# ARTICLES

The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*

CURTIS A. BRADLEY**

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INTRODUCTION

The status of international law\(^1\) in U.S. courts, while long the subject of theoretical interest and debate, has now become a matter of significant practical importance. The number of federal and state cases that raise international law issues has been growing rapidly. And the international law invoked in these cases purports to regulate many matters traditionally within domestic control. Nowhere is this more evident than in the area of international human rights law. Encouraged by the seminal Filartiga decision,\(^2\) victims of human rights abuses in foreign countries increasingly have been seeking relief in U.S. courts.\(^3\) With less success, litigants also have been seeking to have U.S. courts apply human rights and other international standards internally against domestic government actors.\(^4\)

\(^1\) There are two principal types of international law—treaties and customary international law. A treaty is a "purposeful agreement among states," RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch.1, introductory note at 18 (1987) [hereinafter RESTATEMENT (THIRD)]. Customary international law is the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD), supra, § 102(2); see also Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, T.S. No. 993 (sources of international law include "international custom, as evidence of a general practice accepted as law"). Customary international law has essentially the same binding force on the international plane as treaty law. See RESTATEMENT (THIRD), supra, § 102, cmt. j.

\(^2\) Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). In Filartiga, the court allowed two Paraguayans to sue a former Paraguan military official for allegedly violating customary international law by engaging in torture and other acts in Paraguay. In doing so, the court held that customary international law has the status in this country of federal common law. See id. at 885. As Professor Bederman has observed, "[i]n a sense, all current human rights litigation owes its fortune to Filartiga." David J. Bederman, Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation, 25 GA. J. INT'L & COMP. L. 255, 256 (1995-96); see also Harold Hongju Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347, 2366 (1991) ("In Filartiga, transnational public law litigants finally found their Brown v. Board of Education.").


\(^4\) See, e.g., United States v. Alvarez-Machain, 504 U.S. 655 (1992) (involving claim that U.S. government's forcible abduction of Mexican citizen for trial in United States violated both extradition treaty between United States and Mexico and customary international law); United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997) (involving claim that conviction and sentence of Mexican national violated treaties and customary international law); Garcia-Mir v. Meese, 788 F.2d 1446 (11th
It is not surprising, therefore, that in recent years there has been substantial academic discussion of the circumstances under which international law should provide substantive rules of decision for U.S. courts. The questions discussed include: Under what circumstances are treaties "self-executing," and thus immediately enforceable in U.S. courts? Should customary international law have the status of federal common law? If so, does it preempt inconsistent state law? Is it enforceable by U.S. courts against the President? Does it supersede inconsistent federal legislation?

Cir. 1986) (invoking claim that indefinite detention of Cuban citizens by Immigration and Naturalization Service violated customary international law); State v. Steffen, 1994 Ohio App. LEXIS 1973 (Ohio App. 1994) (invoking claim that Ohio death penalty provision violated treaties and customary international law); see also Koh, supra note 2, at 2369 (referring to attempts "to obtain judicial declarations calling American officials to account for their alleged failure to obey international law").


7. See, e.g., Lea Brilmayer, Federalism, State Authority, and the Preemptive Power of International Law, 1994 SUP. CT. REV. 295 (arguing that customary international law preempts inconsistent state law).


International law does not itself answer these questions. As a prominent international law casebook explains: "International law requires a state to carry out its international obligations but, in general, how a state accomplishes this result is not of concern to international law." LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 153 (3d ed. 1993); see also THOMAS BUERGENTHAL & HAROLDO G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 208 (2d ed. 1990) ("[l]t is the authority of the United States decision maker, not the authority of the community of nations, that gives legal effect to the rules of international law within the United States."); Edwin Borchard, The Relation Between International Law and Municipal Law, 27 VA. L. REV. 137, 143 (1940) ("The domestic instruments that the State employs to perform its international obligations are a matter of indifference to international law. It may employ statute or administrative official or judicial control. . . . [I]t may directly incorporate only treaties and not customary [international] law.").
Direct incorporation, however, is not the only means by which international
law interacts with U.S. domestic law. Since the early days of this nation, U.S.
courts also have relied on international law in interpreting federal government
enactments. They have done so, for example, when interpreting statutory terms
that have an established meaning in international law, especially when there is
evidence that Congress intended to incorporate the international law meaning. 10
Courts also have looked to international law when Congress has expressly
directed them to do so. 11

A more general interpretive use of international law, and the focus of this
article, is the “Charming Betsy canon.” In an 1804 decision, Murray v. The
Schooner Charming Betsy, the Supreme Court stated that “an act of Congress
ought never to be construed to violate the law of nations if any other possible
construction remains.” 12 Since then, this canon of construction has become an
important component of the legal regime defining the U.S. relationship with
international law. It is applied regularly by the Supreme Court and lower federal
courts, and it is enshrined in the black-letter-law provisions of the influential
Restatement (Third) of the Foreign Relations Law of the United States. 13

Today, the interpretive role of international law, as reflected in the Charming
Betsy canon, is arguably more important than its substantive role. Notwithstanding
broad claims by academic commentators regarding the domestic effects of
international law, there have been few instances in recent years in which courts

10. This has happened, for example, in the context of federal immigration law. See, e.g., Sale v.
meaning of “deport or return” in refugee provision); INS v. Cardoza-Fonseca, 480 U.S. 421, 436-41
(1987) (looking to international law to determine meaning of “refugee” in asylum provision). It also
has happened in the context of federal maritime law. See, e.g., Chandris, Inc. v. Latsis, 515 U.S. 347,
358 (1995) (looking to international maritime law to determine meaning of “seaman” in Jones Act);
United States v. Rosero, 42 F.3d 166, 171 (3d Cir. 1994) (looking to international maritime law to
determine meaning of “vessel without nationality” in criminal statute).

11. An early example of such direction was an 1819 statute that provided “if any person or persons
whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and
... shall afterwards be brought into or found in the United States, every such offender ... shall, upon
conviction ... be punished with death.” Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 513-14 (emphasis
added). The Supreme Court, in an opinion by Justice Story, upheld this statute over the objection that it
failed to define the crime with sufficient particularity. See United States v. Smith, 18 U.S. (5 Wheat.)
153, 162 (1820). The Court concluded that the crime of piracy had a definite meaning in international
law and that “Congress may as well define by using a term of a known and determinate meaning as by
an express enumeration of all the particulars included in that term.” Id. at 159; see also G. EDWARD
case). The current version of the piracy statute is at 18 U.S.C. § 1651 (1994). For other early examples,
see Henkin, supra note 6, at 1558 n.14. For more recent examples, see 18 U.S.C. § 7 (1994) (allowing
criminal jurisdiction over certain foreign vessels “[t]o the extent permitted by international law”), and
28 U.S.C. § 1605(a)(3) (1994) (denying immunity from suit to foreign states in certain cases “in which
rights in property taken in violation of international law are in issue”).

12. 6 U.S. (2 Cranch) 64, 118 (1804). For a discussion of this case, see infra text accompanying
notes 34-39.

13. See RESTATEMENT (THIRD), supra note 1, § 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.”).
have applied international law directly to restrain domestic governmental actors, at either the federal or the state level. In contrast, courts regularly rely on the Charming Betsy canon in interpreting domestic law. This indirect, "phantom" use of international law can, in some cases, have the same effect as direct incorporation of international law. Indeed, it is arguable that, "[w]hen actual congressional intent is ambiguous or absent," applying the Charming Betsy canon "is the same as creating a rule that the government regulatory scheme cannot violate international law." Moreover, the Charming Betsy canon presumably applies to all international obligations of the United States, regardless of whether they are viewed as enforceable domestic law. For these reasons, lawyers and commentators who have been frustrated by the lack of direct effect given by U.S. courts to international law have to some extent rested their hopes on international law's interpretive role. Indeed, some of them have been pushing to expand both the nature of the canon and its role in U.S. litigation, so that the canon itself can be a vehicle for direct incorporation of international law.

Despite the importance of the Charming Betsy canon, it has engendered relatively little discussion or debate. Only two articles in recent years have considered the canon in depth. Some of the recent general articles on canons of construction refer to it, but without much discussion. International law


17. See infra text accompanying notes 100-26.

18. See Ralph G. Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, 43 VAND. L. REV. 1103 (1990); Jonathan Turley, Dualistic Values in an Age of International Legisprudence, 44 HASTINGS L.J. 185 (1993). Although both of these articles make important contributions to the subject, neither addresses in detail the historical context of the adoption of the Charming Betsy canon, the subsequent changes in international law and federal court power, or the effect of these changes on the possible contemporary conceptions of the canon. Moreover, although the proposals in these two articles differ substantially in form—with Professor Steinhardt calling for a more affirmative use of the Charming Betsy canon and Professor Turley calling for judicial abandonment of the canon—both proposals are in fact motivated by the view that courts should take a more expansive role in international matters. See infra note 100. This is a view that, as I explain, is inconsistent with the aforementioned changes. See, e.g., infra text accompanying notes 252-63. I also disagree with Professor Steinhardt's claim that the canon must be applied by state courts (and federal diversity courts) in interpreting state law. See infra text accompanying notes 305-18.

casebooks and treatises barely mention it, and it receives only superficial coverage in treatises on statutory construction.

One possible reason for this relative silence is that, on first glance, the Charming Betsy canon may seem simple and uninteresting. After all, it is only a canon of construction, and it is one of many similar-sounding canons. Moreover, it does not require that courts use international law to override domestic law, only that they try to harmonize the two. As Professor Steinhardt has correctly observed, however, "the apparent simplicity of the Charming Betsy canon . . . hides a deep and characteristic complexity that goes to the heart of how international law should be applied in the courts of the United States." This complexity becomes apparent when one asks why U.S. courts try to construe statutes to avoid inconsistencies with international law. Where do they get the authority to apply such a rule? And why this rule and not others—for example, a rule that federal statutes should be construed so as not to be inconsistent with French law, or Talmudic law, or Plato’s "Laws"?

In this article, I examine the possible justifications for the Charming Betsy canon in light of certain changes that have occurred since the canon’s adoption. I conclude that, in light of these changes, neither empirical assumptions regarding legislative intent nor judicial respect for international law adequately justify contemporary use of the canon. Rather, to the extent that the canon is to be retained, it is best thought of today as a device to preserve the proper separation of powers between the three branches of the federal government.

Part I examines the origins of the canon. It first reviews the early decisions adopting the canon and some of the ways in which the canon has subsequently been applied. Part I then describes the historical context of the canon’s adoption. This description reveals that the canon was adopted during a time when the international status of the United States, prevailing views concerning the nature of international law, and the role of the federal courts were all very different from what they are today.

Part II describes two common conceptions of the canon—which I call the legislative intent conception and the internationalist conception. The legislative intent conception views the canon as a means of implementing congressional intent; the internationalist conception views the canon as a means of ensuring

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20. Most of the leading U.S. casebooks and treatises on international law do not even mention the Charming Betsy canon. Those that do mention it do so only briefly. See, e.g., Henkin et al., supra note 9, at 224-25.

21. See Steinhardt, supra note 18, at 1111 n.34 (collecting sources).

22. Id. at 1113.

23. If this question seems too fanciful, see Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), in which the Court construed a statutory prohibition on contracts with aliens residing abroad for the performance of "labor or service of any kind in the United States" as not applying to a contract for the services of a Christian minister because, among other things, "this is a Christian nation." Id. at 471; see also id. at 465 ("[N]o purpose of action against religion can be imputed to any legislation, State or national, because this is a religious people.").
that the United States complies with and gives effect to international law. Although traditional accounts of the canon primarily have reflected the legislative intent conception, there have been a number of recent efforts by scholars and judges to promote the internationalist conception.

Part III considers three significant changes that have occurred since the canon's adoption: the post-realist defense of canons of construction, alterations in the structure and content of customary international law, and the redefinition of federal court power resulting from *Erie Railroad v. Tompkins*. In light of these changes, I conclude that neither the legislative intent conception nor the internationalist conception provides an adequate justification for the use of the canon today.

Part IV proposes an alternate justification for the *Charming Betsy* canon, which I call the separation of powers conception. The separation of powers conception views the canon as a means for the courts to shift certain types of decisionmaking to the political branches and to reduce friction between them and the judiciary. This conception is supported by recent Supreme Court decisions, and it is strengthened rather than undermined by the contextual changes since the canon's adoption. Nevertheless, the separation of powers conception does suffer from a substantial problem: it requires a compromise of the very values it is designed to promote. For a variety of reasons, however, I conclude that such a compromise is warranted. Finally, I explain how this conception sheds light on the proper relationship between the canon and state law.

I. THE *CHARMING BETSY* CANON

A. ORIGINS OF THE CANON

The *Charming Betsy* canon received its name from an 1804 Supreme Court decision, *Murray v. The Schooner Charming Betsy*. In fact, however, the Court had already announced the canon three years earlier, in *Talbot v. Seeman*. The *Talbot* case concerned the seizure by a U.S. navy captain, during the undeclared war between the United States and France, of a neutral ship (the *Amelia*) that had been captured by the French. The issue before the Court was whether the captain was entitled to salvage, and if so, how much.

The captain cited a 1799 federal statute that allowed salvage in the amount of

24. 304 U.S. 64 (1938).
25. 6 U.S. (2 Cranch) 64 (1804).
26. 5 U.S. (1 Cranch) 1 (1801). Neither Professor Steinhardt nor Professor Turley discusses the *Talbot* case in their articles on the *Charming Betsy* canon, although Professor Steinhardt does cite the case for another proposition. See Steinhardt, * supra * note 18, at 1138 n.148. A few commentators who have referred to the *Charming Betsy* canon in passing, however, have cited *Talbot*. See Henkin, * supra * note 6, at 1558 n.15; Lobel, * supra * note 8, at 1103 n.159; Pau, * supra * note 5, at 766 n.38.
27. In maritime law, salvage is "a compensation allowed to persons by whose assistance a ship or its cargo has been saved, in whole or in part, from impending danger, or recovered from actual loss, in cases of shipwreck, derelict, or recapture." BLACK'S LAW DICTIONARY 1340 (6th ed. 1990).
one-half the value of a ship and its cargo in the case of ships seized "belonging to ... subjects of any nation in amity with the United States, if re-taken from the enemy ... after ninety-six hours." 28 The Court was concerned, however, that allowing such a large salvage for a neutral vessel would violate customary international law, given that neutral vessels were ordinarily not subject to any salvage under such law. 29 In an opinion by Chief Justice Marshall, 30 the Court acknowledged that the language of the statute could be read as supporting the captain's claim. 31 Nevertheless, the Court said that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations." 32 The Court then proceeded to construe the statute as applying only in the case of vessels from countries at war with the capturing country. The Court explained 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." 33

The Court reaffirmed the canon in Charming Betsy, albeit without citing back to Talbot. Like Talbot, the Charming Betsy case concerned events surrounding the undeclared war with France. During that war, the United States passed the Nonintercourse Act of 1800, 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." 34 To enforce the statute, the Navy was under orders from President Adams to seize any vessel suspected of trading with the French. A U.S. navy frigate subsequently seized the schooner Charming Betsy on the high seas, suspecting her of engaging in trade with Guadaloupe, a French dependency, in violation of the statute.

Before being seized, the Charming Betsy (then named Jane) had been sold by its American owner to a resident of St. Thomas, Jared Shattuck. Shattuck was born in the United States, but had moved as a child to St. Thomas, a Danish island, and had become a Danish citizen. He had not, however, expressly renounced his American citizenship. In evaluating Shattuck's challenge to the seizure of his vessel, the Court had to determine whether the Nonintercourse Act had been properly applied by the Navy to Shattuck. Shattuck argued that

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29. See Talbot, 5 U.S. at 43.
31. See Talbot, 5 U.S. at 43.
32. Id.
33. Id. at 44. The Court did award salvage, but only in the amount of one-sixth the value of the vessel. See id. at 45. The Court based the award not on the statute, but rather on general principles of maritime law, which allowed salvage for essential services rendered to a vessel. See id. at 41-43.
34. Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800) (expired 1801).
applying the Act to him would violate the "rights of neutrality" under international law.\textsuperscript{35}

The Court, again in an opinion by Chief Justice Marshall, recited among the "principles...believed to be correct" and which "ought to be kept in view in construing the act now under consideration," the following proposition: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains..."\textsuperscript{36} The Court then concluded that, at the time of the seizure, Shattuck was neither a resident of the United States nor "under [its] protection," and thus was not within the reach of the Nonintercourse Act.\textsuperscript{37} It is not entirely clear from the opinion how international law actually influenced the Court's conclusion, particularly given that the Court reserved judgment on whether the United States had the power under international law to punish Shattuck.\textsuperscript{38} Nevertheless, the Charming Betsy decision, as Professor Turley has noted, "became the bedrock for a series of later decisions involving international law and judicial construction."\textsuperscript{39}

The genesis of the canon articulated in Talbot and Charming Betsy is not entirely clear. In neither decision did Marshall cite any authority for the canon. He may have had in mind a famous pre-constitutional decision, Rutgers v. Waddington,\textsuperscript{40} in which a New York court had construed a state trespass statute in such a way as to avoid a conflict with the Treaty of Paris and the law of nations.\textsuperscript{41} It is also possible that he derived it from English law, which employs a similar canon.\textsuperscript{42} This is not certain, however, given that the earliest English cases clearly articulating the canon all appear to postdate the earliest American

\textsuperscript{35} Charming Betsy, 6 U.S. at 107.
\textsuperscript{36} Id. at 118.
\textsuperscript{37} Id. at 120.
\textsuperscript{38} See id. (stating that whether Shattuck was immune "from punishment for any crime committed against the United States" is "a point not intended to be decided").
\textsuperscript{39} Turley, supra note 18, at 213.
\textsuperscript{40} N.Y. Mayor's Court 1784, reprinted in SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674-1784, at 302 (R. Morris ed., 1935).
\textsuperscript{41} See id. at 323-35. Noting that "[g]reat pains have been taken on both sides, to enforce the rules by which [the statute] ought to be expounded," the court concluded: "The repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the Legislature passed this statute; and we think ourselves bound to exempt that law from its operation..." Id. at 308, 325. This case was successfully argued by Alexander Hamilton and is discussed and documented in The Law Practice of Alexander Hamilton 282-543 (Julius Goebel ed., 1964) [hereinafter Goebel]. The decision "stirred considerable political opposition in New York" because it was viewed as stretching the language of the statute too far and thereby overriding legislative supremacy. Lobel, supra note 8, at 1086 n.76; see also Henry B. Dawson, The Case of Elizabeth Rutgers Versus Joshua Waddington at xxiv-xxvi (1866) (reciting criticism of decision); Gordon S. Wood, The Creation of the American Republic, 1776-1789, at 459 (1969) (same). After winning in the trial court, Hamilton apparently persuaded his client to settle the case because Hamilton feared the decision would be reversed on appeal. See Charles Grove Haines, The American Doctrine of Judicial Supremacy 104 n.39 (2d ed. 1959). Some commentators have described Rutgers as a precursor to the American doctrine of judicial review. See, e.g., Goebel, supra, at 282, 290; Suzanna Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1134-38 (1987).
cases.\textsuperscript{43} Even if Marshall did not derive the canon itself from English law, he may have derived it from the English canon that statutes are to be construed, if possible, not to override the common law.\textsuperscript{44} The law of nations was, after all, considered part of the English common law.\textsuperscript{45} Moreover, as Professor Henkin has noted, there are “[n]umerous statements” from the Supreme Court in the late-eighteenth and early-nineteenth centuries referring to the law of nations as part of the “common law.”\textsuperscript{46}

B. SUBSEQUENT USES AND FORMULATIONS OF THE CANON

The Supreme Court and the lower federal courts have invoked the Charming Betsy canon in a variety of contexts, without always citing the Charming Betsy decision.\textsuperscript{47} In some cases, courts have invoked the canon to avoid a potential conflict with a treaty. The Supreme Court has stated that there is “a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.”\textsuperscript{48} The canon has been applied to treaties relating to a wide range of subjects, including immigration,\textsuperscript{49} diplomatic rela-


\textsuperscript{44} See Henry Hardcastle, A Treatise on the Rules Which Concern the Construction and Effect of Statutory Law 89 (1879) (discussing common law canon); Peter S. Langhans, Maxwell on the Interpretation of Statutes 116 (12th ed. 1969) (same); Charles E. Odgers, Crazies on Statute Law 114-15 (5th ed. 1952) (same); see also Hersch Lauterpacht, International Law A Part of the Law of England?, 23 Grotius Soc. 55, 57-58 (1939) (equating the international law canon with the common law canon). But cf. Langhans, supra, at 183 (describing the international law canon as part of the “general presumption that the legislature does not intend to exceed its jurisdiction”).

\textsuperscript{45} See 4 William Blackstone, Commentaries 67 (176) (noting that the law of nations is “adopted in its full extent by the common law, and is held to be a part of the law of the land”); see also Heathfield v. Chilton, 98 Eng. Rep. 50, 51 (K.B. 1767) (same).

\textsuperscript{46} Louis Henkin, Foreign Affairs and the United States Constitution 509 n.17 (2d ed. 1996); see, e.g., United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820) (referring to the “law of nations, (which is part of the common law)”; United States v. Worrall, 2 U.S. (2 Dall.) 384, 392 (1798) (referring to “the law of nations, which is part of the common law of the United States”); Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 161 (1795) (redell, J., concurring) (referring to “the common law, of which the law of nations is a part”).

\textsuperscript{47} The Charming Betsy decision also has been cited for a variety of substantive propositions separate from the canon, such as the right of U.S. citizens to expatriate themselves, see, e.g., Savorgnan v. United States, 338 U.S. 491, 497 (1950), and the status of armed merchant vessels under prize law, see, e.g., The Panama, 176 U.S. 535, 547 (1900).


tions, and employment discrimination. Moreover, the canon has been applied not only with respect to treaties with other nations but also with respect to treaties with Indian tribes.

The canon also has been applied in cases involving customary international law. Many of these cases have involved the territorial reach of federal legislation. It is fairly well accepted that customary international law imposes limits on the authority of nations to regulate extraterritorially. As a result, courts often invoke the Charming Betsy canon as a reason for construing ambiguous statutes as not having extraterritorial effect. Indeed, the Supreme Court has created a separate but related canon of construction for this issue, the "presumption


52. See, e.g., United States v. Dion, 476 U.S. 734, 738-39 (1986); Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 690 (1979); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968); see generally Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?, 63 Cal. L. Rev. 601, 623-34 (1975) (describing various formulations of the Indian treaty canon). Although courts generally have applied the Charming Betsy canon without regard to the nature of the particular treaty at issue, there is a recent division in the courts over whether the canon applies to the General Agreement on Tariffs and Trade (GATT). Compare Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (holding that it does apply), and Footwear Distrbs. & Retailers of Am. v. United States, 852 F. Supp. 1078, 1079 (Ct. Int’l Trade 1994) (same), with Mississippi Poultry Ass’n, Inc. v. Madigan, 992 F.2d 1359, 1367 (5th Cir. 1993) (holding that it does not apply because of court’s belief, without further explanation, that extending it to GATT “in the absence of controlling authority would be to exercise raw judicial fiat”). Since the GATT cases typically involve challenges to administrative agency action, another interesting issue that arises in this context is the relationship between the Charming Betsy canon and the deference courts owe to constructions of statutes by administrative agencies. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Of possible relevance to this issue, the Supreme Court has indicated that the canon stating that statutes are to be construed to avoid serious constitutional questions, for which the Charming Betsy decision is sometimes cited, trumps the Chevron rule. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-75 (1988). Noting this, one commentator recently asserted that the Supreme Court has “taken the position that the Chevron rule of deference to agency interpretations of congressional intent is secondary to the Charming Betsy doctrine of avoidance of conflict with international obligations.” Ronald A. Brand, Direct Effect of International Economic Law in the United States and the European Union, 17 Nw. J. Int’l L. & Bus. 556, 571 (1996/97).

53. See RESTATEMENT (THIRD), supra note 1, pt. IV, ch. 1, introductory note at 235 (“International law has long recognized limitations on the authority of states to exercise jurisdiction to prescribe in circumstances affecting the interests of other states.”); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 8 (1965) [hereinafter RESTATEMENT (SECOND)] (“Action by a state in prescribing or enforcing a rule that it does not have jurisdiction to prescribe or jurisdiction to enforce, is a violation of international law . . . .”); GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 493 (3d ed. 1996) (“[I]nternational law has long been understood as restricting assertions of legislative jurisdiction by states . . . .”); see also Andreas F. Lowenfeld, Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case, 89 Am. J. Int’l L. 42, 47 (1995) (“[I]t is now clear beyond doubt that the Supreme Court—majority and minority—understands that the reach of a nation’s law is a subject of international law—public customary international law.”).
against extraterritoriality. 54 This presumption is designed, among other things, to avoid constructions of statutes that would violate customary international law. 55 The Charming Betsy canon also is invoked as a justification for limiting the reach of statutes that are found to overcome the presumption against extraterritoriality. 56

As these examples suggest, at least in the context of customary international law, the Charming Betsy canon has been used primarily as a braking mechanism. Courts have used traditional principles of international law, such as those relating to prescriptive jurisdiction, to restrain the scope of federal enactments. They have not, by and large, relied on customary international law to give such enactments a more expansive reading. 57 For example, even in the Charming Betsy decision, "Chief Justice Marshall honored international law primarily in its avoidance—not in its application." 58

The precise strength of the canon today is somewhat uncertain. Most courts recite the language from Charming Betsy: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." 59 At least some courts, however, appear to interpret "possible" to mean something equivalent to "reasonable." 60 In addition, the black-letter-law formulations of the canon in the American Law Institute's Restatements of Foreign Relations do not precisely track the Charming Betsy language. In the Restatement (Second), published in 1965, the canon was stated as follows: "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." 61 In the Restatement (Third), published in

55. See, e.g., Aramco, 499 U.S. at 255. For a discussion of the various justifications that have been advanced in support of the presumption against extraterritoriality, including the international law justification, see Curtis A. Bradley, Territorial Intellectual Property Rights in an Age of Globalism, 37 Va. J. Int'l L. 505, 513-16 (1997).
56. See, e.g., Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); United States v. Vasquez-Velasco, 15 F.3d 833, 839-40 (9th Cir. 1994); United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945); see also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814-16 (1993) (Scalia, J., dissenting) (discussing use of the canon to limit the reach of statutes when "the presumption against extraterritoriality has been overcome or is otherwise inapplicable"); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 9 (1st Cir. 1997) (Lynch, J., concurring) ("[C]ourts must be careful to determine whether this construction of [the Sherman Act's] criminal reach conforms with principles of international law.").
57. See Turley, supra note 18, at 238 (noting that courts have applied the Charming Betsy canon "largely to avoid jurisdiction or, more recently, to avoid an international conflict by following the least controversial course available under international law").
58. Id. at 231.
61. RESTATEMENT (SECOND), supra note 53, § 3(3).
1987, the phrasing was altered to read: "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." The Restatement (Third) borrowed the phrase "where fairly possible" from the canon of construction which holds that courts are to "first ascertain whether a construction of the statute is fairly possible by which [a constitutional] question may be avoided." If these different phrasings reflect a substantive difference, it may concern the degree of clarity required in a statute before a court will conclude that the statute violates international law. Consistent with the strength of the Charming Betsy language (but perhaps not the other phrasings), courts sometimes have gone to great lengths to construe a statute to avoid a violation of international law. In any event, regardless of whether these phrasings differ in strength, they are all focused on avoiding violations of international law. As discussed in Part IIb, some judges and commentators who desire a broader role for international law in U.S. courts have subtly deviated from these traditional phrasings, shifting the emphasis from avoiding violations of international law to conforming U.S. law to the contours of international law.

C. HISTORICAL CONTEXT OF THE CANON'S ADOPTION

Before evaluating the contemporary validity of the Charming Betsy canon, it may be useful to consider first the historical context of its adoption. All too often, courts and commentators rely on statements by the early Supreme Court concerning the domestic legal status of international law without considering

62. Restatement (Third), supra note 1, § 114.
64. See United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1468 (S.D.N.Y. 1988) (noting the "lengths to which our courts have sometimes gone in construing domestic statutes so as to avoid conflict with international agreements") and holding that "the clearest of expressions on the part of Congress" is required to overcome the canon). As this decision suggests, the Charming Betsy canon may be a strong "clear statement" rule, which, like the presumption against extraterritoriality, can be overcome only by "the affirmative intention of the Congress clearly expressed." EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)); see also Veldhoen v. United States Coast Guard, 838 F. Supp. 280, 283 (E.D. La. 1993) (referring to the Charming Betsy canon in this way). There is certainly language in some of the Supreme Court's treaty decisions suggesting a clear statement requirement. See, e.g., United States v. Cook, 288 U.S. 102, 120 (1933) ("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."). Prior to the Supreme Court's recent characterization of the presumption against extraterritoriality as a strong clear statement rule, one judge asserted that "[t]he showing of congressional intent required to overcome the presumption that Congress does not intend to violate international law is much greater than that required to overcome the presumption against extraterritoriality." Boureislan v. Aramco, 857 F.2d 1014, 1023 (5th Cir. 1988) (King, J., dissenting) (emphasis added). But cf. Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (requiring only "some affirmative expression of congressional intent to abrogate the United States' international obligations").
65. See infra text accompanying notes 100-26.
the context in which the statements were made. Historical context, however, may shed light both on the precise meaning of such statements, as well as on the policy concerns underlying them. Regardless of the degree of one’s commitment to originalism, such contextual information is likely to be relevant to any effort to give effect to such statements in the modern legal system.

One aspect of the historical context is America’s status in the world at the time of the Supreme Court’s adoption of the Charming Betsy canon. As Professor Jay explains, early-nineteenth-century “America was . . . a weak power with an unproven government, operating in a world in which warfare was a common form of dispute resolution and a principal element of the international aspirations motivating many nations.” The possibility that breaches of international law could result in war, with other nations or with Indian tribes, had been a significant concern during the drafting of the Constitution. Thus, as the Supreme Court was undoubtedly aware, the U.S. government had a strong desire to avoid violations of international law, largely due to a fear that a violation might embroil the United States in a military conflict. Professor Jay

66. See Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819, 821 (1989) (“[L]egal commentators have made little effort to consider eighteenth-century pronouncements on the law of nations in the historical context that produced the Constitution and formed the setting for American foreign policy decisions under the new government.”). Thus, for example, nineteenth-century statements by the Court that customary international law is “part of our law” or part of “the law of the land” have been assumed, incorrectly, to mean that customary international law was historically treated as federal law. See Bradley & Goldsmith, supra note 6, at 822-26, 849-50; see also Curtis A. Bradley, The Status of Customary International Law in U.S. Courts—Before and After Erie, 25 Den. J. Int’l L. & Pol’y (forthcoming) (citing additional authority).


68. Jay, supra note 66, at 821.

69. See Frederick W. Marks III, Independence on Trial: Foreign Affairs and the Making of the Constitution 4-5, 151, 177-78 (1986); Anthony D’Amato, The Alien Tort Statute and the Founding of the Constitution, 82 Am. J. Int’l L. 62, 63 (1988); Jay, supra note 66, at 825. For example, during the Constitutional Convention, James Madison, in speaking against the New Jersey Plan, asked skeptically whether it would “prevent the violations [by this country] of the law of nations and treaties, which, if not prevented, must involve us in the calamities of foreign wars?” 5 Jonathan Elliot, Debates on the Adoption of the Federal Constitution 207 (1888). Another example is John Jay’s statement in The Federalist that “[i]t is of high importance to the peace of America that she observe the laws of nations towards all these powers.” The Federalist No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961). One of the specific concerns of the Framers was that, under the Articles of Confederation, the federal government had lacked the power to “cause infractions of treaties or of the law of nations to be punished.” The Records of the Federal Convention of 1787, at 19 (M. Farrand ed., 1911) (quoting Edmund Randolph); see also Elliot, supra, at 127 (same). The Constitution addressed this concern in several ways: by making treaties part of the supreme law of the land, by giving Congress the power to define and punish offenses against the law of nations, and by giving federal courts the power to hear many of the cases that would involve foreign affairs. See U.S. Const. art. VI, cl. 2; id. art. I, § 8, cl. 10; id. art. III, § 2.

70. See generally Jay, supra note 66.
has gone so far as to conclude that "[t]he primary consideration that forced the United States to pay respect to the law of nations was the country's weakness in relation to European powers." 71 Even if this conclusion understates the degree to which U.S. leaders also felt a duty to comply with international law, 72 it nevertheless highlights an important pragmatic concern of the time.

Another aspect of the historical context is that, during this time period, U.S. courts viewed customary international law as an independent source of domestic law. 73 Although the Constitution is relatively silent about the status of customary international law, 74 courts in the nineteenth century treated it as part of the "general common law." 75 The general common law was viewed as a set of background rules, not emanating from any particular sovereign source, that could be applied by courts in the absence of controlling positive law to the contrary. 76 Thus, "American courts resorted to this general body of pre-existing law to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign." 77 With this understanding, courts

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74. There are four references in the Constitution to treaties. Article I prohibits states from entering into treaties. See U.S. CONST. art. I, § 10, cl. 1. Article II gives the President the power to make treaties with the advice and consent of the Senate. See id. art. II, § 2, cl. 2. Article III states that federal courts may hear cases arising under treaties. See id. art. III, § 2, cl. 1. Article VI states that treaties are part of the "supreme Law of the Land." Id. art. VI, cl. 2. By contrast, the Constitution mentions customary international law (referred to at the time of the Constitution as part of the "law of nations") only once. Article I provides that Congress shall have the power to "define and punish ... Offenses against the Law of Nations." Id. art. I, § 8, cl. 10. The historical record of the drafting of the Constitution "is at best inconclusive" regarding the Framers' intent concerning the domestic legal status of customary international law. Burley, supra note 72, at 469. An early draft of Article III, apparently written by James Wilson, would have extended federal court jurisdiction to cases arising under the "Law of Nations." See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 157 (Max Farrand ed., 1966). The reference was deleted, however, without explanation. See Henkin, supra note 6, at 1560 n.22; Jay, supra note 66, at 830.


77. Fletcher, supra note 75, at 1517. Importantly, however, general common law, including customary international law, was not viewed as federal law. It was not, for example, considered part of the "Laws of the United States" referred to in the Supremacy Clause and in Article III. Rather, "[t]he State and federal courts respectively determined international law for themselves as they did common law, and questions of international law could be determined differently by the courts of various States and by the
frequently applied customary international law, referring to it as "part of our law,"78 and as part of "the law of the land."79 Indeed, in some cases, especially those involving prize law, the courts described themselves as operating essentially as an international rather than U.S. tribunal.80

Finally, international law during this period was widely considered to be objective and discoverable. In the late-eighteenth and early-nineteenth centuries, this view was due in part to international law’s association with natural law.81 As the nineteenth century progressed, the objectivity and discoverability of international law were derived more from its association with state practice. Regardless of the basis, international law was accepted as "knowable doctrine."82 Judges who applied international law were seen as involved in a process of discovery rather than creation.83

In view of these nineteenth-century understandings of international law, it is not surprising that the Marshall Court looked to it in construing federal statutes. The negative consequences associated with violations of international law increased the likelihood that Congress would want to avoid such violations. The general common law status of customary international law made it a candidate for the usual presumption against implied repeal of the common law.84 The

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78. The Paquete Habana, 175 U.S. 677, 700 (1900).
80. See, e.g., The Schooner Adeline, 13 U.S. (9 Cranch) 244, 284 (1815) ("The Court of prize is emphatically a Court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country."); Penhallow v. Doane’s Adm’rs, 3 U.S. (3 Dall.) 54, 91 (1795) (Iredell, J.) (Prize cases "are to be determined by the law of nations. A prize court is, in effect, a court of all the nations of the world . . . ."). Prize law was a prominent feature of the Supreme Court’s docket in the nineteenth century, particularly in the early part of the century. For general discussions of prize law in U.S. courts, see White, supra note 11, at 906-15, and David J. Bederman, The Feigned Demise of Prize, 9 EMORY INT’L L. REV. 31, 36-64 (1995) (book review). For early discussions of this topic by Joseph Story, see Note—On the Practice in Prize Causes, 14 U.S. (1 Wheat.) 494 (1816); and Additional Note on the Principles and Practice in Prize Causes, 15 U.S. (2 Wheat.) app. at 1 (1817); see also White, supra note 11, at 454, 907 (describing and documenting Story’s authorship of the notes).
81. See infra text accompanying notes 162-65.
82. Jay, supra note 66, at 823.
84. See generally 2B Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 50.01 (5th ed. 1992) [hereinafter SUTHERLAND] (discussing implied repeal canon). For the English roots of this canon, see supra note 44. For U.S. decisions applying the canon, see infra note 94. Here I am referring to something different than the canon that statutes in derogation of the common law are to be strictly construed. See, e.g., Shaw v. Railroad Co., 101 U.S. 557, 565 (1879); see generally 3 SUTHERLAND, supra, § 61.01 (discussing non-derogation canon). The non-derogation canon is more expansive than the implied repeal canon, since the non-derogation canon is a presumption against any changes to the common law—even additions to it—not just against implied repeal of the common law. In this way, the non-derogation canon is somewhat analogous to the internationalist conception of the Charming Betsy canon, which, as I discuss below, is broader than simply avoiding conflicts with international law. See infra text accompanying notes 100-26. For criticism of the non-derogation canon, see, for example, Jefferson B. Fordham & J. Russell Leach, Interpretation of Statutes in Derogation of the Common Law,
early natural law conception of international law heightened the appropriateness of such a presumption, because it meant that domestic law and international law were in a sense derived from the same source. 85 Furthermore, the perceived objectivity and discoverability of international law reduced separation of powers concerns that may have been generated by judicial reliance on such an external source in interpreting congressional enactments. 86

Of course, that the Charming Betsy canon may have seemed appropriate to the Marshall Court does not mean that it should seem appropriate to us. The question addressed by this article is whether the canon’s application makes sense today, given the substantial changes that have occurred since its adoption.

II. TWO COMMON CONCEPTIONS OF THE CANON

In this Part, I describe two common conceptions of the role of the Charming Betsy canon. Like any models, these conceptions are somewhat artificial in that they undoubtedly blend together to some extent, and the categories they define may not capture all relevant considerations. Nevertheless, these conceptions, by separating out different points of emphasis, are useful in considering how the Charming Betsy canon can best be understood within the framework of the modern U.S. legal system.

A. LEGISLATIVE INTENT CONCEPTION

One common conception of the canon is that it facilitates the implementation of congressional intent. This “legislative intent conception” 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. Consequently, when the text of a statute is unclear, the canon purportedly increases the likelihood of a correct construction, and thereby assists courts in acting as faithful agents of congressional will. This conception does not claim that Congress considered international law in enacting the statute, just that Congress would not have wanted to violate international law if it had considered it. The legislative intent conception thus attributes “an internationally law-abiding character to the


85. See, e.g., James L. Brierly, The Law of Nations: An Introduction to the International Law of Peace 87 (Sir Humphrey Waldock ed., 6th ed. 1963) (“It was natural therefore that judges should think of the two kinds of law not as two unrelated systems, but as the application to different subject-matters of different parts of one great system of law.”); Edwin D. Dickinson, Changing Concepts and the Doctrine of Incorporation, 26 Am. J. Int’l L. 239, 259 (1932) (“The law of nations was necessarily and literally a part of national law in the 18th century, since the two systems were assumed to rest in their respective spheres upon the same immutable principles of natural justice.”); Lobel, supra note 8, at 1078-79 (“Domestic law and international law were not two separate bodies of law, but simply two branches of the law of nature.”); see also Pound, supra note 84, at 390-95 (linking Charming Betsy canon with early views regarding subservience of legislation to natural law).

86. See Clark, supra note 71, at 1280-87.
law-giver whose unclear enactments are at issue.\textsuperscript{87} A number of courts and commentators have endorsed the legislative intent conception at this level of generality. The Restatement (Third) of Foreign Relations Law, for example, states that "[i]t is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law."\textsuperscript{88} The Talbot Court's belief that the legislature holds international law principles "sacred" appears to reflect this conception of the canon.\textsuperscript{89}

The Supreme Court's 1884 decision in \textit{Chew Heong v. United States}\textsuperscript{90} also reflects the legislative intent conception. In that case, the Court had to decide whether a federal statute designed to restrict Chinese immigration had eliminated the ability of a Chinese laborer, who had previously resided in the United States, to re-enter this country. At that time, a treaty between the United States and China provided for a right of re-entry under these circumstances. In construing the statute not to override the treaty, the Court stated that "it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted."\textsuperscript{91}

One variant of this conception might emphasize that, since the canon's adoption, Congress has legislated against the backdrop of the canon's existence. The Supreme Court generally presumes that "Congress legislates with knowl-

\textsuperscript{88} \textit{RESTATEMENT (THIRD), supra note 1, § 115, cmt. a.}
\textsuperscript{89} \textit{See supra} text accompanying note 33. The Court also stated that it had a "duty" to adhere to such a belief, perhaps suggesting something akin to the internationalist conception of the canon discussed below. One commentator has suggested that Chief Justice Marshall's use of the \textit{Charming Betsy} canon, as well as other canons, reflected his assumption "that Congress was fully aware of the legal context surrounding its statutes and would seek to avoid conflict with it." John Choo Yoo, Note, \textit{Marshall's Plan: The Early Supreme Court and Statutory Interpretation}, 101 YALE L.J. 1607, 1618 n.59 (1992). For a general endorsement by Marshall of a legislative intent approach to statutory interpretation, see \textit{Schooner Paulina's Cargo v. United States}, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.) ("In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature.").
\textsuperscript{90} 112 U.S. 536 (1884).
\textsuperscript{91} \textit{Id.} at 541; \textit{see also} Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 814 (D.C. Cir. 1968) ("[I]t may fairly be inferred, in the absence of clear showing to the contrary, that Congress did not intend an application that would violate principles of international law."). Congress nullified \textit{Chew Heong} a few years after the decision by amending the immigration statute to make clear Congress's intent to violate the treaty obligation. The Court subsequently upheld the amended statute notwithstanding the conflict with the treaty. \textit{See The Chinese Exclusion Case}, 130 U.S. 581 (1889). For an argument that the \textit{Charming Betsy} canon has not been applied with sufficient vigor in the immigration context, see Joan Fitzpatrick & William McKay Bennett, \textit{A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States}, 70 WASH. L. REV. 589 (1995). \textit{But cf.} Mojica v. Reno, 970 F. Supp. 130, 147-52 (E.D.N.Y. 1997) (applying strong version of \textit{Charming Betsy} canon in interpreting immigration provision).
edge of the basic rules of statutory construction." As a result, one could argue that Congress has been on notice that if it intends to violate international law, it must make that intent clear. So, regardless of whether the canon's legislative intent prediction was accurate as an original matter, it now has become a self-fulfilling prophecy. Furthermore, Congress has not attempted to overrule the canon by statute, thereby perhaps suggesting acquiescence.

Another variant of this conception might focus not on a desire by Congress to avoid violations of international law, but rather on a desire to avoid repealing existing domestic law by implication. Some international law, such as self-executing treaties to which the United States is a party, is indisputably a part of U.S. domestic law, and courts typically assume that Congress does not intend to repeal domestic law by implication. There is some decisional support for this variant of the legislative intent conception, all in the context of self-executing treaties. More expansive claims for this variant tend to shade into the internationalist conception, to which I now turn.

B. INTERNATIONALIST CONCEPTION

Traditionally, the Charming Betsy canon has been linked to the primacy in the U.S. legal system of domestic law over international law. The canon does not mandate the application of international law. Instead, "the decision whether to incorporate or to exclude international principles rests with the municipal governmental structure." Consistent with this proposition, it is well settled that, when confronted with a clear conflict between a federal statute and an earlier treaty or customary international law, U.S. courts are to apply the

93. See U.S. Const. art. VI, § 2 ("[A]ll treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . "). Non-self-executing treaties are not given effect as domestic U.S. law in the absence of implementing legislation. See Restatement (Third), supra note 1, § 111(3). There is some debate regarding the domestic legal status of customary international law. See supra notes 6-9.
94. The Supreme Court has frequently said that there is a presumption that Congress does not intend to repeal existing law by implication. For decisions applying this presumption to avoid repeal of federal statutory provisions, see, for example, United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976), and Posadas v. National City Bank, 296 U.S. 497, 503 (1936). For decisions applying the presumption to avoid repeal of the common law, see, for example, United States v. Texas, 507 U.S. 529, 534 (1993), and Norfolk Redevelopment & Hous. Auth. v. C & P Tel., 464 U.S. 30, 35 (1983).
95. See, e.g., Whitney v. Robertson, 124 U.S. 190, 194 (1888); Chew Heong v. United States, 112 U.S. 536, 549-50 (1884).
96. One other possible variant of the legislative intent conception deserves brief mention. It is possible that, for political gain, Congress intends to enact statutes that violate international law but that Congress also desires that the courts limit such statutes and avoid the violations when it comes time to apply the statutes. Even if this were an accurate empirical description of legislative intent (and it may be impossible to know), there is no obvious normative reason why courts should seek to give effect to this sort of (arguably undemocratic) intent. Cf. Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 449 (1989) (arguing that even if statutes empirically can be seen as "deals," courts should not treat them as such unless this conception of statutes can be defended on normative grounds).
97. Turley, supra note 18, at 231.
statute. As noted in the Restatement (Third) of Foreign Relations Law, the canon "is influenced by the fact that the courts are obliged to give effect to a federal statute even if it is inconsistent with a pre-existing rule of international law or with a provision of an international agreement of the United States."

Some judges and commentators, including Professor Steinhardt, have nevertheless argued for what could be called an "internationalist conception" of the canon. In essence, this 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. In this sense, courts are to act as "agents of the international order" rather than as agents of Congress.

98. The Supreme Court has held that a later-in-time federal statute supersedes, as a matter of domestic law, an earlier inconsistent treaty. See The Chinese Exclusion Case, 130 U.S. 581, 600-02 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1889); Head Money Cases, 112 U.S. 580, 599 (1884). The Supreme Court has never directly held that Congress can violate customary international law, but it has suggested this in dicta. See Lauritzen v. Larsen, 345 U.S. 571, 578-79 (1953); The Paquete Habana, 175 U.S. 677, 700, 708 (1900); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 39-40 (1826). The lower courts unanimously have held that Congress can violate customary international law. See, e.g., Galo-Garcia v. INS, 86 F.3d 916, 918 (9th Cir. 1996); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Garcia-Mir v. Meese, 788 F.2d 1446, 1453-54 (11th Cir. 1986).

99. Restatement (Third), supra note 1, § 114, cmt. a.

100. For examples of Professor Steinhardt's views in this regard, see Steinhardt, supra note 18, at 1112 (arguing that "Charming Betsy and its progeny offer a potentially potent, though admittedly nondeterminative, adversarial principle under which courts, advocates, and scholars faced with issues of statutory construction are obliged to consult international sources, culling norms from aspirations and interpreting a variety of texts and state practices"); id. at 1128 ("The Charming Betsy principle places the courts of the United States in a position of oversight to avoid the possibility of international liability for the country as a whole."); id. at 1134 ("[I]f the international norm is relevant and nothing in the statute explicitly repudiates it, or if an inconsistency between the norm and the statute can be resolved, the court should adopt the interpretation that preserves maximum scope for both."); id. at 1144 (suggesting that the Charming Betsy canon "offer[s] an affirmative warrant for applying more substantive international standards in the construction of domestic statutes"); and id. at 1197 (arguing that "[a]s the international legal system addresses more substantive aspects of economic and political life ... the Charming Betsy principle should take on a heightened practical and theoretical significance"). Professor Steinhardt disavows, however, a purely "monist" account of the Charming Betsy canon. See id. at 1129, 1134. For a discussion of the distinction between "monism" and "dualism," see infra note 102.

The author of the only other article on the Charming Betsy canon—Professor Turley—calls for rejection of the canon. Interestingly, however, he does so partly out of disagreement with the traditional, restraint-oriented uses of the canon and out of a desire to free courts up to "gap-fill and even update statutory schemes to conform with contemporary realities and norms." Turley, supra note 18, at 266, 270; see also id. at 194 (complaining that, "[m]otivated by concerns of institutional legitimacy, courts unnecessarily limited their own interpretive role even as regulatory and market conditions became increasingly transnational"). In other words, despite his call for rejection of the canon, Professor Turley envisions a judicial role similar to the one envisioned by the internationalist conception of the canon. See also id. at 265-66 (suggesting that there should be "greater judicial involvement in transnational regulation"); cf. Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598 (1990) (calling for courts to reject the presumption against extraterritoriality and instead adopt a broader, transnational conception of federal legislation).

101. Richard A. Falk, The Role of Domestic Courts in the International Legal Order 72 (1964). For a recent suggestion of an entire internationalist agenda, including the application by
This conception, akin to the “monist” view of international law, might call for “essentially rewriting a statute to conform it with international law,” or for construing a statute broadly to mirror international law, even if such a construction is not necessary in order to avoid a violation of international law.

The internationalist conception is closely identified with the view that customary international law is an independent source of law for U.S. courts. In *Filartiga v. Pena-Irala*, for example, the seminal decision endorsing the proposition that customary international law is federal law, the Second Circuit invoked the *Charming Betsy* canon in a footnote, stating that the canon is “[t]he plainest evidence that international law has an existence in the federal courts independent of acts of Congress.” It is not entirely clear what the Second Circuit meant by that statement. If it meant simply that international law influences judicial construction of federal statutes, it was undoubtedly correct. In context, however, the Second Circuit seems to have been arguing that the *Charming Betsy* canon supports the broader proposition that courts can apply customary international law as a substantive rule of decision, without any authorization from the political branches.

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102. Traditionally, the debate regarding the relationship between international law and domestic law has been described as a debate between “monism” and “dualism.” See generally J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 *Br. Y.B. Int’l L.* 66 (1936) (describing this debate). In essence, the monist view is that international law and domestic law are “component parts of a ‘universal legal order’ in which international law has a certain supremacy.” Mark W. Janis, *An Introduction to International Law* 84 (2d ed. 1993). Thus, in its most extreme form, monism would require, among other things, that domestic courts “give effect to international law, notwithstanding inconsistent domestic law, even domestic law of constitutional character.” Louis Henkin, *International Law: Politics and Values* 64 (1995). The dualist view, by contrast, is that international law and domestic law are “two separate, mutually independent legal orders that regulate quite different matters and have quite different sources.” Hans Kelsen, *Principles of International Law* 553 (2d ed. 1966). Under this view, international law is to be applied by domestic courts only when it has been transformed into domestic law pursuant to the rules of the domestic system. See Henkin, *supra* note 9, at 864-65.

103. Lobel, *supra* note 8, at 1180.

104. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

105. *Id.* at 887 n.20.

106. For confirmation of this reading, see *Mojica v. Reno*, 970 F. Supp. 130, 152 (E.D.N.Y. 1997) (citing *Filartiga* for the proposition that the canon is designed “[t]o ensure that United States law does not conflict with international law”), and *United States v. Buck*, 690 F. Supp. 1291, 1297 (S.D.N.Y. 1988) (citing *Filartiga* for the proposition that “implicit” in the *Charming Betsy* canon is the proposition that “[i]nternational law exists in the federal courts independent of acts of Congress”); see also Steinhardt, *supra* note 18, at 1165 (reciting this language from *Filartiga* to support the proposition that the canon should be applied independent of Congress’s intent). Professor Brilmayer has expressed a similar view, albeit drawing more on the legislative intent conception of the canon than the internationalist conception. See Brilmayer, *supra* note 7, at 334. Brilmayer argues that, given the assumption underlying the *Charming Betsy* canon (according to the legislative intent conception) that Congress generally wishes to comply with international law, it is a fair inference that Congress also generally wishes that the states comply with international law. On this basis, she concludes that customary international law, like self-executing treaties, should automatically supersede inconsistent
An internationalist conception of the canon also was invoked in two cases involving the Foreign Sovereign Immunities Act (FSIA).\textsuperscript{107} In *Amerada Hess Shipping Corp. v. Argentine Republic*,\textsuperscript{108} the issue was whether a foreign state could claim immunity under the FSIA for acts in violation of customary international law. In that case, Argentina was alleged to have attacked and caused the sinking of an oil tanker during the Falklands War, in violation of the customary international law protection accorded to neutral shipping vessels. The owner of the ship brought suit under the Alien Tort Statute,\textsuperscript{109} claiming that Argentina had, in the language of the Statute, committed "a tort . . . in violation of the law of nations."\textsuperscript{110} In defense, Argentina claimed that it was entitled to immunity under the FSIA because that statute provides that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States" except as set forth in certain specified exceptions.\textsuperscript{111}

In rejecting Argentina's argument, the appeals court invoked the *Charming Betsy* canon as follows: "Since international law would deny immunity in these circumstances, we would construe the FSIA to grant immunity only if Congress clearly expressed such an intent."\textsuperscript{112} Finding no such clear expression of intent, the court denied Argentina immunity. Significantly, the court did not suggest that granting immunity to Argentina would violate international law. Rather, the court found simply that a grant of immunity was not required by international law. Indeed, "nothing prevents a state from granting more extensive immunities than those granted by international law."\textsuperscript{113} The court was thus using the canon state law, unless Congress authorizes the state law. She explains: "[I]f Congress truly wishes to avoid international law violations (as the traditional version of the *Charming Betsy* presumption would have it), then it must wish that the states not commit violations as well." *Id.* at 335. Professor Lobel makes a similar argument to support his conclusion that the President is bound by customary international law. He argues that the *Charming Betsy* canon "reflects a presumption that Congress intends to maintain the rules of international law in force" and that "[i]t follows that congressional silence should mean that Congress wants the President to follow international rules as law of the land." Lobel, *supra* note 8, at 1120. For criticism of this line of reasoning, see Bradley & Goldsmith, *supra* note 6, at 872 n.350.


\textsuperscript{108} 830 F.2d 421 (2d Cir. 1987).


\textsuperscript{110} *Id.*


\textsuperscript{112} *Amerada Hess*, 830 F.2d at 426.

\textsuperscript{113} HENKIN ET AL., *supra* note 9, at 1126; cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("[T]he public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders."). Beth Stephens and Michael Ratner contend in a recent book that "the international law principle of universal jurisdiction obligates any nation in which such evildoers [i.e., violators of customary international human rights law] are found to either prosecute those accused or extradite them to another nation that will put them on trial." BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 2 (1996) (emphasis added). If this contention were correct, an argument could be made that granting immunity from suit to foreign human rights violators might under some circumstances actually violate international law. But the contention, at least as a general matter, is false. First, it is well accepted that there is no obligation of
not to avoid a violation of international law, but rather to conform U.S. law to the contours of international law. The decision, however, was not long-lived. Without directly focusing on the Charming Betsy issue, the Supreme Court reversed the appeals court, holding that “the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court,” and that none of the FSIA’s exceptions to immunity applied in this case.114

In light of the Supreme Court’s reversal in Amerada Hess, it is somewhat surprising that Judge Wald on the D.C. Circuit subsequently tried to use the Charming Betsy canon in arguably the same way as had the Second Circuit in Amerada Hess. In Princz v. Federal Republic of Germany,115 the court considered a suit by Hugo Princz against Germany to recover damages in connection with Princz’s imprisonment in Nazi concentration camps during World War II. Germany claimed, among other things, that it was immune from suit under the FSIA. The majority of the court agreed. Judge Wald argued in dissent, however, that the FSIA should not be construed to provide immunity under these circumstances. She reasoned that Germany’s conduct had violated certain “peremptory” norms of customary international law,116 and that there is no right under international law to immunity for such violations. Invoking the Charming Betsy canon, Judge Wald stated that “we must, wherever possible, interpret United

extradition under customary international law; extradition obligations can arise only pursuant to treaty. See United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995); RESTATEMENT (THIRD) supra note 1, pt. IV, subch. B, introductory note at 557; M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 6-7 (2d ed. 1996). Second, the principle of universal jurisdiction, when it applies, only gives nations the prescriptive power to regulate based on extraterritorial conduct, not the obligation. See RESTATEMENT (THIRD), supra note 1, § 404, cmt. a (noting that universal jurisdiction “permits any state to apply its laws to punish certain offenses”) (emphasis added). Moreover, universal jurisdiction applies only to a very narrow subset of international law. See I.A. SHEARER, STARKE’S INTERNATIONAL LAW 212 (11th ed. 1994). It is true, however, that the Torture Convention and the Genocide Convention, both of which the United States has ratified, contain obligations to prosecute or extradite persons who have committed certain egregious acts. See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, arts. 5, 7, 8, 23, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, arts. V, VI, VII, 78 U.N.T.S. 277. Even these treaties, however, do not purport to regulate the grant of immunity in civil actions.

114. See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438, 439-43 (1989). Professor Steinhardt, a proponent of the internationalist conception of the Charming Betsy canon, disagrees with the Court of Appeals’ decision in Amerada Hess, but only because he concludes that the court “construed as silence text and legislative history that could not logically bear such a construction.” Steinhardt, supra note 18, at 1172. He contends that “Charming Betsy and its progeny support the form of [the court’s] analysis.” Id. (emphasis added).

115. 26 F.3d 1166 (D.C. Cir. 1994).

116. A peremptory norm, also called a “jus cogens” norm, is a rule of customary international law “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 53 U.N. Doc. A/Conf. 39/27, reprinted in 8 I.L.M. 679, 699 [hereinafter Vienna Convention]; see also Sideimer de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (discussing attributes of peremptory norms); Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (same); RESTATEMENT (THIRD), supra note 1, § 102, cmt. k & reporters’ note 6 (same).
States law consistently with international law." The court was therefore required, she argued, to construe the FSIA as providing no more immunity than is accorded under international law. This use of the canon obviously is more expansive than simply avoiding violations of international law. The internationalist character of Judge Wald's conception of the canon is confirmed by her assertion—similar to the court's statement in *Filartiga*—that the canon exists because "international law is part of our law."  

A related use of the canon is the argument, advanced by a number of commentators, that customary international law should be considered in constru-

117. *Prinz*, 26 F.3d at 1183 (emphasis added). In describing the canon in this way, Judge Wald mischaracterized *MacLeod v. United States*, 229 U.S. 416 (1913), as holding that "statutes should be construed consistently with American obligations under international law." *Prinz*, 26 F.3d at 1183 (emphasis added). In fact, what the Court said was this:

The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law.

*MacLeod*, 229 U.S. at 434 (emphasis added). Professors Steinhardt and Turley make a similar mistake in characterization. See Steinhardt, *supra* note 18, at 1127 (asserting that the canon "directs the court to interpret statutes consistently with international law whenever possible"); id. at 1161 (asserting that, pursuant to the *Charming Betsy* canon, "courts are directed to interpret statutes consistently with international law"); Turley, *supra* note 18, *passim* (referring to the *Charming Betsy* canon as a "presumption in favor of international law"); see also Paust, *supra* note 5, at 765 ("[I]t was early recognized that statutes should be interpreted so as to be consistent with international law . . . .").

118. As a result, Judge Wald argued that the court should deem Germany's conduct to be an implicit waiver of immunity, thereby allowing the suit to proceed under the FSIA's waiver exception. See *Prinz*, 26 F.3d at 1183; see also 28 U.S.C. § 1605(a)(1) (denying immunity where "the foreign state has waived its immunity either explicitly or by implication").

ing the scope of U.S. constitutional provisions.\textsuperscript{120} Several commentators have argued, for example, that the Eighth Amendment outlaws the execution of juvenile offenders because such executions are forbidden by customary international law.\textsuperscript{121} Other commentators argue that international law should inform the interpretation of the Due Process and Equal Protection Clauses of the Constitution.\textsuperscript{122} At least one commentator has suggested that the Due Process Clause be interpreted so as not to allow for jurisdiction based merely on the transitory presence of the defendant, because of the purported inconsistency of such jurisdiction with international law.\textsuperscript{123}

Assuming that the canon is applicable to constitutional as well as statutory provisions, it is important to keep in mind that current constructions of the Constitution do not require any of the alleged violations of international law discussed by the commentators. The Eighth Amendment, for example, does not

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\textsuperscript{123} See Russell Weintraub, \textit{An Objective Basis for Rejecting Transient Jurisdiction}, 22 RUTGERS L.J. 611, 611-12 (1991); see also RESTATEMENT (THIRD), supra note 1, § 421, cmt. e & reporters’ note 5 (explaining that jurisdiction based on transitory presence is inconsistent with international law). In the nineteenth century, the Supreme Court sometimes analogized to international law in determining the due process requirements for personal jurisdiction. See, e.g., Pennoyer v. Neff, 95 U.S. 714, 728-34 (1877).
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require the execution of juveniles. The Supreme Court has held simply that the Eighth Amendment does not forbid such executions.124 To the extent such executions occur, it is not because they are prescribed by the Eighth Amendment, but rather because they are prescribed by federal or state statutes (which presumably are unambiguous in authorizing such executions, and therefore not subject to the canon).125 Thus, like Judge Wald, these commentators are seeking to use the Charming Betsy canon not as a braking mechanism to avoid violations of international law, but rather as an engine to conform U.S. law to the aspirations of international law.126

III. CHANGES SINCE THE CANON’S ADOPTION

As discussed in Part I, the Supreme Court’s adoption of the Charming Betsy canon made perfect sense in light of the historical context of the early-nineteenth century.127 In this Part, I focus on certain changes in the context. Specifically, I discuss three developments during this century that are relevant to the continued validity of the Charming Betsy canon: first, the post-realist defense of canons of construction; second, alterations in the structure and content of customary international law; and third, the redefinition of federal court power in Erie Railroad v. Tompkins. In light of these changes, neither the


125. With respect to the potential applicability of the canon to state laws, including state death penalty laws, see infra text accompanying notes 305-18.

126. Without referring to the Charming Betsy canon, the Supreme Court has in some cases looked to nonbinding international pronouncements and the views and practices of other countries in determining rights under the Due Process and Cruel and Unusual Punishment Clauses of the Constitution. See Restatement (Third), supra note 1, § 701, reporters’ note 7 (collecting cases); see also Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (noting that “the climate of international opinion concerning the acceptability of a particular punishment” is an additional consideration that is “not irrelevant” in determining rights under the Cruel and Unusual Punishment Clause). For an example of a lower court’s use of an internationalist conception of the canon, consider the Fernandez v. Wilkinson litigation in the Tenth Circuit. The district court there ordered the Immigration and Naturalization Service to release from a federal penitentiary a Cuban citizen awaiting deportation because the court found that, although the detention was consistent with “the United States Constitution [and] our statutory laws,” it nevertheless violated customary international law. 505 F. Supp. 787, 795, 798 (D. Kan. 1980). Such a direct use of international law to restrain the Executive is unusual and has not been followed by other courts. See, e.g., Guzman v. Tippy, 130 F.3d 64 (2d Cir. 1997); Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1448 (5th Cir. 1993); Garcia-Mir v. Meese, 788 F.2d 1446, 1453-54 (11th Cir. 1986). Importantly, however, the Tenth Circuit on appeal in Fernandez reached the same result as the district court, not by means of applying international law directly against the Executive, but rather in part by invoking international law’s interpretive role. See Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). Specifically, the court looked to international law in ascertaining the constitutional requirements of due process, and the court interpreted the relevant immigration statutes to avoid a conflict with these requirements. See id. at 1388-89. 1390. For discussions of this litigation, see LILICH & HANNUM, supra note 16, at 161; Lillitch, supra note 16, at 404-05; Robert J. Martineau, Interpreting the Constitution: The Use of International Human Rights Norms, 5 HUM. RTS. Q. 87, 103 (1983); and Steinhardt, supra note 18, at 1158-61.

127. See supra text accompanying notes 68-86.
legislative intent conception nor the internationalist conception provides an adequate justification for contemporary use of the canon.

A. POST-REALIST DEFENSE OF CANONS OF CONSTRUCTION

Canons of construction have long been a prominent feature of American, as well as English, statutory interpretation. Many of the nineteenth-century American and English treatises on statutory interpretation were organized around well-accepted canons. The leading American treatise on statutory interpretation during this century—the Sutherland treatise—contains a multivolume description of various canons. In addition, canons have been and continue to be routinely invoked by federal and state courts.

During the latter half of this century, however, commentators have heavily criticized the use of canons. Canons were a common target of the legal realist commentators during the 1940s through the 1960s. The most prominent critic was Karl Llewellyn, who purported to demonstrate that "there are two opposing canons on almost every point." More recently, some commentators, including Judge Posner, have cited to law and economics and public choice scholarship, with its focus on the realities of legislative bargaining and the costs of legislation, as further undermining the legitimacy of canons. In 1989, Professor Sunstein observed that "[a]lmost no one has had a favorable thing to say about the canons in many years."

There are three principal criticisms of canons. First, critics claim that canons do not provide any meaningful restraint on judicial decisionmaking. Because of the existence of counter-canons and the selective use of canons by judges, critics argue that canons "are useful only as facades, which for an occasional judge may add lustre to an argument persuasive for other reasons." Second, critics claim that canons do not accurately reflect likely congressional intent. They argue that canons either rely on factors unlikely to be considered by


129. See 2A & 3 Sutherland, supra note 84.


132. Sunstein, supra note 96, at 452.

133. Frank C. Newman & Stanley S. Surrey, Legislation—Cases and Materials 654 (1955); see also Posner, Problems of Jurisprudence, supra note 131, at 282 (asserting that canons "are just a list of relevant considerations, at best of modest utility"); "there are so many of them that often one finds canons tugging both ways in the same case"); Posner, Statutory Interpretation, supra note 131, at 807 ("[T]wo inconsistent canons can usually be found for any specific question of statutory construction.").
legislators or assume an attention to detail by the drafters that is inconsistent with the realities of the legislative process. A related criticism questions the existence and discoverability of legislative intent. Finally, critics claim that the canons promote judicial activism by allowing judges to ignore the plain meaning of statutes. Although Congress has the ability to overturn statutory decisions with which it disagrees, this can be politically difficult and costly. Canons may also promote activism, some critics argue, by allowing judges to use ostensibly value-free rules to hide their true policy considerations.

Despite these criticisms, there recently has been a resurgence of academic and judicial support for canons. Prominent scholars, including Professors Eskridge, Shapiro, and Sunstein have written in support of canons. Furthermore, the Supreme Court seems to be relying more heavily on certain types of canons—most notably, “clear statement” rules—than ever before.

134. See Posner, *Statutory Interpretation*, supra note 131, at 806 (“There is no evidence that members of Congress, or their assistants, who do the actual drafting, know the code or that if they know, they pay attention to it.”); id. at 811 (“Most canons of statutory construction go wrong . . . because they impute omniscience to Congress.”).


138. See *Richard A. Posner, Federal Courts: Challenge and Reform* 309 (1996) (referring to canons of construction as “fig leaves covering decisions reached on other grounds”); Posner, *Statutory Interpretation*, supra note 131, at 816-17 (“By making statutory interpretation seem mechanical rather than creative, the canons conceal, often from the reader of the judicial opinion and sometimes from the writer, the extent to which the judge is making new law in the guise of interpreting a statute or a constitutional provision.”).


Instead of treating the canons as an "undifferentiated lump," recent academic supporters of canons divide them into numerous categories, which roughly boil down to two sets—"descriptive canons" and "normative canons." Descriptive canons, which include rules of syntax and grammar, "involve predictions as to what the legislature must have meant, or probably meant, by employing particular statutory language." Normative canons, by contrast, "direct courts to construe any ambiguity in a certain way in order to further some policy objective." Commentators typically classify the Charming Betsy canon with the normative canons.

Supporters of the normative canons admit that the canons are "not policy neutral," but rather "represent value choices by the [c]ourt." Thus, commentators have de-emphasized legislative intent as the primary justification for the canons and have focused instead on the "public values" served by the canons. As Professor Eskridge explains, "[w]hile the canons of construction have long operated as presumptive rules for interpreting statutes, they have generally not been articulated in terms of underlying public values, until recently."

The public values promoted by the canons may be substantive, such as the protection of under-enforced constitutional norms, or they may be institutional, fulfilling, for example, "goals associated with the separation of powers and with plausible assessments of comparative institutional competence." The value may simply be the promotion of continuity in the law. This emphasis on values rather than intent does not by itself establish that any particular canon is justified. Defenders admit that such legitimacy depends on whether the values promoted by the canon are proper (and properly applied by cases is less relevant now, however, given the Court's recent holding that Congress has no power under the Commerce Clause to abrogate Eleventh Amendment immunity. See Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

141. Eskridge, supra note 140, at 276.


143. Ross, supra note 142, at 563. Examples include ejusdem generis (where general words follow a specific list, the general words should be limited to things similar to those in the list) and expressio unius est exclusio alterius (the expression of one thing is the exclusion of another). See 2A Sutherland, supra note 84, §§ 47.17, 47.23.

144. Ross, supra note 142, at 563.

145. See, e.g., Eskridge, supra note 19, at 1026; Eskridge & Frickey, supra note 19, at 603.

146. Eskridge & Frickey, supra note 19, at 595-96.


148. Eskridge, supra note 19, at 1018.

149. See Eskridge & Frickey, supra note 19, at 630-31.

150. Sunstein, supra note 96, at 457; see also Posner, Statutory Interpretation, supra note 131, at 815-16 (noting that shifting emphasis from legislative intent to institutional considerations "does not prove that the canon is a good one").

151. See Shapiro, supra note 139, at 925, 941.
judges), and whether they outweigh other values that may be offended by use of the canons. As Professor Sunstein notes, "interpretive norms will be defensible only to the extent that good substantive and institutional arguments can be advanced on their behalf." 152

This "post-realist" shift in emphasis away from legislative intent to substantive and institutional values may deflect some of the criticisms of canons noted above. The first criticism—that canons do not provide meaningful restraint on judges—is deflected by treating canons not as restraints but rather as value choices made by the courts, which may or may not fall within the courts’ authority. As Professors Eskridge and Frickey explain, "[t]he canons are one means by which the Court expresses the value choices that it is making or strategies it is taking when it interprets statutes (thus, results produce canons)." 153 Some defenders of canons also note that the contradictions in canons pointed out by Llewellyn and other critics were overstated, 154 and, in any event, primarily concerned canons that make claims regarding linguistic meaning or historic intent, not the normative canons. 155 Some defenders argue that, even if the canons are in tension and relatively vacuous in the abstract, they can nevertheless be useful to judges in articulating their policy preferences and in deciding on an interpretation in situations in which the judge does not have a strong policy preference. 156

The second criticism—that canons do not reflect likely legislative intent—is deflected simply by de-emphasizing intent. The focus on institutional and substantive values does not deem legislative intent irrelevant. Canons, after all, apply only if the text is unclear. The shift to institutional and substantive values, however, reduces the heavy reliance on empirical claims about what Congress intended.

The third criticism—that canons allow judges to be activist—is highlighted by the emphasis on substantive and institutional values. After all, judges are now openly "adding" policy considerations to the text they are interpreting. But this criticism is addressed by defending the legitimacy of the value in question, and the courts’ right to apply it. For example, the activism associated with a canon might allow judges to avoid other, more problematic forms of activism. The canon might also be defended as promoting legislative accountability and

152. SUNSTEIN, supra note 142, at 158.
153. Eskridge & Frickey, supra note 19, at 596.
154. See ESKRIDGE & FRICKEY, supra note 147, at 709-10; Shapiro, supra note 139, at 925; Sunstein, supra note 96, at 452; see also ANTONIN SCALIA, A MATTER OF INTERPRETATION 26 (1996) ("[I]f one examines [Llewellyn's] list, it becomes apparent that there really are not two opposite canons on 'almost every point'—unless one enshrines as a canon whatever vapid statement has ever been made by a willful, law-bending judge.").
155. See Eskridge & Frickey, supra note 19, at 595 (noting that Llewellyn "did not explore in any detail the 'substantive' canons").
specificity. This criticism is further addressed by noting that judges are likely to bring discretion and judgment to statutory interpretation, and that it is better to have them articulate the background principles they are relying on than to keep them secret.

My goal here is not to establish the correctness of this post-realist defense of canons. It is sufficient for my purposes to note that the legitimacy of canons has been seriously called into question, and that the contemporary defense of their legitimacy has shifted from empirical claims regarding legislative intent to a focus on substantive and institutional values. Under this framework, "statutory interpretation ceases to be solely a problem of discovering meaning," and instead "becomes an issue of institutional competence and authority."

B. THE NEW CUSTOMARY INTERNATIONAL LAW

The second change that is relevant to the continued legitimacy of the Charming Betsy canon concerns the structure and content of customary international law. As Professor Brilmayer has observed, "notions of what international law is all about are central to arguments about whether it belongs in American courts." This observation is true not just with respect to the direct use of international law as a substantive rule of decision, but also with respect to the indirect use of international law as a canon of construction.

To understand the recent changes in the nature of customary international law, it is necessary to understand what customary international law was historically. For this purpose, it is useful to distinguish between two periods of U.S. history: the eighteenth century through the early-nineteenth century, which I will call the "early historical period," and the mid-nineteenth century through World War II, which I will call the "late historical period."

In the early historical period, customary international law—referred to as part of the "law of nations"—was closely linked by courts and commentators with natural law. Blackstone, for example, described the law of nations as "a

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157. For an argument that these values are served by the presumption against extraterritoriality, see Bradley, supra note 55, at 550-61.

158. See Sunstein, supra note 96, at 412, 462.


161. I should emphasize that I am using these terms to refer merely to periods in U.S. history, with the recognition that international law itself dates back much further. See Shearer, supra note 113, at 7-11 (discussing history of international law).

162. See White, supra note 11, at 677-78; Philip Quincy Wright, Enforcement of International Law Through Municipal Law in the United States 224 (1915); Dickinson, supra note 85, at 253-59; Jay, supra note 66, at 822; Harold H. Sprout, Theories as to the Applicability of International Law in the Federal Courts of the United States, 26 AM. J. INT'L L. 280, 280-81 (1932). Chief Justice Marshall's own views regarding the relationship of natural law and international law were not entirely clear, since his opinions contained both natural law and positivist elements. See Ziegler, supra note 30, at 8 ("[N]othing about Marshall and his connection with international law is as difficult to determine as the
system of rules, deducible by natural reason," and said that it "result[s] from those principles of natural justice, in which all the learned of every nation agree." 163 Similarly, Emerich de Vattel's famous international law treatise, frequently relied upon by the Supreme Court and counsel during this period, asserts that international law can be ascertained by "a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns." 164 Consistent with this view, the Supreme Court in 1814 referred to the law of nations as "founded on the great and immutable principles of equity and natural justice." 165

Another feature of the law of nations during the early historical period was the lack of a sharp distinction between public and private international law. 166 The law of nations encompassed not only the law governing the relations among nations, but also the "law merchant," maritime law, and the law of conflict of laws. 167 Moreover, even with respect to interstate matters, the law of nations regulated to some extent the behavior of individuals. 168 For example, it governed individual breaches of neutrality 169 and attacks on foreign diplomats. 170

Finally, customary law, rather than treaty law, was the principal source of international law during this period. 171 Many important areas of international law were unregulated by treaty, and the existing treaties were generally bilateral rather than multilateral. 172 As the Restatement (Third) of Foreign Relations Law notes, "[u]ntil recently, international law was essentially customary law: agreements made particular arrangements between particular parties, but were not

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163. 4 Blackstone, supra note 45, at 66-67.
165. The Venus, 12 U.S. (8 Cranch) 253, 297 (1814) (Marshall, C.J., concurring); see also Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (explaining that, to determine the law of nations, the Court will look to "the great principles of reason and justice"). Courts and commentators adhering to this natural law view did not ignore customary practice in determining the law of nations, but they considered such practice to be an embodiment of natural law. See Randall Bridwell & Ralph U. Whitten, The Constitution and the Common Law 27, 51 (1977); William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth 159 (1995); Jay, supra note 83, at 1056.
169. See Jay, supra note 66, at 841-44.
170. See Dickinson, supra note 166, at 29-30; see also Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784).
171. See Janis, supra note 102, at 42.
ordinarily used for general law-making for states."  

International law changed during the late historical period. As the nineteenth century progressed, courts and commentators began to embrace positivism. As early as 1825, the Supreme Court held, in an opinion by Chief Justice Marshall, that a practice contrary to the law of nature does not automatically violate the law of nations, because the law of nations is derived from "the usages, the national acts, and the general assent" of the nations of the world. Commentators during this period similarly began describing the law of nations in terms of state practice and consent. This view was well-settled doctrine by the time of The Paquete Habana decision, in which the Court described the law of nations as derived from "the customs and usages of civilized nations." As a result, the determination of customary international law was primarily inductive; "[t]he question of what states ought to do was answered primarily by what they have done."  

Also during this period, there came to be a separation between public and private international law. As part of this separation, the private law components of the law of nations—the law merchant, conflict of laws, and maritime law—gradually were absorbed into domestic law. The law of nations came to regulate primarily the relations among states, not the rights and duties of individuals. During this period, "it was thought to be antithetical for there to be international legal rights that individuals could assert against states, especially against their own governments."  

174. See Henkin et al., supra note 9, at xxv-xxvii; Arthur Nussbaum, A Concise History of the Law of Nations 222-23 (1947). The influence of positivism can be traced even earlier, but it achieved dominance gradually during the nineteenth century. See Koh, supra note 101, at 2608.
175. See Dickinson, supra note 85, at 259; see also Sprout, supra note 162, at 281 (noting in 1932 that the natural law conception of international law had become "obsolete").
177. See, e.g., Amos S. Hershey, The Essentials of Public International Law 20 (1914) (defining international law as based on custom and agreement rather than natural law); 1 Lassa Oppenheim, International Law 8-15 (1905) (same); Archer Polson, Principles of the Law of Nations 12 (1860) (same).
178. The Paquete Habana, 175 U.S. 677, 700 (1900); see also The Scotia, 81 U.S. (14 Wall.) 170, 187 (1871) (observing that international maritime law "rests upon the common consent of civilized communities" and has force "because it has been generally accepted as a rule of conduct").
179. Stein, supra note 172, at 465; see also Henkin, supra note 102, at 33 (discussing "authentically customary law").
180. See Janis, supra note 102, at 234; Janis, supra note 168, at 63.
181. See Koh, supra note 2, at 2353-54.
182. Janis, supra note 102, at 245; see also Buergenthal & Maier, supra note 9, at 126-27 (explaining that human rights issues were not regulated by international law prior to World War II); Neuman, supra note 120, at 120 (describing "the worldview of late-nineteenth-century international law [as] characterized by unfinching positivism, expansive notions of sovereignty, and the denial that individuals could be 'subjects' (or right holders) in international law"); Jeffrey M. Blum & Ralph G. Steinhardt. Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53, 56, 64-66 (1981) (same). International law
A final change during this period, particularly during the latter part of the period, was the proliferation of treaties and statutes. The late historical period saw a significant increase in the number and types of treaties, as well as the advent of general international lawmaking by means of multilateral treaties.\(^{183}\) It also saw the incorporation of many treaty obligations into federal statutory law. As a result, much of the traditional customary international law began to be codified.\(^{184}\) This eventually happened, for example, with respect to foreign sovereign and diplomatic immunity.\(^{185}\) Other traditional customary international law, such as prize law, became irrelevant during this period.\(^{186}\)

This history helps place in context the radical changes in customary international law after World War II.\(^{187}\) As Professor Goldsmith and I have described elsewhere, there have been at least three fundamental changes in the nature of customary international law: it can arise much more quickly; it is less tied to state practice and consent; and it increasingly regulates the ways in which nations treat their own citizens.\(^{188}\) These changes were the result of, among other things, the Nuremberg trials and the establishment of the United Nations and other international organizations.\(^{189}\)

In some ways, the new customary international law looks a lot like the law of nations in the early historical period.\(^{190}\) In particular, the new customary international law appears to be linked at least implicitly with natural law concepts. Thus, whereas the customary international law of the late historical period was derived from state practice and consent, the new customary international law, like the law of nations in the early historical period, is derived to some extent from principles of morality.\(^{191}\) This linkage with natural law is most evident with regard to international human rights law.\(^{192}\)

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\(^{184}\) See Nussbaum, supra note 174, at 191-210.


\(^{186}\) Prize law, an important feature of the Supreme Court’s nineteenth-century docket, has now largely disappeared. See Bederman, supra note 80, at 36-41.

\(^{187}\) See Bradley & Goldsmith, supra note 6, at 838-42.


\(^{189}\) See Bradley & Goldsmith, supra note 6, at 839; see also Blum & Steinhardt, supra note 182, at 56.

\(^{190}\) See Blum & Steinhardt, supra note 182, at 56 (noting the “substantial parallels between the late twentieth century and the period around 1789”).

\(^{191}\) See Henkin, supra note 102, at 37; Lessig, supra note 76, at 1796.

\(^{192}\) See Restatement (Third), supra note 1, § 701, cmt. b (noting that international human rights
But there are also important differences between the new customary international law and the law of nations in the early historical period. The principal difference is the content. For the first time, customary international law is viewed as providing a host of rights that individuals can assert against their own governments. The change has been called the most “radical development in the whole history of international law.” The *Restatement (Third) of the Foreign Relations Law of the United States* stated in 1987 that customary international law prohibited seven categories of human rights abuses. The *Restatement (Third)* suggested that its list was a conservative one, and that other actions, such as religious and gender discrimination, might also violate customary international law. It further observed that “[o]ther rights may already have become customary law and international law may develop to include additional rights.” Since then, commentators have claimed that customary international law protects a wide range of other social, economic, and political rights. It is precisely these rights that proponents of the internationalist conception of the *Charming Betsy* canon are seeking to advance.

### C. ERIE AND THE REDEFINITION OF FEDERAL COURT POWER

The third change that is relevant to the continued viability of the *Charming Betsy* canon is the redefinition of federal court power resulting from the Supreme Court’s decision in *Erie Railroad v. Tompkins.* *Erie* fundamentally altered the role of the federal courts in this country. The federal courts in the nineteenth century felt free to develop their own common law, independent of the common law developed by state courts, except with respect to subjects considered “local” in nature. In overruling the *Swift v. Tyson* decision that had

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193. See Janis, supra note 102, at 245; Rosalyn Higgins, Conceptual Thinking About the Individual in International Law, 24 N.Y.L. Sch. L. Rev. 11, 11-12 (1978); Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U. L. Rev. 1, 9-10 (1982); see also Janis, supra note 102, at 247 (“Until relatively recently, there were no guarantees of human rights at the level of international law comparable to those sometimes available in municipal law.”).


195. The seven categories are: “(a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, [and] (g) a consistent pattern of gross violations of internationally recognized human rights.” *Restatement (Third), supra* note 1, § 702.

196. See id. cmts., j. l.

197. Id. reporters’ note 1.

198. See Bradley & Goldsmith, supra note 6, at 841 nn.168-71 (listing sources).

199. 304 U.S. 64 (1938).
approved this practice, the Court declared that "[t]here is no federal general common law." The Court held, consistent with its reading of the Rules of Decision Act, that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." 

*Erie* reflects two shifts from nineteenth-century legal thinking. The first is the shift from natural law thinking to legal positivism, in particular the variant of legal positivism that views all law as emanating from a sovereign source. As Justice Frankfurter later explained, *Erie* "did not merely overrule a venerable case. It overruled a particular way of looking at law." The Court in *Erie* concluded that the practice of the federal courts in developing their own general common law rested on a fallacy. This fallacy involved the assumption, in the words of Justice Holmes, that "there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" In fact, said the Court (again quoting Holmes), there is no such law: "law in the sense in which courts speak of it today does not exist without some definite authority behind it." Thus, for example, when a state enforces the common law, it "is not the common law generally but the law of that State existing by the authority of that State."

The second shift is the legal realist shift from viewing judges as finding law to viewing them as making it. The *Erie* Court, for example, quoted Justice Field's observation that federal general common law "is often little less than what the judge advancing the doctrine thinks at the time should be the general

200. *Id.* at 78.

201. The Rules of Decision Act was originally enacted as part of the Judiciary Act of 1789 and today appears at 28 U.S.C. § 1652 (1994). The Act provides: "The laws of the several States, except where the Constitution or treaties of the United States, or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*.

202. *Erie*, 304 U.S. at 78. The Court forgot about treaties, which are also mentioned in the Rules of Decision Act (as well as in the Supremacy Clause).


204. Guaranty Trust Co. v. York, 326 U.S. 99, 101 (1945); see also BIRDWELL & WHITTEN, *supra* note 165, at 130 ("*Erie* purported to overrule a particular philosophy of, or manner of looking at, law."); ERIAN CHEMERSINSKY, *FEDERAL JURISDICTION* § 5.3.5, at 300 (2d ed. 1994) ("[T]he decision reflected a major shift in jurisprudence away from a belief that courts simply apply preexisting objectively true natural law principles."); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PAC. L. REV. 263, 283 (1992) ("*Erie*'s real significance is that it represents the Supreme Court's formal declaration that this [nineteenth-century] view of the common law (with all its implications for our understanding of law in general) is dead . . . .").


206. *Id.* (internal quotation marks omitted).

207. *Id.* (internal quotation marks omitted).
law on a particular subject." The Court therefore emphasized the need to identify the source of the authority being exercised by the federal courts, noting, for example, that "no clause in the Constitution purports to confer [general common-lawmaking] power upon the federal courts." 

It is the combination of these two theoretical shifts that made federal general common law so objectionable. This law was now viewed as being made, and it was viewed as being made by federal judges. The result, given the absence of a proper delegation of such power to the federal courts, was "an unconstitutional assumption of powers by courts of the United States." The constitutional problem in Erie concerned not only federalism, but also separation of powers. The federalism problem was the one that was most obvious. In developing general common law, the federal courts had "invaded rights which . . . are reserved by the Constitution to the several States." Although not quite as apparent, the constitutional problem also involved separation of powers. The Court in Erie indicated that even if the federal government had the power to make general common law binding on the states, this did not mean that the federal courts had this power. Hence its statement that, "[e]xcept in the matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State." This separation of powers strand

208. Id. at 78 (quoting Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368, 401 (1893) (internal quotation marks omitted)); see also Casto, supra note 203, at 908 ("Erie . . . signalled an intellectual revolution that pictured judges as lawmakers in a relativistic legal world.").

209. Erie, 304 U.S. at 78.

210. Id. at 79 (quoting Black & White Taxicab v. Brown & Yellow Taxicab, 276 U.S. 518 (1928) (Holmes, J., dissenting) (internal quotation marks omitted)); see also Casto, supra note 203, at 928 ("The positivist belief that judges make law is a sine qua non to this constitutional argument."). In addition, such a delegation of power by Congress was viewed as impossible at the time, because Congress was not viewed as itself having the power to make law governing the areas of general common law (such as the tort liability of interstate railroads at issue in Erie). See Erie, 304 U.S. at 78. This aspect of the Court's analysis presumably is outdated, given the Supreme Court's broad reading after Erie of Congress's powers under the Commerce Clause. See CHEMERINSKY, supra note 204, § 5.3.5, at 300; John Hart Ely, The Irrepressible Myth of Erie, 87 HARV. L. REV. 693, 703 n.62 (1974); but cf. United States v. Lopez, 514 U.S. 549 (1995) (holding that statute regulating possession of firearms near schools exceeded Congress's commerce powers). There might, of course, still be limits on the ability of Congress to delegate its (now broader) lawmaking power to the courts. But cf. Dan M. Kahan, Lenity and Federal Common Law of Crimes, 1994 SUP. CT. REV. 345, 355 (stating that there is today no formal bar to delegation of lawmaking power to courts but rather "only a series of localized 'strict construction' or 'clear statement' rules, which tend to operate as nondelegation doctrines within their respective fields of operation").

211. See, e.g., Clark, supra note 71, at 1260-62; Paul J. Mishkin, Some Further Last Words on Erie—The Thread, 87 HARV. L. REV. 1682, 1685 (1974); see also Lessig, supra note 76, at 1793 (noting that Erie concerned both the federalism question, "why are federal judges making this state law?" as well as the separation of powers question, "why are federal judges making this state law?").

212. Erie, 304 U.S. at 80.

213. Id. at 78; see Clark, supra note 71, at 1261-62 ("An essential premise of the Court's decision in Erie . . . appears to be that unilateral lawmaking by federal courts in this context violates the Constitution's separation of powers."); Henry Monaghan, The Supreme Court, 1974 Term—Forward: Constitutional Common Law, 89 HARV. L. REV. 1, 11-12 (1975) (Erie "recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power."). The separation of powers and federalism problems are related. Separation of powers in this context protects
of *Erie*, which was made clearer in subsequent decisions, is probably more important today than the federalism strand.\(^{214}\)

Notwithstanding *Erie*, the federal courts have continued to create *some* common law. This post-*Erie* "federal common law" differs from the earlier general common law in that it is considered part of supreme federal law under Article VI of the Constitution, and thus is binding on the states.\(^{215}\) Although scholars differ significantly regarding the proper scope of federal common law, many agree that, in light of *Erie*, this lawmaking is proper only if authorized in some fashion by either the Constitution or federal legislation.\(^{216}\) As Justice Jackson put it, "[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them."\(^{217}\)

\(^{214}\) See, e.g., *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 n.9 (1981) (noting that "the States are represented in Congress but not in the federal courts").

\(^{215}\) See Merrill, supra note 137, at 20 ("[A]s the powers of the federal government have grown in relation to those of the states, the separation-of-powers principle has probably eclipsed federalism as the dominant ground for questioning lawmaking by federal courts.").

\(^{216}\) See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-07 (1964). Judge Friendly famously referred to this common law as the "new federal common law." *Id.* at 383. This term can be confusing because "federal" might refer either to the nature of the law (supreme federal law) or the source of the law (federal courts). As noted above, the common law applied by federal courts before *Erie* was not, and by large, supreme federal law. See supra note 77.

\(^{217}\) For a discussion of various theories regarding federal common law, see George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication*, 12 PACER L. REV. 229 (1992). As Professor Brown explains, the theories "range from the prohibitive view, founded on the Rules of Decision Act, through a broad middle ground, emphasizing the need for authorization, that permits a range of federal common law, to an inclusive view under which the federal courts enjoy, presumptively, the same lawmaking powers as Congress." *Id.* at 260.

\(^{218}\) See, e.g., Clark, supra note 71, at 1259; Field, supra note 213, at 895-96; Friendly, supra note 216, at 407, 421, 422; Merrill, supra note 137, at 46-47; Monaghan, supra note 213, at 11-12; see also Bradley & Goldsmith, supra note 6, at 856 n.263 (citing additional authority). But see Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. REV. 805, 813 (1989) ("Courts must act, of course, within their constitutional and statutory jurisdiction. But no other ‘authorization’ is required."). It is important to distinguish here between the authorization for and the substance of the federal common law rule. Although the authorization for federal common-lawmaking must be traced to the Constitution or a federal enactment, the substance of the lawmaking, almost by definition, need not. The line between the two may not always be clear, and the distinction may in fact be "one of degree," Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980), but the essential difference between the creation of a federal common law rule and traditional statutory and constitutional interpretation is that the creation of the federal common law rule occurs "when the substance of that rule is not clearly suggested by federal enactments." Field, supra, at 890 (emphasis in original); see also Merrill, supra, at 4 ("[F]ederal common law begins where textual interpretation—or what courts conventionally regard as 'interpretation'—ends.").

\(^{219}\) D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring). Not all of the Supreme Court’s federal common law decisions easily satisfy the authorization requirement. Perhaps the most questionable decision in this regard is *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), in which the Court created federal common law to govern the tort liability of contractors providing military equipment to the federal government. Even in that case, however, it is arguable that
This authorization requirement could be construed broadly or narrowly. Recent decisions by the Supreme Court, however, suggest a narrow view of the scope of federal common-lawmaking power. In both Atherton v. FDIC,220 and O'Melveny & Myers v. FDIC,221 for example, the Court emphasized that federal common law is appropriate only in rare instances and that the decision whether to exercise preemptive federal power is primarily for Congress, not the courts.222 The Court also emphasized that the creation of federal common law is normally inappropriate in the absence of a "significant conflict" between state law and "an identifiable federal policy or interest."223 Finally, the Court expressed an unwillingness to base federal common law merely on generalized policy arguments, such as a purported need for uniformity.224

D. EFFECT OF THE CHANGES

For a number of reasons, these and related changes tend to render questionable both the legislative intent and internationalist conceptions of the Charming Betsy canon. As a result, if the canon is to be retained, a different conception may be necessary.

1. Post-Realist Defense of Canons of Construction

The legislative intent conception of the Charming Betsy canon does not sit well with the post-realist defense of canons. The post-realist defense, particu-

the Court had statutory or constitutional authorization. See id. at 510-12 (finding significant conflict between state law and federal policy because of provisions in Federal Tort Claims Act); Clark, supra note 71, at 1368-75 (arguing that the lawmaking in Boyle was authorized by the constitutional structure). Moreover, in recent decisions, the Supreme Court appears to have adopted a narrower view of federal common law than the one suggested in Boyle. See infra text accompanying notes 220-24. For criticism of Boyle, see, for example, Ronald A. Cass & Clayton P. Gillette, The Government Contractor Defense: Contractual Allocation of Public Risk, 77 Va. L. Rev. 257 (1991), and Michael D. Green & Richard A. Matasar, The Supreme Court and the Products Liability Crisis: Lessons from Boyle's Government Contractor Defense, 63 S. Cal. L. Rev. 637 (1990).

222. Atherton, 117 S. Ct. at 670; O'Melveny, 512 U.S. at 87.
223. Atherton, 117 S. Ct. at 670; O'Melveny, 512 U.S. at 87. The Court thus, among other things, seems clearly to have rejected the view articulated by Professor Weinberg, see Weinberg, supra note 218, at 813, that federal common-lawmaking power is coextensive with the power of Congress. See also Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("[N]or does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts."); Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and the Federal System 756-57 (4th ed. 1996) (noting that Professor Weinberg's broad view of federal common law "finds little support in the case law . . . or among commentators" and that "[n]ost judges and commentators believe that the federal courts' power to fashion law is considerably more limited than that of Congress").
224. Thus, the Court in O'Melveny referred disparagingly to "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity" and criticized "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." O'Melveny, 512 U.S. at 88, 89. And the Court in Atherton noted that the mere "existence of related federal statutes [does not] automatically show that Congress intended courts to create federal common law rules." Atherton, 117 S.Ct. at 670.
larly with respect to "normative" canons like Charming Betsy, rests not primarily on legislative intent but rather on substantive and institutional values. This is in part because, as the critics of canons have pointed out, any attempt to ground such canons in legislative intent encounters substantial conceptual and empirical difficulties. Thus, to establish that the Charming Betsy canon reflects likely congressional intent, one would have to address difficult questions, such as: Does Congress as a whole have an intent regarding international law? If so, how does one ascertain this intent, or even the likely intent? Can one generalize with respect to Congress's intent concerning all ambiguous statutes? Which Congress counts for purposes of this generalization—the one that enacted the statute or the one at the time of the litigation? How does a judge assess congressional intent if a statute clearly violates international law in some respects but is ambiguous in others?

In addition to these questions, an intent-based account of the Charming Betsy canon would have to confront problematic empirical evidence suggesting that compliance with international law is often not the political branches' paramount concern. The recent Helms-Burton Act and Iran-Libya Sanctions Act, for example, have been widely condemned around the world as violating the GATT and NAFTA trade agreements and customary international law rules concerning prescriptive jurisdiction. The failure by Congress during the last several years to authorize timely payment of United States dues to the United Nations similarly has been seen by many observers as a breach of this country's international obligations. Consider also the provision in the Maritime Drug Law Enforcement Act that denies standing to any person charged under the Act from raising a defense under international law. Similar prominent examples with respect to the Executive include the abduction at issue in Alvarez-Machain, the activities in support of the contras in the Nicaragua cases litigated before both the International Court of Justice and domestic courts (as

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229. See 46 U.S.C. § 1903(d) (1997). At least one court has held that this provision does not prevent a defendant from invoking the Charming Betsy canon and thereby arguing that the Act should be construed not to violate international law. See Singleton v. United States, 789 F. Supp. 492, 500-01 (D.P.R. 1992), aff'd, 26 F.3d 333 (1st Cir. 1994).

well as the U.S. disregard of the ICJ judgment), and the announcement by the Clinton Administration that it would not participate in the World Trade Organization's dispute settlement proceedings concerning the validity of the Helms-Burton Act. Other examples undoubtedly will arise after this article is published.

These examples may reflect changes in the international status of this country. It may be, as Professor Lobel has suggested, that "[a]s international relations changed and American military and economic power grew, the status of international law [in this country] also changed." Although perhaps not quite the economic and military superpower that it was in the aftermath of World War II, the United States is certainly not the fledgling nation that it was at the time of the adoption of the Charming Betsy canon, concerned that any breach of international law would embroil it in war. This does not mean, of course, that the United States is unconcerned with international law compliance. But it may suggest that, from the U.S. perspective, the perceived risks associated with lawbreaking have been reduced. Nor does the possible erosion of the connection between international law compliance and national security mean that it is morally right for the United States to ignore international law. Perhaps an argument can be made that the U.S. position regarding international law that developed "in a time of relative weakness ought to be honored when the United States has reached its place in the sun." But, whatever one's position on these questions, the change in the status of the United States may provide a ground for questioning judicial enforcement of U.S. compliance with international law through use of the Charming Betsy canon, if such judicial


233. In addition to the purported violations of international law referred to in the text, the United States is currently the subject of criticism for failing to agree to various human rights and weapons treaties, including the Convention on the Rights of the Child and the anti-personnel land mines convention. See, e.g., Edward Mortimer, The U.S. Is Often Depicted as Leading the World Crusade for Human Rights, but the Reality Is Rather Different, Fin. Times, Dec. 10, 1997, at 24.

234. Lobel, supra note 8, at 1104.

235. See supra text accompanying notes 68-71.

236. The United States may well have other pragmatic interests today in complying with international law, such as interests relating to international trade, political influence, and stability. It is doubtful, however, that these interests generally rise to the level of national survival. Cf. Anthony D'Amato, Debate: The "Domestication" of International Law: Negative, in International Law Anthology 403, 408 (Anthony D'Amato ed., 1994) (discussing economic and other costs to the United States as a result of the Alvarez-Machain case). Nor is it clear when or how often the costs outweigh the benefits to the United States of violating international law.

enforcement is supposed to be based on an assessment of the likely intent of either Congress or the political branches as a whole.

This problem is not avoided by the claim that Congress legislates against the backdrop of the canon.\textsuperscript{238} Even if it is correct to assume that Congress is aware of the canon when it enacts statutes, its failure to overcome the canon may not be the result of a desire to comply with international law. It may be due to other factors, such as limitations on its time and political capital. As noted above, canons impose costs on the legislature.\textsuperscript{239} If the imposition of these costs is unjustified, it is not a sufficient defense to argue that these costs are less than infinite because a canon can be overridden by specific statutory language. Indeed, if this sort of argument were sufficient, it would mean that no canon could be revisited by the judiciary as outdated.

In any event, even if abstract predictions regarding legislative intent do support a weak version of the Charming Betsy canon, we have actual evidence regarding the attitude of the political branches that is inconsistent with these abstract predictions. I discuss this evidence below. Moreover, as I explain, the argument that Congress has legislated against the backdrop of the canon is misleading because the nature of international law has substantially changed, such that the canon may not in practice mean what it used to mean.

2. The New Customary International Law

The post-World War II changes in the structure and content of customary international law undermine both the legislative intent and internationalist conceptions of the Charming Betsy canon. They undermine the legislative intent conception because, even if it is fair to say that Congress has in the past legislated against the backdrop of the canon, or has acquiesced in the canon, the effect of the canon may be quite different when applied to the new customary international law. The nature of international law, particularly customary international law, is now radically different, and there is an increasing possibility of inconsistency and conflict between international law and domestic law.\textsuperscript{240}

Moreover, regardless of how one construes the attitude of the political branches with respect to international law in general, we have fairly specific evidence of their attitude concerning the new customary international law, particularly in the human rights area. The purported customary international human rights norms are largely derived from, or codified in, multilateral treaties.\textsuperscript{241} It is noteworthy that the United States has so far declined to ratify

\textsuperscript{238} See supra text accompanying note 92.
\textsuperscript{239} See supra text accompanying note 137.
\textsuperscript{240} See Steinhardt, supra note 18, at 1111 ("As international law has moved in this century 'from an essentially negative code of rules of abstention to positive rules of cooperation,' its potential overlap with domestic statutory regimes has become pronounced." (quoting WOLFGANG G. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 62 (1984))).
\textsuperscript{241} See Bradley & Goldsmith, supra note 6, at 832, 839-40; Henkin, supra note 192, at 36; Sohn, supra note 193, at 12.
many of these treaties. In addition, for the treaties that it has ratified, the United States has consistently attached a series of reservations, understandings, and declarations ("RUDs") that purport to limit the treaties' domestic effect. One motivation for these RUDs, which the government included in the face of substantial domestic and foreign opposition, "was a desire not to effectuate changes in domestic law." Some commentators have criticized these RUDs as being in violation of international law. They argue that, by refusing to allow changes to domestic law, the RUDs are incompatible with the object and purpose of the treaties, and are thereby invalid pursuant to Article 19 of the Vienna Convention on the Law of Treaties. Professor Henkin has also suggested that the frequent use of


243. For example, the United States attached five reservations, five understandings, and four declarations to its ratification of the International Covenant on Civil and Political Rights, see 138 Cong. Rec. S4781 (daily ed. Apr. 2, 1992), a treaty that has been described as "the cornerstone of modern international human rights law." William A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?, 21 Brook. J. Int'l L. 277, 277 (1995). These RUDs include retention of certain substantive rights that are in conflict with provisions of the Covenant, such as the right to execute juveniles. They also include a federalism clause, stating that, in implementing the treaty, matters within the jurisdiction of the constituent states may be implemented by the states rather than by the federal government. In addition, they include a declaration that the treaty is not self-executing. Similar provisions appear in connection with the U.S. ratification of other human rights treaties. See 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994) (International Convention on the Elimination of All Forms of Racial Discrimination); 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

244. David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DePaul L. Rev. 1183, 1206 (1993). Again taking the example of the International Covenant on Civil and Political Rights, the non-self-executing declaration "clarif[i]es] that the Covenant will not create a private cause of action in U.S. courts," International Covenant on Civil and Political Rights, Senate Comm. on Foreign Relations Report, S. Rep. No. 102-23, at 19 (1992); the federalism understanding "serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between State and Federal governments or to use the provisions of the Covenant to 'federalize' matters now within the competence of the States," id. at 18; and specific reservations that preserve differences between U.S. law and the requirements of the Covenant ensure that "changes in U.S. law in these areas will occur through the normal legislative process," id. at 4.


246. Article 19 of the Convention states in relevant part that a nation may not enter a reservation to a treaty if "the reservation is incompatible with the object and purpose of the treaty." Vienna Convention, supra note 116, art. 19; see also Reservations to the Convention on the Prevention and Punishment of
non-self-executing clauses is unconstitutional,247 or at least "'anti-Constitutional' and highly problematic as a matter of law,"248 because it subverts Article VI, which states that treaties are the supreme law of the land.249

These criticisms, if accepted, may have the effect, unintended by the critics, of negating the U.S. ratifications, both on the international plane250 and as a matter of domestic politics. They may also have the effect of reducing the likelihood of future U.S. ratification of human rights treaties. As David Stewart has explained, it is likely that the RUDs were needed in order to obtain the political support required for ratification.251 In any event, these RUDs make clear that the political branches are not receptive to treating the human rights treaties—the genesis of much of the customary international law of human rights—as an independent source of domestic law. As Professor Henkin himself has observed, "By its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies, or practices, even where they fall below international standards."252 Consequently, the empirical claim that the political branches wish to comply with international law may be particularly suspect in this context of the new customary international law.253

the Crime of Genocide, 1951 I.C.J. 15 (May 28) (adopting similar standard). The United States has not ratified the Vienna Convention, but (through the State Department) it has indicated that it believes that much of the Convention reflects customary international law. See RESTATEMENT (THIRD), supra note 1, pt. III, introductory note, at 145.

247. Henkin, supra note 245, at 346; see also Thomas Buergenthal, Modern Constitutions and Human Rights Treaties, 36 COLUM. J. TRANSNAT'L L. 211, 222 (1997) (making similar point).

248. Henkin, supra note 46, at 202; see also Lori F. Damrosch, The Role of the United States Senate Concerning “Self Executing” and “Non-Self-Executing” Treaties, 67 CHI.-KENT L. REV. 515, 518 (1991) (arguing that “the trend toward non-self-executing treaty declarations is unfortunate and should be resisted”).

249. U.S. CONST. art. VI, cl. 2. The Supreme Court has recognized since 1829 that not all treaties are self-executing. See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). There 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. See Vazquez, supra note 5, at 705-08. The Restatement (Third) takes the position that it is the intent of the United States that controls and that a treaty is non-self-executing if the Senate, in giving consent to the treaty, requires implementing legislation. Restatement (Third), supra note 1, § 111(4)(b) & cmt. h.

250. The effect of an invalid reservation as a matter of international law is not entirely clear. The effect may depend on whether the particular reservation is severable, which in turn may depend on how important the reservation was to the ratifying state in its decision to be bound by the treaty. See Schabas, supra note 243, at 317-18; cf. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 66 (July 6) (separate opinion of Judge Lauterpacht) (arguing that when an invalid reservation is an essential component of a nation's consent to the compulsory jurisdiction of the International Court of Justice, the entire consent is "devoid of legal effect").

251. See Stewart, supra note 244, at 1189.

252. Henkin, supra note 245, at 342.

253. The Torture Victim Protection Act of 1991 is a potential counterexample to the political branches' general lack of receptivity to incorporating the new customary international law into domestic law. In that Act, Congress created a federal cause of action against any individual, acting "under actual or apparent authority, or under color of law, of any foreign nation," who subjects another individual to torture or extrajudicial killing. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1997)). It is noteworthy, however, that the Act applies only to acts committed
This evidence also undermines the internationalist conception of the canon. The approach of the political branches to the human rights treaties is, for better or worse, a rejection of internationalism. Far from approving the judicial enhancement of domestic law with international norms, the political branches have insisted—at least in the context of international human rights law, which is the principal focus of the internationalist conception—that domestic law be preserved unless and until the political branches incorporate the international norms. As one commentator recently observed:

While the United States once had a legal system that was international-law friendly, this is certainly no longer true today. In fact, the United States has moved from being a pioneer in this area to being a country that . . . puts increasing obstacles in the way of giving domestic effect to its international legal obligations.254

This development may be regrettable, but it is nevertheless a fact that should be considered when determining the proper treatment of international law by the federal judiciary.

3. _Erie_ and the Redefinition of Federal Court Power

The reasoning in _Erie_ and the resulting restrictions on post-_Erie_ federal common law also tend to preclude an internationalist conception of the _Charming Betsy_ canon. Although customary international law was treated in the nineteenth century in something of an internationalist fashion,255 the framework for this treatment—pre-positivistic general common law—was repudiated in _Erie_. In addition, _Erie_ requires that all law applied by the federal courts be either federal or state law, which means that federal courts can no longer apply international law of its own force. _Erie_ thus negates the premise of the internationalist conception “that the [international law] norms operate without the mediation of a political branch.”256 The natural law character of the new customary international law further heightens the separation of powers problem because this law is even more clearly being made rather than found. Finally, although it has become accepted after _Erie_ that some federal law can emanate from the federal courts themselves, the authorization requirement underlying the post-_Erie_ federal common law further precludes the sort of independent federal court application of such law envisioned by the internationalist

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under the authority or color of law of foreign nations and thus does not allow suits against the U.S. federal or state governments. Thus, even in this rare instance of implementation of the new customary international law by the political branches, there was resistance to allowing international law to change U.S. law. See generally Curtis A. Bradley & Jack L. Goldsmith, _The Current Illegitimacy of International Human Rights Litigation_, 66 Fordham L. Rev. 319, 363-68 (1997) (discussing limited nature of the Torture Victim Protection Act).


255. See _supra_ text accompanying notes 73-80.

256. Steinhardt, _supra_ note 18, at 1128.
conception. In light of this, it should not be surprising that the recent Supreme Court, which has been sensitive to the separation of powers aspect of Erie, has been generally unreceptive to internationalist-type claims concerning the interpretive role of international law. For example, as discussed above, the Court in Amerada Hess was unwilling to restrict the statutory immunity of foreign states based on international law. In Stanford v. Kentucky, the Court rejected the argument that it should consult international practice in construing the Eighth Amendment, "emphasiz[ing] that it is American conceptions of decency that are dispositive." And in Sale v. Haitian Centers Council, the Court refused to interpret a U.S. immigration statute as providing rights to refugees on the high seas, even though the Court acknowledged that providing such rights might be consistent with the "spirit" of international law. These decisions, like the actions of the political branches described above, have been heavily criticized by those who advocate a larger role for international law in the U.S. legal system. They are nevertheless part of the contemporary legal landscape, and they should therefore be considered in evaluating the future scope and viability of the Charming Betsy canon.

IV. THE SEPARATION OF POWERS COMPROMISE

In this Part, I propose an alternate conception of the Charming Betsy canon, which I call the "separation of powers conception." This conception has support in recent case law and, unlike the other conceptions, is strengthened rather than undermined by the changes described above. This conception nevertheless requires a compromise of the very separation of powers values that it seeks to promote. Although the question is a close one, for a variety of reasons I conclude that such a compromise is warranted. I also explain how this conception sheds light on the proper relationship between the Charming Betsy canon and state law.

A. SEPARATION OF POWERS CONCEPTION

It is well settled that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the

257. Erie also undermines the variant of the legislative intent conception relying on the "in pari materia" concept, see supra text accompanying notes 93-95, since it renders doubtful the domestic law status of customary international law. See Bradley, supra note 66; Bradley & Goldsmith, supra note 6, at 852-55.

258. See supra text accompanying notes 220-24.

259. See supra text accompanying note 114.


261. Id. at 370 n.1.


263. Id. at 183; cf. id. at 207 (Blackmun, J., dissenting) (accusing the majority of violating the Charming Betsy canon).
political'—Departments of the Government." 264 This principle reflects both formal and functional considerations. 265 The formal considerations include the Constitution’s express assignment of policymaking and foreign affairs powers to the political branches and the Executive’s head-of-state role in representing the United States in relations with other nations. 266 The functional considerations include the political branches’ advantages vis-à-vis the courts in obtaining foreign affairs information and in responding to changing world conditions. 267

Against this backdrop, the separation of powers conception views the Charming Betsy canon as a means of both respecting the formal constitutional roles of Congress and the President and preserving a proper balance and harmonious working relationship among the three branches of the federal government. The canon arguably does this in several ways. First, it is a means by which the courts can seek guidance from the political branches concerning whether and, if so, how they intend to violate the international legal obligations of the United States. Second, the canon reduces the number of occasions in which the courts, in their interpretation of federal enactments, place the United States in violation

264. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); see also Regan v. Wald, 468 U.S. 222, 242 (1984) ("Matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952))); Chicago & S. Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("Such decisions [concerning foreign policy] are wholly confined by our Constitution to the political departments of the government, Executive and Legislative.").

265. Theories of separation of powers are frequently classified as either “formalist” or “functionalist.” See Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1522-31 (1991); Flaherty, supra note 67, at 1733-38; Thomas W. Merrill, The Constitutional Principle of Separation of Powers, 1991 SUP. CT. REV. 225, 225-35. Formalist theories view separation of powers as “a rule that must be followed because it is laid down in the Constitution and the Constitution is supreme federal law.” Merrill, supra, at 230. Functionalist theories, by contrast, consider the legitimacy of institutional arrangements “in terms of their contribution toward attaining certain ends.” Id. at 231.

266. See, e.g., U.S. CONST. art. I, § 1 (assigning all “legislative Powers” in the Constitution to Congress); id. art. I, § 8 (listing numerous legislative powers delegated to Congress, including the power to regulate commerce with foreign nations, the power to define and punish offenses against the law of nations, and the power to declare war); id. art. II, § 1 (vesting the “executive Power” in the President); id. art. II, § 2 (making the President Commander in Chief); id. (giving the President and Senate the power to make treaties).

267. See, e.g., Jack I. Garvey, Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers, 24 LAW & POL’Y INT’L BUS. 461, 462 (1993) ("[T]he courts lack the necessary informational resources, the ability to adjust to diplomatic nuance and timing, and the appropriate remedial resources to respond to the international political dynamic."); Louis Henkin, The Foreign Affairs Power of the Federal Courts: Sabbatino, 64 COLUM. L. REV. 805, 826 (1964) ("Inevitably, the courts tend to establish rules of more-or-less general applicability, which can only relate to the needs of foreign policy grossly, and on the basis of assumptions and generalizations hardly consonant with flexibility, currentness, and consistency."); John Yoo, Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act, 20 HASTINGS INT’L & COMP. L. REV. 747, 764-69 (1997) (explaining reasons why courts are not well suited to handle foreign relations issues); see also Baker v. Carr, 369 U.S. 186, 211 (1962) ("Not only does resolution of such [foreign affairs] issues frequently turn on standards that defy judicial application, or involve the exercise of discretion demonstrably committed to the executive or legislature; but many such questions demand single-voiced statement of the Government’s views.").
of international law contrary to the wishes of the political branches. Third, by requiring Congress to decide expressly whether and how to violate international law, the canon reduces the number of occasions in which Congress unintentionally interferes with the diplomatic prerogatives of the President.

This conception differs from the other two conceptions because it emphasizes institutional relationships rather than legislative intent or respect for international law. The separation of powers conception, like the other two conceptions, acknowledges that the violation of international law can create foreign relations difficulties for the United States. But it takes no view as to whether particular violations of international law are desirable or undesirable from the U.S. perspective. Nor does it agree with the internationalist conception that courts should supplement U.S. positive law with international law. 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.

The separation of powers conception also agrees with the legislative intent conception that, when Congress wishes to violate international law, it has the institutional capacity to make this intent clear. But it does not agree that the principal function of the canon is to implement likely congressional intent, or even that assessing “likely congressional intent” is possible. Rather, it simply holds that, when faced with ambiguous statutes, the division of power among the federal branches is best served by interpreting such statutes so as not to violate international law.

Unlike the other two conceptions of the Charming Betsy canon, the separation of powers conception is strengthened rather than undermined by the changes discussed above. Its emphasis on institutional values is consistent with the modern shift in emphasis from intent-based accounts of canons to values-based accounts. Its traditional, restraint-oriented view of the canon avoids the potential conflict with the political branches that may be entailed by the more affirmative internationalist conception. Its emphasis on structural constitutional considerations rather than on the importance of international law per se is consistent with the redefinition of federal court power resulting from Erie. Indeed, Erie itself was premised on similar separation of powers considerations. The domestic constitutional nature of these separation of powers values is what distinguishes the Charming Betsy canon from the presumably improper canons that I hypothesize in the introduction (French law, Talmudic law, Plato’s “Laws”).

268. See supra text accompanying notes 141-52.
269. See supra text accompanying notes 240-53.
270. See supra text accompanying notes 199-224.
271. See supra text accompanying notes 210-15. The treatment of customary international law as a default limitation on ambiguous legislation is also probably closer to the pre-Erie status of customary international law (general common law) than the view of some internationalist commentators that customary international law has the status today of federal common law. See Lessig, supra note 76, at 1791 (noting that customary law before Erie “was law in the sense of defaults”); cf. Sunstein, supra note 96, at 453 (analogizing canons to the use of gap-filling default rules in contract law).
Moreover, there is decisional support for this conception of the canon. Most directly, the Supreme Court has in recent years cited the Charming Betsy decision for another canon—that statutes are to be construed if possible to avoid serious constitutional questions. The Court has stated that this constitutional canon “has its roots” in the Charming Betsy decision,272 and is “the essence” of that decision.273 While these statements are somewhat cryptic, the Court appears to be suggesting that the Charming Betsy canon is designed to avoid difficult separation of powers problems associated with judicial speculation over whether Congress intended to violate international law.274

More generally, recent Supreme Court decisions suggest that the Court increasingly favors and uses interpretive rules like the Charming Betsy canon to accomplish judicial restraint in the area of foreign affairs. This practice stems both from concerns regarding the lack of judicial competence, as well as from the expectation that restraint may produce additional guidance from the political branches.275 For example, in EEOC v. Arabian American

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274. Thus, in Catholic Bishop, the Court, after citing the Charming Betsy decision, referred to McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963). See Catholic Bishop, 440 U.S. at 500. In McCulloch, the Court had construed the National Labor Relations Act not to apply to foreign conduct and had noted that “[t]he presence of such highly charged international circumstances [associated with extraterritorial application of the Act] brings to mind” the Charming Betsy canon. McCulloch, 372 U.S. at 21. The Court in Catholic Bishop described McCulloch as a decision where “the Court declined to read the National Labor Relations Act so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations.” Catholic Bishop, 440 U.S. at 500; see also Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (discussing Charming Betsy and McCulloch); Commodity Futures Trading Comm’n v. Nahas, 738 F.2d 487, 493 n.13 (D.C. Cir. 1984) (“Our rules of statutory construction in the instant case [including the Charming Betsy canon] embody concerns for preserving the relationships between the branches of government in a system of separation of powers.”). There is at least one important functional difference between the Charming Betsy canon and the constitutional canon: if Congress clearly violates the Constitution, courts will enforce the Constitution; if Congress clearly violates international law, courts will enforce the statute. See supra text accompanying note 98.

275. The Court’s approach today thus differs from the approach reflected in its decision in Zschernig v. Miller, 389 U.S. 429 (1968). In Zschernig, an opinion authored by Justice Douglas, the Court held that a state inheritance statute that denied benefits to residents of Communist countries was constitutionally preempted by the federal government’s dormant foreign affairs powers. Zschernig, 389 U.S. at 440-41. As Professor Bilder has noted, “Zschernig is a unique case—the only one in which the
Oil Co., the Court was called upon to decide whether Title VII of the Civil Rights Act of 1964 \(^{277}\) applied to discriminatory conduct occurring in another country. In concluding that the statute did not apply to such conduct, the Court applied a strong presumption against extraterritoriality, whereby federal statutes will be construed to apply only within the territorial borders of the United States unless an "affirmative intention of the Congress clearly expressed" can be found to the contrary. \(^{278}\) In doing so, the Court noted both that an extraterritorial reading of Title VII would raise "difficult issues of international law," \(^{279}\) and that "Congress, should it wish to do so, may . . . amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot." \(^{280}\)

The model for the separation of powers conception can also be found, to some extent, in the Court's famous Sabbatino decision. \(^{281}\) There, the Court reaffirmed the act of state doctrine, pursuant to which "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." \(^{282}\) Before Sabbatino, the precise rationale for the application of the act of state doctrine by U.S. courts was unclear, although the courts sometimes justified it by reference to principles of international law. \(^{283}\) In Sabbatino, the Supreme Court explained that the doctrine is not required by international law, but rather is based on domestic separation of powers considerations. \(^{284}\) In particular, the Court said that the doctrine "concerns the compe-

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Supreme Court has clearly stated such a doctrine of a 'dormant' foreign relations power." Richard B. Bilder, The Role of States and Cities in Foreign Relations, 83 AM. J. INT'L L. 821, 825 (1989); see also Bradley & Goldsmith, supra note 6, at 865 (explaining the "reasons to think that Zschernig's dormant foreign relations preemption retains little, if any, validity"); Jack L. Goldsmith, Foreign Affairs, and Federalism, 83 VA. L. REV. 1617 (1997) (criticizing Zschernig and arguing for the abolition of dormant foreign affairs preemption).

279. Id. at 255.
280. Id. at 259. For somewhat similar reasoning, see Barclays Bank PLC v. Franchise Tax Board of Cal., 512 U.S. 298, 331 (1994) (rejecting challenge under dormant foreign commerce clause to state taxation rule and noting that "we leave it to Congress—whose voice, in this area, is the Nation's—to evaluate whether the national interest is best served by tax uniformity, or state autonomy"); and United States v. Alvarez-Machain, 504 U.S. 655, 669 (1992) (refusing to bar prosecution of defendant abducted from Mexico and noting that "the decision of whether respondent should be returned to Mexico . . . is a matter for the Executive Branch"). For other recent Supreme Court decisions applying the presumption against extraterritoriality, see Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 173 (1993); and Smith v. United States, 507 U.S. 197, 203-04 (1993).
284. See Sabbatino, 376 U.S. at 423 (stating that the act of state doctrine "arises out of basic relationships between branches of government in a system of separation of powers"); id. at 427-28 (stating that the act of state doctrine is designed "to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs"); see also W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 404 (1990) (describing the act of state doctrine as "a consequence of domestic separation of powers").
tency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." In applying the doctrine in that case, and thereby refusing to pass judgment on the foreign government acts in question, the Court expressed concerns about both its constitutional authority and institutional competence in such matters.

B. OBJECTIONS

Despite the above decisional support, the separation of powers conception is not free from question. Although they have not considered the precise framework described above, both ProfessorSteinhardt and Professor Turley have argued that separation of powers is an inadequate basis for the canon. They advance essentially two lines of criticism.

1. Erosion of Separation of Powers

Professors Steinhardt and Turley both argue that the separation of powers considerations relating to judicial involvement in foreign affairs are not absolute and have been eroded in recent years. In support of this claim, they point out that U.S. courts are increasingly adjudicating cases relating to foreign affairs and are increasingly applying international law. They also point out that one of the central judicial doctrines reflecting separation of powers considerations—the political question doctrine—is not applied in many of the cases that touch on foreign affairs. The implication of all this, as Professor Turley puts it, is that "[t]he past institutional legitimacy arguments for [the Charming Betsy canon] will continue to lose potency as courts adopt a more expansive institutional perspective." This line of criticism has a number of problems. First, it has a strong element of bootstrapping, because it seeks to justify a certain judicial role by the judiciary's own conceptions of its role. Even if courts have been disregarding separation of powers concerns, this would not necessarily mean that they should be doing so. Of course, the separation of powers concerns themselves have been

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285. Sabbatino, 376 U.S. at 423. For a discussion of the shift in Sabbatino to a separation of powers conception of the act of state doctrine, see Koh, supra note 2, at 2362-63.

286. See Sabbatino, 376 U.S. at 431-34. The separation of powers conception of the Charming Betsy canon differs to some extent from the separation of powers rationale of Sabbatino. Whereas both concern limitations on the competence and authority of the federal courts vis-a-vis the political branches, Sabbatino was also premised on the need to protect certain exclusive powers of the federal political branches vis-a-vis the states. As a result, unlike the act of state doctrine in Sabbatino, the Charming Betsy canon may not be supreme federal law binding on the states. See infra text accompanying notes 305-18; cf. Sabbatino, 376 U.S. at 425-27 (holding that the act of state doctrine is a matter of federal common law binding on the states). The creation of preemptive federal law in Sabbatino was in any event problematic because the Court may have lacked sufficient authorization to create such law. See Henkin, supra note 267, at 814-16.


288. See Steinhardt, supra note 18, at 1133; Turley, supra note 18, at 233-34.

289. Turley, supra note 18, at 232.

290. Here I borrow to some extent from Bradley, supra note 55.
articulated in judicial decisions, such as the Supreme Court's decisions in *Erie* and *Sabbatino*. These decisions, however, reflect well-accepted limitations on judicial competence and constitutional authority that are not rebutted simply by noting that some courts (mostly lower courts rather than the Supreme Court) have been seeking a more expansive institutional role.\(^{291}\)

Second, this argument misinterprets the separation of powers conception. The conception does not claim that the interpretation of international law is a "political question" completely outside of judicial competence and authority. Rather, it claims that judicial interpretations of statutes that result in violations of international law are sufficiently political as to warrant a technique of avoidance. Thus, even if these interpretations do not pose political questions *per se*, they nevertheless are sufficiently distinct from other statutory construction issues as to warrant special treatment. The separation of powers conception of the canon requires judicial restraint in the face of statutory ambiguity, not the complete judicial abstention required by the political question doctrine.

Finally, the courts have not in fact been disregarding separation of powers considerations. Even with respect to the political question doctrine, the one place in which the courts continue to give it teeth is in the area of foreign affairs.\(^{292}\) Moreover, although "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,"\(^{293}\) the courts continue to give substantial deference to the political branches in a number of other foreign affairs areas, such as recognition of foreign governments,\(^{294}\) head-of-state immunity,\(^{295}\) and extraterritorial law en-

\(^{291}\) Cf. Merrill, *supra* note 137, at 10-11 ("[T]here is no circularity in using decisions of the Supreme Court to assess the legitimacy of decisions of the Supreme Court—at least if we can distinguish intelligibly between the Court's explication of general structural principles and its application of those principles in particular cases.").

\(^{292}\) See, e.g., United States v. Martinez, 904 F.2d 601, 602 (11th Cir. 1990); Smith v. Reagan, 844 F.2d 195, 198-200 (4th Cir. 1988); Akteve v. United States, 925 F. Supp. 731, 738 (M.D. Fla. 1996), aff'd, 105 F.3d 1400 (11th Cir. 1997); see also Peter W. Low & John C. Jeffries, Jr., *Federal Courts and the Law of Federal-State Relations* 123 (3d ed. 1994) (noting that although "successful resort to the political question doctrine in purely domestic disputes is rare . . . [t]he doctrine appears . . . to have greater vitality in foreign affairs").

\(^{293}\) Ralph G. Steinhardt, *Human Rights Litigation and the "One Voice" Orthodoxy in Foreign Affairs, in World Justice: U.S. Courts and International Human Rights* 23, 30 (Mark Gibney ed., 1991) (observing that continued viability of political question doctrine is "especially true in foreign affairs").


\(^{295}\) See, e.g., National Petrochemical Co. of Iran v. The M/T Stolt Sheaf, 860 F.2d 551, 553 (2d Cir. 1988) ("[T]he Supreme Court has acknowledged the President's exclusive authority to recognize or refuse to recognize a foreign state or government and to establish or refuse to establish diplomatic relations with it."); United States v. Noriega, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990) ("[R]ecognition of foreign governments and their leaders is a discretionary foreign policy decision committed to the Executive Branch and thus conclusive upon the courts.").

\(^{296}\) See, e.g., United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (concluding that a court has no power to grant immunity to an alleged head of state when "the Executive Branch has manifested its clear sentiment that [the defendant] should be denied head-of-state immunity"); *In re Doe* v. United States, 860 F.2d 40, 45 (2d Cir. 1988) ("[I]n the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state."); Jungquist
forcement.296 As Professor Henkin puts it, "foreign affairs makes a difference."297 The courts also continue to favor the use of rules like the Charming Betsy canon as a way to give effect to such separation of powers considerations, as illustrated by the Aramco case discussed above.298

2. Separation of Powers Contradiction

Professor Turley advances a second, and better, criticism of the separation of powers conception. He argues correctly that use of the canon does not in fact eliminate separation of powers concerns: "By interpreting international sources and defining 'conflicts' between municipal and international laws, the court is actively engaged in a transnational dispute regardless of its ultimate decision under the canon."299

Thus, as he argues, the separation of powers conception seems to contradict itself. It justifies the use of the Charming Betsy canon on the basis of judicial deference to the political branches in the area of foreign affairs. But at the same time, the canon that it endorses requires that the courts make some assessment of international law. This assessment means that the courts will to some extent be making foreign policy judgments. In addition, their assessment may conflict with the interpretation of international law that would be reached by the political branches.300 It therefore is not a sufficient defense of the canon simply to note, as one book does, that the canon helps "prevent the judicial branch from placing the United States in violation of its international legal obligations when that result was not intended by the political branches."301

In considering this line of criticism, it is important to keep in mind several factors that reduce the separation of powers concerns associated with use of the canon. First, there is a difference between evaluating the content of international law and evaluating the proper U.S. stance toward this law. The canon involves primarily the former, something that is less political and more consistent with the traditional judicial role and competence than the latter. Second, the canon, as traditionally applied, invokes international law primarily to avoid conflicts, not to give international law independent, affirmative effect. It thus does not pose a significant danger of committing the country to international law in a way not

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v. Nahyan, 940 F. Supp. 312, 321 (D.D.C. 1996) ("Head of State immunity ... extends only to the person the United States government acknowledges as the official head-of-state.... Recognition of a government and its officers is the exclusive function of the Executive Branch, to which the courts must defer.").

296. See, e.g., United States v. Alvarez-Machain, 504 U.S. 655, 670 n.16 (1992) (emphasizing, in considering a challenge to the extraterritorial abduction of a criminal defendant, the "advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to unilateral action by the courts of one nation").

297. Henkin, supra note 46, at 132.

298. See supra text accompanying notes 275-80.

299. Turley, supra note 18, at 238.

300. See Steinhardt, supra note 18, at 1187-94; Turley, supra note 18, at 238.

301. Buergenthal & Maier, supra note 9, at 211.
intended by the political branches. Third, the canon applies only when legislation is ambiguous; if a statute is clear, the courts will apply it regardless of any violation of international law. The ultimate authority to determine the country’s relationship with international law therefore rests with the political branches. Finally, potential conflicts between the branches are further reduced by the traditional judicial practice of giving substantial weight to the views of the political branches, especially the Executive, regarding the content of international law.\textsuperscript{302}

Although these factors reduce the separation of powers concerns, they probably do not negate them. The judiciary, under this conception of the canon, is still making judgments relating to this country’s interpretation of and relationship with international law. As a result, the decision whether to retain the canon may depend on a weighing of the separation of powers benefits against the separation of powers costs. It is to this balancing issue that I now turn.

C. The Constitutional Balance

The separation of powers balance with respect to the Charming Betsy canon appears to be a close question. Although the canon may result in separation of powers benefits, it also entails separation of powers costs—costs that might be avoided simply by eliminating the canon. Nevertheless, in my view several factors tilt the constitutional balance in favor of retaining the Charming Betsy canon. First, the separation of powers costs associated with judicial error without the canon probably are greater than with the canon. In its traditional form, the Charming Betsy canon has been used primarily as a braking mechanism.\textsuperscript{303} If judges do not use the canon, they are more likely to err in favor of over-enforcing statutes because international law will no longer be exercising a brake on their interpretation. If they use the canon, they are more likely to err in favor of under-enforcement, because they will apply it as a brake in some cases in which Congress actually did want to violate international law (or would have wanted to if it had considered the matter).

Erroneous under-enforcement of federal enactments may have negative domestic effects. It may, for example, confer less protection to U.S. business interests overseas than Congress desired—for example, by limiting an intellectual property statute to U.S. borders.\textsuperscript{304} But erroneous over-enforcement may have both negative domestic effects and foreign relations consequences. It may, for example, give more protection to business interests than Congress desired, and thereby harm consumer interests by reducing competition. In addition, over-enforcement has the potential for generating adverse foreign relations consequences associated with violating international law, such as reduced credibility

\textsuperscript{302} See Restatement (Third), supra note 1, § 112, cmt. c.
\textsuperscript{303} See supra text accompanying notes 57-58.
\textsuperscript{304} For an argument that the courts should limit intellectual property statutes in this way, see Bradley, supra note 55.
and influence around the world. These additional consequences may be large or small, and may or may not be material in any particular case. But in the face of uncertainty regarding the appropriate balance, it is sensible, from a separation of powers perspective, for the courts to err in the direction of under-enforcement. This is particularly true given the lack of judicial competence and constitutional authority in the foreign affairs area.

Second, although the legislative intent conception is not strong, particularly with respect to the new customary international law, it probably still carries some force. It seems likely that, at least in a weak sense, the political branches (particularly the Executive) still care about international law, if for no other reason than that violations of international law may have negative effects on the relationship between the United States and other countries. As a result, when confronted with ambiguous statutes, the Charming Betsy canon probably continues to be one useful consideration in judicial efforts to faithfully implement federal enactments.

Finally, there is the long-standing nature of the canon. In addition to the values associated with stare decisis, the fact that the canon has been a feature of the relationship between the federal judiciary and political branches for so long, without generating substantial controversy, may suggest by itself that the canon (in its traditional rather than internationalist form) does not significantly undermine the separation of powers. Moreover, the long-standing existence of the canon, without a reaction from the political branches, may suggest some sort of acquiescence that further reduces the separation of powers problem. These factors should not be overstated. Tradition by itself is not a justification, and silence may not mean acquiescence. This is particularly true when the circumstances underlying adoption of the practice have changed. Nevertheless, these factors do provide some additional support for retention of the canon, and should therefore be taken into account. Significantly, these factors do not justify the recent calls for an internationalist conception of the canon.

Notwithstanding these factors, the separation of powers costs in question suggest that courts should exercise some caution in applying the canon. There are several specific steps that the courts probably should take in this regard. First, courts should continue to give deference to the political branches concerning the content of international law. Second, when applying the canon, courts should require clear evidence of the international law principles alleged to be violated, particularly with respect to the new customary international law. Finally, courts should reject internationalist versions of the canon, and apply the canon only in its traditional, violation-avoidance form.

D. THE CANON AND STATE LAW

An additional issue that is worth consideration is the relationship between the Charming Betsy canon and state law. Must state statutes be construed, if fairly possible, so that they do not violate international law? What if a state refuses to apply the canon in construing its own law; is it subject to reversal by the
Supreme Court? Should federal courts apply the canon in diversity cases when interpreting state law?  

The traditional understanding of *Erie* and the role of the Supreme Court would seem to require a negative answer to these questions. Under *Erie*, the interpretation of state law is a matter of state law, even when conducted by federal courts. Thus, “[a] federal court faced with a question of unsettled state law must do its best to guess how the state court of last resort would decide the issue.” State courts are free to disagree with such predictions, and state interpretations of state law are not subject to review by the Supreme Court.  

Some commentators have nevertheless suggested that states are bound by the canon. Professor Steinhardt contends, for example, that “the supremacy clause of the Constitution and the federal interest in relatively uniform interpretations of international law should support a *Charming Betsy* norm in these local contexts.”  

An assessment of this claim may depend on the proper conception of the canon. If the canon is viewed as merely an empirical assumption regarding likely congressional intent, then it would not seem to be binding on courts evaluating the likely intent of state legislatures. As Professor Brilmayer ex-

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305. It may be that, when interpreting federal statutes, state courts are bound by federal interpretive principles, including the *Charming Betsy* canon. But this would not be because the canon is itself supreme federal law. Rather, it would be because the underlying federal statute is supreme federal law and the state courts have an obligation to construe the statute in the same way in which the federal courts would do so. This can be viewed, in effect, as the flip side of *Erie*. Similarly, state courts are presumably bound by federal interpretive rules governing treaties, another form of supreme federal law. See David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 955 n.2 (1994).  


308. See, e.g., Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976) (“We are, of course, bound to accept the interpretation of [state] law by the highest court of the State.”); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626-32 (1875) (concluding that the Court lacks statutory authority to review a state court on issues of state law). *But see* Montana v. Egelhoff, 116 S. Ct. 2053 (1996) (Ginsburg, J., concurring) (suggesting that the Court construe a state statute in a way contrary to the state's highest court in order to avoid constitutional question); cf. Leavitt v. Jane L., 116 S. Ct. 2068 (1996) (per curiam) (reviewing federal appellate court's determination of state law, even though not ordinarily an issue proper for Supreme Court review, in order to avoid construction of state law that would conflict with the Federal Constitution).  

309. Steinhardt, *supra* note 18, at 1114 n.45; see also James D. Willets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33, 42 (1995) (“Rules of judicial construction dictate that state and federal law, where fairly possible, should be interpreted in accordance with international obligations of the U.S. . . . .” (emphasis added)). It is possible that Professor Bradford Clark also adheres to this view. He contends that “the constitutional structure suggests that states generally lack legislative competence to prescribe binding rules of decision in situations in which federal courts would interpret a federal statute narrowly to avoid violations of international law.” Clark, *supra* note 71, at 1357. Clark's statement is cryptic; it could mean either that (a) international law is supreme federal law, or (b) the *Charming Betsy* canon is supreme federal law.
plains, "If all that is involved is using Charming Betsy to interpret federal statutes, then the Supreme Court probably has no basis for requiring the states to go along."\textsuperscript{310} And, indeed, there has not been one reported state decision applying the Charming Betsy canon.\textsuperscript{311}

Similarly, if the canon is viewed as a separation of powers limitation on the power of the federal courts, there may be no reason to think that it applies to the relationship between state courts and their legislatures. After all, state courts are not subject to the same separation of powers limitations as federal courts.\textsuperscript{312} For example, many state courts are authorized to provide advisory opinions, but "it is firmly established that federal courts cannot [do so]."\textsuperscript{313} In addition, state courts are not bound by the prohibition in Erie on making general common law.\textsuperscript{314} More broadly, it is well settled that federal courts are courts of limited jurisdiction,\textsuperscript{315} whereas many state statutes "appear to assume the ability of the court to hear any claim recognized by law, whatever the source of that law may be."\textsuperscript{316} If states want to allow their courts more authority vis-à-vis state legislatures than the federal courts have vis-à-vis the federal legislature, it would seem to be within their prerogative to do so.\textsuperscript{317}

But if the canon is viewed in internationalist terms, in which the goal of the canon is to make it more difficult for the United States to violate international law, or to cause the United States to move closer to the aspirational goals of

\textsuperscript{310} Brilmayer, supra note 7, at 334 n.114.

\textsuperscript{311} See generally Field, supra note 213, at 899.

\textsuperscript{312} See City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision."); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981) ("[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers."); Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("[W]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

\textsuperscript{313} See CHEMERINSKY, supra note 204, § 2.2, at 48.

\textsuperscript{314} See CHEMERINSKY, supra note 204, § 5.1, at 247.

\textsuperscript{315} See CHEMERINSKY, supra note 83, at 1004.

\textsuperscript{316} See Bradley, supra note 55 (making similar arguments with respect to differential treatment of extraterritoriality of federal and state statutes); Bradley & Goldsmith, supra note 253 at 347-48 n.162 (making similar arguments in response to claim that application of customary international law by state courts would be just as undemocratic as its application by federal courts). Professor Weinberg does not seem to consider these differences between state and federal courts when she argues that separation of powers should not constrain federal common-lawmaking because it does not restrain state common-lawmaking. See Weinberg, supra note 218, at 843. Some separation of powers doctrines, of course, are binding on the states. For example, the political question doctrine is presumably binding on the states because, when it applies, the issue in question is determined to be within the exclusive competence of the federal political branches. See James M. Edwards, The Erie Doctrine in Foreign Affairs Cases, 42 N.Y.U. L. Rev. 674, 688 (1967); Louise Weinberg, Political Questions and the Guarantee Clause, 65 U. COLO. L. Rev. 887, 942-44 (1994). For a similar reason, the act of state doctrine, according to the Sabbatino decision, is binding on the states (although the legitimacy of its status as supreme federal law may be questionable). See supra note 286.
international law, then the canon arguably applies equally to the states. If, on the other hand, the internationalist conception is rejected (as this article argues it should be), then there may be no basis for treating the Charming Betsy canon as binding on the states.\textsuperscript{318}

\textbf{Conclusion}

The number of international cases in U.S. courts continues to grow. So does the overlap between international law and U.S. domestic law. The direct incorporation of international law into the U.S. legal system faces significant obstacles, however, such as the frequent refusal by the political branches to allow treaties to be self-executing and the theoretical uncertainties associated with the domestic legal status of customary international law. As a result, the indirect, interpretive role of international law, especially the Charming Betsy canon, is likely to become increasingly important.

The Charming Betsy canon has, to date, been largely uncontested. Several developments, however, compel re-examination of the canon. These developments include the post-realist defense of canons, the changes in the structure and content of customary international law, and the redefinition of federal court power after Erie. In light of these developments, neither predictions about legislative intent nor respect for international law provides an adequate justification for continued use of the canon. Rather, the canon is best understood today as based on separation of powers considerations. This conclusion has important implications for the proper scope and role of the canon, as well as for its relationship to state law.

This conclusion may also have broader implications. The separation of powers conception of the canon resembles the justifications that have been advanced in support of other interpretive practices of the modern Supreme Court, such as the canon that federal statutes should be construed to avoid serious constitutional questions,\textsuperscript{319} the presumption that Congress does not intend to preempt traditional state functions,\textsuperscript{320} and the deference given to

\textsuperscript{318} A more difficult question arises in the following situation: What if a state court did apply the Charming Betsy canon, and construed state law to avoid a violation of international law; would the state court’s view of international law in that situation be subject to Supreme Court review? There are two issues here. First, since the Supreme Court reviews only matters of federal law, does the international law in question have the status of federal law? Self-executing treaties ratified by the United States have this status, but other forms of international law may not. See Bradley & Goldsmith, supra note 6 (arguing that customary international law does not properly have the status of federal law); Restatement (Third), supra note 1, § 111 (distinguishing between domestic legal status of self-executing and non-self-executing treaties). Second, is there an independent and adequate state ground? Even if a state court decides an issue of federal law, the Supreme Court “will not hear a case if the decision of the state’s highest court is supported by a state law rationale that is independent of federal law and adequate to sustain the result.” Chemerinsky, supra note 204, § 10.5, at 614.


administrative agency interpretations of ambiguous federal statutes.\(^{321}\) Each of these practices arguably reflects concerns about the judiciary's institutional competence and constitutional prerogatives.\(^{322}\) Although consideration of these practices is beyond the scope of this article, the conceptual issues considered herein may be relevant to these and other aspects of the judiciary's role in the U.S. legal system. More generally, it may be that the more we study this country's relationship with international law, the more we will learn about this country's relationship with itself.

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\(^{322}\) Thus, the constitutional canon is designed to minimize friction between the branches by reducing the occasions for the exercise of constitutional judicial review and by allowing courts to signal constitutional concerns to Congress. See Eskridge, supra note 19, at 1021; Sunstein, supra note 96, at 469. The traditional state functions canon "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." United States v. Bass, 404 U.S. 336, 349 (1971). And the Court defers to agency interpretations of regulatory statutes because the Court perceives in this context that "interpretive choices are policy choices, and policy choices should be made by agents with democratic accountability." Lessig, supra note 76, at 1798; see also Chevron, 467 U.S. at 866 ("In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").