the interaction between three concepts: first, the latest explanation for the canon, enunciated in an article by Professor Curtis Bradley;<sup>11</sup> second, the dramatic changes in the nature of customary international law (CIL) since the time of *Charming Betsy*; and third, the expansion of international law into human rights realms traditionally thought of as domestic matters. Professor Bradley proposes that the canon stems from a separation of powers principle that prevents judicial encroachment into the foreign affairs prerogatives of the political branches. His theory — the most recent of three major theories<sup>12</sup> — has since become a well-accepted rationale, but a rationale that has not received any thorough examination. This Note concludes that because the historical and theoretical ground has shifted beneath the canon since its creation, Professor Bradley's effort to theorize its justification, like prior efforts, inevitably fails. Breaking from the approaches of previous scholarship, this Note does not propose a new

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<sup>8</sup> See Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990) (proposing that the canon be expanded to become a vehicle by which courts can consult international law as a source of interpretation).

<sup>9</sup> See Bradley, *supra* note 2, at 685–90 (arguing that the *Charming Betsy* canon need not conflict with *Chevron* deference); Restani & Bloom, *supra* note 5, at 1543 (noting that when international agreement is clear, a doctrine other than the *Charming Betsy* canon may hold sway); Michael F. Williams, *Charming Betsy, Chevron, and the World Trade Organization*, 32 LAW & POL'Y INT'L BUS. 677, 702–03 (2001).

<sup>10</sup> *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 575 (1988).

<sup>11</sup> Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

<sup>12</sup> The two other theories are that the canon best captures congressional intent not to violate international law and that the canon is justified as a mode by which courts can import international norms into domestic law. See *infra* Part II, pp. 1218–19.

theory to explain the *Charming Betsy* canon. Rather, it proposes to change the canon itself.<sup>13</sup>

Part I recounts the origins of the *Charming Betsy* canon and the case whose name it bears. Part II describes Professor Bradley's theory, which this Note terms the Separation of Powers Rationale. Part III analyzes that rationale and explains why it fails to provide a coherent theory supporting the canon in light of the evolution of international law since the time of *Charming Betsy*. Part IV offers three proposals that would change the *Charming Betsy* canon to render it consistent with both the practical logic of the canon and the international legal landscape of today.

### I. THE CHARMING BETSY CASE

The *Charming Betsy* canon takes its name from *Murray v. Schooner Charming Betsy*. The case centered on the meaning of the Nonintercourse Act, which prohibited trade "between any person or persons resident within the United States or under their protection, and any person or persons resident within the territories of the French Republic, or any of the dependencies thereof."<sup>14</sup> The issue that gave birth to the famous canon concerned the meaning of "under the protection" of the United States, and whether a former American turned Dane captaining a formerly American ship sailing under the Danish flag would fall under the sweep of the statute. Citing the principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," Chief Justice Marshall reasoned that the Nonintercourse Act could not be applied to Jared Shattuck, the captain of the *Charming Betsy*, since allowing his capture would violate international norms regarding the capture of neutral nations and their citizens in a declared war.<sup>15</sup>

It is important to understand Chief Justice Marshall's general purpose in crafting what has become known as the *Charming Betsy* canon. He did not explain from what legal authority or line of logic he derived the canon. He in fact simply stated it, as if it sprung from spontaneous generation. But while his reasoning is not apparent on the face of the opinion, commentators have pointed to possible pragmatic motivations. At the time, the United States was a militarily

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<sup>13</sup> This Note limits its argument to a critique of the theoretical and practical justifications for the *Charming Betsy* canon and corresponding proposals for change. It does not comment on whether it is normatively good for the United States to follow international law generally or in specific circumstances. This Note's argument touches on that issue only indirectly, arguing that decisions to follow or violate international law should be left to the political branches, unencumbered by judicial interference.

<sup>14</sup> Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801).

<sup>15</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

weak nation vis-à-vis European powers.<sup>16</sup> Concurrently, the nation had the second largest merchant marine in the world, and its economy was greatly dependent on uninterrupted trade with European nations, which were continually at war with one another.<sup>17</sup> Because it had much to lose and no great ability to prevail in battle, the United States's interest was in avoiding conflict with other nations. In light of the historical situation, *Charming Betsy*'s affirmation of international norms had the potential of reaping great economic rewards for the United States by providing American merchant ships with greater protection from foreign seizure.<sup>18</sup> It would also minimize military conflict with other nations, as war was a likely result of such disagreements.<sup>19</sup> This pragmatic purpose appears repeatedly in the early applications of the canon. The cases generally involved extraterritorial disputes with foreign nationals, with courts citing *Charming Betsy* while expressing aversion to international conflict.<sup>20</sup> In the absence of satisfactory doctrinal explanations,<sup>21</sup> the pragmatic benefits of Chief Justice Marshall's reinforcement of international norms has great explanatory power, and it informs the way in which the canon should be analyzed today. The pragmatic thrust of the canon provides part of the basis for the reform proposals this Note advances in Part IV.

## II. THE SEPARATION OF POWERS RATIONALE

Because the *Charming Betsy* decision was so opaque about its reasoning, other commentators have proposed competing rationales. Professor Bradley satisfactorily critiques the two main competing rationales — the Congressional Intent and the Internationalist Rationales — in his article. The Congressional Intent Rationale, which posits that the canon best tracks Congress's desire to abide by international law,<sup>22</sup> fails because it blithely assumes the fiction of unitary Congressional intent and also does not fit with the reality that Congress is either at times unaware of international law or even actively hostile to it.<sup>23</sup> The Internationalist Rationale, which posits that the canon is a tool for the judiciary to advance the normatively desirable goal of harmonizing domestic law with international law,<sup>24</sup> fails because it explicitly invites the judiciary to participate both in foreign relations policy and in legis-

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<sup>16</sup> See Leiner, *supra* note 6, at 18.

<sup>17</sup> *Id.* at 17.

<sup>18</sup> *Id.* at 18.

<sup>19</sup> See Bradley, *supra* note 11, at 492.

<sup>20</sup> See Turley, *supra* note 5, at 216–17 (collecting cases).

<sup>21</sup> See Leiner, *supra* note 6, at 1.

<sup>22</sup> See Bradley, *supra* note 11, at 495–97.

<sup>23</sup> See *id.* at 517–20.

<sup>24</sup> See *id.* at 498–99.

lation, areas from which it is precluded by the Constitution.<sup>25</sup> Therefore, this Note concentrates on examining Professor Bradley's rationale, as it is has not yet been examined in depth.

The Separation of Powers Rationale conceives of the *Charming Betsy* canon as serving both the formal and functional constitutional purposes of the separation of powers among the branches of the federal government. As a formal matter, this rationale sees the canon as preserving the Constitution's express apportionment of foreign relations powers to the Executive and the legislature.<sup>26</sup> As a functional matter, this rationale emphasizes the competency of the political branches in foreign affairs, seeing those branches as better suited than the judiciary to the policy-oriented decisionmaking of choosing whether to violate international law.<sup>27</sup> These formal and functional goals are achieved when the canon pushes statutory constructions toward consistency with international law, reducing the number of instances in which the United States violates international law against the wishes of the political branches and constructively forcing the judiciary to consult the political branches about their wishes regarding violations. Also, by forcing Congress to be clear when writing statutes, it reduces the instances in which Congress unintentionally interferes with the foreign relations prerogatives of the Executive.<sup>28</sup>

The motivating idea behind this rationale is not that Congress or the Executive generally intends to follow international law. Rather, this rationale posits that a general presumption in favor of the judicial underenforcement of federal statutes in the face of contrary international law has fewer negative effects in the long run than judicial overenforcement of statutes. Stated simply, the underenforcement of statutes in a manner consistent with international law may have negative domestic effects, but overenforcement in violation of international law may have both negative domestic *and* foreign relations effects. In the face of uncertainty, the balance of negatives comes out in favor of the *Charming Betsy* canon, with its resultant effect of placing the responsibility for deciding to violate international law squarely on the shoulders of the political branches.<sup>29</sup>

In Part III, this Note looks at the formal and functional premises that Professor Bradley employs to justify his theory, and explains why his theory is in fact undermined by them.

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<sup>25</sup> See *id.* at 523–24.

<sup>26</sup> *Id.* at 525.

<sup>27</sup> *Id.* at 526.

<sup>28</sup> See *id.* at 526.

<sup>29</sup> See *id.* at 532–33.

### III. THE PROBLEMS WITH THE SEPARATION OF POWERS RATIONALE

This Part explains the deficiencies of the Separation of Powers Rationale brought about by theoretical changes in international law since the days of the original *Charming Betsy* case. These deficiencies point the way not toward a new rationale for the canon, but toward a re-making of the canon in a more targeted and humble form, or, indeed, its wholesale abandonment with regard to CIL. The Separation of Powers Rationale is attractive for its two-pronged emphasis on the constitutional principle of separation of powers and on the comparative competency of the executive and legislative branches vis-à-vis the judiciary in the area of foreign relations. However, a close inspection of the balance of powers that the canon strikes between Congress and the judiciary reveals that the rationale fails to justify the canon. In fact, analysis shows that the principle of separation of powers cuts *against* use of the canon. This is so for three reasons.

First, logical differences between the canons of constitutional avoidance and the *Charming Betsy* canon highlight the latter's weakness in supporting the separation of powers. Second, a judicial canon that construes congressional statutes in line with international law blunts Congress's ability to voice its opinion on CIL, the formation of which is dependent on state practice largely expressed through legislative acts. Rather than staying the hand of the judiciary, the *Charming Betsy* canon extends it into the sphere of international law affairs that should be the province of the legislature and the Executive. Third, it is questionable whether the balance the canon strikes between domestic legislative costs on the one hand and the costs of foreign affairs repercussions on the other is prudent, at least as applied to international law that concerns matters traditionally of a domestic nature.

#### A. *A Comparison of the Charming Betsy and Constitutional Avoidance Canons*

Professor Bradley, in his article on the Separation of Powers Rationale, places weight on the idea that "structural constitutional considerations" underlie the logic of the *Charming Betsy* canon.<sup>30</sup> He cites Supreme Court decisions that link the *Charming Betsy* canon with the constitutional avoidance canon as having the same "roots" and "essence."<sup>31</sup> From this relationship, Professor Bradley concludes that the *Charming Betsy* canon is meant to avoid "difficult separation of powers problems" similar to the way the constitutional avoidance canon is

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<sup>30</sup> *Id.* at 526.

<sup>31</sup> *Id.* at 527.

meant to prevent the encroachment of congressional powers by a judiciary striking down legislation on constitutional grounds.<sup>32</sup> Looking deeper into this analogy, however, turns up a striking lack of logical fit between the separation of powers reasoning of the constitutional avoidance canon and that of the *Charming Betsy* canon.

The separation of powers argument for the constitutional avoidance canon is fairly simple. The constitutional avoidance canon pushes the judiciary to read a statute in a way that preserves its force as much as possible so that congressional action at least has *some* effect rather than no effect at all, which would be the result if a statute breaks against the rocks of unconstitutionality.<sup>33</sup> To do otherwise may create a situation in which the judiciary is overenforcing the Constitution by striking down legislation that Congress did not intend to cross any constitutional barrier. However, while the Constitution presents a nullifying legal force in the context of the constitutional avoidance canon, international law presents no such nullification. If a statute is read to violate international law — whether treaty law or customary international law — it is not invalidated, but rather overrides the earlier-in-time international law.<sup>34</sup> This is a political and legal prerogative of Congress, as it is able to choose both whether the nation's domestic laws will conform to its international obligations and whether the United States will repudiate international law on the international plane.<sup>35</sup> Therefore, the danger of encroaching on Congress's powers by striking down the whole effect of a statute is not present in the context of the *Charming Betsy* canon. The choice is not between some effect and no effect, but between two permissible effects. What the canon does is privilege one of those effects over the other.

This privileging poses a problem from a separation of powers perspective. It is reasonable to think that the separation of powers is not violated when the judiciary cabins congressional lawmaking power with a canon that uses constitutional violations as the limiting principle. That is, after all, the constitutional role of the courts, and they cannot violate one constitutional principle by enforcing the edicts of another. However, courts arguably violate the separation of powers when they cabin congressional lawmaking power with a canon that draws force from a body of law that has no constitutional origin and

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<sup>32</sup> *Id.* Professor Bradley cites these decisions to support his argument. However, scholarship elsewhere — including Professor Bradley's own scholarship — considers these comparisons to be hard-to-explain mistakes by the Court. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 578 (2d ed. 2006); Bradley, *supra* note 2, at 686.

<sup>33</sup> See Posner, *supra* note 3, at 814–15.

<sup>34</sup> RESTATEMENT (THIRD), *supra* note 7, § 115(1).

<sup>35</sup> Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1567–69 (1984) (describing the role of Congress in deciding when to violate international law).

does not promote any competing constitutional value. The *Charming Betsy* canon therefore can be viewed as casting an international law-based, quasi-constitutional “penumbra” that crowds out and inhibits congressional lawmaking.

Judge Richard Posner has leveled a similar criticism against the canon of interpreting statutes to avoid constitutional questions, as distinguished from constitutional violations. He laments that the constitutional question canon “enlarge[s] the already vast reach of constitutional prohibition . . . to create a judge-made constitutional ‘penumbra’ that has much the same prohibitory effect as the . . . Constitution itself.”<sup>36</sup> Congress’s practical difficulty overriding inaccurate judicial interpretations aggravates this expansion of prohibition.<sup>37</sup> The constitutional question canon increases the costs of legislating in the gray areas of constitutional law, costs that ossify the law around supra-constitutional contours. Applying this criticism to the *Charming Betsy* canon reveals the same problem, except the prohibitory effects on American law come not from the Constitution, but from international law. Cast in its most unfavorable light, the *Charming Betsy* canon creates a constitution from “without,” with little or no connection to the Constitution from within.

It is important to note that Judge Posner’s “penumbra” criticism of the constitutional question canon is itself susceptible to criticism. According to Professor Alexander Bickel, instead of unjustifiably cabin-ing congressional lawmaking, the constitutional avoidance canon reduces friction between the legislature and the judiciary. Professor Bickel reasons that unnecessary judicial discussions of constitutional matters — even in upholding a congressional statute — may affect other legislation and cast a prohibitory pall over the U.S. Code.<sup>38</sup> Preventing such discussion therefore avoids interbranch conflict and preserves the separation of powers. Professor Cass Sunstein also finds value in the constitutional question canon, arguing that the canon compensates for the judiciary’s underenforcement of some constitutional norms.<sup>39</sup> Because judicial nullification of statutes on constitutional grounds presents an antidemocratic problem, courts do not enforce some constitutional norms with the vigor necessary to fully vindicate them. Therefore, a canon that pushes statutes away from areas of constitutional doubt and seemingly expands the scope of con-

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<sup>36</sup> Posner, *supra* note 3, at 816.

<sup>37</sup> *See id.*

<sup>38</sup> *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 181 (2d ed., Yale Univ. Press 1986) (1962).

<sup>39</sup> *See* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2112 (1990).



stitutional prohibitions is actually bringing the law into greater conformity with the true contours of the Constitution.<sup>40</sup>

Gauging the validity of these justifications is beyond the scope of this Note, but what is relevant is that neither is applicable to the *Charming Betsy* canon. First, Professor Bickel's argument stresses that constitutional reasoning in the courts necessarily affects the constitutional propriety of other statutes. International law, however, does not possess the structural nature of constitutional law; its contours do not demarcate the validity and invalidity of other laws, at least not any more than any other body of non-constitutional law. To put it in stark terms, a court opinion declaring that a statute violates and overrides international law does not affect other statutes any more than an opinion declaring that an inheritance statute violates and overrides the old rule against perpetuities. Second, Professor Sunstein's argument hinges on the existence of underenforced constitutional norms underlying any canon's penumbra. While these norms may be present in the constitutional question canon, they do not exist in the *Charming Betsy* canon. What underlies the *Charming Betsy* penumbra is not constitutional law, but international law. It may be the case — and probably is the case<sup>41</sup> — that international law is underenforced in the United States. But that underenforcement comes not from courts being shy about striking down democratically enacted statutes, but rather from the explicit political choice of Congress and the Executive not to implement or render self-executing various treaties and CIL norms. Unlike with constitutional values, courts do not have an obligation to domestically enforce international law that is not implemented or self-executing.<sup>42</sup> And even when international law is implemented or self-executing, it can be overridden by statute.<sup>43</sup> Therefore, the normative force of Professor Sunstein's argument — that courts should compensate for an underenforced Constitution — loses its impetus in the *Charming Betsy* context.

The foundations of the constitutional violation and question avoidance canons cannot be used for support in the *Charming Betsy* context, despite Supreme Court case law to the contrary. If the judiciary is to privilege international law through a canon of construction, the rationale for such a canon must come from somewhere other than the logic of the constitutional avoidance canons.

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<sup>40</sup> See *id.*

<sup>41</sup> See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1179 (1985).

<sup>42</sup> See RESTATEMENT (THIRD), *supra* note 7, § 111(3)–(4).

<sup>43</sup> *Id.* § 115 (1)(a), (2).

B. *The Charming Betsy Canon's Encroachment on Congress's CIL-Making Powers*

The Separation of Powers Rationale fails for a subtler and more invidious reason: it forces the judiciary to encroach upon Congress's power to contribute to the evolving body of CIL. To fully explain this problem, one must understand the changes that have occurred in international law since the time of the *Charming Betsy* case. International law changed in two major ways that are relevant to this Note in the time between 1804 — when it was known as the “law of nations” — and today. First, international law in 1804 was conceived of as natural law, whereas today it is considered positive law developed through, and grounding its authority in, state action and consent.<sup>44</sup> Second, international law in 1804 primarily focused on relations between nations or their respective citizens, whereas today international law extends to matters that have been traditionally considered domestic issues, such as human rights.

1. *From Natural Law to a Positivist Conception of International Law.* — Like almost all law prior to the late nineteenth century, international law was thought by jurists to be derived from universal, objective, and discoverable “natural” principles. While seeds of a more positivist view of international law based on state practice and consent appeared as early as 1650,<sup>45</sup> the natural law conception of international law was dominant during the time of the *Charming Betsy* case. Emmerich de Vattel — whose 1758 treatise on the law of nations was arguably the most influential work on the subject<sup>46</sup> and was frequently cited by the early Supreme Court<sup>47</sup> — wrote that “[t]here certainly ex-

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<sup>44</sup> There are recent observations that the positivist view of international law is fraying, as pronouncements of international organizations are increasingly being cited as evidence of regnant international law with little examination of their correlation to state practice. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 839 (1997). However, as a formal matter, such pronouncements are considered only evidence of state practice and evidence of *opinio juris*, and not authoritative international law sources in themselves. Also, this trend is not a reversal of the positivist theory, but a mere addition of rights to the general body of CIL and treaties, which are still determined by state action and consent. Therefore, the analysis of this Note retains its relevance, especially as international law most likely will not return to a natural law-based system.

<sup>45</sup> J.L. BRIERLY, *THE LAW OF NATIONS* 35 (Sir Humphrey Waldock ed., 6th ed. 1963). Professor Brierly describes the work of Richard Zouche, *Jus et Judicium Feciale, Sive Jus Inter Gentes*, published in 1650, which did not abandon the natural law conception of the law of nations, but “preferred to deduce the law from the precedents of state practice.” *Id.* Zouche is sometimes referred to as the precursor of positivist international jurists. *Id.*

<sup>46</sup> *Id.* at 37; Jesse S. Reeves, *The Influence of the Law of Nature upon International Law in the United States*, 3 AM. J. INT'L L. 547, 549 (1909) (identifying Vattel as the most popular of the continental international legal writers in the early United States).

<sup>47</sup> The Supreme Court cited or discussed Vattel in 135 cases in the years prior to 1900, including in *Charming Betsy* itself. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 79

ists a natural law of nations . . . . [It] is a particular science, consisting in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns.”<sup>48</sup> Vattel conceived of two forms of the law of nations: “necessary” law, which consisted of immutable natural principles, and then “voluntary” international law, which consisted of customs of nations that arose out of those necessary natural principles.<sup>49</sup> State action in contravention of that natural law was therefore unlawful.<sup>50</sup>

But the dominance of the natural law view changed with the rise of positivism in the late nineteenth century.<sup>51</sup> Following the general theoretical trend of the whole of law, international law became unmoored from its grounding in ephemeral ideas of a natural order. Whereas state practice had been merely evidence of the natural international law before, jurists began to point to state practice as the legal source of international law.<sup>52</sup> U.S. courts tracked this trend, and the positivist conception of international law was enshrined in the *The Scotia*<sup>53</sup> decision, an 1872 Supreme Court case. Justice Strong laid out an undeniably positivist theory of international law:

[A]ll the laws of nations . . . rest[] upon the common consent of civilized communities. [They are] of force, not because . . . prescribed by any superior power, but because [they] ha[ve] been generally accepted as . . . rule[s] of conduct. . . . Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation.<sup>54</sup>

Those words are in line with modern international law, which is generally made up of two bodies of consensual law: treaty law and customary international law. Treaty law is grounded in explicit state consent, while CIL arises out of general and consistent state practice that stems from a sense of legal obligation.<sup>55</sup> International law, therefore, is not immutable as it was conceived to be in the natural law era, but is constantly changing either through treaty or evolving state prac-

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(1804). For perspective, the pre-1900 Court cited Blackstone — whose work applies to wider expanses of law and theory than Vattel’s — in 285 cases.

<sup>48</sup> EMMERICH DE VATTEL, *THE LAW OF NATIONS*, at vii (Joseph Chitty ed. & trans., T. & J.W. Johnson & Co. 1867) (1758).

<sup>49</sup> *See id.* at xv; *see also* Reeves, *supra* note 46, at 553–54 (discussing how early American scholars, influenced by Vattel, conceived of international law as resting upon the natural authority of God).

<sup>50</sup> *See* VATTEL, *supra* note 48, at xv.

<sup>51</sup> ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 222–23 (1947).

<sup>52</sup> *See id.*

<sup>53</sup> 81 U.S. (14 Wall.) 170 (1872).

<sup>54</sup> *Id.* at 187.

<sup>55</sup> Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1031, 1060; RESTATEMENT (THIRD), *supra* note 7, § 102.

tice. This protean nature of international law today complicates the logic underlying the *Charming Betsy* canon.

2. *From Regulating Relations Between States to Regulating Domestic Matters.* — The substantive content of international law has expanded in the post–World War II era, extending its reach from regulating relations between different states to regulating relations between states and their own citizens. Prior to World War II and the human rights atrocities of that period, international law was clearly demarcated from domestic law. It was defined as “the body of rules and principles of action which are binding upon civilized states in their relations with one another.”<sup>56</sup> This conception of international law rose out of the political order established by the Peace of Westphalia, the watershed treaty that marked the beginning of an era in which determinations of civil authorities were supreme in their own territory — namely, it created the modern conception of sovereignty.<sup>57</sup> By hardening the borders between states, Westphalia created a clean distinction between domestic and international matters, a distinction that held until the twentieth century.

In the aftermath of World War II, the Nuremberg and Tokyo war crimes tribunals and the codification of human rights standards within the new United Nations structure ushered in a new era of international law.<sup>58</sup> Spurred by a global movement to put legal, and not just political, constraints on the war and genocide of the preceding years, this new era saw the drafting and entrance into force of various multilateral treaties dealing with human rights of civil, political, and economic natures that previously had been considered the domain of the domestic law of sovereign states.<sup>59</sup> This extension of the reach of international law means that the scope and influence of the *Charming Betsy* canon has expanded greatly beyond the bounds Chief Justice Marshall knew when he created the canon in 1804.

3. *Difficulties with the Formation of CIL and the Charming Betsy Canon.* — Keeping in view the relevant history of the evolution of international law, the crux of this criticism of the Separation of Powers

<sup>56</sup> BRIERLY, *supra* note 45, at 1.

<sup>57</sup> *See id.* at 5–16.

<sup>58</sup> *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 9–12 (1982).

<sup>59</sup> The U.N. Charter, drafted in 1945, includes many human rights standards. U.N. Charter art. 1, para. 3; *id.* art. 13, para. 1(b); *id.* art. 55; *id.* art. 62, para. 2. Following the U.N. Charter were several other treaties affirming human rights, parts of which are widely considered codifications of CIL. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Jan. 3, 1976); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

Rationale lies in Congress's ability to influence the two elements of CIL formation. Congress, while not traditionally as involved in the building of CIL as the Executive,<sup>60</sup> is one of the main engines of the United States's participation in CIL-making, as it is a major source of official national pronouncements on matters touched upon by international law.<sup>61</sup> Importantly, Congress's role in CIL-making has grown and will continue to grow if the recent expansion of CIL's scope into domestic affairs continues. As Congress possesses sole authority to legislate domestically, U.S. practice on such issues can largely be determined by opening the U.S. Code. Congress is able to make statements implicating international law customary norms through its statutes, which themselves can be taken either as evidence of state practice or as statements that lead to enforcement action by the Executive that can be taken as evidence of state practice. Also, a congressional statute that violates a norm of CIL can be taken as an expression of Congress's view that that norm lacks binding power. Congressional statutes can also be taken as sources of consistent objection to an existing or emerging CIL norm.

Congress's growing role in CIL-making casts a shadow on the propriety of the *Charming Betsy* canon. For the canon to have any bite in a court opinion, it must push the court away from a statutory interpretation it otherwise would have reached and do so for the sole reason that it would violate international law. In a case involving CIL, the function of the canon is to privilege existing CIL — the status quo — against what would normally be interpreted as a congressional statement to the contrary and against any evolution in CIL. This is problematic for two reasons, one practical, one constitutional.

First, on a practical level, the canon raises a barrier against U.S. participation in the international dialogue that forms CIL, muffling the voice of the democratically elected national legislature in a growing set of matters of national and international import. While it is difficult to measure in concrete terms the expansion of CIL in recent years, it is generally accepted that the scope and depth of CIL have increased since the World War II era.<sup>62</sup> CIL is in a period of rapid development, and the *Charming Betsy* canon slows the ability of Congress to add the voice of the United States to that development. In light of Congress's difficulty in responding to judicial misreadings of its statutes,<sup>63</sup> the *Charming Betsy* canon imposes high costs on Congress for it to com-

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<sup>60</sup> See RESTATEMENT (THIRD), *supra* note 7, § 1 n.2.

<sup>61</sup> See *id.* § 102 (2) n.b (stating that CIL is formed in part from "public measures and other governmental acts and official statements of policy"); see also Henkin, *supra* note 35, at 1567–69 (describing the role of Congress in deciding when to violate international law).

<sup>62</sup> See Bradley & Goldsmith, *supra* note 44, at 839–41.

<sup>63</sup> See *supra* note 37 and accompanying text.

ment on status quo norms of CIL. The effect of these high costs is an ossification of CIL, at least to the extent that the United States contributes to it. Blunting American participation in the formation of CIL in this way has major policy implications, as the reach of CIL extends to areas of vital national interest.<sup>64</sup>

It is important not to overstate the difficulty posed by the *Charming Betsy* canon. One can say that these costs are imposed only when a statute is ambiguous, and that clear statutes will not be obstructed from having their proper influence on CIL since the *Charming Betsy* canon does not apply to them. However, it is also important not to understate the difficulty. The Federal Reporter and U.S. Reports are not wanting in examples of courts finding ambiguity where there arguably is none<sup>65</sup> and of cases that exhibit stark splits among judges and Justices as to the clarity of a statute.<sup>66</sup> Clarity, to borrow a cliché, is very much in the eye of the beholder, because courts applying the *Charming Betsy* canon differ on what the canon requires a statute to be *clear on*.

One particularly relevant illustration of this problem is in *United States v. Palestine Liberation Organization*.<sup>67</sup> In that case, Congress intended to deny the Palestine Liberation Organization (PLO) a U.N. headquarters on U.S. soil.<sup>68</sup> The statute Congress passed to do so was plain in its text.<sup>69</sup> However, the court cited the *Charming Betsy* canon and held that while the statute's language was clear that it wanted to preclude a PLO headquarters as a general matter, it did not contain language that made it explicit that Congress wished to do so by violating a U.N. Agreement that required the United States to allow all U.N. groups headquarters.<sup>70</sup> Many commentators have criticized this decision as the court "shutting its eyes" to obvious congressional intent,<sup>71</sup> and the case highlights the potential of the *Charming Betsy*

<sup>64</sup> See *supra* p. 1226.

<sup>65</sup> See, e.g., *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 979–82 (1986) (finding ambiguity surrounding the term "shall").

<sup>66</sup> See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (Court splitting 5–4 on whether a clear congressional statement from silence and the overall regulatory scheme could be found); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (Court splitting 5–3 on the meaning of the word "modify").

<sup>67</sup> 695 F. Supp. 1456 (S.D.N.Y. 1988).

<sup>68</sup> *Id.* at 1460.

<sup>69</sup> 22 U.S.C. §§ 5201(b), 5202(3) (2000) ("Congress determines that the PLO and its affiliates . . . should not benefit from operating in the United States . . . . [N]otwithstanding any provision of law to the contrary, [it shall be unlawful] to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States . . . .")

<sup>70</sup> See *Palestine Liberation Org.*, 695 F. Supp. at 1468–69.

<sup>71</sup> See, e.g., Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 323 (2001).

canon to frustrate not only clear intent, but also the conscious and unconscious contributions of Congress to the development of CIL.

The second, constitutional problem with a judicial brake on Congress's CIL-making powers is that it violates the separation of powers principle upon which Professor Bradley's theory for the canon depends. Even bracketing the adverse practical effects on the national interest described above, the canon should fail on this problem alone. While it is the role of the courts to interpret international law,<sup>72</sup> the Constitution makes clear that courts have no role in shaping U.S. policy vis-à-vis the rest of the world, international law and custom included. By privileging status quo CIL norms over congressional statements to the contrary, the *Charming Betsy* canon places an unconstitutional judicial check on Congress's role in foreign policymaking.

Stepping back, it is elucidating to recognize that these practical and constitutional problems stem from the fact that the international legal landscape today is vastly different from that at the time of the *Charming Betsy* decision. Because the law of nations was conceived of as fixed and applicable within the United States, the canon did not present the same normative and constitutional problems it does today. Under the old conception, a court cabining congressional action with the law of nations theoretically did not frustrate the formation of that law because the law of nations was independent of congressional action. And there was no constitutional problem of judicial encroachment on congressional foreign policy powers: Congress, in passing statutes violating the law of nations, was not contributing to the formation of the law of nations. It was merely violating general common law, which traditionally exerted its own pressure on statutory enactments through the canon against implied repeal of the common law.<sup>73</sup>

This equipoise changed drastically with the rise of legal positivism during the nineteenth century and through the twentieth. This new theoretical view of international law frustrates the logic of the *Charming Betsy* canon. If state laws and actions create CIL, the *Charming Betsy* canon sabotages in the womb the CIL it is supposed to be applying by preventing Congress from enunciating those laws and the resulting actions. Rather than respecting Congress's discretion in following and forming international law, the canon undermines it. Meant for an early nineteenth-century world, the canon ill fits the twenty-first century. Like an old wineskin bursting under the pressure of new wine, the *Charming Betsy* canon no longer works in a new age.

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<sup>72</sup> See RESTATEMENT (THIRD), *supra* note 7, §§ 111(2)–(3), 112(2).

<sup>73</sup> See Hersh Lauterpacht, *Is International Law a Part of the Law of England?*, 25 TRANSACTIONS OF THE GROTIUS SOC'Y 51, 57–58 (1939) (fusing the common law canon with a canon to construe statutes not to violate international law).

C. *Nonenforcement of International Human Rights Norms*

It is unclear whether the Separation of Powers Rationale can justify the *Charming Betsy* canon under an argument that the canon reduces judicial error costs imposed on the political branches. Professor Bradley's Separation of Powers Rationale is, at its heart, a simple balancing of error costs: the costs associated with courts' mistakenly frustrating congressional intent balanced against the foreign relations costs associated with courts' mistakenly construing statutes to violate international law. In this model, the least amount of error costs equates to the least amount of judicial overreach into the legislative prerogatives of Congress. The Rationale reasons that the *Charming Betsy* canon's presumptive overenforcement of international law results in error costs felt only domestically, whereas no presumption (in the absence of a canon) would result in both domestic *and* foreign relations error costs.<sup>74</sup> In other words, the Separation of Powers Rationale asserts that avoidance of foreign relations costs is the best strategy to reduce interpretive error costs overall.

However, this claim is not stable for at least two reasons. First, it is merely conjecture that the purely domestic error costs imposed by the *Charming Betsy* canon are less than the combined domestic and foreign relations error costs arising from having no canon. For sure, there are fewer *areas* where consequences are felt (two versus one), but whether the magnitude of those errors justifies the canon is not clear. However, coming to a definite empirical answer on this question is likely not feasible, and this Note accepts Professor Bradley's argument that the better guess may be to consolidate all errors domestically.

But this Note does not accept the second assumption underlying Professor Bradley's balance of costs argument: namely, that construing statutes in line with all international law all the time, with no room for distinction, is the best way to reduce overall error costs. Although violations of international law dealing with interstate relations usually spur other states to take enforcement action that imposes serious costs on the political branches, violations of international law dealing with domestic issues rarely invite enforcement and therefore result in minimal foreign relations costs. Scholarship analyzing the enforcement of human rights norms repeatedly shows that states violating the human rights of their citizens are rarely, if ever, disciplined by other states unless enforcement is motivated by some other strategic incentive.<sup>75</sup> This is so because states are organized with the goal of maximizing the

<sup>74</sup> Bradley, *supra* note 11, at 532–33.

<sup>75</sup> See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 117 (2005).



welfare of their citizens and members.<sup>76</sup> A state will act to enforce international legal rights — whether its own or another state’s — if enforcement action will result in a net benefit to that domestic welfare. Thus, a state very infrequently punishes other states for the violation of the rights of those states’ own citizens because the benefit to the domestic polity is either low or unclear in comparison to the cost of enforcement, whether it be economic or military in nature.<sup>77</sup>

In light of this cost differential between violations of “domestic” and “interstate” international law, it is reasonable to question whether the *Charming Betsy* canon’s blanket presumption in favor of all international law optimally reduces judicial error costs on the political branches. While the balance of costs that the canon struck may have been optimal back in 1804 — when international law mainly dealt with interstate relations — that balance of costs may be different in today’s era of international human rights and nonenforcement of those rights. If violations of human rights law stir no foreign relations consequences, this undoubtedly affects the ledger of costs from which the Separation of Powers Rationale draws its justification.

Exactly how nonenforcement of human rights law affects the ledger of costs and what that says about modification of the *Charming Betsy* canon is discussed in section IV.B. This section, however, stresses this point: the *Charming Betsy* canon was originally conceived during a time when international law concerned only interstate relations and the foreign relations consequences of violations were very serious and very salient. It is an open question whether the underlying logic of the canon should be applied to contemporary international law that implicates domestic issues and does not raise the specter of serious costs.

#### IV. REFORMING THE *CHARMING BETSY* CANON — THREE PROPOSALS

This Note regards Professor Bradley’s Separation of Powers Rationale to be generally correct in approach: namely, it attempts to conceive the *Charming Betsy* canon as a doctrine premised on minimizing judicial encroachment on congressional lawmaking and foreign relations prerogatives. However, this Note disagrees with Professor Bradley that the canon, unchanged since 1804, actually serves separation of powers purposes. In order to meet those purposes, the *Charming Betsy* canon must be reconciled with the dramatic historical and theoretical developments in international law since 1804. This Note proposes the following three discrete changes to the canon, beginning with

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<sup>76</sup> See Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 502–04 (2006).

<sup>77</sup> See GOLDSMITH & POSNER, *supra* note 75, at 117, 211–15.

the most modest and advancing to the most sweeping: First, courts should avoid applying the *Charming Betsy* canon as a plain statement requirement or as a way to actively import international norms into domestic law. Second, courts should draw a distinction between CIL concerning human rights and CIL dealing with interstate matters, applying the *Charming Betsy* canon only to the latter. Third, courts should abandon the use of the *Charming Betsy* canon entirely when statutes implicate CIL.

*A. Courts Should Disentangle the Canon from a Plain Statement Requirement and Judicial International Law Activism*

This Note's most modest proposal is that courts applying the *Charming Betsy* canon should refrain from turning it into a plain statement requirement or a means by which to incorporate international law into domestic statutes. Courts should only exercise the canon after a review of all interpretive sources shows that an interpretation not in violation of international law is at least reasonable. This proposal is modest because many courts do in fact apply the canon this way,<sup>78</sup> and the prevailing Restatement of the canon makes clear that it should only be employed "[w]here fairly possible."<sup>79</sup> However, many courts (including the Supreme Court) apply the canon in a strict, plain statement form.<sup>80</sup> Some courts and commentators have advocated the use of the canon in an even stronger form that invites international law norms into the interpretative calculus, reading statutes not merely to prevent them from violating international law, but to construe their contours as matching the norms prescribed by international law.<sup>81</sup> Moving the canon away from plain statements and even more activist constructions would not eliminate the constitutional separation of powers problem described in Part III, nor would it eliminate the practical problem of curtailing the United States's voice on CIL. But it would at least lessen the degree of the practical problem.

On the practical front, adhering to the Restatement version of the canon would lower the barrier to congressional participation in CIL-

<sup>78</sup> See, e.g., *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991); *United States v. Georgescu*, 723 F. Supp. 912, 921 (E.D.N.Y. 1989).

<sup>79</sup> RESTATEMENT (THIRD), *supra* note 7, § 114 ("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.").

<sup>80</sup> See, e.g., *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1468 (S.D.N.Y. 1988).

<sup>81</sup> See, e.g., Steinhardt, *supra* note 8, at 1128; Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 705 (2007) ("Whatever framework [to evaluate courts' use of human rights treaties in interpreting domestic law] may be developed, it should be one that recognizes and embraces domestic courts' emerging roles as transnational actors . . .").

making. A strict plain statement rule allows Congress to contribute to CIL only in the extremely rare instances where it cites a norm and announces a modification. Judicial incorporation of international law norms frustrates the American voice on CIL even further, introducing a countervailing pressure on congressional pronouncements. Employing the canon in a weak form would increase the number of instances in which courts employ interpretive methods free from an international law status quo bias, giving more latitude to Congress's ability to modify CIL — gradually, interstitially, unconsciously, or explicitly. Although the status quo bias would still exist when an interpretation that does not run afoul of international law is fairly possible (even if not probable), interpretation would at least be liberated from the influence of existing CIL norms and the interpretation would not be prematurely squelched under the weight of a plain statement requirement.<sup>82</sup>

On the constitutional front, the continued use of the canon even in modest form would still result in an unconstitutional judicial encroachment on Congress's foreign affairs power. Although the number of cases in which the canon operates to change the outcome would be fewer, that would not ameliorate the *Charming Betsy* canon's inherent unconstitutionality.

*B. Courts Should Refrain from Applying the  
Charming Betsy Canon to CIL Concerning Human Rights*

A proposal that aims to strike a better balance of judicial interpretive error costs is to have courts refrain from applying the *Charming Betsy* canon in cases in which the international law norm at stake is a human rights norm regulating the United States's domestic actions concerning its own citizens. As discussed in section III.C, it is not clear that construing statutes in line with all international law, all the time, is the best way to reduce overall error costs. Where a relatively cognizable subset of international law does not invite foreign relations costs, and where there would therefore be no savings in foreign relations costs to outweigh domestic costs, the canon should be abandoned. Human rights violations invite little to no foreign relations costs in the form of retaliation or enforcement action; thus, removing these norms from the canon's scope would produce fewer overall judicial error costs. It is important to note that removing human rights from the purview of the canon would not create a presumption in favor of violation, but only lead courts to choose the interpretation they find most probable using traditional interpretive sources.

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<sup>82</sup> See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 263 (1991) (Marshall, J., dissenting) (“When [plain statement rules] apply, such rules foreclose inquiry into extrinsic guides to interpretation . . .”).

This proposal deserves more detailed and comprehensive explication. Any refinement of the canon must total the sum of interpretive error costs felt domestically, interpretive error costs arising from strained foreign relations, and, importantly, any added decision costs,<sup>83</sup> and compare that to the costs of the classic canon. If the relative cost is lower, then the refined canon should be adopted. The canon functions as a rule pushing all interpretations of ambiguous statutes to produce domestic costs only. Logically, such a rule creates a greater absolute number of errors than if there were no canon, since it does not allow judges to render a decision on which interpretation is most probable and most likely to be correct from a review of all interpretive sources. However, under Professor Bradley's calculus, creating more absolute errors in this way ultimately produces a lesser amount of error costs. A world in which there were no canon would have a certain number of judicial interpretive errors (since judges *will* inevitably make mistakes) that produce a certain amount of domestic costs and a certain amount of foreign relations costs. In a world with the *Charming Betsy* canon, the number of errors would increase, but there would be zero foreign relations costs in interpreting ambiguous statutes, and all error costs would be shifted to the domestic sphere. Assuming Professor Bradley's calculus is correct, the combined domestic and foreign relations costs of a no-canon world are greater than the purely domestic costs imposed by the *Charming Betsy* canon.

The overall error costs, however, can be further lowered by excluding international human rights CIL from the canon's sweep. Such a refinement would still result in a certain absolute number of errors: the number of errors would be fewer than that produced by the *Charming Betsy* canon since the refinement allows judges to exercise more discretion in the area of human rights; but the number of errors would be greater than that produced by having no canon, since the refinement would still push judges to choose less probable interpretations in non-human rights areas of international law. This change in the canon would result in fewer domestically felt error costs than the classic *Charming Betsy* canon, since courts would not be erroneously overenforcing international human rights norms in the domestic sphere; it would still result in more domestically felt error costs than having no canon, since courts would still domestically overenforce non-human

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<sup>83</sup> Professor Bradley understandably does not consider decision costs since he is not proposing to change the canon. However, any change in interpretive method that seeks to achieve a lower total of error costs must take into account decision costs. Presumably, courts could arrive at the correct answer in every case if they had unlimited resources (education, research staff, time, and so on). But the costs of such a judicial system would be prohibitive, and one must examine new interpretive proposals to ensure that any increase in decision costs does not swallow the decrease in error costs.

rights law. The greatest virtue of the refined canon, however, lies in the fact that it retains the classic canon's zeroing of foreign relations costs, while reducing domestic costs. Since human rights violations invite no cognizable enforcement or retaliation, removing them from the canon's scope would not increase the foreign relations costs incurred. The combined domestic and foreign relations costs of the refined canon would therefore be lower than both the amounts produced by the classic *Charming Betsy* canon and in a no-canon world.

A further virtue of the refined canon is that it adds a de minimis amount of decision costs. When applying the *Charming Betsy* canon correctly, courts already study interpretive sources to determine if an interpretation that is harmonious with international law is fairly possible. The refined canon would only ask that the judge determine whether the legal norm at issue is a human rights norm dealing mainly with the United States's own citizens, or if it involves interstate relations (for example, the law merchant or maritime law), and then apply the *Charming Betsy* canon only if appropriate. This extra step, which constitutes the whole of this proposed refinement, incurs a small amount of decision costs yet yields a significant savings in domestically felt judicial error costs.

Beyond its pragmatic advantages, it is important to note that this refinement brings the *Charming Betsy* canon back to its original purpose: that of preventing the nation from incurring detrimental foreign relations costs. As explained in Part I, the *Charming Betsy* Court was motivated to avoid conflicts with an international law that was then purely interstate in nature. A refined canon that strips away the domestically entangled international human rights law that has arisen since 1804 also avoids such conflicts, and can be considered a purer form of the *Charming Betsy* canon that restores the original balance of costs struck by the Marshall Court — the true “classic” canon.

### C. *The Canon Should Not Apply to Any Form of CIL*

This Note's last proposal is its most sweeping: that courts wholly abandon the *Charming Betsy* canon where CIL is concerned. It is the most sweeping because it seeks theoretical coherence between the positivist manner in which CIL is formed today and the separation of powers boundaries found in the U.S. Constitution. As discussed in section III.B, the *Charming Betsy* canon represents a bias toward the status quo in CIL, one imposed by the judiciary on the ability of the legislature to contribute to the gradual construction of international law. With no foreign relations powers delegated to the judiciary in the Constitution, the judiciary's self-insertion into the CIL-making process is unconstitutional, even in a refined form that removes it from human rights realms. Therefore, eliminating the canon with regard to CIL is not only prudent, but mandated by the supreme law of the land.

A rebuttal to this proposal is that the canon, in classic or refined form, works to reduce judicial interpretive error costs, and thus reduces the degree (if not the number of instances) to which the judiciary frustrates the prerogatives of Congress. Under this argument, the canon is therefore promoting the constitutional idea of separation of powers even if it is technically unconstitutional. It is important to scrutinize this argument. Errors in interpretation are inevitable — there will always be some form of inadvertent encroachment by the judiciary since judges are fallible and questions always contain an element of uncertainty. The question then is whether the judiciary can form a rule (for instance, a canon of construction) that decreases the degree or number of mistakes. If it can, the judiciary should adopt the rule. But one must remember that such a rule is merely prudential — premised on a constitutional value, not mandated by the Constitution. Therefore, if the *rule itself* is unconstitutional, the entire logic of adopting the prudential rule is undermined. The *Charming Betsy* canon, as explained by Professor Bradley, is attempting to promote a separation of powers value by violating that very same value. That rationale is unstable and untenable, and the clear resolution is to recognize that the canon has been overtaken by changes in legal theory and, in the realm of CIL, should be swept away.

#### CONCLUSION

There is a common thread that runs through all of the theoretical and pragmatic problems that afflict the *Charming Betsy* canon: the political and legal world of 1804 is no longer. The *Charming Betsy* canon was developed by the Marshall Court at a time when international law was viewed as natural law, when it exclusively concerned relations between nations, and when the fledgling United States depended on international law to protect its commercial interests. In that historical and theoretical milieu, the canon achieved a practical and logical coherence: it applied immutable, natural principles applicable in U.S. courts to steer the nation away from international conflict that would have been economically and militarily disastrous.

But that coherence does not survive into the twenty-first century. International law now extends to traditionally domestic issues, develops in a positivist manner, and is no longer at all times vital — if at all beneficial — to preserving the foreign affairs interests of the United States. The literature on the *Charming Betsy* canon has not accounted for this divergence between the canon and the state of the world, and instead has attempted to rationalize the canon with newer and better theories. But none of these rationales, including Professor Bradley's, survives scrutiny. The path forward is not to change the theory underlying the canon, but to change the *Charming Betsy* canon itself.